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NATIONAL REPORTER SYSTEM—STATE SERIES

THE
PACIFIC REPORTER

VOLUME 165

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE
SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA
AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

JUNE 25—JULY 30, 1917

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1917

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OF THE COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

ARIZONA—Supreme Court.

ALFRED FRANKLIN, CHIEF JUSTICE.

JUDGES.

D. L. CUNNINGHAM.
HENRY D. ROSS.

CALIFORNIA—Supreme Court.

F. M. ANGELLOTTI, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

F. W. HENSHAW.
LUCIEN SHAW.
W. G. LORIGAN.
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HENRY A. MELVIN.
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First District.

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F. H. KERRIGAN.[1]
JOHN E. RICHARDS.

Second District.

N. P. CONREY, PRESIDING JUSTICE.
VICTOR E. SHAW.
W. P. JAMES.

Third District.

N. P. CHIPMAN, PRESIDING JUSTICE.
E. C. HART.
A. G. BURNETT.

COLORADO—Supreme Court.

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TULLY SCOTT.
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JOHN C. RICE.

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JUSTICES.

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HENRY F. MASON.
SILAS PORTER.
JUDSON S. WEST.
JOHN MARSHALL.
JOHN S. DAWSON.

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SUMMERS HARDY, VICE CHIEF JUSTICE.

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J. H. MILEY.[2]
ROBT. M. RAINEY.[2]

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NESTOR RUMMONS.
A. M. STEWART.

Division No. 2.

C. A. GALBRAITH.
FRANK B. BURFORD.

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SAM HOOKER.
HUNTER L. JOHNSON.

Division No. 4.

PRESTON S. DAVIS.
THOS. A. EDWARDS.
R. P. DE GRAFFENRIED.

---

[1] J. D. Murphy served as judge pro tem.

[2] Supreme Court increased to nine members April 16, 1917.

[3] Terms of all Commissioners expired January 31, 1917.

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OKLAHOMA—Supreme Court (Cont'd).

SUPREME COURT COMMISSIONERS (Cont'd).

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Division No. 6.

J. C. ROBBERTS.
W. F. FREEMAN.
R. W. HIGGINS.

SUPREME COURT COMMISSIONERS.

March 31, 1917, to November 30, 1918.

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NESTOR RUMMONS.[4]
A. M. STEWART.[4]

Division No. 2.

C. A. GALBRAITH.[4]
A. T. WEST.[4]
D. K. POPE.[5]

Division No. 3.

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SAM HOOKER.[4]
W. V. PRYOR.[5]

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SMITH C. MATSON.[7]

OREGON—Supreme Court.

THOMAS A. McBRIDE, CHIEF JUSTICE.

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ASSOCIATE JUDGES.

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JUSTICES.

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E. E. CORFMAN.
VALENTINE GIDEON.[8]
S. R. THURMAN.[8]

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GEORGE E. MORRIS.

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O. R. HOLCOMB.
WALLACE MOUNT.

WYOMING—Supreme Court.

CHARLES N. POTTER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

CYRUS BEARD.
RICHARD H. SCOTT.

---

[4] Appointed March 31, 1917.
[5] Appointed April 23, 1917.
[6] Appointed Justice of Supreme Court April 16, 1917.
[7] Appointed April 19, 1917.
[8] Appointed May 8, 1917.

COURT RULES

SUPREME COURT OF OKLAHOMA

Adopted June 11, 1917

I. The regular terms of this court will be held beginning on the second Tuesday of October, December, February, April and June of each year, at 10 o'clock a. m., standard time. Special sessions may be held at any time upon call of the Chief Justice. The forenoon sitting will convene at 9 o'clock and the afternoon sitting at 1:30 o'clock.

II. All causes in which no notice for oral argument has been given shall stand for submission on the first day of the term; all causes standing for trial will be heard in the order assigned, unless the court, on proper motion and showing, shall order otherwise; provided, that in making up the trial docket the clerk shall so arrange the assignment of the cases that those from each supreme court judicial district may be heard together as nearly as may be.

III. At least seventy (70) days prior to the commencement of each term of court, the clerk shall send to the attorneys interested a printed copy of the trial docket for the term following, showing the day on which each cause will be heard. All attorneys interested shall be notified by the clerk of all orders of the court concerning each case.

IV. Attorneys desiring to make oral arguments, shall file notice thereof with the clerk of such intention, within ninety (90) days after the commencement of the proceeding in error. If no notice is served, causes will stand submitted on briefs. No motion shall be argued unless by direction of the court. The court will allot such time as may be deemed sufficient for argument of a cause, not to exceed one hour to counsel upon each side. Only two counsel will be heard on each side, and counsel amicus curiæ will be heard by leave of court only.

V. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion, supported by citation of the authorities relied upon; and, except in cases where all the facts relied upon are of record, such motions shall be supported by affidavit. No motion nor petition for re-hearing will be considered unless reasonable notice has been given to counsel upon the opposite side of the case, except where in the opinion of the court an emergency exists. Copies of all motions and petitions for re-hearing must be served upon opposing counsel who will be allowed ten days from the service thereof to file response thereto. Five copies of all motions and petitions and of the response thereto shall be filed.

VI. Every motion to advance a cause shall contain a brief statement of the matter involved, with the reason for the application.

VII. In each civil cause filed in this court, counsel for plaintiff in error shall, unless otherwise ordered by the court, serve his brief on counsel for defendant in error at least forty (40) days before the case is set for submission. Counsel for plaintiff in error shall file with the clerk of this court twenty (20) copies of such brief within the time above designated, and defendant in error shall, within thirty (30) days after the service of the brief of plaintiff in error upon him, file with the clerk of this court twenty (20) copies of his answer brief, and serve same upon plaintiff in error; and all reply briefs, except as otherwise ordered by the court, must be filed by the date the case is submitted or called for argument. Proof of service must be filed with the clerk within ten (10) days after service.

In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment, in its discretion.

VIII. In all proceedings in this court, in citing cases from the courts of this state, counsel are required to cite the volume and page of the official state reports in which the case is reported. A failure to comply with this rule will render briefs subject to be stricken from the files.

IX. Application for a re-hearing in any cause, unless otherwise ordered by the court, shall be made by a petition to the court signed by counsel and filed with the clerk, within fifteen (15) days from the date on which the opinion in the cause is filed. Such petition shall state briefly the grounds upon which counsel rely for a re-hearing and show either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called either in brief or oral argument, or which has been overlooked by the court, and the question, statute or decision overlooked must be distinctly and particularly set forth in the petition. No oral argument will be allowed on an application for re-hearing except upon order of the court; but if such application is granted, the cause shall be assigned for re-hearing and the clerk shall notify both parties or their counsel of the time when such re-hearing will be had, and such time may be given for argument or brief as the court shall allow.

In any case in which a petition for re-hearing is denied, or in which an opinion is rendered on re-hearing, no further motions or applications for re-hearing or review will be allowed and the clerk shall not file any such motions or applications, except by leave of court first obtained.

X. After the expiration of 15 days from the filing of an opinion, the clerk shall issue a mandate to the court in which the judgment was rendered in accordance with the decision of this court, provided that when a petition for re-hearing is filed within the time prescribed by rule IX or by leave of court, no mandate shall issue in said cause until said petition for re-hearing shall have been determined.

XI. Where the original supersedeas bond or a certified copy thereof is included in the case made or transcript of the record and that fact is called to the attention of the court in the briefs of counsel for defendant in error, this court will, in all proper cases, where defendant in error is entitled thereto, render judgment thereon at the same time judgment is rendered in the cause.

XII. Upon the affirmance of a judgment, execution may issue thereon from this court; or a writ of procedendo shall be issued to the court below upon the payment by the successful party of the costs incurred in this court.

XIII. Any Justice may file a dissenting opinion in any cause in which he is entitled to sit and in the determination of which he participates; but before any such dissenting opinion is filed, it shall be submitted in conference to the Justices who concurred in the original opinion. No syllabus to a dissenting opinion shall be published.

XIV. In the taxation of costs in the Supreme Court, the clerk shall not tax any costs for expense of case-made, transcript, or record, unless the person claiming same shall, prior to the filing of the opinion in the cause, file with the clerk a verified statement of such expenses and showing that he has paid the same.

XV. In all original actions or proceedings instituted in this court, it shall be necessary for the plaintiff or applicant for the writ to state fully, by affidavit, the reasons why the action or proceeding is brought in this court instead of in one of inferior courts having concurrent jurisdiction. In addition to the original petition or application, five copies thereof shall be filed.

(B) In all applications to the Supreme Court for original writs except applications for the writ of habeas corpus, either under its original or appellate jurisdiction, the applicant shall show that he has given notice to the opposite party or his attorney of record of his intention to apply for such writ and the time thereof, or furnish satisfactory reasons by affidavit for his failure to give such notice.

(C) The notice above required shall be not less than five nor more than fifteen days. Applications under this rule must be made on a Tuesday unless there be some special emergency requiring earlier action.

(D) The opposing party shall be at liberty to make any objection he sees fit upon the face of the papers presented with the application.

(E) Upon the final hearing of any application under this rule, each side shall furnish for the use of the court twelve written or printed copies of their points and authorities.

XVI. Any practicing attorney of any state or territory or of the District of Columbia, having professional business in this court, may, on motion, be recognized for the purpose of presenting such cause in which he appears as counsel.

XVII. Transcripts may be certified by the court clerk substantially in the following form:

State of Oklahoma, County of ....:

I, ..., court clerk for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal of this court this ...... day of ......, 19.. ......Court Clerk.

XVIII. A certificate of the settlement of a case-made may be substantially in the following form:

I, the undersigned judge of the district court of ...... district for ...... county, Oklahoma, hereby certify that the foregoing was presented to me as a case-made in the action above entitled (here cite the facts with reference to the appearance of parties and suggestion of amendments), and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand at .... in ...... county, Oklahoma, this ...... day of ...... 19....
.........., District Judge.

Attest:
..........., Court Clerk.

XIX. Orders for amending or completing transcripts and case-made, or for reviving, reinstating, or dismissing causes, shall be made only upon written motions, stating the grounds thereof; and reasonable notice thereof must be served upon the opposing counsel.

XX. The record may be temporarily withdrawn by an attorney interested in the case for the purpose of enabling him to prepare his brief and abstract, and in all such cases the attorney receiving such record shall receipt for the same, and return it to the clerk within twenty (20) days from its receipt, such attorney paying all charges of transmitting and returning such record. In no case shall the clerk allow an original opinion to be taken from his office.

The original of any pleading or motion shall not be taken from the clerk's office without an order of court or one of the Justices authorizing it.

XXI. Counsel for plaintiff in error shall number the pages of the petition in error and the record, and index the record before filing the same.

XXII. The record and petition in error need not be printed, but by agreement of parties filed with the clerk, may be printed and the expense thereof taxed as costs in the case.

XXIII. No argument or motion filed or made in this court shall contain language showing disrespect for or contempt of the trial court.

XXIV. Rule VII shall not apply to cases of writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law. In such cases briefs shall be prepared and served in the form, manner and time as may be directed by the court in each cause.

XXV. Whenever attorneys who are residents of this state file a written application with the clerk of this court for admission to practice as an attorney and counselor at law in the courts of this state, and show in such application that they have been admitted to practice in a court of record in another state or territory or of the District of Columbia, and that such order is still in force, it is ordered that such attorney or attorneys shall be permitted to practice in the courts of this state until the next meeting of the Bar Commission for the purpose of examining applicants or making recommendation upon such applicants.

XXVI. The brief of the plaintiff in error in all cases shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court. If the defendant in error or appellee shall claim such abstract is incomplete for the purpose stated, his brief shall contain a counter-abstract correcting any such omissions or inaccuracies. Where a party complains on account of the omission or rejection of testimony, he shall set out in his brief the full substance of the testimony to the admission or rejection of which he objects, stating specifically his objection thereto. Also, where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portion to which he objects or may save exceptions. A party need not include in his abstract all the evidence in support of a claim on his part that it does not show or tend to show a certain fact; but when such a question is presented, the adverse party shall print so much of the evidence as he claims to have that effect. The abstract shall state only the substance of those parts of the record the bearing of which upon the case can be clearly shown in this manner; such as are purely formal or otherwise immaterial shall be omitted altogether, but quotations must be made with verbal accuracy whenever the decision of any question in controversy may be affected thereby. The abstract shall refer to the pages of the record.

The brief shall contain the specifications of errors complained of, separately set forth and numbered; the argument and authorities in support of each point relied on, in the same order, with strict observance of rule VII. The brief of the appellee or defendant in error shall contain with pertinent references to the pages of the abstract, any points challenging the right of plaintiff in error to be heard; a full statement of any additional facts shown by the abstract and deemed essential; citations of authorities and discussion of the alleged errors, in the same order as in the brief of the plaintiff in error. All briefs shall be printed unless otherwise ordered.

XXVII. The court may, at any time after a cause is submitted, request counsel for either or both parties to an action to file with the court, within the time fixed by the court in its request, additional authorities, if any they have, upon any proposition involved in the action; provided, that when such request is made upon counsel for either party to the action, the same shall be made in writing, and a copy of the same shall be mailed to counsel for the opposite party to the action.

XXVIII. Whenever in any case filed in this court it shall be made to appear to the clerk of this court by the affidavit of a plaintiff in error, his agent or attorney, that the defendant in error has no attorney of record, or that he is beyond the limits of the state, or that his residence is unknown, so that it is impracticable to serve citation upon him in the ordinary method provided by law, it shall be the duty of the clerk of this court upon the plaintiff in error making provision for the payment of the expense thereof, to cause notice of the pendency of such cause to be published once each week for four successive weeks in some newspaper published in the county in which the case was tried.

CRIMINAL COURT OF APPEALS OF OKLAHOMA

I. The regular terms of this court will be held as follows:

January term, the first Tuesday after the second Monday in January.

March term, the first Tuesday in March.

May term, the first Tuesday in May.

July term, the first Tuesday in July.

September term, the first Tuesday in September.

November term, the first Tuesday in November.

Special sessions of the court may be held at any time upon the call of the Presiding Judge. At the opening of the term, court shall convene at two o'clock, p. m. The sessions thereafter shall convene at ten o'clock, a. m., and two o'clock, p. m.

II. Counsel for plaintiff in error shall number the pages of the petition in error and case-made before filing the same, and shall attach thereto a complete and correct index, indicating the pages of the record, showing the pleadings, names and testimony of the witnesses for the state, their cross-examination and the names and the testimony of witnesses for the defendant and their cross-examination, and shall file with the original petition in error and case-made a copy of the same for the use of counsel.

III. The clerk shall not permit any original record to be taken from the court room, or from the office of the clerk without an order from the court or one of the judges.

IV. Transcripts may be certified by the court clerk substantially in the following form:

State of Oklahoma, County of ——, ss.:

I, ——, court clerk for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof I have hereunto set my hand and the seal of this court this —— day of ——, 19—.

————, Court Clerk.

V. A certificate of the settlement of a case-made may be substantially in the following form:

I, the undersigned, judge of the district (superior or county) court of —— district (or county) of Oklahoma, hereby certify that the foregoing was presented to me as a case-made in the above entitled cause (here state the facts with reference to the appearance of parties and suggestion of amendments), and I now settle and sign the same as a true and correct case-made and direct that it be attested and filed by the court clerk.

Witness my hand at —— in —— county, Oklahoma, this —— day of ——, 19—.

————, District Judge.

Attest: ————, Court Clerk.

VI. In each cause filed in this court, counsel for plaintiff in error shall, unless otherwise ordered by the court, serve his brief upon the Attorney General within sixty days after filing his petition in error and shall at the same time file five copies of said brief with the clerk of this court, and the Attorney General shall, unless otherwise directed by the court, have thirty days after service on him of plaintiff in error's brief in which to serve and file his answer briefs. The briefs are not required to be printed, but when so desired may be printed. Proof of service of briefs may be filed with the clerk of this court within ten days after service. In habeas corpus proceedings, briefs shall be prepared and served as may be directed by the court in each cause.

VII. The brief of plaintiff in error shall contain—First. A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised. Second. A specification of the errors relied upon, specifically and particularly setting out each error asserted and intended to be urged. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected, stating specifically the objections thereto. When the error alleged is to the instructions of the court the specifications shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused. Abstracts shall be indexed and shall refer to the pages of the record. Third. A brief of the argument, exhibiting a clear statement of the point of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. In citing cases from the courts of this state, counsel are required to cite volume and page of the official state report in which the case is reported.

VIII. The court may at any time after a cause is submitted request counsel for either or both parties to file with the court within the time fixed by the court in its request, additional authorities if any they have upon any proposition involved in the cause.

IX. When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the exceptions taken thereto, and the judgment and sentence and if no prejudicial error appears will affirm the judgment.

X. No argument or motion filed or made in this court shall contain language showing disrespect for or contempt of the trial court.

XI. All cases shall be assigned for oral argument in the order in which they are filed and will be heard in the order assigned unless the court on proper motion and showing shall order otherwise. At least fifteen days prior to said assignment, the clerk of the court shall notify the attorneys of record of the day on which such case will be heard. All motions to advance causes must contain a brief statement of the matter involved with the reasons for the application.

XII. The plaintiff in error shall be entitled to open and conclude the argument of the case. One hour on each side will be allowed for the argument and no more without special leave of the court. The time thus allowed may be apportioned between the counsel on the same side, at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

XIII. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion. A half hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court.

XIV. The party moving to dismiss shall serve notice of the motion with a copy of his brief of argument on the counsel for plaintiff in error of record in this court, at least two weeks before the time fixed for submitting the motion. There may be united, with a motion to dismiss an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

XV. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded and to deliver a copy to the reporter as soon as the same shall be recorded.

Any judge may file a dissenting opinion in any cause in which he is qualified to sit, and in the determination of which he participated; but before any such dissenting opinion is filed it shall be submitted in conference to the judges who concurred in the original opinion. No syllabus in the dissenting opinion shall be published.

XVI. Application for a rehearing in any cause, unless otherwise ordered by the court, shall be made by a petition to the court signed by counsel and filed with the clerk within fifteen days from the date on which the opinion in the cause is filed. Such petition shall briefly state the grounds upon which counsel relies for a rehearing, and show either that some question decisive of the case and duly submitted by the counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the court, and the question, statute, or decision so overlooked must be distinctly and particularly set forth in the petition. If such application is granted, the cause shall be assigned for rehearing, and the clerk shall notify both parties or their counsel of the time when such will be had, and such time may be given for argument or brief as the court shall allow.

XVII. After the expiration of fifteen days from the filing of an opinion, the clerk shall issue a mandate to the court in which the judgment was rendered, in accordance with the decision of this court and no petition for rehearing shall stay such mandate unless the person applying for rehearing shall present such petition to and obtain from one of the judges who concurred in the opinion a stay of such mandate until such petition for rehearing shall be heard. The judge to whom such petition is presented shall examine the same, and if, in his opinion, a rehearing will probably be granted, he may make an order staying such mandate.

In any case in which a petition for rehearing is denied, or in which an opinion is rendered on rehearing, no further motions or applications for rehearing or review will be allowed, and the clerk shall not file any such motions or applications, except by leave of court first obtained.

XVIII. Any practicing attorney of any state or territory, or the District of Columbia, having professional business in this court, may on motion be recognized for the purpose of presenting such cause in which he appears as counsel.

XIX. Improper, insulting or contemptuous language or conduct of attorneys to or concerning each other in court, or to and concerning the court, or any member thereof, either in or out of court, will be considered and treated as a contempt of the court.

XX. All communications and inquiries in relation to causes pending or other court matters shall be addressed to the clerk of the Criminal Court of Appeals.

Adopted by the court July 3, 1917.

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(175 Cal. 83)

In re SPAFFORD'S ESTATE.

SPAFFORD et al. v. CITIZENS' TRUST & SAVINGS BANK. (L. A. 5096.)

(Supreme Court of California. May 4, 1917. Rehearing Denied May 31, 1917.)

EXECUTORS AND ADMINISTRATORS 🔑510(2)—ORDERS APPEALABLE—ORDERS IN PROBATE.

An order refusing to set aside and vacate an order settling the account of an administrator not being embraced by the provisions of Code Civ. Proc. § 963, subd. 3, specifying the orders and judgments from which an appeal may be had in probate proceedings, is not appealable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2236.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceedings in the matter of the final settlement of the account of the Citizens' Trust & Savings Bank as administrator of Daniel E. Spafford, deceased. On motion of Gertrude E. Spafford and others to set aside and vacate an order settling the account. From an order denying the motion, the movants appeal. Appeal dismissed.

M. A. Fleming and Tobias R. Archer, both of Los Angeles, for appellants. Tanner, Odell & Taft, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles, for respondent.

VICTOR E. SHAW, Special Judge. This is an appeal from an order of court denying the motion of appellants, made September 5, 1916, under section 473 of the Code of Civil Procedure, to set aside and vacate an order of court, made on April 19, 1916, settling the account of the administrator of the estate of Daniel E. Spafford, deceased.

The order involved is not embraced by the provisions of subdivision 3 of section 963 of the Code of Civil Procedure, which specifies the orders and judgments from which an appeal may be had in probate proceedings. Not only is there a want of statutory authority upon which to base the prosecution of an appeal from such an order, but this court has repeatedly refused to entertain appeals from such orders. See Lutz v. Christy, 67 Cal. 457, 8 Pac. 39; Estate of Calahan, 60 Cal. 233; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Cahill, 142 Cal. 628, 76 Pac. 383.

Appellants rely upon the opinion in the Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532, wherein the court, in sustaining the right of appeal from an order denying a new trial to one named as executrix of a will and who had been adjudged incompetent, held that subdivision 2 of section 963 of the Code of Civil Procedure, which then authorized an appeal from an order granting or refusing a new trial, embraced all such orders whether made in probate proceedings or civil actions. There is nothing said in this opinion, however, which can be construed as authorizing an appeal from the order made in the case at bar. Indeed, the cases above referred to are cited with approval in so far as they determine that an appeal does not lie from an order of court vacating or refusing to vacate orders like the one which is the subject of this appeal.

The appeal is dismissed.

We concur: SLOSS, J.; SHAW, J.

(175 Cal. 84)

SAN LUIS OBISPO COUNTY v. RYAL et al. (L. A. 3811.)

(Supreme Court of California. April 30, 1917.)

1. BAIL 🔑64—APPEAL BOND—LIABILITY OF SURETIES.

In view of Pen. Code, §§ 1273, 1279, 1292, providing that the essential requirement of bond as far as sureties are concerned is that they will pay a specified amount to the state in event the principal should make default, an appeal bond, providing upon failure of the principal to perform its conditions "that he will pay to the state of California the sum of $2,000," did not bind the sureties to pay anything themselves.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 278.]

2. BAIL 🔑71—ACTION ON APPEAL BOND—PLEADING—MISTAKE.

In a suit on a bond in a criminal appeal, where there were no allegations of inadvertence or mutual mistake in the preparation and giving of the bond, and it does not appear by whom it was prepared, but does appear that it was accepted and approved in the exact terms it contains, the plaintiff cannot contend that the word "he" was inadvertently used instead of the word "we," and that the real intent and purpose in giving the undertaking was to give a bond making the sureties primarily liable.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Department 2. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the County of San Luis Obispo against A. M. Ryal and others. Judgment for plaintiff, and defendants appeal. Reversed.

Carpenter & Gibbons, of San Luis Obispo, for appellants. Chas. A. Palmer and Thomas Rhodes, both of San Luis Obispo, for respondent.

LORIGAN, J. This action was brought to recover from defendants the sum of $2,000, for which it is alleged they are liable upon an undertaking in that amount executed by them as sureties in a criminal action and which was declared forfeited by the superior court of San Luis Obispo county for breach of its conditions. These are all the allegations in the complaint respecting said undertaking save that it is annexed to the complaint as a part thereof.

The undertaking sued on is a bond on appeal. It is entitled People of the State, etc., Plaintiff, v. Teofil Klempke, Defendant, and recites and provides that:

> An order having been made by the superior court of San Luis Obispo county admitting said defendant to bail pending appeal in the sum of $2,000, "we, A. M. Ryal * * * and Henry C. Hansen, * * * hereby undertake * * * that Teofil Klempke will surrender himself in execution of the judgment upon its being affirmed or modified, or upon the appeal being dismissed, or * * * in case the judgment is reversed and the cause remanded for a new trial that he will appear in the court to which said cause may be remanded and submit himself to the orders and decrees thereof, or if he fails to perform either of these conditions, that *he* will pay to the state of California the sum of two thousand dollars." (The italics ours.)

Defendants signed the bond and justified upon it; it was thereupon approved and filed, and the defendant Klempke was released under it.

Defendants filed a general demurrer to the complaint which was overruled, and, having failed to answer within the time allowed, judgment for the penal amount of the bond was entered against them. They appeal from the judgment presenting thereunder the sole question of the validity of the order overruling their demurrer.

[1] This bond, set out in the complaint and sued on, is assumed to have been, and doubtless was, given as a bond on appeal under sections 1273, 1279, and 1292 of the Penal Code, which provide for such a bond and its form and conditions. One of the conditions provided by the Code to be inserted in such a bond, and in fact the essential requirement as far as sureties thereon is concerned, is that, in the event that the defendant in whose behalf the bond is given fails to do or perform any of the things provided therein (fully recited in the bond set out here), the sureties will pay to the state of California a sum particularly specified, being the amount in which the defendant is ordered admitted to bail; in fact, to pay a designated penal sum in the event of the delinquency of their principal. It is a familiar rule of law that sureties cannot be held beyond the terms of their contract of suretyship. They have a right to declare in their bond the terms and conditions upon which they shall be bound and to stand on the precise terms of that contract. This principle of law, when applied here, is decisive of this appeal. Though the Code has provided just what the essentials of a bond on a criminal appeal shall contain, as also what the sureties shall undertake in it, it is clear that in preparing the undertaking here in question there was not one word used in it whereby the defendants, as sureties therein, undertake or agree to do anything. The law requires, and the form of bond set out in the Code provides, that the sureties shall bind themselves in the event of the appealing defendant failing to do certain things they will pay to the state of California a specified penal sum. A valid bond would have provided that "we (the sureties) will pay" to the state in the event our principal fails to comply with any of the conditions the sum specified as a penalty. But in the bond sued on here the sureties did not agree to pay anything in default of their principal; they only promised their appealing principal—the defendant—would pay. There being then nothing in the bond which bound them to pay any penal sum in the event of the default of their principal, and standing upon the strict terms of their contract, they cannot be compelled to do it. This should require no further discussion.

[2] It is asserted by respondent that the bond is good in every particular, except that the word "he" was inadvertently used instead of the word "we," and that the real intent and purpose in giving the undertaking was to give a bond making the sureties primarily liable. But the trouble with this position is that there are no allegations of any inadvertence, lack of true intent, or mutual mistake on the part of any one in the preparation and giving of this bond. It does not appear by whom it was prepared or presented or approved. All that appears is that it was accepted and approved in just the terms it contains. There is no room for the application of any rules of construction. There is nothing uncertain or doubtful or indefinite about its terms. The language of the bond is clear. It is plain the sureties agreed that their principal would pay, but they did not agree thereunder to pay anything themselves. The Code provisions, it is true, contemplate that the sureties on a bail bond should so bind themselves and that the bond should so provide, but the trouble with the bond here is that it does not do so, and this court cannot make a different contract for the parties than they themselves have made.

The judgment appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.

(175 Cal. 37)

KLEIN v. MARKARIAN. (S. F. 7322.)

(Supreme Court of California. May 2, 1917.)

1. SPECIFIC PERFORMANCE 🔑30—CERTAINTY OF CONTRACT.

Contract providing for balance of price being paid "in quarterly yearly payments" is one the terms of which are not sufficiently certain to make the precise act to be done clearly ascertainable, and so under Civ. Code, § 3390, subd. 6, not specifically enforceable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 83–85.]

2. SPECIFIC PERFORMANCE 🔑51 — JUST AND REASONABLE CONTRACT.

If it was the intention of the parties to an option contract, signed only by the vendor, requiring conveyance on payment of a quarter of the price, and not providing how the obligation to make the deferred payment is to be evidenced or secured, that he shall have no writing signed by any one else evidencing an obligation to pay the balance, nor any security therefor, beyond the inadequate security of a vendor's lien, specific performance thereof could be refused under Civ. Code, § 3391, subd. 2, as not "just and reasonable" as to the vendor defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154.]

3. SPECIFIC PERFORMANCE 🔑28(1)—CERTAINTY OF CONTRACT.

Option contract for land not providing how obligation to pay balance of price is to be evidenced or secured, if contemplating the purchaser is to give some kind of secured evidence thereof, is not specifically enforceable, because of its uncertainty as to the manner thereof.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61, 65, 66.]

4. TENDER 🔑15(3)—OFFER OF PERFORMANCE —EFFECT—STATUTE.

Code Civ. Proc. § 2076, providing that objections not made at the time by a person to whom tender is made are deemed waived, is qualified by Civ. Code, § 1501, providing that failure to object does not waive a defect which could not, if specified, have been obviated by the person making the offer; and so where an option given by defendant to plaintiff is so indefinite as to time of payment and manner of evidencing and securing deferred payments, as not to be specifically enforceable, defendant is not bound by a tender of notes for a definite time secured by mortgage on the property, though he specified no objections thereto, as plaintiff could not have remedied the defects in the option, and to hold defendant bound by a tender outside its provisions would be to make a new contract for him.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 41, 42, 45.]

Department 1. Appeal from Superior Court, Fresno County; W. M. Conley, Judge.

Action by L. W. Klein against M. Markarian. From an adverse judgment and order, plaintiff appeals. Affirmed.

Everts & Ewing, of Fresno, for appellant. D. A. Cashin, Sutherland & Barbour, and L. L. Cory, all of Fresno, and Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

SLOSS, J. Appeal by plaintiff from a judgment and an order denying his motion for a new trial. The action was for specific enforcement of an alleged contract for the conveyance of real estate, or to recover damages for the breach.

The essential facts are stated in the court's findings, which may be summarized as follows: On November 16, 1910, Markarian, the defendant, executed a written option, whereby he offered to sell to L. W. Klein & Co. a tract of land in Fresno county "for the sum of $45,000, payable at the times and upon the terms and conditions following, to wit, $11,000 to be paid within ten days from and after said company shall have notified me of its acceptance of this offer. The balance to be paid as follows: In quarterly yearly payments, with interest at 6 per cent. annually. Upon the making of $11,000 payment of said purchase price, I will make, execute, and deliver to said company or to any person named or substituted by it my deed of conveyance of said property, with and containing the usual covenants." By the writing the defendant agreed, upon acceptance of his offer, to furnish an abstract showing good title. The offer or option was to remain in force until the 16th day of December, 1910, "and thereafter until the same shall be withdrawn by notice in writing." The option was never withdrawn. On February 17, 1911, said L. W. Klein & Co. gave to the defendant written notice that it accepted the offer, and demanded that defendant furnish an abstract and execute a conveyance to the plaintiff (named as substituted for L. W. Klein & Co.), offering, at the same time, to pay the defendant the sum of $11,000, and to execute and deliver to him plaintiff's four promissory notes for $8,500 each, payable, respectively, one, two, three, and four years after date, with interest at 6 per cent. per annum, payable annually, together with a mortgage on the said land to secure the payment of such notes. The defendant refused to convey the land or to accept the money or the notes or the mortgage offered, notifying plaintiff at the same time that he would not perform said contract. On the 4th day of May, 1912—some fourteen months later—the plaintiff made a renewed tender and demand, and the defendant again refused to accept the tender or to make the conveyance. The court finds that the contract was just and equitable, and that the purchase price of $45,000 was the reasonable value of the land at the time the option was given, and at the time it was accepted, i. e., on February 17, 1911. Since the last-named date, the land has increased in value, and it was, on the 4th day of May, 1912 (the date of the second demand), worth $60,000. It is found, contrary to the averment of the complaint, that plaintiff was not damaged in the sum of $15,000. The conclusions of law drawn from these facts were that the contract was and is "incomplete, uncertain, and indefinite; that by reason thereof said contract cannot be specifically enforced"; and that plaintiff had suffered no damage. Accordingly, judgment was entered denying plaintiff either equitable or legal relief.

[1] It is an old and unquestioned rule of equity that, whatever right there may be to maintain an action at law for damages, a contract will not be specifically enforced unless it be complete and certain in its terms. Pom. Contr. § 159; Agard v. Valencia, 39 Cal. 292, 301; Co-op. Ass'n v. Phillips, 56 Cal. 539, 546; Reymond v. Laboudigue, 148 Cal. 691, 84 Pac. 189. The Civil Code (§ 3390, subd. 6) includes, among the obligations which cannot be specifically enforced, "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." The written option or offer upon which plaintiff relies is both uncertain and incomplete in its statement of the terms of payment. After providing for a cash payment of $11,000, it declares that the balance of $34,000 is to be paid "in quarterly yearly payments, with interest at 6 per cent. annually." This is, at the best, a vague or ambiguous provision. The clause would seem, at first glance, to call for "quarterly" or "quarter yearly" payments; i. e., payments at intervals of three months. But, so understood, it fails to indicate the number of such payments, or the amount of each. The uncertainty in this respect is fatal to the claim for specific performance. Williams v. Stewart, 25 Minn. 516; Platt v. Stonington Sav. Bk., 46 Conn. 476; Potts v. Whitehead, 20 N. J. Eq. 55; Schmeling v. Kriesel, 45 Wis. 325. The appellant contends that the expression was designated to provide for annual payments, each covering a quarter of the balance. This, however, is a strained reading of the language. In any event, the words used are far from expressing the suggested purpose with anything like clearness or certainty.

[2, 3] Furthermore, the contract fails to provide how the obligation to make the deferred payments is to be evidenced or secured. The option was signed by the defendant alone. He was to convey his land upon payment of less than one-fourth of the purchase price. Thereupon he would have no writing signed by any one evidencing an obligation to pay the balance, nor any security for such balance beyond the inadequate security of a vendor's lien. If this was the intent of the parties, specific performance might have been properly refused upon the ground that the contract was not "just and reasonable" as to the defendant. Civ. Code, § 3391; Godwin v. Collins, 3 Del. Ch. 196; Diamond, etc., Co. v. Todd, 6 Del. Ch. 163, 14 Atl. 27. If, on the other hand, the parties contemplated that the purchaser should give some form of secured evidence of indebtedness to cover the deferred payments—and this the plaintiff's own conduct shows to have been his view—the agreement was entirely uncertain with respect to the manner in which the balance should be evidenced and secured. Marsh v. Lott, 8 Cal. App. 385, 97 Pac. 163.

[4] The appellant concedes, virtually, that the writing is, on its face, so uncertain as to preclude specific enforcement. He claims, however, that all uncertainty was removed by his act of tendering four notes, together with a mortgage to secure them. The defendant having then failed to specify any objections to the terms of the instruments tendered, he was, it is argued, precluded from objecting thereafter. Section 2076 of the Code of Civil Procedure, providing that objections not made by a person to whom a tender is made are deemed waived, is cited in support of this claim. This section is qualified by section 1501 of the Civil Code, which provides, in effect, that the failure to object does not waive a defect which could not, if specified, have been obviated by the person making the offer. Allen v. Chatfield, 172 Cal. 60, 69, 156 Pac. 47. No matter what the defendant might have said in response to the offer, the plaintiff could not, of course, have remedied the defects in the written option. The writing was so indefinite that the plaintiff could not, within its terms, lay the foundation for a decree of specific performance. To hold the defendant bound by a tender outside of the provisions of the option would be to make a new contract for him. His mere silence, when the unauthorized offer was made to him, did not constitute an assent to such new contract.

Under the findings, the court properly refused to award damages for the breach of the contract. There was no increase in the value of the land between the signing of the option and the defendant's breach, which occurred when he refused to comply with the first demand, that of February 17, 1911. So that, assuming that the case presents the element of bad faith which, under section 3306 of the Civil Code, is essential to a recovery of the difference between the contract price and the value at the time of the breach, the findings (amply supported by the evidence) show that there was no such difference. There is no claim that plaintiff suffered any other item of damage recoverable under section 3306.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 21)

DROWN v. NEW AMSTERDAM CASUALTY CO. et al. (S. F. 7308.)

(Supreme Court of California. April 30, 1917.)

1. Insurance 🔑448—Right to Proceeds—Beneficiary Killing Insured.

Public policy prevents a beneficiary who unlawfully kills the insured from recovering on the insurance policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1150.]

2. Criminal Law 🔑308—Presumption—Innocence.

Under the direct provisions of Pen. Code, § 1096, defendant in a criminal trial is presumably innocent until his guilt is proved beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731.]

3. Evidence 🔑60 — Presumptions — Innocence of Crime.

In a civil action under Code Civ. Proc. § 1826, a party is presumed innocent of crime until contrary is proven to a moral certainty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81.]

4. Insurance 🔑635—Pleading 🔑8(3) — Sufficiency of Complaint—Beneficiary Killing Insured.

In an action on an insurance policy, allegations that the beneficiary discharged a loaded pistol at insured and killed him, and therefore could not recover on the policy, do not preclude recovery, since the killing may not have been premeditated or unlawful, and the last allegation is merely the pleader's conclusion.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1599–1602.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Willard N. Drown, administrator of the estate of Archer Cullen Drown, deceased, against the New Amsterdam Casualty Company and Amelia C. Drown. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

J. F. Leicester and Drown, Leicester & Drown, all of San Francisco, for appellant. Lilienthal, McKinstry & Raymond, of San Francisco, for respondents.

SHAW, J. The plaintiff has appealed from the judgment upon the judgment roll alone. The court below having sustained the demurrer to the complaint without leave to amend, the sole question presented is whether the complaint states a cause of action.

The action is by the administrator of the estate of Archer Cullen Drown to recover the proceeds of a policy issued by the defendant company insuring the said Archer Cullen Drown against death by accidental means. The complaint alleges that on June 22, 1912, the defendant issued the policy sued on whereby the company agreed "to pay, * * * in the event of the accidental death of said Archer Cullen Drown, * * * to the beneficiary designated in said policy, if surviving, otherwise to the executors or administrators of said Archer Cullen Drown," the proceeds of the policy; that Amelia C. Drown, wife of the insured, was and is named therein as the beneficiary; that while the policy was in full force and effect, on the 24th day of October, 1913, the said Archer Cullen Drown met with death by accidental means in the following manner: That while the said Archer Cullen Drown was "reclining and reposing in his bed, and whilst he was wholly unarmed, and was resting and endeavoring to or was sleeping, his said wife Amelia C. Drown took a loaded pistol in her hand and discharged the same at the said Archer Cullen Drown, and shot and killed her said husband, Archer Cullen Drown"; that the injuries resulting therefrom were not intentionally or otherwise self-inflicted, and that the injuries and resulting death were without design, unforeseen, and unexpected on the part of the said Archer Cullen Drown; that claim of loss under said policy was duly presented to the defendant company; that said Amelia C. Drown, the beneficiary designated in the policy, caused the accidental death of said Archer Cullen Drown, as above related, and that "because such death was caused by her act, as aforesaid, she is not herself entitled to take any advantage or benefit under said policy. * * * but that the liability of the said defendant New Amsterdam Casualty Company upon and under said policy continues in full force and effect, and any and all moneys upon or under said policy belong to and form part of the estate of said Archer Cullen Drown, deceased"; that said Amelia C. Drown claims an interest adverse to plaintiff in the proceeds of said policy as the designated beneficiary and is a necessary party defendant; that said Amelia C. Drown after the death of the said Archer Cullen Drown did assign and transfer to the plaintiff, as such administrator, all her right and interest under the said policy; that demand was duly made by plaintiff upon the defendant company for the payment of the proceeds of the said policy, but that the said defendant company has refused to make such payment to plaintiff or to the said Amelia C. Drown, or to any other person on account of or in satisfaction of the amount due under said policy.

[1] On the part of the appellant it is conceded that where one insures his own life for the benefit of another person, and the beneficiary murders or unlawfully kills the person insured, public policy will not allow such beneficiary to recover upon the policy. It is contended, however, that in such a case if the terms and conditions of the policy have been fully performed by the person insured, the law will not permit the policy to lapse in favor of the insurer, but will raise a resulting trust in favor of the estate of the insured person and allow a recovery upon the pol-

icy by his personal representatives. Both parties have presented their views on this proposition with much force and ability.

[2-4] We cannot find in the allegations of the complaint any statement of the facts necessary to raise the question. One of the strongest disputable presumptions known to the law is the presumption "that a person is innocent of crime." Code Civ. Proc. § 1963, subd. 1. In a criminal action the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt. Pen. Code, § 1096. In a civil action proof to a moral certainty, which may fall short of proof beyond reasonable doubt, is sufficient. Code Civ. Proc. § 1826. It is an invariable rule that if the fact that another person has committed a felony is essential to a cause of action or defense, the person asserting such cause of action or defense must, in order to maintain it, show that such other person has committed such felony. In his pleading of the cause of action or defense he cannot rely on a statement of the mere conclusion that the other person did commit the offense, or that he was guilty thereof, but must state every fact which it would be necessary to prove against such person to establish the crime and his guilt thereof in a criminal prosecution therefor, except, perhaps, the venue. If the facts essential to the crime are not alleged there can be no presumption that such crime has been committed and the person concerned must be presumed to be innocent thereof.

If we apply these principles to the present case it will clearly appear that there is no foundation in the complaint for the argument that Amelia C. Drown was guilty of the murder or of the unlawful killing of Archer Cullen Drown. Murder is the unlawful killing of a human being with malice aforethought. Pen. Code, § 187. Such malice may be either express or implied. Pen. Code, § 188. Manslaughter is the unlawful killing of a human being without malice, either voluntarily, "upon a sudden quarrel or heat of passion," or involuntarily, "in the commission of an unlawful act, not amounting to a felony or in the commission of a lawful act which may produce death, in an unlawful manner, or without due caution or circumspection." Pen. Code, § 192. There are no allegations in the complaint to the effect that the killing of Archer Cullen Drown was done with that malice, either express or implied, which is necessary to make the act a murder. In order to constitute voluntary manslaughter there must be an intent to kill, though it is not that deliberate and malicious intent which is an essential element in the crime of murder. People v. Freel, 48 Cal. 437. There is no allegation that the killing, though without malice, was done upon the sudden quarrel or heat of passion which is necessary to reduce an unlawful and intentional killing to manslaughter. It is not averred, either directly or indirectly, that the killing was done in the commission of an unlawful act, or in the commission of a lawful act in an unlawful manner, or without due caution or circumspection. There is, therefore, no basis for the claim that the complaint shows an involuntary manslaughter. It is not alleged that it was unlawful or that it was intentional. The pleader seems to have been careful to avoid making either of these allegations. The complaint alleges that the death was accidental, that it was "effected solely and exclusively by accidental means," that "said accidental death" resulted from the act of said Amelia C. Drown. It described the act which caused his death as follows: "Amelia C. Drown took a loaded pistol in her hand and discharged the same at the said Archer Cullen Drown, and shot and killed" him. All this might have occurred without any intention on her part either to shoot him or kill him. A loaded pistol may be discharged at a person by another without any intent whatever to kill. In the connection in which "at" is used in the sentence it means merely that she shot the pistol in the direction of said Archer Cullen Drown. It carries no necessary implication of intent, and no intent is alleged in the complaint in any other manner. If, after taking the pistol in her hand, she accidentally discharged it without any intention whatever of doing so, and the pistol was then pointed in the direction of the decedent, it could truthfully be said that she had shot the pistol at him. The language is as consistent with an unintentional and accidental discharge as with a discharge with the intent to shoot the decedent. It does not expressly declare that it was accidental, although that fact might be implied from the language describing it as "the accidental death" and as a death caused by "accidental means." In view of the lack of any showing in the complaint that the killing was felonious, the case cannot be considered upon the theory that she is estopped by her conduct and on grounds of public policy from claiming the benefits of the policy of insurance. Even an intentional killing, if done in her lawful self-defense, would not prevent her from claiming the benefits of the policy. The facts alleged, however, exclude the theory of self-defense. There is an allegation that because of the facts relating to the cause of his death, as above stated, Amelia C. Drown is not entitled to enforce the policy or take the benefit thereof. But this is a conclusion of law, and it in no wise alters or enlarges the legal effect of the facts. If the plaintiff seeks to recover on behalf of the estate on the ground that the beneficiary cannot claim the benefits of the policy, he must state the facts upon which the principles of public policy denying her right must rest. Upon this complaint such statement would be unnecessary because upon the face of the complaint the beneficiary is entitled to recover upon the policy, it being alleged that the proper proof of death and claim of loss was made, and the allegation that she has assigned her interest to plaintiff for the benefit of the estate is sufficient to entitle him to maintain the action. If the defendant desires to make a defense on the ground stated, an answer will be necessary setting up the facts upon which it is claimed the beneficiary of the policy is debarred from recovery thereon. Upon the facts stated in the complaint we can see no ground for holding that it does not state a cause of action in favor of the plaintiff. It would be manifestly improper for this court to render a decision upon an assumed fact of so grave a character, unless such fact is shown by the record before it. It may be remarked that it is stated in the briefs that she has been acquitted of criminal homicide.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(175 Cal. 21)

STATE BANK OF LANSING v. McLAURY et al.

SAME v. McLAURY.

(Sac. 2333, 2334.)

(Supreme Court of California. April 30, 1917.)

1. Judgment 🔑894 — Satisfaction — Order to Enter Satisfaction—When Proper.

Where judgment debtor moved for order to satisfy judgment under Code Civ. Proc. § 675, authorizing such order whenever a judgment is satisfied in fact otherwise than upon an execution, there was no error in denying the motion, where the only evidence as to satisfaction was affidavits in direct conflict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1706–1709, 1712.]

2. Judgment 🔑894 — Satisfaction — Order to Enter Satisfaction—When Proper.

Though, in proceeding to have a judgment satisfied of record under Code Civ. Proc. § 675, it may be that the court should not decide the issue of satisfaction on affidavits alone, a movant, who fails to ask independent trial by jury or a reference of such issue, cannot complain that the court should not have decided such issue on affidavit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1706–1709, 1712.]

3. Appeal and Error 🔑523(2)—Scope of Review — Record — Requisites and Sufficiency.

The court cannot, on appeal from granting or denial of a motion to satisfy judgment under Code Civ. Proc. § 675, consider affidavits or other evidence used in the court below, unless they are authenticated by incorporation into a bill of exceptions, within court rule 29 (119 Pac. xiv).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2374.]

Department 1. Appeals from Superior Court, Tulare County; W. B. Wallace, Judge.

Actions by the State Bank of Lansing against C. S. McLaury and Harry Thompson and against C. S. McLaury. On defendants' motions for orders satisfying the judgment. From orders denying the motions, defendants appeal. Affirmed.

Everts & Ewing, of Fresno, for appellants. Bradley & Bradley, of Visalia, for respondent.

SLOSS, J. Appeals in two cases are here presented. The plaintiff is the same in both actions. C. S. McLaury and Harry Thompson are defendants in the one action, and McLaury is the sole defendant in the other. Except for this circumstance, and a difference in the amounts involved in the two cases, the facts are identical, and the two appeals have been submitted upon a single set of briefs. A brief statement of the facts in No. 2334 will illustrate the legal questions common to the two appeals.

The plaintiff brought an action against McLaury on a promissory note, and recovered judgment by default. More than a year after the entry of the judgment, McLaury gave notice that he would move the court for an order satisfying the judgment and recalling an execution issued thereon. The notice of motion was accompanied by the affidavit of McLaury in which he stated, in effect, that since the entry of the judgment, the plaintiff had come into the possession of money, sufficient in amount to cancel the indebtedness represented by the judgment. Said money was declared to be the proceeds of securities belonging to McLaury, and held by the plaintiff under an agreement that money collected thereon should be applied upon said indebtedness. The plaintiff filed an affidavit denying the holding of any securities for McLaury, or the collection of any money applicable to McLaury's debt. The court made an order denying the motion to satisfy the judgment and recall the execution. The appeal is from this order.

[1] The motion was made under section 675 of the Code of Civil Procedure, which authorizes the court to order entry of satisfaction "whenever a judgment is satisfied in fact, otherwise than upon an execution." Buckeye R. Co. v. Kelly, 163 Cal. 8, 124 Pac. 536, Ann. Cas. 1913E, 840. The order is to be made only where the judgment has in fact been satisfied. In the case before us, the only evidence touching this vital question consists of affidavits which are in direct conflict. It is difficult to see, therefore, how it can be contended that the court erred in denying to the defendant the relief for which he asked.

[2] The appellant's argument is that, where the fact of satisfaction by payment is in controversy, the court should not, upon a motion under section 675, decide this issue upon affidavits alone. The payment being denied, the court, it is claimed, should either remit the defendant to an independent action, or should provide for determination

of the disputed fact by means of a reference or a submission to a jury. 23 Cyc. 1498. There is much force in the suggestion that an issue of this kind could better be determined otherwise than by the summary procedure of a motion made and resisted upon affidavits. Woodford v. Reynolds, 36 Minn. 155, 30 N. W. 757; Atkinson v. Harrison, 153 Pa. 472, 26 Atl. 294. It may well be that, where the fact of payment is disputed, a reference would be proper. Dwight v. St. John, 25 N. Y. 203. But the appellant is not, on the record before us, in a position to question the action of the court below. There is nothing to indicate that he requested a reference, or the submission of the issue of fact to a jury. He undertook, apparently, to present his motion for decision on affidavits, and, having so presented it, he cannot now insist that the court below should, of its own motion, have directed a procedure different from that which he himself initiated and invited.

[3] We have discussed the case on the assumption that the record properly shows that the motion was presented to the court upon the two affidavits to which we have referred. But, in fact, the record does not show this. The transcript consists merely of copies of the complaint, the judgment, defendant's notice of motion, a written motion, defendant's affidavit, a counter affidavit, the order denying the motion, and the notice of appeal. These papers are certified by the clerk as correct copies of the originals on file. They are not incorporated in any bill of exceptions. Under the settled rule of this court, we cannot, on an appeal from the granting or denial of a motion like the one here involved, consider affidavits or other evidence used in the court below, unless such affidavits or evidence be authenticated by incorporation into a bill of exceptions. Rule 29 of this court (119 Pac. xiv) provides for this method of authentication where no other mode is authorized by law. There is no law authorizing another mode in such cases as this, unless, perhaps, the evidence taken can be brought up in a transcript prepared under the alternative method provided by sections 953a, 953b, and 953c of the Code of Civil Procedure. There is no pretense of any attempt to procure a record under these sections. Not only, therefore, are we precluded from considering the affidavits printed in the transcript, but we must assume, in support of the order, that any additional evidence which would support it was presented to the court below. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Estate of Dean, 149 Cal. 487, 87 Pac. 13. It is incumbent upon the appellant to show error, and this he has not done, where he fails to present to the appellate court the evidence on which the trial court acted. In support of the order, we would be entitled to assume, if that were necessary, that the court below did order a reference or submit the issue to a jury, as the appellant urges it should have done, and that the reference or the jury trial resulted in favor of the respondent's contention.

We are not called upon to decide here whether the denial of defendant's motion would operate as a bar to an independent action in equity to enjoin the enforcement of the judgment. It is enough, for present purposes, to say that error in the denial of the motion is not shown.

In each of the above-entitled cases, the order appealed from is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 59)

BANK OF COMMERCE & TRUST CO. v. KENNEY. (L. A. 3969.)

(Supreme Court of California. May 4, 1917.)

1. APPEAL AND ERROR 🔑901—REVIEW—PRESUMPTIONS.

Every presumption is in favor of the regularity of the proceedings in a court of general jurisdiction upon which a judgment is based, and it devolves upon the appellant to affirmatively show the error upon which he relies for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670.]

2. COURTS 🔑35—JURISDICTION—PRESUMPTIONS.

In a suit to quiet title to land acquired by defendant in a partition suit, and purchased by plaintiff at sheriff's sale, where the return of summons and service thereof in that suit upon this defendant is not brought up in the record, the court in examining the recitals in the judgment roll in the partition suit will not examine for proof of personal service upon this defendant; but, since the presumption is that the court would not have acted illegally, will examine only for showing in the record of want of such personal service.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146.]

3. COURTS 🔑35—JURISDICTION—PRESUMPTION.

In a suit to quiet title to land acquired by defendant in a partition suit and purchased by plaintiff at sheriff's sale, where the recital in the partition suit is that legal process "was duly served upon all persons who had or claimed to have any interest in said property who are in this state," and that as to others service by publication was had, as this defendant, who had an interest in the property, will be presumed to have been within the state, in the absence of a contrary showing, and as he is not shown to be within the excepted class upon whom service was had by publication, the appellate court must accept as true that he was "duly served," which under the circumstances shown could not be other than "personally served," since any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment, and hence the judgment is binding upon defendant, although designating him as "Kinney" instead of "Kenney."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146.]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Suit to quiet title by the Bank of Commerce & Trust Company against Patrick Kenney. Judgment for plaintiff, and defendant appeals. Affirmed.

E. H. Lamme and E. I. Kendall, both of San Diego, for appellant. Sam Ferry Smith, of San Diego, for respondent.

VICTOR E. SHAW, Judge pro tem. From a judgment rendered in favor of plaintiff quieting its title to certain real property described in the complaint as lots 17 to 20, both inclusive, in block 39 of Middletown addition, according to partition map thereof on file in the county clerk's office of San Diego county, in the case of Roark et al. v. Forward et al., and an order denying his motion for a new trial, defendant appeals.

It appears in the statement on the motion for a new trial that Middleton addition is a subdivision of pueblo lot 1121 of the public lands of the city of San Diego; that after the title of the said pueblo lot had vested in a number of persons as tenants in common, among whom was Patrick *Kenney*, the defendant, an action was instituted wherein all owners thereof were made parties, the purpose of which suit was to obtain a decree partitioning said pueblo lot 1121. A summons was issued by the clerk in form as directed by section 756 of the Code of Civil Procedure, which, as shown by the judgment roll in the partition suit, the court found to have been served as follows:

> "That legal process of this court was duly served upon all the parties and all the tenants in common and all persons having any interest in or lien of record by mortgage, judgment or otherwise upon said tract of land or any particular portion thereof and all persons who had or claimed to have any interest in said property who were in this state, and that as to all persons or parties having any share or interest who were unknown or who resided out of this state or who had departed from this state or could not, after due diligence, be found within this state or conceal themselves to avoid the services of summons, or who was a foreign corporation, having no managing or business agent, cashier or secretary within this state, and the facts were made to appear by affidavit to the satisfaction of the court, and it appearing by such affidavit and the verified complaint on file that a cause of action existed against said defendants in respect to whom the service was made and that they were each necessary and proper parties to the action, and the said court made an order that a service be made by publication of the summons and said summons was duly served upon all and each of said parties by publication as provided by law and directed by said order."

At the trial a judgment was rendered wherein it was, among other things, decreed that Patrick Kinney was the owner of and entitled to have set apart to him as such owner all of block 39, as designated upon the partition map, subject, however, to the payment of $140.50 costs assessed against said lot. Default being made in payment of said costs, block 39 was, by the sheriff, sold and conveyed to one H. C. Gordon, from whom, by mesne conveyances, the plaintiff acquired title to the lots in question.

The proposition presented is, conceding defendant's ownership of an individual interest in the pueblo lot represented by block 39, was he divested of title thereto by the sheriff's sale to Gordon, to whose interest plaintiff succeeded? That upon this record he was so divested of title admits of no doubt, unless the proceedings in the partition suit are void as to him by reason of designating Patrick *Kinney* as the owner of such interest when, in fact, the true name of such owner was Patrick *Kenney*. Appellant concedes that had there been personal service upon the defendant, then the use of the name Kinney for Kenney might be deemed a mere misnomer, or the doctrine of idem sonans be applied, and hence, in either view of the case, no cause for complaint exist; but he contends that such rule has no application to cases where service is obtained by publication, in support of which contention he cites a number of authorities from other jurisdictions. In our view of the case, it is unnecessary to determine this proposition.

[1, 2] Every presumption is in favor of the regularity of the proceedings in a court of general jurisdiction upon which a judgment is based, and it devolves upon the appellant to affirmatively show the error upon which he relies for reversal. The return of the summons and service thereof is not brought up in the record. We must therefore look to the recitals in the judgment roll, not necessarily for proof of personal service upon the defendant, without which appellant insists a binding decree as to defendant could not have been made, but since the presumption is that the court would not have acted thus illegally, for a showing in the record of want of such personal service.

[3] Now the recital is "that legal process * * * was duly served upon all * * * persons who had or claimed to have any interest in said property who were in this state," and that, as to others, service by publication was had. Conceding, as claimed by the appellant, that under the circumstances shown service upon the defendant by publication would not warrant the rendition of the judgment against him, nevertheless, since he admittedly had an interest in the property, and since the contrary is not made to appear, the presumption is that he was within the state, and being in the state and not shown to be within the excepted class upon whom service was had by publication, we must accept as true the recital that he was "duly served," which under the circumstances shown could not be other than "personally served." "Any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one

which will defeat the judgment." In re Eichhoff, 101 Cal. 600, 36 Pac. 11; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301. Hence, conceding the recitals in the judgment roll to be applicable to substituted service, in which case, as claimed by appellant (though not decided), the judgment is invalid, they are likewise equally applicable to and consistent with personal service, so presumed to have been made, hence the judgment is binding upon defendant.

It is significant that, while defendant disclaims being a party to the partition suit, and asserts that he was not served with process therein, he nevertheless claims ownership, not of an undivided interest in the said pueblo lot, but title to the segregated portion thereof designated as block 39 according to the partition map prepared and filed in the case of Roark et al. v. Forward et al., as set apart to Patrick *Kinney*, which claim, in the absence of any conveyances thereto shown, finds support in the sole theory that he, as owner of an interest therein and as a party to said action sued as Patrick *Kinney*, derived his title to such segregated parcel of land through and by virtue of the partition proceedings. As to such interest as he had in the property, he, as Mr. Patrick *Kinney*, affirms the proceeding in so far as it sets aside and confirms to him that portion of the pueblo lot designated on the map as block 39 which, except for the proceeding, would have no location or habitat. But as to the other matters connected with the proceeding, which may prove burdensome, he, as Patrick *Kenney*, disaffirms and repudiates the same.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

(175 Cal. 26)

In re KEITH'S ESTATE. (S. F. 7965.)

(Supreme Court of California. April 30, 1917.)

1. APPEAL AND ERROR 🔑757(1) — REVIEW — RECORD IN BRIEFS.
Under Code Civ. Proc. § 953c, providing that the parties must print in their briefs such portions of the record, brought up in typewritten form, as they desire to call to the attention of the court, it is not required to consider any more thereof than is incorporated in the briefs.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092.]

2. APPEAL AND ERROR 🔑757(3) — BRIEFS — SETTING OUT EVIDENCE.
To prevent affirmance on the ground that any alleged error in rulings on evidence does not appear to have been prejudicial, enough of the evidence brought up in typewritten form should, under Code Civ. Proc. § 953c, be given in the briefs to enable the court to determine whether the rulings had any bearing on the result.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092.]

3. DESCENT AND DISTRIBUTION 🔑71(6) — CLAIMS AGAINST ESTATE—CHILDREN OF TESTATOR—EVIDENCE.
Evidence *held* to show that one claiming against a will, making no provision for her, on the ground that she was testator's only child, was not his daughter.
[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 235.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John M. Keith, deceased, Louise K. Thomson petitioned for distribution to her, and appeals from a judgment of dismissal. Affirmed.

See, also, 159 Pac. 705.

E. B. Mering, of San Francisco, for appellant. John L. McNab, Gavin McNab and Nat Schmulowitz, all of San Francisco, for respondents.

SLOSS, J. John M. Keith died on the 27th day of April, 1914, leaving a large estate. On May 28, 1914, a paper, dated March 3, 1913, was admitted to probate in the superior court of the city and county of San Francisco as the holographic will of said decedent, and letters testamentary were issued to J. J. Mack named therein as executor. The order admitting the will to probate has long since become final. In June, 1915, the executor filed his first annual account, and soon thereafter various beneficiaries named in the will filed applications for partial distribution. While matters were in this condition, Dr. Sarah J. Tedford presented a paper, dated April 20, 1914, as the last will of John M. Keith, and filed a petition for its admission to probate. The alleged will purported to give the entire estate to Louise Keith Thomson, described as Keith's "only daughter," and named Dr. Tedford "truste to carry out the exicutive work of probating" the will.

The petition for probate was filed on September 3, 1915. The petitioner having been advised that the time for questioning the probate of the will of March 3, 1913, had long gone by, she dismissed her petition on September 15, 1915. On the last-named day, Louise K. Thomson, the appellant herein, filed a petition asking that the entire estate be distributed to her. In this petition she alleged that Keith had been married twice; that she, the petitioner, was the sole issue of the first marriage, and that there was no issue of the second; and that she, as sole heir, was entitled to receive the entire estate because of the omission of the decedent to make any provision for her in his will. She subsequently filed a petition for partial distribution, based upon similar allegations, and the proceedings here under review were had under this petition and the oppositions thereto. The court found that Keith was married only once, and that there was no issue of this marriage; that Louise K. Thomson was not a child of John M. Keith, and was not entitled to inherit any part of his estate. Judgment was entered denying and dismissing her petition for partial distribution. From this judgment she appeals. The record was brought up in typewritten form under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure.

[1, 2] The truth of appellant's claim that she was the daughter of John M. Keith presented the one vital issue of fact in the case. She has not included in her brief, or in a supplement thereto, any part of the record, or of the evidence upon which the lower court acted in determining the fact of her alleged relationship to the decedent against her. She contents herself with referring to a few rulings in the admission and rejection of evidence, and with the claim, unsupported in most instances by argument or citation of authority, that these rulings were erroneous. Under the provisions of section 953c, the court is not required to consider any more of the record than the parties have seen fit to incorporate in their briefs. O'Rourke v. Skellenger, 169 Cal. 270, 146 Pac. 633. The bald references by appellant to alleged errors in the admission or rejection of evidence do not enable us to determine whether the rulings complained of, if erroneous, had any bearing upon the result of the trial. Abstract error is not a ground for reversal, nor is error which does not appear to have been prejudicial. The judgment appealed from might well be affirmed on this ground alone.

[3] We have, however, made a sufficient study of the evidence (the essential parts of which are carefully collated by the respondents in their brief), to convince us that the same result must be reached upon a review of the entire record. The appellant's claim rested, in the main, upon the testimony of Dr. Tedford. Stated in barest outline, Dr. Tedford's story was that she met John M. Keith in San Francisco in the year 1862. He told her that he was a native of England or Scotland. In September, 1864, Keith was married to Nina Kirby. On November 7, 1865, the appellant, Louise Keith, now Louise Keith Thomson, the issue of this marriage, was born. Her mother, Nina Kirby Keith, died within a few hours after giving birth to the child. In January, 1867, Keith was married to Adelaide M. Sheldon. The first marriage, the birth of the child, the death of the mother, and the second marriage all took place at Chicago, and Mrs. Tedford was present on each of these occasions. In 1886, at San Francisco, Keith obtained a divorce from his second wife. In 1887, Keith and his daughter Louise made a journey to Alaska, and both were thought to have been lost in a shipwreck. Dr. Tedford learned in 1898 that the daughter had survived the wreck, but neither she nor the appellant saw or heard anything of Keith until April 20, 1914, just one week before Keith's death, when they met him walking on the street in San Francisco. A mutual recognition ensued. The three went into a store, where Keith wrote his will in favor of the petitioner. This document, according to Mrs. Tedford's story, is the paper which she offered for probate many months after Keith's death. In addition to the testimony of Dr. Tedford, that of some other witnesses was offered in support of the claim that the appellant was Keith's daughter. One of these witnesses knew Keith as manager of a railroad eating house at North Platte, Neb., during the period from 1869 to 1879, Keith then having a little girl with him. Although this witness had not seen the girl for nearly 40 years, he was able, at the trial, to identify her with the petitioner. Another witness testified that he had seen the petitioner with Keith at Bakersfield in the years from 1884 to 1887. This, with some further testimony of minor corroborative value, was the evidence introduced to establish the appellant's case. We need not stop to point out its inherent weakness. A more detailed statement would disclose abundant ground for saying that the testimony of Mrs. Tedford, which formed the main reliance of the appellant, was on its face improbable and unworthy of belief. It is not, however, necessary to go so far. The respondents introduced evidence, unimpeached and convincing, making it entirely clear, either that the appellant was not the daughter of any man named Keith, or that, if her father did bear that name, he was not the Keith whose estate is here involved.

This evidence, consisting of the testimony of reputable witnesses, supported by an abundance of documentary proof, showed that John M. Keith was a native of the state of Georgia; that he came to California "in the '50's," locating in Gilroy somewhere about 1860. He was shown to have been at Gilroy, or in the San Joaquin valley, at the various times when Mrs. Tedford claimed to have seen him in Chicago. He lived in Gilroy until 1874, when he was married to Lucy Goodman. From the date of his marriage to her, he lived with his said wife until her death in 1907. Shortly after the marriage, Keith moved to Kern county, and he lived near or in Bakersfield until 1901, when he removed to San Francisco. It is abundantly shown that during the entire period of his marriage he had no child, and no child was living with him. During the years when, according to appellant's claim, he was living in North Platte, Neb., he was, beyond question, residing continuously in this state.

The appellant's case is so obviously without merit that a decision against her was inevitable. The respondents are well within the bounds of moderation when they characterize the claim as one "devoid of truth and lacking even plausibility." Under these circumstances, it would be idle to discuss, or even to enumerate, the assignments of error which are presented. If the rulings complained of had not been made, it would still be perfectly apparent that the appellant's pretensions have no substantial foundation. At no stage of the law would an appellate court, on such a record as the one before us, have felt justified in reversing this manifestly just judgment, even though some technical error may have been committed during the trial. Much less can the rulings be given any weight since the adoption of section 4½ of article 6 of the Constitution. Our examination of the record convinces us that, if there were errors in the proceedings below, they did not result in a miscarriage of justice. On the contrary, it would be a glaring miscarriage of justice to require a new trial in a case like this.

The claim of the petitioner should never have been presented to any court. When it had been rejected by the learned judge of the trial court, after a patient hearing of all the evidence there was no justification or legitimate reason for an appeal. The case is an eminently proper one for the imposition of a penalty for the protracting of baseless litigation.

The judgment is affirmed, and it is adjudged that the respondents recover from the appellant the sum of $100 as damages for the taking of a frivolous appeal.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 72)

DYNES v. BEKINS VAN & STORAGE CO.

(L. A. 3768.)

(Supreme Court of California. May 7, 1917.)

1. Appeal and Error 🔑856(5)—New Trial—Grounds for Granting.

An order granting new trial will be affirmed, if it can be justified upon any of the statutory grounds urged by the mover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410, 3423, 3424.]

2. Appeal and Error 🔑1015(2) — New Trial—Grounds for Granting.

An order granting a new trial will not be disturbed where the evidence is decidedly and substantially conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3866.]

Department 1. Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by Paul Dynes against the Bekins Van & Storage Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Earle & McLaughlin and Williams, Goudge & Chandler, all of Los Angeles, for appellant. Collier & Clark and Jones & Evans, all of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from an order granting the motion of the defendant for a new trial.

The action was to recover the sum of $3,000 as damages caused by the destruction of the plaintiff's goods by fire while they were stored in a warehouse belonging to the defendant. It is alleged that the plaintiff shipped the goods to the defendant and was informed by defendant that they had been received and were stored in a fireproof warehouse in Los Angeles, and that defendant agreed to store the same in said fireproof warehouse until wanted by the plaintiff; that afterwards plaintiff demanded of the defendant the possession of said goods, but defendant neglected and refused to return the same and converted the same to its own use. In a second count plaintiff alleges that while the property was in the possession of the defendant for storage defendant informed plaintiff that the goods were perfectly safe and stored in a fireproof warehouse in Los Angeles, and that plaintiff relied upon said representations and agreed to allow the goods to remain in the possession of the defendant and paid the storage charges therefor; that the said warehouse was not fireproof; that while the said goods were stored therein they were totally destroyed by fire; and that defendant failed and neglected to store said goods in a fireproof warehouse. The defendant denied that it agreed to store the goods in a fireproof warehouse, or that it received storage charges for storage of that character. It further denied that plaintiff was informed by defendant that the goods had been received by defendant and stored in a fireproof warehouse, or that the defendant undertook or agreed to do so, or that by reason of any failure to store the same in a fireproof warehouse the goods were lost or destroyed. It will be observed that there was no charge in the complaint that the fire which destroyed the goods was caused by the negligence of the defendant, or by its failure to take due care of the goods, except in so far as it may be implied from the fact that it did not store the same in a fireproof warehouse. The case was tried by a jury, a verdict of $3,000 damages in favor of plaintiff was returned, and judgment given accordingly.

[1] Defendant's motion for new trial was based on various grounds, including the ground that the verdict was contrary to the evidence, and specifically that there was no evidence of any contract to store the goods in a fireproof warehouse, or of any representations that the same had been or were stored in such warehouse.

> "It is only necessary to discover whether any of the grounds are sufficient; for the rule is well settled that the order granting a new trial will be affirmed if it can be justified on any ground made by statute the subject of a motion for a new trial." Churchill v. Flournoy, 127 Cal. 361, 59 Pac. 793.

It should be added, of course, that such ground must be properly specified in the notice of intention to move for new trial and in the specifications of error or insufficiency of the evidence in the statement or bill of exceptions on which the motion is heard.

[2] We deem it unnecessary to consider the matter at further length. A perusal of the evidence on the issues above stated shows that it is decidedly and substantially conflicting. Under these circumstances "the judge should set aside the verdict whenever he is not satisfied with it upon the evidence, and his order in that regard will not be disturbed on appeal if the evidence is substantially conflicting." Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26.

The order is affirmed.

We concur: LAWLOR, J.; SLOSS, J.

(175 Cal. 67)

DES GRANGES v. DES GRANGES et al.
(L. A. 3732.)

(Supreme Court of California. May 7, 1917.)

1. DEEDS ⇨61—ESTATE CONVEYED.

Where husband deeded to wife fee title to his lands, and wife subsequent to his death and pursuant to his wishes executed and delivered deeds to children to be recorded upon her death, the effect of such deeds was to vest in children the legal title, with a tenancy reserved for life to the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141.]

2. APPEAL AND ERROR ⇨607(1)—REVIEW—RECORD.

On appeal, a transcript of evidence cannot be reviewed where appellant failed to give a ten-day notice after entry of judgment to the clerk of the superior court for its preparation, as required by Code Civ. Proc. § 953a, and where appellant asked for no relief under Code Civ. Proc. § 473, or attempted to excuse or explain her failure to give a statutory notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

3. APPEAL AND ERROR ⇨607(1)—REVIEW.

Code Civ. Proc. § 953a, requiring ten days' notice after entry of judgment to clerk of court for preparation of transcript of evidence, is mandatory, not merely directory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

Department 1. Appeal from Superior Court, Orange County; Curtis D. Wilbur, Judge.

Action to quiet title by Josephine Des Granges against John C. Des Granges and others. From a judgment quieting title in plaintiff to a life estate and in the defendants as remaindermen, plaintiff appeals. Affirmed.

Edwin A. Meserve, Shirley E. Meserve, and Paul H. McPherrin, all of Los Angeles, for appellant. Avery & French, of Los Angeles, and Williams & Rutan, of Santa Ana, for respondents.

LAWLOR, J. This is an action to quiet the plaintiff's title to 80 acres of improved orchard land situated in Orange county. A trial was had before the court sitting without a jury. It was found that on June 11, 1898, Otto Des Granges, Sr., the deceased husband of the plaintiff and the father of the three defendants, was the owner of the land; that on that day he made various instruments in contemplation of his death for the purpose of conveying the property, excepting for a small plot reserved as "Mausoleum Premises," in severalty equally to his four children, subject, however, to the provision of a certain writing, designated as his last will, which purported to reserve a life interest in the property in favor of his wife; that on June 19th following he duly published and declared the said writing as his will, and delivered to his four children the four instruments which purported to convey the property to them; that also in connection with this transaction he acknowledged and delivered to his wife an instrument which "purported to convey to [her] the absolute title in fee simple to the premises, * * * but which said instrument was in truth and fact signed and acknowledged by said Otto Des Granges, Sr., solely and only for convenience in order to avoid the expense of administration upon his estate after his death, and to simplify the disposition of said property according to the wishes of said Otto Des Granges, Sr., after his death, which was then impending and momentarily expected by him, and with the intention and purpose on the part of said Otto Des Granges, Sr., of putting the legal title to said premises in his said wife, Josephine Des Granges, plaintiff herein, in trust for the four children of said Otto Des Granges, Sr., and Josephine Des Granges, then living, the interest of each to be a remainder in fee respectively in the separate tracts, * * * after the termination of a life estate in her, the said Josephine Des Granges, and without any purpose or intention of vesting in her the absolute title thereto in fee, and the said plaintiff well knew and understood and acquiesced in and consented to said purpose and intention, and then and there knew and understood and consented that any right or interest which she might acquire or appear to acquire by or through said instrument was and should be subject to such trust; that the said Otto Des Granges, Sr., husband of plaintiff, reposed great trust and confidence in his said wife, and at said time there was an understanding and agreement between them that she would retain the title to a life estate in said property for and during her natural life, and would execute conveyances of the remainder in fee to the four children then living; * * * that no valuable consideration of any sort was paid by or on behalf of the said Josephine Des Granges * * * except love and affection as the consideration for said life estate in said plaintiff"; that Otto Des Granges, Sr., died on June 24th, and on July 2d the plaintiff, in accordance with his instructions, executed four deeds and delivered them to the defendant John C. Des Granges, one of the children, which deeds respectively purported to convey to each of the four children the particular portion of the property which the husband had designated in the instruments first referred to, and instructed him to keep the same until her death, "and then to cause the same to be placed on record"; and that on July 7th she conveyed the plot of land set aside as the mausoleum premises to her children for a burial place for themselves and their descendants forever. From these findings the court concluded, as matter of law, "that the plaintiff is the owner of a life estate for the term of her natural life in the premises," and that the defendants are respectively the owners of the remainder estates, and accordingly entered its decree quieting the titles of the respective parties. The plaintiff appeals from the judgment.

[1] It is contended that the findings are inconsistent, and that the conclusions drawn therefrom are contrary to law. In support thereof the plaintiff claims that, according to the findings, the husband conveyed to her by his deed of July 19th merely a life estate with the remainders over to the children. But notwithstanding this proposition, argues the plaintiff, the court further found that the plaintiff by her deeds of July 2d conveyed the present title to the children, thus in effect finding that "she conveyed away a fee title which she never had." There is nothing in the findings to support this contention. The court clearly states that the plaintiff received the complete title from her husband. The children acquired no legal interest in the property, therfore, until the plaintiff, acting in accordance with her deceased husband's wishes, on July 2d delivered the deeds to John C. Des Granges, at which time, as the court finds, she "then and there relinquished and gave up all control and dominion over the same, and did not retain any power to retake or repossess herself of the same." The effect of this transaction was to vest the legal title at once in the children, with a tenancy for life reserved to herself. As regards three of the deeds, John Des Granges, the depositary, became the trustee for the three children respectively named therein as the grantees. The situation in this respect is identical with that considered in Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, and is conclusively determined by the holding of that case. The fourth deed, like the others, was absolute in terms and its delivery by the plaintiff directly to the grantee himself, John C. Des Granges, vested the title in him, but not absolutely, for the circumstances surrounding the making of the delivery, the transactions which preceded it and of which the conveyance to him was merely a part, impressed the title thereof with an equitable life estate in favor of the plaintiff, and to that extent constituted the grantee a trustee.

[2] The plaintiff's briefs are almost exclusively directed to the sufficiency of the evidence to support the findings. It is argued at great length that the evidence is in most respects insufficient. In support of the contentions, the plaintiff offers a transcript of the evidence which was attempted to be prepared by the alternative method of appeal, although, it should be mentioned, the judgment roll also appears before us in the usual form of a printed transcript. The transcript of evidence, however, cannot be reviewed on appeal, for the reason that the plaintiff utterly failed to give the ten days' notice to the clerk of the superior court for its preparation which section 953a of the Code of Civil Procedure requires. This fact is fully brought out in special findings made by the court "upon hearing the matter of the settlement and allowance of said transcript," following the defendants' objection to its certification. Those findings were:

> "That there had been no request to cause said transcript to be prepared, filed with said clerk prior to the 18th day of October, 1913; that the plaintiff had notice of the entry of the judgment herein on the 20th day of August, 1913, and that on the 1st day of October, 1913, the plaintiff filed in the office of said clerk her notice of appeal from the judgment theretofore entered therein; and that the plaintiff had not filed any request for the preparation of such transcript with said clerk within ten days after notice of entry of judgment."

Thus it appears that nearly two months elapsed after the plaintiff had notice of the entry of the judgment and before the required notice was given to the clerk. And it does not appear that the plaintiff at the hearing, or at any other time, asked for any relief under section 473 of the Code of Civil Procedure, or attempted to offer any explanation to excuse her failure to comply with the provisions of section 953a.

[3] There was presented, in fact, no opportunity for the exercise of any discretion by the court. Yet, as shown by the bill of exceptions prepared in accordance with the rule laid down in Hecker v. Baker, 19 Cal. App. 667, 127 Pac. 654, the trial court "announced, as a matter of law, his holding that the provision of the law, limiting the period of time for the filing of such request to ten days after notice of the entry of the judgment or decree, is directory and not mandatory," and thereupon certified to the record. This holding is clearly erroneous. It finds no support in the decisions of this court, and is in no wise justified by the scheme embodied in the alternative method of appeal. On the contrary, the application of such reasoning to the facts of this case practically nullifies the clear provisions of the Code relating thereto. The obvious conclusion is, therefore, that, by failing to give the notice within the time fixed by law, the plaintiff lost her right to proceed with the preparation of the transcript of the evidence on appeal in the manner provided by the section. See Fiske

v. Gosbey, 168 Cal. 334, 143 Pac. 611. This disposes of the appeal.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

(175 Cal. 91)

ÆTNA LIFE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 7943.)

(Supreme Court of California. May 9, 1917.)

1. MASTER AND SERVANT 🔑366—COMPENSATION ACT—"EMPLOYÉ"—PARENT AND CHILD.

Under Workmen's Compensation Act,[1] § 14, defining an employé as a person in the service of a person, as defined by section 13, under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including minors, and Civ. Code, § 197, providing that the father and mother of a legitimate unmarried child are equally entitled to its custody, services, and earnings, and section 1965, providing that a contract of employment is a contract by which one, who is called the "employer," engaged another, who is called the "employé," to do something for the benefit of the employer, or a third person, an unmarried minor son, living with and supported by his parents, and doing such work as directed by father, without any agreement as to wages, is not an "employé," entitled to compensation under the Workmen's Compensation Act for injuries received while serving father, and entitling father to reimbursement from insurance carrier on policy protecting him against claims on the part of his employés.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

2. MASTER AND SERVANT 🔑366—WORKMEN'S COMPENSATION—MINOR CHILD OF EMPLOYER—"EMANCIPATION."

That a father from time to time gave a son 19 years old small sums of money did not constitute "emancipation," where son's services belonged to his father, who supported and controlled him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Emancipation.]

In Bank. Proceeding by the Ætna Life Insurance Company against the Industrial Accident Commission and another, to review an award under the Workmen's Compensation Act. Award annulled.

Redman & Alexander, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. Review of an award of the Industrial Accident Commission. Arthur Rieck was discovered on his father's ranch, unconscious and with a fractured skull. He was at the time a minor of the age of 19 years, who was living with his parents at their home on the ranch. He did such work on the ranch as he was directed to do by his father. No one was an eyewitness to his accident, but the evidence points with strong probability to the fact that, while riding a horse to round up mules in a field on the ranch, he was thrown and struck on his head. The evidence unquestionably, then, supports the Commission's findings that his injury arose out of the services which he was rendering to his father. The vital question is whether, under the evidence, he was an employé within the meaning of our law. The case arises under the demand of the father against the petitioner for the payment of medical and other expenses incurred by the father and growing out of this injury to his son. The Ætna Life Insurance Company had issued its policy, protecting the father against such claims on the part of his employés. This present claim was pressed upon the ground that the son was such an employé, and the Commission so held, making its award accordingly.

Section 197 of our Civil Code provides that:

> "The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings."

In this class belongs Arthur Rieck, and unquestionably, unless there had been some legal change in the status of father and son, each and both were subject to the provisions of this Code section, and the provisions of section 196 of the same Code, which declares that:

> "The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

Section 14 of the Compensation Act defines an employé as:

> A "person in the service of an employer as defined by section 13 under any appointment or contract of hire or apprenticeship express or implied, oral or written, including aliens and also including minors."

In this connection section 1965 of the Civil Code defines a contract of employment in the following language:

> "The contract of employment is a contract by which one, who is called the employer engages another, who is called the employé, to do something for the benefit of the employer, or of a third person."

The evidence upon this matter (that of the father) is as follows:

> "Q. What was the agreement or arrangement between you and your son with reference to his employment? A. There was really no arrangement; he is not of age, and simply works for what I tell him, and there was no contract or agreement whatever between us; he does whatever I tell him to do. * * * Q. Your book does not show any payments made to him by check or cash? A. I have no record of that at all. He is not of age. His wages belong to me. I don't have to pay him any wages. * * * Q. How does it happen that you never had any charge against Felix in this book? A. He is my son, and I am supposed to furnish him everything until he is of age."

[1] It would seem that this law and this evidence was conclusively determinative of the matter against the award of the Commission. But the argument in support of the award is that a minor is invested with the power to make a contract of hiring under sections 33 and 34 of the Civil Code; that section 14 of the Compensation Act above quot-

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[1] St. 1913, p. 284.

ed includes in its definition of employés minors; that from the evidence the Commission was justified in finding an implied contract of service; that such an implied contract of service will support this award; that this implied contract of service need not be for a fixed wage, but may be upon the basis of the usual payment for such services, or upon the expectations of the parties; that therefore any testimony which warrants the inference that services were rendered under such expectations, and were accepted by the other party with knowledge, actual or constructive, of such expectations, is sufficient to establish the relationship of employer and employé; and, finally, that herein it is "notable" that both father and son are insisting that the relationship existed, while it is only an outstanding third party—the insurance company—which is denying it.

It is indeed notable that father and son have combined in their demand against the insurance company, but it has not the slightest persuasive value as tending to establish the relationship which they claim to have existed. Their interests in this particular action are identical, and together they are working for a common end. But, aside from this, the fault and fallacy of respondent's argument will at once become apparent when it is pointed out that the reasoning upon which respondents rely and the authorities which they bring to the support of that reasoning (where the relationship between parent and minor child is involved) all have to do with the case of an emancipated child, who has by virtue of that emancipation become entitled to contract for himself.

We need not here enter into any lengthy discussion of what acts or omissions will effectuate the emancipation of a child, for the simple reason that no emancipation can be here asserted, and the father's testimony, showing rather an unusually clear conception of his rights and corresponding duties, is an absolute denial of emancipation:

> "There was no contract or agreement whatever between us." "He does whatever I tell him to do. * * * His wages belong to me. I don't have to pay him any wages." "He is my son, and I am supposed to furnish him everything until he is of age."

Suffice it, upon the question of emancipation, to quote from our own case of Lackman v. Wood, 25 Cal. 147, and to refer to 25 Cyc. 1672. In Lackman v. Wood, it is said:

> "The power of a father to emancipate his minor child cannot be questioned; nor can there be any doubt as to the effect of such emancipation upon the relations of the persons who are parties to it. The child is freed by emancipation from parental control; he can claim his earnings thereafter as against his father, and is in all respects his own man. Emancipation is defined as 'an act by which a person, who was once in the power of another, is rendered free,' and the adjudged cases show that the doctrine of emancipation, as actually administered, is not less comprehensive than the definition."

[2] Nor, finally, does the fact that the father from time to time gave the son small sums of money, even though both father and son should testify that these sums were on account of payment of wages, at all militate against the incontrovertible fact that the son had not been emancipated. A son 19 years of age was surely entitled to some spending money, and, as his earnings belonged wholly to his father, it would be strange indeed if his father did not give him such sums for his own purposes. Many fathers are called upon to do the same thing, and many, to encourage their sons to form habits of industry and frugality, and "to learn the value of money," make these donations dependent to a greater or less extent upon the conduct and services of the child. But such payments in no sense work an emancipation of the child himself. Schouler on Domestic Relations (5th Ed.) § 267; Arnold v. Norton, 25 Conn. 92.

The award is therefore annulled.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.

(175 Cal. 74)

SAN JOAQUIN LIGHT & POWER CORP. v. RAILROAD COMMISSION.

(S. F. 7884.)

(Supreme Court of California. May 8, 1917.)

1. ELECTRICITY 🔑11—FIXING RATES—POWERS OF COMMISSION—JURISDICTION OF COURT.

The function of making rates to be charged by an electric power company is legislative, and the only ground upon which the courts may interfere with it is that the specific order impairs constitutional rights, and interference will not be made unless on a clear showing that the constitutional rights have been invaded.

2. ELECTRICITY 🔑11—FIXING RATES—POWERS OF COMMISSION—JURISDICTION OF COURT.

Where Railroad Commission fixed 8 per cent. as reasonable return on investment of electric power corporation, and apportioned rates which the corporation asserted would produce but 6½ per cent., the court could not hold as a matter of law that the rate was confiscatory.

3. ELECTRICITY 🔑11—FIXING RATES—"PROPERTY."

A power corporation owning hydroelectric plants with extensive water rights is entitled to have the value of such water rights considered in fixing its rates; the water rights being "property."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

4. ELECTRICITY 🔑11—FIXING RATES—REVIEW—BURDEN OF PROOF.

The burden is upon an electric power corporation, in certiorari to review an order fixing its rates, to show the existence of any value of property claimed by it.

5. ELECTRICITY 🔑11—FIXING RATES—VALUATION OF PROPERTY—METHODS.

In estimating the value of an electric company's plant for purpose of fixing rates, the value of the company's right to divert 6 per cent. of the water from a stream could not be fixed at 6 per cent. of the total damage that would accrue to the riparian owners if the entire flowage were withdrawn; such a basis being too speculative.

6. ELECTRICITY ⚷11—FIXING RATES—VALUATION OF PROPERTY.

In computing rates of electric power corporation, it was not entitled to have charged off a deficit incurred during development period, where the rates indicated that after the development period such deficits had been more than overcome by profits in excess of the standard 8 per cent.

In Bank. Certiorari by the San Joaquin Light & Power Corporation, to review an order of the Railroad Commission fixing rates. Order affirmed.

Short & Sutherland, of Fresno, and Jared How, of San Francisco, for petitioner. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondent.

SLOSS, J. This is a proceeding in certiorari to review an order of the Railroad Commission fixing the rates to be charged by the petitioner, San Joaquin Light & Power Corporation, for electric energy.

From the exhaustive and painstaking opinion accompanying the order it appears that the Commission fixed the value of the petitioner's property "used and useful in electric business," at the sum of $10,054,540. On this value the Commission then undertook to allow a return of 8 per cent., or $804,363.20 per annum, and the sum last named was found to be a fair, just, and reasonable sum to be received by the petitioner as an annual return on the fair value of its property. Specific rates for the different kinds of service rendered by the utility were fixed in accord with this basis.

It is not claimed that the rates thus fixed will not yield to the petitioner the estimated return of $804,363.20. The contention is that in fixing the fair value of the property of the petitioner devoted to its electric business, the Commission failed to make allowance for two items of property, and that, in consequence, the earnings of the petitioner will fall below the rate of 8 per cent. determined by the Commission to be fair, just, and reasonable. These items consist of: (a) The value of certain water rights; and (b) the "going concern" value of the petitioner's plant. The petitioner contends that, under the undisputed evidence before the Commission, a valuation of at least $650,000 should have been allowed for the first of these items; of $1,651,021 for the second. If these sums were added to the value placed upon the plant by the Commission, the estimated return of $804,363.20 would realize to the petitioner a net earning of 6.51 per cent. instead of 8 per cent.

[1] The petitioner does not point out any evidence in the record which would force, or even justify, the conclusion that a limiting of its return to 6½ per cent. on the value of its property would amount to confiscation, or, in other words, that it would, if held to so low a rate of earning, be deprived of its property without due process of law. "The function of ratemaking is purely legislative in its character, and this is true whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated." Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

The only ground upon which the courts may interfere with the exercise of this function is that the action in question impairs constitutional rights. The rates will not be set aside except upon a clear showing that such rights have been invaded. Knoxville v. Knoxville Water Co., supra; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034.

[2] In view of our decision in Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668, it cannot be claimed that a return of 6½ per cent. net upon the value of property devoted to such a public use as the one in question is, as matter of law, confiscatory. As we pointed out in that case, the court is not called upon to determine the rate which it, if vested with the power of fixing rates, would determine to be just and reasonable. Its right to interfere exists only where the rate-fixing body has confined the public utility to a return below that which, under the evidence in the particular case, can fairly be regarded as the lowest reasonable percentage of profit. "If the ordinance gives a rate of return which, although low, is not palpably unreasonable, the court is not to upset the action of the council because it may think a higher rate more appropriate." In the Contra Costa Case we held that the evidence did not show that a return of 4.682 per cent. was less than the lowest rate of return which the city council might fairly have determined to be just. The petitioner contends that because the Commission fixed 8 per cent. as a reasonable rate of return, anything below that rate is, for the purposes of this case, necessarily confiscatory. We cannot accept this view. The ultimate question is whether the rates fixed for electric service deprived the petitioner of its property without due process of law. The value of the property devoted to the public use, the return which should be earned upon this property, and the specific rates which will produce this return, are all elements in the problem. The final question for the court is merely whether the rates fixed will deprive the utility of its property without due process of law. The Commission might have fixed rates without making a finding, in figures, of the value of the property, or of the rate of return which, in its judgment, should be realized. If it had so done, or if it had declared its purpose of allowing an earning of only 6½

per cent., we should have been confronted with the same question that is now before us, namely, whether the rates fixed will produce a confiscation, in whole or in part, of the petitioner's property. This question must be answered upon a consideration of the evidence tending to show the lowest rate of return which the Commission might reasonably have allowed. If it has not gone below this minimum, the courts are powerless, even though the rates fixed may not produce as high a return as the regulating body believed and intended.

But apart from this, we think the petitioner does not substantiate its claims with respect to either of the items of valuation alleged to have been improperly ignored.

[3] The San Joaquin Light & Power Corporation operates a plant for furnishing electric energy in a number of counties in the San Joaquin Valley. It is the successor in interest of various corporations, the first of which was organized in 1895. Its power is generated, in part, by means of hydroelectric plants. To this end it maintains power stations upon various streams; and in connection with these stations it has acquired and owns the right to divert a portion of the flow of such streams, returning the water in due course to the streams below the point of diversion. These water rights are property, and the petitioner is unquestionably entitled to have their value considered in the fixing of its rates. San Joaquin, etc., Co. v. County of Stanislaus, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. Ed. 1041.

[4] The Commission, in the present case, made an allowance for such value, based upon the cost incurred in the acquisition of these rights. The petitioner claims that a further allowance should have been made. Concededly, the burden is upon the public utility, in cases of this kind, to show the existence of any value claimed by it. In the effort to establish the value of its water rights, the petitioner proceeded upon two theories.

The first of these is described in the briefs as the "comparative steam cost theory." It is well described in the respondent's brief as "based on the assumption that the value of petitioner's water rights can fairly be determined by capitalizing, at 8 per cent., the difference in the cost of service resulting from the operation of petitioner's hydraulic installations and what the cost of service would be if petitioner's electric energy were generated in a steam plant located near the oil field and burning oil." Of this element of the case it is sufficient to say that there was substantial evidence before the Commission to the effect that, at the ruling price of oil at the time of the hearing, the petitioner could generate electricity by means of steam plants at a less cost than that involved in the operation of its hydroelectric plants, after making due allowance for all charges in connection with the installation of the necessary steam plants. According to this testimony, the advantage in favor of generation by steam would continue until the price of oil had increased by 50 per cent. Without expressing any opinion regarding the propriety of this method of fixing the value of a water right, it is perfectly obvious that the Commission did not impair the petitioner's rights, when it concluded that application of the comparative steam cost theory did not show that the water rights had any value beyond their cost.

[5] The other theory was advanced with reference to a water right on the North fork of the San Joaquin river. There the corporation had constructed and was maintaining the Crane Valley reservoir, in which it stored a portion of the water flowing in the river, in order to equalize the flow during different portions of the year. Ultimately, the water stored found its way back into the river. The result of this course was to decrease the flow of the river from January to June, inclusive, and to increase it from July to December, inclusive. The petitioner's diversion is subject to a prior right to the first 1,500 second feet of the San Joaquin river. There are some 170,000 acres of land riparian to the San Joaquin river which are, or may be, affected by the withholding and storage of water by the petitioner. The effect of the storage in the Crane Valley reservoir is to diminish the water which would otherwise flow to these lands by 8.1 per cent. in the month of March, and 2.6 per cent. in the month of April. During these months irrigation upon a considerable portion of the riparian lands begins, and the use of water upon them is beneficial. The argument made is, in effect, the following: The right to store and withhold water is a detriment to these riparian lands. If that right were not already owned by the San Joaquin Light & Power Corporation, it would have to be acquired from the lower riparian owners, either by purchase or by condemnation, and the value of the right is to be measured by the price which would have to be paid for this acquisition. The difficulty with the argument is, however, that the petitioner, upon whom rested the burden of proof, failed to furnish data from which any satisfactory estimate of value could be deduced. Evidence was introduced tending to show that the 170,000 acres of land would be worth $65 per acre less, if the entire flow of the San Joaquin river were stopped, than they would if the flow continued undiminished. On this basis the damage which the entire acreage would suffer from total deprivation of water would amount to $11,050,000. The diminution during the months of March and April caused by the storage in the Crane Valley reservoir averaged about 5 or 6 per cent. of the total flow during these months. Hence, it is said, the lands are damaged to the extent of 5 or 6 per cent. of the damage which they would suffer if all of the water were

withdrawn. So estimated, the value of the water rights amounts to $650,000. The basis of this computation is too speculative, not to say fanciful, to be entitled to any serious weight. It assumes that the benefit derived by riparian land from the flow through or by it of a stream is in direct proportion to the volume of the stream. Such is not the fact. In point of legal right, of course, the owner of land bordering upon a stream has a right to have the usual flow of the stream unimpaired, and may enjoin any unauthorized diminution. But the amount of damage which he will suffer by the subtraction of any fractional part of the water depends upon a multitude of circumstances. In some instances the damage resulting from the removal of a part of the flow might be very great, while in others it might be nominal. Furthermore, the petitioner's position involves the additional assumption that the withdrawal of water during two months will have the same detrimental effect upon lower lands as that which would follow a diversion for the entire irrigating season. Certainly, no fair estimate of the value of a water right can be based upon such broad and unsupported generalizations as underlie the appellant's argument here.

[6] It is further claimed that the Commission refused to make a proper allowance for "going concern" value. It is recognized by the authorities that a business in active and successful operation has a value over and above that of its component parts. Knoxville v. Knoxville Water Co., supra. The decision of the Commission states that the tangible propery "is being valued as property in successful operation by a going and successful utility." We see no reason to question the propriety of this declaration, unless we accept the claim of petitioner that the evidence required the inclusion of an additional sum of $1,651,021. This figure is reached by computing the company's deficit in revenue, during the development period, in 8 of its 15 districts, and extending the averages derived from such computation so as to make them apply to the entire system. The "development period," thus referred to, covers the period from the inception of the enterprise until the given district earned a net revenue of 8 per cent., which is taken as the standard earning. The opinion of the Commission declares, and the record sustains the statement, that since the development period the petitioner's earnings over and above the 8 per cent. standard have been sufficient to balance all of the deficits of the development period, with interest thereon for the entire period. Under these circumstances the Commission was fully justified in excluding the item of development cost as an element of going concern value. The question is not essentially different from that before the Supreme Court of the United States in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244. The following quotation is in point:

> "Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had long carried on business in the city of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business."

Here the evidence showed affirmatively that the company was under no such necessity.

We see no ground for interfering with the action of the Commission. The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(174 Cal. 703)

FARLEY v. REINDOLLAR et al.

(S. F. 7143.)

(Supreme Court of California. March 26, 1917. On Petition for Rehearing in Bank, April 25, 1917.)

1. MUNICIPAL CORPORATIONS 🔑298—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—PROTESTS.

Under the Improvement Act of 1911 (St. 1911, p. 734) § 6, providing that protests against the doing of proposed work shall be heard by the city council at its next regular meeting after expiration of the time within which protests may be made, and that the council "may adjourn said hearing from time to time," a council, taking up the matter of a protest at such next regular meeting, did not lose jurisdiction to proceed further because it did not decide the protest at such meeting, but duly adjourned the hearing to a date two weeks later; such date not being unreasonably later.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 799.]

On Petition for Rehearing.

2. MUNICIPAL CORPORATIONS 🔑298—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—PROTESTS—OBJECTION BY NONPROTESTING OWNER—"JURISDICTION."

A nonprotesting property owner cannot urge that the city council lost or failed to acquire jurisdiction to proceed under the Improvement Act of 1911, § 7, by failing to hear protests of other property owners "at the next regular meeting * * * after the expiration of the time within which * * * protests may be made," as required by section 6 of the act, where all of the protestants have been heard and no one of them is complaining; for the "jurisdiction" spoken of in section 7 of the act means only that, if the council has not duly disposed of the protests, then, so far as protestants are concerned, it shall have no power to proceed further.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 799.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

Department 2. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by W. S. Farley against C. F. Reindollar and another. From judgment for the named defendant, plaintiff appeals. Reversed. Petition for rehearing denied.

Phil J. Strubel and W. T. Kearney, both of San Francisco, for appellant. Walton C. Webb, of San Francisco, and Ben F. Woolner, of Oakland, for respondents.

HENSHAW, J. Plaintiff having performed certain street work upon a street of the city of Oakland under the Improvement Act of 1911 (Stats. 1911, p. 730), brought his suit to foreclose an assessment lien on the property of defendant Reindollar. A general demurrer to his complaint was sustained, and from the judgment which followed plaintiff has appealed.

It is conceded that in all respects saving one the complaint is sufficient. The particular in which it was found to be insufficient is the following: The complaint alleged that a protest against the doing of the proposed work was made by certain owners of property. That defendant was not one of the protestants, and—

> "that the said city council proceeded to hear and pass upon said protest at the next regular meeting of said city council, after the filing of said protest, to wit, on the 11th day of July, A. D. 1911, and thereupon and at said time, by resolution, duly continued and adjourned said hearing to the 24th day of July, A. D. 1911, at the hour of 11:30 a. m. of said last-named day, and that due notice was given to said protestants of the time and place of hearing said protest. That the hearing of said protest came on regularly before said city council at a regular meeting thereof, at the time and place set for said hearing, and said protestants being personally present, or being duly represented at said hearing, the said council, after due consideration by its resolution No. 111, N. S., duly and unanimously overruled and denied said protest, and sustained the aforesaid resolution of intention No. 38,299."

[1] The law governing the right to protest and the procedure after protest is found in section 6 of the act of 1911, and so far as it pertains to this consideration the language of the section is as follows:

> "At the next regular meeting of the city council after the expiration of the time within which said protest may be so made, the city council shall proceed to hear and pass upon all protests so made and its decision shall be final and conclusive. * * * The city council may adjourn said hearing from time to time."

Respondent's view, which successfully he impressed upon the trial court, was that this language made it imperative upon the city council to pass on the protest and to decide the protest at its next regular meeting, or, failing to do this, its jurisdiction to proceed further was lost. Even if this statute did not authorize, as in terms it does, an adjournment of the hearing from time to time, no court would hold that such a tribunal lost jurisdiction to proceed with a matter which it had regularly taken up for hearing because it continued that hearing to some other not unreasonable or forbidden date. It would require some positive declaration of law to abridge the general right which belongs to all legislative, ministerial, and judicial officers to continue the hearing and consideration of a matter over which they have acquired jurisdiction within reasonable limits and bounds of time. Thus, to instance but one of many similar conditions which will readily occur, if the law declared that all protests must be heard and disposed of within one month after the filing of the protest or all power and jurisdiction to proceed further should be at an end, here would be a peremptory and mandatory time limit fixed within which the council must act or lose the power to act. But all this is superfluous in view of the fact that the law itself makes express provision for continuances and adjournments of the hearings—just such continuance and adjourned hearing as the pleading declares was regularly ordered and at which adjourned hearing, as the pleading further declares, every protestant was present and was heard. But two cases from our state are cited by respondent in support of his most untenable position. Unhesitatingly we declare that if either in fact supported that position it would call for immediate reversal in the light of the plain language of the law. But neither does so. The first of these is Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692. There a protest was filed under a law which declared that the protest should be laid before the council at its next regular meeting, and that the "council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned." The protest was not laid before the council either at its next or at any of several succeeding regular meetings. The council thus never acquired jurisdiction, and so never, after having acquired jurisdiction, did it continue the hearing. After a considerable lapse of time the council took up the matter of the protest, and the Court of Appeal very properly held that there had been a failure on the part of the council to acquire jurisdiction of the proceeding by virtue of its neglect to take up the matter of the protest for hearing at its next regular meeting. Here the matter of the protest was taken up at the next regular meeting of the council, and the hearing was duly adjourned to a later and not unreasonable date. The second case is Southern Construction Co. v. Howells, 21 Cal. App. 330, 131 Pac. 756. In that case the law provided for an appeal to the council by disaffected property owners, and declared that after the filing of such an appeal "notice of the time and place of the hearing shall be published for five days." The required publication was not made, and again the Court of Appeal, with strict legality, held that the publication was made jurisdictional to the right of the council to pass on the appeal. Enough has been said to show the inappositeness of both of these cases, and for the reasons given the judgment appealed from is reversed.

We concur: MELVIN, J.; LORIGAN, J.

On Petition for Rehearing.

PER CURIAM. Upon petition for rehearing respondent urges that this court failed to apprehend and so to discuss and to decide the principal proposition upon which he relies, and there is merit in respondent's contention. Respondent's position as it now appears is that protests were filed before the 11th day of July, 1911, but that the time for filing protests did not expire until July 13, 1911; nevertheless that on the 11th day of July, before the expiration of the time within which protests might be filed, the city council took up the matter of the protests already filed and continued and adjourned the hearing of the protests until the 24th day of July, 1911; still further that the street law provides (Stats. 1911, pp. 734, 735) that "at the next regular meeting of the city council after the expiration of the time within which said protests may be so made, the city council shall proceed to hear and pass upon all protests so made"; that the city council having continued the hearing of the protests until July 24th did not, as the law required, proceed to hear and pass upon the protests "at the next regular meeting of the city council after the expiration of the time" because such next regular meeting was upon July 14th, the day after the expiration of the time for filing protests. Such being the facts, respondent's contention is that the council never acquired jurisdiction to proceed further with the matter, because in cases where protests have been filed (so respondent argues) only after the regular disposition of those protests in accordance with the law is the council deemed to have acquired jurisdiction to order the proposed improvements. Street Law, Stats. 1911, p. 730, pt. 1, § 7.

[2] It is to be noted that no question is here presented of the regularity of the notice to property owners, giving them an opportunity to protest; still further that this defendant was not himself a protestant. His proposition, then, is that because of this asserted irregularity in the matter of the hearing of the protests of those who actually did protest, the council failed to acquire jurisdiction to proceed with the work, and that this failure so to acquire jurisdiction can be urged by a nonprotesting property owner. But such is not our law, nor does respondent cite any authority in support of the law. In Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692, the property owners who urged the objection that the city council had failed to acquire jurisdiction were the very ones whose protests had not met with hearing in accordance with the law. In Construction Co. v. Howells, 21 Cal. App. 330, 131 Pac. 756, the objection to the failure to give notice was heard in an action of a property owner who had appealed to the city council objecting to the assessment. Preliminarily it may be said that the law looks with steadily decreasing favor on property owners who sit by without urging any objections which they may have to the proceedings about to be taken, for the hearing of which objections the law affords ample opportunity, and then, after their property has been improved, endeavor to deprive the contractor of his just remuneration by ultra technicalities. Harney v. Benson, 113 Cal. 314, 45 Pac. 687; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53; McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924.

Therefore to this objection it must be made answer that whatever force might attach to it were it an objection made by a protestant who had, for failure of the council to observe the requirements of the law, been deprived of a legal hearing of his protest, from the lips of this respondent, who never made a protest at all, it is entitled to no weight. The jurisdiction spoken of in section 7 of the street act means no more, as used in that section, than that if the council has not duly disposed of the protests, then so far as protestants are concerned it shall have no power to proceed further. If it has duly disposed of the protests, then as to all the world it has the power to proceed. But where, as here, all of the protestants have been heard, and no one of them is complaining, and the sole complainant is one who has sat by in silence, it is too well settled to require more than a citation of authority, that such a property owner cannot object to the disposition of protests to which he was not a party. Harney v. Heller, 47 Cal. 15; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

Wherefore the petition for a rehearing is denied.

(33 Cal. App. 300)

SOULE v. NORTHERN CONST. CO. et al.
(Civ. 1907.)

(District Court of Appeal, First District, California. March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. WORDS AND PHRASES—"SLAB"—"BEAMS"—"GIRDERS"—"REINFORCING STEEL BARS"—"TYING WIRE"—"FABRIC."

A "slab" in concrete construction is that portion of the structure underneath and supporting the floor and extending between the beams and girders. The "beams" support the slabs, while the "girders" are the long supports running a few feet apart longitudinally through the interior of the building and generally supported by the columns. "Reinforcing steel bars" are small sections of steel made into straight or twisted bars embedded in the concrete to take up tensional and shearing strains due to the longitudinal load of the structure. "Tying wire" is No. 16 black fencing wire used to fasten the steel together. "Fabric" consists of a union of drawn wires made up in rows.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fabric; Second Series, Slabs; Beams.]

2. CONTRACTS 🔑199(1) — CONSTRUCTION — CONFLICTING CLAUSES.

Where contract specifications for concrete work were conflicting as to whether reinforcing bars or fabric should be placed in floors and roofs, the provision definitely giving contractor such option will be given preference over a contrary provision of general nature.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 884, 884½, 885, 887-889.]

3. CONTRACTS 🔑152—CONSTRUCTION—"ETC."

A subcontract with plaintiff "to furnish and set in place all the reinforcing bars, tying wire, etc.," according to contract specifications, referred to other reinforcing material, including fabric specified in contract, the court not being justified in holding the term "etc." meaningless, since the words "et cetera," abbreviated to the form "etc.," are equivalent to the phrase "others of like kind; and the rest; and so on."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738.

For other definitions, see Words and Phrases, First and Second Series, Et Cetera—Etc.]

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Edward L. Soule against the Northern Construction Company and others. Judgment for plaintiff, and defendant named appeals. Reversed.

N. A. Dorn, of San Francisco, for appellant. Jordan & Brann, of San Francisco, for respondent Soule. Henry Ach, of San Francisco, for respondent Abrams. Cushing & Cushing, of San Francisco, for respondent First Federal Trust Co.

KERRIGAN, J. This is an action to foreclose a mechanic's lien. From the judgment given and entered against it, the defendant Northern Construction Company has appealed.

The sole point in the case is whether or not, under a fair construction of a contract entered into between the plaintiff and said company, the former was required to install reinforced steel bars or fabric in the floor and roof slabs entering into the construction of a certain building. From the record it appears that the Northern Construction Company on the 21st day of April, 1913, entered into a written contract with Albert Abrams for the construction of a garage upon a lot in San Francisco. Under the terms of this contract the company was required to construct a concrete building, to be reinforced by steel bars, fabric stirrups, and tying wire. In the specifications, which were a part of the contract, there was a general provision reading: "Bars will be used in all footings, beams, girders, walls, but in no floor or roof slabs." Following upon the execution of this contract the company entered into a contract with plaintiff, who was a dealer in and a contractor for the installation of reinforcing steel, by the terms of which plaintiff agreed "to furnish and set in place in a workmanlike manner all reinforcing steel bars, tying wire, etc., required to be used in the construction of that certain building to be erected on the lands hereinafter described in accordance with the plans and specifications for the construction of said building." It is the contention of the plaintiff that under the terms of this contract he was not required to furnish and set in place reinforcing steel for the floors and roof of the building.

[1] Before discussing this point it may not be amiss to say that a slab in concrete construction is that portion of the structure underneath and supporting the floor and extending between the beams and girders. The beams support the slabs, while the girders are what are commonly termed the long supports, which run a few feet apart longitudinally through the interior of the building, and which are generally supported by the columns. Reinforcing steel bars are small sections of steel made into straight or twisted bars, which are imbedded in the concrete to take up the tensional and shearing strains which are due to the longitudinal load of the structure where such strains are encountered. Tying wire is No. 16 black fencing wire, and is used to fasten the steel together. Fabric consists of a union of drawn wires made up in rows. In passing it may also be stated that no personal judgment is sought against Albert Abrams or against the First Federal Trust Company. They are merely formal parties defendant to the action.

[2] Under one provision of the specifications no bars are to be used in the slab reinforcement of the floors and roof, while under another provision it is optional with the contractor as to whether or not in the slab reinforcement of the floors and roof bars or fabric shall be used. There is a conflict between those two provisions of the specifications; but the provision stating that no bars shall be used in the floor and roof reinforcement is general in its character, while the other provision refers specially to floors and roof, and perhaps that provision therefore should control as to the nature of the work to be done on that part of the building. We have no doubt, however, but that under these two provisions the original contractor was required to furnish and set in place either bars or fabric for the floor and roof reinforce-

ment; and this, of course, is required of the subcontractor unless, as asserted by him, the expression "etc." found in his contract is without force, and means nothing.

[3] He took over the contract for the general installation of the reinforcing steel for the building, and when he did so it was doubtless expected that all work of that character would be done by him; and we think this contract when fairly construed so provides. The contract requires him to furnish and set in place all the reinforcing bars, tying wire, "etc.," according to the plans and specifications for the building. The words "et cetera," abbreviated to the form "etc." are said by Webster to be equivalant to the phrase "others of like kind; and the rest; and so on." In the case of Gray v. Central R. R. Co., 11 Hun (N. Y.) 70, 75, it was held that the term "etc.," as used in a contract for the sale of a boat, where the parties agreed to take the boat, "provided, upon trial, they are satisfied with the soundness of her machinery, boilers, etc.," meant "other things," referring to other material parts of the boat. The expression "etc.," as used in the contract before us, certainly must have been used for some purpose; and we think it means "other reinforcing material," which, of course, would include fabric. There is nothing in the case which would warrant us in holding the term to be meaningless. In our opinion its effect, taken in connection with the provision of the specifications above quoted, was to require the contractor to furnish and install bars or fabric in the slab reinforcement of the floor and roof. We think the trial court was in error in exempting the plaintiff from this obligation, and that the judgment should be reversed. It is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

On Resubmission.

LENNON, P. J. The judgment is reversed, for the reasons stated in an opinion filed February 23, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

(33 Cal. App. 310)

CALL et al. v. JENNER LUMBER CO.

(Civ. 2034.)

(District Court of Appeal, First District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

1. LOGS AND LOGGING 🔑3(14)—SALES—STANDING TIMBER.

A contract for the cutting of timber on plaintiff's land provided that the cutting and removal should be completed within five years from the time of commencement and in no event later than July 1, 1915; that upon ceasing to cut timber the premises were to be surrendered to plaintiff; and that no right existed to enter upon the land after the time specified. Defendant's assignor entered the land and cut timber for about three months upon which it suspended operations entirely. Before July 1, 1915, but after the expiration of five years from the commencement of the cutting, defendant entered the land to continue operations. *Held*, that the right to cut timber had been forfeited, since a sale of standing timber, the same to be removed within a specified time, is a grant of only so much thereof as shall be removed within that period.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

2. LOGS AND LOGGING 🔑3(14)—SALE OF TIMBER—CONDITIONS—COVENANTS.

A provision, in a contract for the cutting of standing timber on the land of another, that the cutting should be completed within five years and in no event to be carried on beyond a given date, the premises to be surrendered upon the completion of the cutting, is a condition of the same and not a mere covenant to remove the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

3. LOGS AND LOGGING 🔑3(14)—SALE OF TIMBER—FORFEITURE—TIMBER CONTRACTS.

A contract for the sale of standing timber provided that the cutting should be completed within five years and in no event to be carried on after a specified date, at which time the premises were to be surrendered to the owner. The vendee of the timber commenced operations but suspended them after three months, but the owner of the land continued in possession during the three months and for the remainder of the five years. *Held* that, upon the happening of the default, it was not necessary for the owner of the land by any overt act to assert his right of forfeiture.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

4. LOGS AND LOGGING 🔑3(14)—SALE OF TIMBER—FORFEITURE—NOTICE.

Where operations under a contract to cut standing timber within a specified time were abandoned, no other notice of forfeiture of the contract was necessary than the service of such notice upon the vendee's assignee when he attempted to recommence operations after the time limited in the contract.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Suit by Mercedes L. Call and others against the Jenner Lumber Company to enjoin cutting of timber. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. R. Leppo, of Santa Rosa, for appellant.
Geary & Geary, of Santa Rosa, for respondents.

KERRIGAN, J. Action to enjoin the defendant from entering upon certain lands of the plaintiffs and cutting and removing the redwood and pine timber thereon. The judgment went for the plaintiffs as prayed, and defendant appeals.

The predecessor of the plaintiffs on June 15, 1906, entered into a contract with the

Western Redwood Lumber Company, the assignor of the defendant, by which it granted and conveyed to said lumber company the redwood and pine timber upon a tract of land known as Mayer's ranch or tract. Said contract was entered into pursuant to an option previously given fixing the price to be paid and providing that the timber should be removed by July 1, 1915. Among the provisions of the contract by which the timber was conveyed to the lumber company were the following:

> "It is further mutually agreed and made an express condition hereof that said party of the second part is to and will fully complete the cutting and removal of the said pine and redwood timber and trees hereby conveyed to it within the period of five years from the time when it shall commence to cut the same, but in no event later than the 1st day of July, 1915; that when it shall commence to cut and remove the said timber and trees it shall thereafter proceed with the cutting and removal thereof with due diligence and dispatch; and that as soon as it shall stop the cutting and removal thereof it is to and will surrender, turn over and deliver to said parties of the first part the full, actual and exclusive possession of the said Mayer tract, and of every part and parcel thereof, to be by them thereafter held, possessed, used and enjoyed as of their first and former estate therein. * * *
>
> "It is further mutually agreed and made an express condition hereof that all of the timber and trees purchased by or hereby granted and conveyed to said party of the second part are to and shall be cut and removed from the said Mayer tract before the said 1st day of July, 1915, and that upon the expiration of the period ending on said last named day, and by reason of the expiration thereof, this conveyance and all rights of the said party of the second part hereunder, if not previously determined, shall forthwith and wholly cease, determine, lapse and become void, and that it shall not have any right whatever at any time after said last named day to enter upon the said Mayer tract, or any part of the same, or to cut or to remove any of the timber, trees or wood growing or standing or lying or being thereon; also that any and all timber, trees, wood, logs or other products of the said land, or of the trees or timber thereon, which shall on said last named day, or on the sooner determination of the rights of the said party of the second part hereunder, remain or be upon the said tract, shall belong absolutely and exclusively to said parties of the first part."

In the month of August, 1907, the Western Redwood Lumber Company proceeded to cut and remove the timber, and in a period of three months had cut and removed about one-half of the standing timber, at which time it became insolvent and ceased operations. Some three years thereafter the defendant succeeded to the rights, if any at that time existed, under its said grant and contract, but did nothing towards resuming operations until some time during January, 1914, some 6½ years after the Western Redwood Lumber Company had commenced the removal of the timber, and over 6 years after its cessation of operations, at which time it began to make preparations therefor. Immediately thereupon, to wit, on February 5, 1914, the plaintiffs served written notice upon the defendant not to enter upon the said tract of land or to cut or remove timber therefrom, and notifying it that the rights to the timber formerly owned by the Western Redwood Lumber Company had been terminated and had reverted to said plaintiffs. The plaintiffs through their predecessor and tenants were at all times, including the brief period of operation by the lumber company, in possession of the land involved in the action, using the same in connection with an adjoining tract for dairying purposes. After the shutting down of operations by the lumber company, no attempt was made to preserve the railroad and other improvements upon the premises constructed by it to facilitate its work; the railroad was partly destroyed by slides and washouts; the cabins and cookhouse remained unoccupied; the wire rope and machinery were left out in the woods to rust. The doors and windows of the cabins were at all times left open and the stove in the cooking house fell to pieces. After the abandonment of the work of cutting and removing the timber and until early in the year 1914, an employé of the lumber company or its successor, designated as a "caretaker," visited the Mayer tract about once a month; but such visits were unknown to the plaintiffs, and resulted at no time in any effort or steps taken to preserve the improvements or personal property left by the lumber company at the scene of its former operations. The land both before and after the execution of the contracts upon which the defendant's rights are founded was at all times assessed to the plaintiffs, and their predecessors, who paid all taxes thereon, and at no time was any interest therein assessed to the defendant or its assignor.

Upon evidence establishing the foregoing state of facts, the court found that on October 30, 1907, the Western Redwood Lumber Company and all of its agents and employés entirely withdrew from the land; and that neither they nor the defendant has thereafter ever been in possession thereof or exercised acts of ownership with regard thereto, but that the plaintiffs ever since said 30th day of October, 1907, have been in possession of the lands and of all the standing and growing timber thereon; and as a conclusion of law found that the defendant has no interest in the pine or redwood timber growing upon said tract.

[1] In support of the appeal, it is the principal contention of the appellant that under the contract in suit, construed in connection with the option which preceded it, no forfeiture of the right to cut and remove the timber could occur before July 1, 1915. With this contention we cannot agree. We are of the opinion that the rights granted to the assignor of the defendant are to be found in the contract of June 15, 1906, entered into upon the exercise by said assignor of the option previously given to it, and that the plain meaning of the provisions of that contract above quoted is that the right of the grantee thereunder to cut timber should expire ipso facto at the end of five years from the com-

mencement of the cutting, and in any event should expire on July 1, 1915, so that, if the grantee delayed the commencement of its operations until a point of time less than five years prior to said last-mentioned date, the five-year period would be thereby correspondingly curtailed. It is not necessary in sustaining this judgment to go so far as to hold that the grantee's rights were forfeited by its discontinuance of operations on October 30, 1907. It is sustainable upon the theory that those rights continued in force five years from the commencement of the removal of the timber, which would be in August, 1912. As we have seen, it was nearly two years later than this date that the defendant prepared to re-enter the lands for the purpose of resuming operations. It has been frequently and expressly held that a sale of standing timber, the same to be removed within a specified time, is a grant of only so much thereof as shall be removed within that period.

The rule applicable to contracts such as the one in suit is stated in 25 Cyc. 1551:

> "It is customary, where standing timber is sold without the land, to provide in the contract that the timber shall be removed within a specified time. Where such clause is inserted, the time usually begins to run from the execution of the conveyance, although sometimes a different time is agreed upon, such as the time of the commencing of the cutting. The general rule is that where the contract requires the timber to be removed within a given time the sale is only of so much timber as is removed within that time, and confers no authority to remove after the expiration of the time specified. The majority of cases hold that the title to the timber not removed reverts to the owner, but some of the cases merely hold that the buyer has no right of entry. Each case depends upon the terms of the particular contract."

In the case of King v. Merriman, 38 Minn. 47, 35 N. W. 570, an action for damages for the conversion of a quantity of sawlogs, the court used this language:

> "Contracts relating to an interest in standing timber, with an express limitation as to the time of removal, are familiar to the American courts in the timbered states. * * * Sometimes these contracts are in the form of conveyances of timber; sometimes of a sale, coupled with a license to enter; sometimes of a formal license to enter and cut, and again of a reservation of the timber by the grantor in the conveyance of the land. But, whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself. The reasons are manifest. Any other construction would be against the expressed intention of the parties. Moreover, if the right of entry be not limited to the time fixed, it would be practically unlimited, which would amount to so serious an incumbrance upon the land as to materially interfere with the owner's right to use or dispose of it."

In Utley v. S. N. Wilcox Lumber Co., 59 Mich. 263, 26 N. W. 488, the Supreme Court of Michigan says:

> "The legal effect of this contract was that Wilcox, the owner of the land, sold to Utley the pine timber thereon for $2,500, Utley to cut and remove the same therefrom during the winter of 1877-78, or, if it could not be done for lack of snow, then he was to cut and remove the same during the winter of 1878-79, and before May 1, 1879. The title of the timber passed to Utley immediately upon the execution of the contract. * * * The license to enter, and remove the timber, continued, * * * until May 1, 1879. The express agreement of Utley was that he would commence at once on the job" and finish by May 1, 1879. "The intention is clearly expressed to limit the time in which he might cut and remove the sawlogs. * * * From all the contracts and acts of the parties in connection therewith the intention clearly appears to limit the time in which the timber * * * should be cut and removed, and that the sale was confined to such timber as should be cut and removed within the specified time."

In Null v. Elliott, 52 W. Va. 229, 43 S. E. 173, the owner of the land granted, bargained, and sold all the timber, tanbark, and ties on the premises. The contract provided that the grantee was to have two years from date to take off and remove said timber and not later, and to have all the privileges of going on said land with roadways, millsites, etc. The time limit in the contract expired, and the grantor notified the grantee not to further trespass upon the land by cutting any more timber, or removing that already cut, or the temporary buildings erected by the grantee upon the land. The grantee filed his bill, setting out the hardships of the contract, the great loss he would sustain if he was prevented from reaping the benefits thereof, and asking the court to relieve him by extending the time for the execution of the contract. The court in deciding the case says:

> "A contract for the sale of all the timber, tanbark, and ties on a certain tract of land, and providing that the purchaser is to have two years to take off and remove such timber, and not later, does not authorize the purchaser to sever any timber standing on the land after the two-year limit has expired. Such a provision as this in timber contracts is held to be a condition of the sale, and not a covenant to remove, and that the purchaser only takes such of the timber as he may cut and remove in the specified time; otherwise it remains the property of the landowner as part of the land. * * * Such being the law, the plaintiff could not ask a court of equity to extend the time limit, for it would be making a new and entirely different contract between the parties."

[2] The appellant further contends that the provision in the contract that the removal of the timber should be completed within five years from the time of its commencement is a mere covenant on the part of the grantee such as is alluded to in the case from which we have just quoted, the breach of which entails no forfeiture; and cites the case of Peterson v. Gibbs, 147 Cal. 6, 81 Pac. 121, 109 Am. St. Rep. 107. The facts of that case, however, were different from those here. The contract gave to the grantees ten years within which to remove the timber, followed by a provision that for every year thereafter that the timber was allowed to remain on the land the grantees should pay the sum of $200. The court held that in such a case the removal within ten years was not a condition attached to the grant of the timber, but it also laid down the rule that "the question in each case is as to what is the contract between the parties."

[3] The next contention of the appellant is that if the right of forfeiture existed before July 1, 1915, it was not self-executing, but upon the happening of the default it was necessary for the plaintiffs by some overt act to assert their right of forfeiture, and that if they failed to do so, or thereafter recognized the defendant's interest as continuing, no forfeiture accrued. We think that this contention is sufficiently answered by the finding of the trial court that the plaintiffs at all times were in possession of the land after the withdrawal by the defendant's assignor, and by what we have already said as to the five-year limitation upon the right to cut timber upon the plaintiff's land.

The adverse findings of the trial court also dispose of the further contention that the plaintiffs expressly, impliedly, and by laches waived any right of forfeiture that existed in their favor, and were estopped by their conduct to claim any termination of defendant's rights prior to July 1, 1915.

The further claim is made by the appellant that any limitation of time for the cutting of timber was superseded by express agreement; but the evidence upon which this contention is based, viz. an expression in a letter written by one of the plaintiffs to the defendant, was not considered by the trial court as susceptible of receiving this construction, and we think the trial court was entirely correct in its conclusion.

[4] It is finally urged in support of the appeal that the court's finding, "That prior to the service of said notice (of February 5, 1914) plaintiffs did no other act to indicate a claim of forfeiture," entitled defendant to judgment; but we think it sufficiently apparent from what we have already stated that under the facts of this case it was not necessary for the plaintiffs to do more than they did to permit them to exclude defendant from their lands from and after the month of August, 1912; and the only occasion or necessity for serving the defendant with the written notice of February 5, 1914, alluded to in the finding of the trial court in question, arose from the asserted intention of the defendant at that time to resume lumbering operations upon the plaintiffs' land.

For the foregoing reasons, the judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(33 Cal. App. 319)

PEOPLE v. KUHN. (Cr. 532.)

(District Court of Appeal, Second District, California. March 27, 1917.)

1. FORGERY 🔑47 — FRAUDULENT INTENT—QUESTION FOR JURY.

In a prosecution for forging a check, the fraudulent intent of defendant was a question for the jury.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 123.]

2. FORGERY 🔑44½ — SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of employé for forging employer's check.

3. FORGERY 🔑14 — NECESSITY FOR ACTUAL DAMAGE.

It is not necessary to sustain a conviction for forgery that the party whose name has been forged has suffered actual damage; it being only essential that it appear that if manifest intent of defendant culminated in success, such damage would follow.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 49.]

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

A. Kuhn was convicted of forgery, and appeals from judgment and from an order denying motion for new trial. Affirmed.

Albert D. Trujillo, of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of forgery and sentenced to a term of imprisonment. He appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] It was charged by the information that the defendant forged the name of G. W. Dewey to a check for the sum of $25, drawn on the Farmers' Exchange National Bank of San Bernardino. The defendant did not deny having drawn the check, and did not deny having signed the name of Dewey thereto. He claimed in his defense to have obtained some authority authorizing him so to do, although he did not assert that this authority expressly authorized him to draw checks, but rather that he was authorized to do business for Dewey. In the city of San Bernardino Dewey owned a furniture business, which was conducted by an agent named Lipphard. Dewey lived in the city of Los Angeles. Lipphard had full control of the business in San Bernardino, including the making of deposits of money in bank, and drawing checks thereon. Such checks were drawn in the name of Dewey, with the initials of Lipphard following the signature. The defendant had made some collections and attended to the sales of some merchandise on behalf of the Dewey store in San Bernardino. The manager, however, testified that no authority had at any time been given to defendant to draw checks, either by himself or by Dewey. The check described in the information was cashed by the defendant at a saloon in Colton. Defendant testified that of the $25 which he received he paid to Lipphard, manager of the store of Dewey, $10, and retained the remaining $15 for the purpose of paying his expenses on a trip to the city of Los Angeles, where he claimed to have had some business to do with Dewey himself. Lipphard denied having received the $10 men-

tioned by the defendant. The check upon being presented to the bank for payment was declared to be a forgery, and the arrest of defendant followed in consequence. Upon this state of the evidence the defendant here contends on his appeal that there was no showing made of any intent to defraud Dewey. The matter of the intent of the defendant was a thing to be determined by the jury, and upon the whole evidence, which has been briefly stated in the abstract, we think the verdict of guilty was wholly authorized.

[3] It is not necessary, as has been held, that a party whose name has been forged has suffered actual damage; it is only essential that it appear that if the manifest intent of the defendant culminated in success, such damage or detriment would follow. People v. Turner, 113 Cal. 280, 45 Pac. 331.

We have examined very fully the statement of the evidence as brought here in the reporter's transcript, as well as the instructions given by the trial judge. We can discover no error which prejudiced the defendant in his right to a fair trial, and we think that the proof was ample to sustain the verdict.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(33 Cal. App. 321)

GROTEFEND v. MAY et al. (Civ. 1634.)

(District Court of Appeal, Third District, California. March 27, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

1. Action 🔑22 — Nature of Cause of Action—How Determined.

Where a plaintiff sets up two different causes of action upon the same contract, the real nature of the cause of action will be determined from the contract itself.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124–139, 143, 145.]

2. Trusts 🔑35(1)—Express Trust—Distinguished from Sales Contract.

An agreement under which plaintiff withdrew his claim for a land patent and defendant agreed that, upon obtaining a patent, he would convey to plaintiff a portion of the land so obtained, is a sales contract and does not create an express trust so as to make the doctrine of laches inapplicable until defendant repudiated its terms.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45, 49, 50.]

3. Specific Performance 🔑105(3)—Demand for Performance—Laches.

Plaintiff's cause of action upon an agreement, under which he withdrew his claim to a patent for land and defendant agreed to convey to him for a certain consideration a portion of such land after obtaining a patent, accrued when defendant obtained the land, and no demand for performance was necessary to make the doctrine of laches applicable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327–341.]

4. Limitation of Actions 🔑66(15)—Computation.

Where a demand for performance of a contract is necessary to start the statute of limitations running, the demand must be made within a reasonable time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 373, 374.]

5. Contracts 🔑211 — Construction—Time of Performance.

Whether time is of the essence of a contract is ordinarily determined from its terms, although some consideration may be given the character of the property involved when the contract is silent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938–943.]

6. Specific Performance 🔑105(3)—Laches.

If a demand to perform a contract to convey mining property was necessary to make the doctrine of laches applicable, more than a reasonable time elapsed for such demand where made eight years after defendant obtained the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327–341.]

Appeal from Superior Court, Trinity County; J. W. Bartlett, Judge.

Action by George A. Grotefend against Edward F. May, George L. Taylor, and H. White, surviving trustees of the Trinity Dredging & Hydraulic Gold Mining Company. Judgment for plaintiff, and defendants appeal. Reversed.

W. C. Sharpstein, of San Francisco, for appellants. Thomas B. Dozier, of San Francisco, for respondent.

HART, J. The following, extracted from the initial brief of the appellant, comprehends a complete and an accurate statement of the facts of the controversy presented for solution by this appeal:

"The second amended complaint alleges two causes of action, both of which, however, are founded on a single written instrument, Exhibit A, which is annexed to the pleading.

"It appears therefrom and from the allegations of the first cause of action that the Trinity Dredging & Hydraulic Gold Mining Company, to which we shall hereafter refer as the 'corporation,' was an applicant before the local United States Land Office for a patent to certain mineral lands, including the premises in controversy; that plaintiff filed an adverse to said application as to practically all of said land, including the premises in controversy, and commenced an action in the superior court pursuant to Revised Statutes U. S. § 2326 (Comp. St. 1916, § 4623), 'to determine the question of the right of possession' to the lands embraced in said adverse; that while said action was pending the parties to it entered into an agreement by the terms of which plaintiff was to dismiss said action and his adverse, the corporation was to proceed with its application for patent upon the issuance of which it was to convey the premises in controversy to plaintiff free of incumbrance, who was thereupon to pay the corporation $50 in cash and deliver to it his promissory note for $50, without interest, payable in six months; that pursuant to this agreement plaintiff did dismiss said action and his adverse, and the corporation prosecuted its application for patent with the result that the patent was issued June 30, 1906; that on November 30, 1907, the corporation became dissolved for nonpayment of the corporation license tax, and the defendants are the survivors of the directors of the corporation in office at the date of the dissolution; that on April 30, 1914, plaintiff tendered performance on his part and demanded of defendants the deed provided by the agreement, which demand was refused; that this action was commenced May 15, 1914.

"The second cause of action omits all reference to the adverse proceedings by plaintiff in the land office and in the court, but in lieu thereof alleges that the corporation agreed to sell to plaintiff the premises in controversy upon receipt of the patent. Otherwise the allegations are identical with those of the first cause of action."

The defendants interposed a demurrer to each of the causes of action stated upon the grounds: (1) That there was no cause of action stated; (2) that the cause of action was barred by the provisions of section 337, subd. 1, and section 343, of the Code of Civil Procedure; (3) that the plaintiff has been guilty of laches. The demurrer being overruled, the defendants answered, and thus, without denying the allegations of the complaint, pleaded the statute of limitations, basing said plea upon the sections of the Code of Civil Procedure invoked and specified in the demurrer; and also pleaded laches. It was stipulated by the parties that the cause be submitted to the trial court for its decision upon the second amended complaint and the answer thereto; it being further stipulated, in support of the allegations of the answer, that the original complaint in the action was filed and said action commenced on the 19th day of May, 1914. Findings were by said stipulation waived, and it was further stipulated that "this stipulation shall form a part of the judgment roll." Upon the issues framed as indicated and the above-mentioned stipulation, the court rendered and entered its judgment, decreeing and adjudging that the defendants, within 30 days from and after "the date of service of notice of entry of this decree, make, execute, acknowledge and cause to be certified, a good and sufficient deed, conveying and assuring the title, and all of the title" to that portion of the lands referred to in the complaint which is described as the N. E. ¼ of the N. W. ¼ of section 28, township 36 N., range 7 W., M. D. M., situated in the county of Trinity. This appeal is prosecuted by the defendants from said judgment.

It will be observed from the above statement that the parcel of land in controversy is a fractional portion of all the lands mentioned in the complaint, and that the adverse filed by the plaintiff to the application of the defendants for a patent involved all of the lands so mentioned and described, "save and except the N. E. ¼ of the N. W. ¼, and the E. ½ of the W. ½ of the N. W. ¼ of section 28, township 36 N., range 7 W., M. D. M.," within which section all the lands described in the complaint are situated.

The questions submitted for decision by this appeal, as must be obvious from the above statement of the issues, are whether the causes of action set out in the complaint are barred by the provisions of the statute of limitations invoked and pleaded by the defendants or by the laches of the plaintiff.

As seen, the first cause of action stated proceeds upon the theory that the corporation, in prosecuting its application for and obtaining a patent to the land in dispute, acted for and in behalf of the plaintiff, and that, upon securing the patent, it became the holder of the legal title in trust for the plaintiff. In other words, the contention is that by the agreement an express trust was created. It is hence argued that, since the statute of limitations cannot run against a trust until the repudiation thereof by the trustee, and, inasmuch as there was no repudiation of said trust until the 30th day of April, 1914 (15 days preceding the commencement of this action), the statute cannot be invoked to defeat the plaintiff's right of action.

In the second count or cause of action, the complaint, as shown, alleges that by the written agreement referred to the corporation agreed to sell, and the plaintiff agreed to purchase, the land in question upon the issuance to the former by the general government of a patent to said land. Thus a contract for the purchase and sale of the property is stated.

The plaintiff, however, relies mainly upon the theory upon which the first cause of action proceeds, and, while we may properly assume that the decision of the trial court was founded upon said theory, we are of the opinion that, in either case, the plaintiff's cause of action has lapsed by reason of laches.

[1, 2] Although the plaintiff has set up two different causes of action under the written agreement upon which the action is founded, we must, nevertheless, determine the nature of the cause of action which is available to him under the contract upon which he declares from the nature of the contract itself. Burling v. Newlands, 112 Cal. 476, 494, 44 Pac. 810. Thus considering and viewing the action, we are constrained to the opinion that it is not, nor could it be, under the agreement, one for the enforcement of an express trust, as counsel for the plaintiff contend, but merely one for the specific performance of the terms of a contract whereby a prospective vendor has agreed, for a specified consideration, to convey to a prospective vendee a certain parcel of land, after the former had acquired title thereto. In other words, we are unable to perceive in the contractual relation established between the parties by the agreement the essential elements of an express trust. Of course, in a sense, there existed between the parties a trust relationship. Nearly all contracts and every agency embrace a trust relationship, but it does not follow that in all such contracts or agencies an express trust is created or that the running of the statute is affected thereby.

Boyer v. Barrows, 166 Cal. 757, 758, 759, 138 Pac. 354. Here neither of the parties, although claiming a conflicting priority of right to purchase the land, was vested with the legal title, the perfection of which in either the one or the other rested upon the event of the prosecution to completion of the requisite proceedings before the land department of the general government. The plaintiff withdrew his application or adverse, and, when this was done and the suit arising thereon dismissed, the parties in legal effect conceded that the land in contest was the property of the corporation, subject, of course, to the paramount title of the government. Thereupon the agreement or contract between the parties supervened, which alone formed the basis of any right of action in the plaintiff. Stevens v. McChrystal, 150 Fed. 85, 87, 80 C. C. A. 39. The agreement, however, bears a close analogy to and is, in effect, one whereby the parties agreed to join in the acquisition for their joint benefit a certain parcel of land, the one to obtain the legal title and thereupon, for a stated consideration, to convey to the other an interest therein. Boon v. Chamberlain, 82 Tex. 480, 18 S. W. 655. In that case, the parties had entered into an agreement for the joint acquisition of land, one of the parties impliedly agreeing that, upon securing the legal title, he would convey to the other a half interest therein. The point submitted for decision was whether the action was one for the specific performance of a contract for the conveyance of real property, and therefore subject to the operation of the statute of limitations as to such actions, or whether the agreement, which formed the basis of the action, created an express trust and the action thereon not barred until there had been a repudiation of the trust. The Texas court thus disposed of the respective contentions of the parties:

> "Was the contract between Clark and appellant a contract for the conveyance of real estate? We think it was. It is true that it was a contract for the joint acquisition of lands, and not a contract for the sale of lands. It is none the less true that by its terms Clark impliedly bound himself to convey to appellant a half interest in the land as soon as he acquired the legal title. This suit seeks to enforce that contract; that is to say, to have it specifically performed. * * *
>
> "The last question which suggests itself in this case is: When did the cause of action accrue? Did it arise as soon as Clark acquired the legal title, or not until there was some act repudiating the trust? In suits for specific performance of contracts to convey land, the cause of action accrues upon the happening of the condition upon which the vendor binds himself to make the title. Glasscock v. Nelson, 26 Tex. 150. And so in case of a contract for the joint acquisition of land, in which it is contemplated that one party shall acquire the title and convey an interest to the other, we see no reason why the latter may not sue as soon as the title is acquired. It may be that, by reason of the trust existing between the parties, equity would not hold the plaintiff guilty of laches until the defendant had done some act which showed that he no longer recognized the trust; yet the defendant binds himself to make the title to the plaintiff for his interest in the land as soon as he acquires title himself, and we are of opinion that upon a mere failure to do so a cause of action arises."

We can perceive no substantial distinction between the agreement in the Texas case and that with which we are here concerned.

The cases cited by the respondent are not conceived to be in point here. For instance, the cases of Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624, and Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082, cited by respondent, were where the parties who were to receive the conveyances had rendered services which were the consideration for the deeds. But in neither of those cases did the agreement create an express trust. Of course, a resulting trust arose, and this from the nature of the transaction—not only because of the nature of the agreement, but by reason of the fact that the party to receive the conveyance had performed or executed the consideration for the deed.

In the instant case, no money was paid nor service performed as a consideration for the conveyance. Indeed, it does not appear that the plaintiff paid any part of the expense incident and essential to the prosecution of the claim for a patent. There was no relation of confidence subsisting between the parties at the time of the making of the agreement. They were, in fact, in antagonism with each other relative to the contested land until the agreement was entered into between them. Recapitulating, the transaction simply amounted to this: That each of the parties claimed the prior right to apply for a patent. One withdrew his claim, and the other agreed that, upon obtaining the patent, he would convey to the former for a specified consideration a certain portion of the land so obtained. As before stated, we can discern in this transaction nothing more than either a mere agreement for the sale of real property or one for the joint acquisition of real property by the parties for their joint benefit.

But it is claimed that the fact that the effect of the agreement was to create an express trust is evidenced by the recital therein that:

> "The parties hereto have reached an agreement and understanding as to the rights of the several and respective parties."

The complaint, however, nowhere directly alleges that the corporation ever at any time acknowledged or conceded that the plaintiff was the owner or entitled to the property described in the agreement. Assuming therefore that the recital referred to was amenable to the interpretation to which the plaintiff subjects it, it cannot be considered as in aid of or as supplying pretermitted averments essential to the making of that proposition an issue. In Hayt v. Bentel, 164 Cal. 680, 686, 130 Pac. 432, 434, a similar point was made. The court said:

> "But there is no allegation, in either the complaint or the answer, that plaintiff ever did re-

> ceive or take possession of the lot. The contract is annexed to the complaint and made a part thereof. But all that is averred is that the parties made an agreement for possession, not that possession was in fact delivered. Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading"—citing a number of cases.

The reason underlying this rule is that it is only by inference or argument from the recital in the contract that it can be assumed that the fact to which the recital relates existed, "and the rule is as much in force under the Code as at common law that argumentative pleading is not permissible." Hibernia S. & L. Soc. v. Thoronton, 117 Cal. 483, 49 Pac. 578.

[3, 4] No reason is to be perceived for doubting that the agreement upon which this action is predicated is a "writing" within the contemplation and meaning of section 337, subd. 1, of the Code of Civil Procedure; and, while we are of the opinion that a cause of action arose in favor of the plaintiff eo instanti upon the acquisition of the legal title to the land by the corporation (Gray v. Dougherty, 25 Cal. 266, 282; Danielson v. Neal, 164 Cal. 748, 130 Pac. 716), and that therefore no demand for performance was necessary to start the statute to running, yet, assuming that a demand was necessary for that purpose, the proposition remains that such demand should have been made within a reasonable time after the acquisition by the corporation of the legal title to avoid the intervention of the presumption of abandonment of the agreement.

> "Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand, but must make it within a reasonable time." Thomas v. Pac. Beach Co., 115 Cal. 136, 142, 46 Pac. 899, 900; Palmer v. Palmer, 36 Mich. 494, 24 Am. Rep. 605; Hintrager v. Traut, 69 Iowa, 746, 27 N. W. 807; Steele v. Steele, 25 Pa. 154; Bills v. Silver King Mining Co., 106 Cal. 9, 39 Pac. 43; Hopkins v. Lewis, 18 Cal. App. 107, 113, 122 Pac. 433.

[5, 6] Conceding, then, that a demand was necessary in this case, the question arises: Was the demand made within a reasonable time? The answer must be in the negative.

What is a reasonable time in a given case must always depend, of course, upon the circumstances thereof; and, in determining this question where the contract is for the sale of property, and where, as is so in this case, there is no express provision in the contract fixing the time within which the conveyance is to be made, some consideration is to be given to the character of the property which is the subject of the contract, although the general rule is that whether time is of the essence of the contract is to be determined from the terms of the writing itself. Skookum Oil Co. v. Thomas, 162 Cal. 539, 546, 123 Pac. 363.

Judge Lindley, in his treatise on Mines (volume 2, § 859), says:

> "The authorities, both in England and America, recognize that, where mines or mining property are the subject of the contract, time is of the essence, independent of any express stipulation inserted in the instrument."

In Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479, one of the syllabi reads:

> "Time may become of the essence of a contract for the sale of property, not only by the express stipulation of the parties, but from the very nature of the property itself; mineral property requires the parties interested in it to be vigilant and active in asserting their rights."

This rule is approved in Skookum Oil Co. v. Thomas, supra. The reason of this rule is that mining property is of that peculiar character that it is subject to frequent, sudden, or great fluctuation in value, and to permit an advantage to be gained or great loss to be suffered by long and unreasonable delay in demanding a conveyance or the money stipulated to be paid for such land would constitute the transaction an unconscientious one.

Under the above-stated principles and the facts as they are made to appear here, the conclusion is inevitable that the plaintiff, by postponing the taking of steps looking to the acquisition of his rights under the contract, was guilty of laches, and that by reason thereof his right of action on the contract is barred. Marsh v. Lott, 156 Cal. 643, 648, 105 Pac. 968; Hopkins v. Lewis, 18 Cal. App. 107, 113, 122 Pac. 433.

The land involved in this controversy is admittedly mining property. By the agreement, as we have seen, the corporation bound itself to convey to the plaintiff when it acquired title to the land. This agreement necessarily implied that at the same time the plaintiff would perform his part of the contract. And thus the time was definitely fixed when either, by offering to perform the condition to which he had bound himself, could put the other in default. The corporation failed to perform its obligation, and, of course, the plaintiff knew it. He further knew, or at least was well justified in assuming, from the fact that the corporation was as against him an applicant for a patent to the land, that the latter desired to retain it, and this, too, notwithstanding its agreement to relinquish the title to him after the patent was received. If, then, it was his intention or desire to secure the conveyance, he should have been active and vigilant in the matter of the enforcement of his rights thereunder and not have been guilty of that procrastination or inaction or passiveness which will be held to constitute acquiescense in the breach of a contract of this character or to raise the presumption of the abandonment thereof. Nor has he shown any admissible reason or valid excuse for his long period of inaction and passiveness.

A court of equity does not encourage the litigation of stale claims. It will not grant aid to those who slumber upon their rights. Nothing can call that court into activity but conscience, good faith, and diligence, and, where these (or any of them) are wanting, it will remain passive and do nothing.

It is further to be suggested that it is to be presumed, from the fact that the title to the property has been in the corporation or its successors (the trustees) during the entire period intervening between the date of the issuance of the patent to the corporation and the date upon which the plaintiff for the first time made a move to secure a conveyance, that the corporation and its successors have paid the annual taxes accruing against said property. The agreement provides that the corporation shall convey the property to the plaintiff "free and clear of all incumbrances," which include taxes and assessments levied upon and against property. Civ. Code, § 1114. It will hardly be contended that the agreement contemplates that the corporation should be charged indefinitely with the payment of the taxes levied against the property, and, since the duty or obligation of taking the initiative in the consummation of the agreement rested upon the one no less than upon the other of the parties thereto, it would seem that the failure of the plaintiff to offer to pay the taxes which had presumably been paid by the corporation upon the property for over seven years means a failure to offer to do complete equity in the premises.

The appellant makes a number of other points in impeachment of the judgment; but, as we believe the action here is barred by laches, those points need not be considered.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(33 Cal. App. 303)

TAUGHER v. RICHMOND DREDGING CO. et al. (Civ. 1626.)

(District Court of Appeal, Third District, California. March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. Appeal and Error ⇐1011(1)—Review—Findings of Fact.

The finding of a trial court as to a matter of fact based upon conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

2. Appeal and Error ⇐1073(1)—Harmless Error—Judgment.

In a suit against a corporation and a stockholder thereof owning almost all of the stock, there was no prejudice in entering judgment in a fixed sum against each, since the payment by the corporation will discharge the liability of the stockholder, and the payment by him of the amount adjudged payable by him will discharge the corporation pro tanto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4240.]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by Edward B. Taugher against the Richmond Dredging Company and another. From a judgment for plaintiff and the denial of a new trial, defendants appeal. Affirmed.

W. H. H. Hart, of San Francisco, for appellants. J. L. Taugher, of San Francisco, for respondent.

CHIPMAN, P. J. The action is by the assignee of the claim of J. L. Taugher for legal and professional services as attorney at law alleged to have been rendered and performed at the special instance and request of defendant Richmond Dredging Company, at divers times between May 1, 1910, and March 8, 1912, both dates inclusive, which said services were of the alleged value of $13,180, no part of which has been paid. Cutting was made a party defendant as a stockholder in said dredging company. The complaint specifies five different matters in which said attorney performed services of considerable consequence to the dredging company. One of these matters related to services rendered in commencing and conducting an action in the superior court of Contra Costa county wherein said dredging company was plaintiff and the Santa Fé Railroad Company the defendant, in which plaintiff recovered judgment for $25,925. Another was for services in connection with the recovery of the possession of the dredger "Richmond No. 1" prior to the filing of a libel in the United States District Court, in Admiralty, and also for services in said admiralty court in connection with said libel. Other services are alleged to have been rendered for said dredging company in and about two certain actions commenced in the superior court of the city and county of San Francisco by the Richmond Light & Power Corporation against said dredging company. Also for services in connection with a certain contract wherein the Santa Fé Railroad Company was party of the first part, the said dredging company party of the second part, and the East Shore & Suburban Railway Company party of the third part. It is alleged that the capital stock of said dredging company was $200,000, divided into 2,000 shares, each of the par value of $100, and that all of said shares were subscribed, of which said stock said Cutting was, at all times mentioned in the complaint, the owner of 1,998 shares in his own right. The pleadings are verified.

In their answer the defendants made certain admissions, but denied in substance that said attorney performed the services alleged to have been performed by him, and denied any indebtedness to him or to plaintiff on account of any said alleged services; denied, on information and belief, that J. L. Taugher "ever was, or now is, a duly, or otherwise qualified, or licensed attorney, or counselor at law, or licensed, or practicing as such, or entitled to practice at any time as such"; denied that the subscribed capital stock of said company was or now is greater in number than 38 shares; and alleges that Cutting "was the subscriber of one share and no more." It is alleged as further answer in substance that Cutting engaged Attorney Taugher (plaintiff's assignor) "to help him, the said Cutting, with the cases and legal affairs of him, said Cutting, and the various corporations in which he, the said Cutting, was interested," including the corporation defendant herein, and that said Taugher agreed "to do all of said Cutting's legal work and the legal work of said corporations in which said Cutting was interested, for and in consideration of said $200 per month, with the express understanding that nothing further whatever would be charged or paid except such further sums as would be satisfactory to said Taugher in the event that he (said J. L. Taugher) should succeed in winning said cases satisfactorily to said Cutting," and that said Taugher "promised to see the whole work through and get nothing over $200 per month until the work was finally finished and the money collected, and then only such further sum as would be satisfactory to said Cutting." It is further alleged "that no moneys as yet have been collected from any of the judgments, and said J. L. Taugher has not completed his said service and has not complied with or performed the terms of said contract," wherefore said Taugher is not entitled to any further compensation; that defendants have and each of them has complied with every condition of said contract on their part to be performed; and that, before the assignment made to plaintiff, said J. L. Taugher "had been fully paid for all work that he had performed in the premises and for all the work mentioned and described in plaintiff's complaint herein"; that said J. L. Taugher "refused to perform further services for said defendants, or either of them, in said business; and that by reason thereof said defendants, and each of them, were not satisfied with said J. L. Taugher's services in the premises."

The court found as facts: Finding 1. That J. L. Taugher was a duly qualified and licensed attorney practicing as such under the laws of this state. Finding 2. That Richmond Dredging Company was at all times mentioned a duly organized corporation under the laws of California. Findings 3, 4, 5. That the capital stock of said company is as alleged in the complaint and was all duly issued, "and, at all and every of the times mentioned in plaintiff's complaint, H. C. Cutting was and now is the owner in his own right of 99.9 per centum of the whole capital stock of said company, and of the subscribed stock thereof and was the owner of 1,998 of said shares." None of the foregoing findings is now challenged, although in their verified answer defendants denied that said J. L. Taugher was an attorney at law, denied that more than 38 shares of the capital stock of said company had been issued, and alleged that Cutting "was the owner of one share and no more." Findings 6 to 12, both inclusive, are challenged as not supported by the evidence. They may be summarized as follows: That J. L. Taugher performed services for the dredging company as alleged in the complaint, of the reasonable value of $4,650, no part of which has been paid, and that plaintiff is the owner of said claim by assignment to him prior to the commencement of the action. Findings 6, 7, 8. That there is now due and owing to plaintiff for said services, from said dredging company, the sum of $4,650, and from said Cutting the sum of $4,645.33. Findings 9, 10, 11. Finding 12 is as follows: "That all the allegations of the answer of defendants are untrue, except the express admissions contained therein."

As conclusions of law the court found that plaintiff was entitled to recover from defendant dredging company, the sum of $4,650 and costs of suit and from defendant Cutting the sum of $4,645.33 and 99.99 per centum of the costs. Judgment passed accordingly. Defendants appeal from the judgment and the order denying their motion for a new trial.

There is abundant evidence that plaintiff's assignor performed services as attorney practically as averred in the complaint, and there was ample evidence to support the findings as to the value of said services. The evidence would have justified a larger judgment. The evidence was that much important successful litigation was conducted by Attorney Taugher for defendant dredging company, occupying substantially all his time for nearly two years.

The only questions as to which there was any serious controversy were: First, were the services rendered by Attorney Taugher performed for the Richmond Dredging Company at its instance and request? Second, were these services performed under the contract alleged in the answer which in effect was alleged to have been that Mr. Taugher "would do all of said Cutting's legal work and the legal work of the corporations in which said Cutting was interested, for and in consideration of said $200 per month" and, when the work was finished, "only such further sum as would be satisfactory to said Cutting"? Third, did Mr. Taugher fail to perform the terms of said contract? Fourth, has he been fully paid?

It appeared that Mr. Cutting was president of the Richmond Dredging Company and also president of the Point Richmond Canal & Land Company, and owned substantially all of the shares of these corporations. In the course of his testimony concerning the alleged contract he claimed to have made with Mr. Taugher, Mr. Cutting testified:

"Q. Did you at that time explain to him with reference to the different corporations that you had? A. Oh, yes. He thoroughly understood that. Q. Tell what you said to him on that subject. A. I told him all about it; I told him the whole layout. That the Point Richmond Land & Canal Company and the Richmond Dredging Company were practically myself, the same thing; and I explained to him the business and the construction of the whole thing. We went clear through it with long explanations."

He testified that he had a great deal of private business outside of these corporations.

[1] It appeared that Mr. Taugher performed services for the Richmond Land & Canal Company and also for Mr. Cutting individually, and there was evidence that payments were made by Cutting and by the Point Richmond Canal & Land Company to Mr. Taugher, as shown by checks and receipts, amounting to $3,669.50. Defendants claim that this amount should have been deducted from the amount found by the court to be due for said services, to wit, $4,650. Mr. Taugher contended, and so testified, that these payments were made by Cutting and the Richmond Canal & Land Company for services rendered by him to them, and that he had applied the payments on account of such services, and that there remained an unpaid balance due him from Cutting and said corporation. None of these payments appeared to have been made by the Richmond Dredging Company or on account of services for that company. As to the alleged contract that Attorney Taugher was to receive only $200 per month and such further compensation as Cutting might feel disposed to allow, the testimony of Cutting and Taugher was in sharp conflict, the latter testifying that no such contract was made. The finding of the court that defendants' claim in this respect is untrue is, under the rule, conclusive upon us. As the court found that the contract alleged by defendants was not entered into, it would follow that there was no breach of such contract by Attorney Taugher.

There was no formal employment of Attorney Taugher evidenced by a resolution of the directors of the dredging company. His employment was by Cutting on its behalf, and it received the benefit of the services rendered. Cutting was for all practical purposes the corporation and was managing its business much the same as if it were his own. We do not think the corporation can escape liability on the theory that Cutting was unauthorized to incur it. The finding of the court that the services of Attorney Taugher were performed at the instance and request of the defendant company, and not under the contract alleged by defendants, finds support in the evidence.

This action was commenced March 9, 1912. After the judgment had been recovered against the Santa Fé Railroad Company in favor of the Richmond Dredging Company and some time prior to the commencement of the present action, a disagreement arose between Attorney Taugher and Cutting as to the compensation due to the former for his services, who at the time was urging further payment on account. Some of the matters in the attorney's charge had been finally disposed of, while others were yet unfinished and an appeal by the Santa Fé Company in the dredger case was impending. It is not necessary to burden this opinion with the testimony bearing upon the merits of this dispute. It arose mainly out of Cutting's contention that Taugher was working under a contract for $200 per month, which the court found was not true. Much bitterness of feeling between the two men was engendered which resulted in the substitution by Cutting, with Taugher's consent, of another attorney to conduct the Richmond Dredger Company case for respondent on the appeal and the severing of all relations as client and attorney, followed by the present action.

We think the evidence abundantly showed that Taugher had not been paid in full for his services, as is now contended by appellant, and treating the payments made, as probably the court did, as justly applicable, as far as they went, towards compensating the attorney, his services were shown to be reasonably worth an additional amount quite equal to that found by the court.

Nor do we think the evidence showed that there was an agreement on Taugher's part, as is claimed, "to prosecute each of the cases mentioned in plaintiff's complaint, to a finality, which he did not do." No doubt he expected to be retained in the business to a finish, but the evidence would not have justified the court in finding that his compensation depended upon such a condition. Besides, he did not voluntarily throw up his brief, but was relieved from further responsibility in the business by Cutting himself. His action was for services rendered up to the date of his discharge, which was early in March, 1912. The evidence was directed to the value of his services rendered, and the witnesses based their estimate of such value upon the successful manner in which he had conducted the business prior to his discharge.

[2] It is claimed that the court erred in entering judgment against the dredger company for $4,650 and costs of suit, $56.25, and a separate judgment against defendant Cutting for $4,645.33 and $56.19 costs. There is in fact but one judgment; but, inasmuch as Cutting's liability was that only of a stockholder, the amount of the judgment chargeable to him was necessarily less than that against the dredging company because he did not own all of its capital stock. A payment of the judgment by the dredging company would discharge his liability under it, and the payment by him of the amount adjudged payable by him would discharge the dredging company pro tanto. We do not see how either appellant is prejudiced by the form of the judgment.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(33 Cal. App. 287)

SQUIRES v. ESTEY. (Civ. 1871.)

(District Court of Appeal, First District, California. March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. TAXATION 🔑800(1)—TAX SALES—CANCELLATION—REIMBURSEMENT OF PURCHASER.

Where owner of property seeks equitable relief against tax deed or sale as a cloud upon his title or seeks to obtain judgment invalidating such sale or deed, relief will be refused unless he first repay to the tax purchaser or his grantee or assignee the taxes, penalties, interest, and costs justly chargeable against the land and paid by such purchaser, with legal interest from time of payment, less such rents as the purchaser in possession may have received, even though the assessment and levy of the taxes for which the property was sold was irregular or void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586.]

2. TAXATION 🔑809(3)—TAX SALES—REIMBURSEMENT OF PURCHASER—PLEADING.

In action to quiet title against defendant claiming under tax deed, defendant's amended answer and cross-complaint alleging amount of taxes paid *held* sufficient as to details of assessment and levy of taxes in absence of special demurrer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1586, 1602.]

3. TAXATION 🔑814(1)—TAX SALES—REIMBURSEMENT OF PURCHASER.

The right of a purchaser of a tax title upon the cancellation of his tax deed to recover taxes, interest, and penalties paid by him rests upon equitable principles, and is not dependent upon Pol. Code, § 3898, subd. 5, as amended in 1913 (St. 1913, p. 560).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1612.]

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action to quiet title by Raymond J. Squires against Charles V. Estey. From a judgment directing the reimbursement of defendant for taxes paid as a condition of the judgment quieting title, plaintiff appeals. Affirmed.

L. A. Kottinger and Milton Shepardson, both of Oakland, for appellant. John G. Lawlor, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from the judgment in defendant's favor in an action commenced by the plaintiff, as the owner of a certain tract of land, to quiet title thereto against the defendant claiming under a tax deed. The defendant in his answer and cross-complaint set up his tax deed as a defense to the action, and also averred that he had paid out and expended the sum of $905 as taxes, penalties, costs, interest, and charges which were assessed and a lien upon said property at the time he obtained said tax deed to the same, and the payment of which was a condition precedent to the issuance of said tax deed; and the defendant prayed that, should the court find his tax deed for any reason invalid, and adjudge the plaintiff to be the owner of the property, it should also in its judgment decree that the plaintiff be required to repay to the defendant the sums so expended. Upon the issues as thus made up the trial court found the defendant's tax deed to be invalid, but directed the repayment to the defendant by the plaintiff of the sum of $835.90 so expended by him for taxes and so forth, and decreed that its judgment quieting the plaintiff's title should be ineffectual until such sum was paid. From this judgment the plaintiff prosecutes this appeal.

[1] The main contention of the appellant is that the various items of taxes, etc., alleged to have been paid by the defendant as a prerequisite to the issuance to him of the tax deed were based upon assessments and levies of taxes by the state and by the city of Oakland which were void on account of numerous defects and irregularities as shown in the proofs and pointed out in the briefs of appellant. Conceding that such defects and irregularities exist, and that they were such as would have rendered void the tax deed issued to the defendant, and uncollectible the taxes based thereon in any proceedings initiated by the state to compel the plaintiff as the owner of the property to pay the same, or even in any proceeding initiated by the defendant to quiet his title to the property, we are still unable to distinguish this case from the case of Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492, wherein the rule is laid down that:

> "Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession."

It is contended, however, by the appellant that this rule has only application to cases where the assessment and levy of the taxes sought to be recovered were so far legal as to have created a lien upon the property. But the case above cited does not make this distinction in its application of the broad principle that he who seeks equity must do equity; but, on the contrary, the most recent cases which are cited therein as upholding the doctrine, or which have been decided since, are cases in which the assessments and levies of taxes were void for irregularities as vital as those relied upon by the appellant in the case at bar, notwithstanding which the owners of the property going into a court of equity, seeking the equitable relief of a decree quieting their title as against void tax deeds, were required in each case to pay or offer to pay a sum equal to the taxes which would be justly due. Couts v. Cornell, 147

Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; Sav. & Loan Soc. v. Burke, 151 Cal. 616, 91 Pac. 504; Campbell v. Canty, 162 Cal. 382, 123 Pac. 266; Johnson v. Canty, 162 Cal. 391, 123 Pac. 263; Cordano v. Kelsey, 28 Cal. App. 9, 151 Pac. 391, 398. Upon the authority of those cases we find no merit in the foregoing contention on the part of the appellant.

[2] The appellant also contends that the defendant's amended answer and cross-complaint were insufficient in respect to their affirmative averments as to the details of the assessment and levy of the taxes sought to be recovered. We are of the opinion that, however uncertain and indefinite the defendant's pleading may be in the respects indicated, it was sufficient to raise the issue in the absence of a special demurrer.

[3] As to the appellant's contention that section 3898, subd. 5, of the Political Code, as amended in 1913 (St. 1913, p. 560), is void in its attempted application to assessments and levies of taxes made before the passage of such amendment, it is sufficient to say that the respondent's right to a recovery in the case at bar does not depend upon this or any other section of the Code, but rests upon a principle of equity well established in the decisions of the courts long prior to the amendment of the Code.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

On Resubmission.

LENNON, P. J. The judgment is affirmed, for the reasons stated in an opinion filed March 2, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

* * *

(33 Cal. App. 347)

FRED MEDART MFG. CO. v. WEARY & ALFORD CO. (Civ. 2019.)

(District Court of Appeal, Second District, California. April 3, 1917.)

1. SALES 🔑52(6) — SELLER'S ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

In a seller's action for price, evidence that plaintiff's alleged agent notified defendant buyer that he was acting as such agent, and that the goods were billed directly from the plaintiff to defendant, does not sustain a finding that defendant purchased from the agent and not from plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138.]

2. PRINCIPAL AND AGENT 🔑105(4)—AUTHORITY OF AGENT TO COLLECT PURCHASE PRICE.

An agent for the sale of personal property without possession thereof is not authorized to collect the purchase price, although Civ. Code, § 2325, authorizes a general agent intrusted with possession of the thing sold to do so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 301, 374.]

3. PRINCIPAL AND AGENT 🔑137(1)—LIABILITY OF THIRD PARTIES—COLLECTING PURCHASE PRICE.

Where defendant buyer notified plaintiff seller that he intended to pay the purchase price to plaintiff's alleged agent, and no objection was raised, plaintiff is estopped to claim that such agent was unauthorized to receive payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492, 494.]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Fred Medart Manufacturing Company against the Weary & Alford Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant. Ralph F. Twombly, of Los Angeles, for respondent.

JAMES, J. Suit was brought to recover the sum of $411.64 alleged to be due and owing to the plaintiff from the defendant on account of the sale of certain merchandise. Judgment was in favor of defendant. The appeal is from the judgment and is presented upon the judgment roll and a bill of exceptions.

Plaintiff at times material to the controversy was engaged in the city of St. Louis, Mo., in manufacturing steel office furniture of certain particular varieties. J. M. Bloom was an agent of the plaintiff in the city of Los Angeles. In July, 1913, he quoted to the defendant prices on certain articles of metal furniture. In the letter containing the quotations he stated:

> "The lockers are made by the Fred Medart Mfg. Co. of St. Louis, for which I am California agent."

The offer made by Bloom was accepted by the defendant, and the articles of merchandise were thereafter delivered, being billed directly from the plaintiff manufacturing company to the defendant. On December 24, 1913, the plaintiff wrote to the defendant advising the latter that their draft drawn to cover a portion of the purchase price of the merchandise had been returned with the notification from the collecting bank that the drawee was "paying their local agent." The letter also contained the following:

> "Up to this writing, we have not received the remittance through our local agent and are today taking this matter up with him."

On January 6th the plaintiff wrote to defendant as follows:

> "We have not received this remittance, and we again take this matter up with you and ask that you kindly advise us immediately upon receipt of this letter if you have paid any money to Mr. J. M. Bloom. P. S. If you have not paid this account to Mr. Bloom, kindly mail us check."

On January 15th the defendant wrote to the plaintiff acknowledging receipt of the letter of January 6th, and stating to the plaintiff that settlement had been delayed, but that, as soon as the goods had been satisfactorily installed, "we will settle in full with Mr. Bloom." It appears to be agreed that full settlement was thereafter made with Bloom, the agent, subsequent to which time defendant received notification from the plaintiff that Bloom was not authorized to accept the payment on its behalf. This suit was prosecuted on the same theory.

[1] The trial judge by his findings determined that the merchandise in question was purchased from Bloom, and not from the plaintiff, and that Bloom had been fully paid therefor. In view of the fact, as shown by the evidence, that Bloom in his first letter to the defendant gave notice that he was acting as agent for the plaintiff, and also as the merchandise was billed directly from the plaintiff to the defendant and correspondence was had showing at all times that plaintiff was the principal of Bloom, it must properly be said that the finding referred to is not supported by the evidence. However that may be, the court did find that Bloom received payment in full for the merchandise.

[2] This brings us to the question as to whether, assuming that an agency only existed between plaintiff and Bloom, Bloom possessed authority to bind the plaintiff by receipt of the purchase price agreed upon. The rule is of long standing that an agent for the sale of personal property merely, not having possession thereof, is not thereby vested with authority to bind his principal by collection of the purchase price. Our Civil Code, § 2325, provides:

> "A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price."

[3] Herein the authority of a factor having possession of goods and a mere sales agent without possession differs. But, conceding that Bloom had no authority under his contract of agency to collect the proceeds on the sale of the merchandise furnished by the plaintiff, we think that under the facts here shown there was created for such purpose an agency by estoppel; that is, that the failure of the plaintiff to notify the defendant of the limitation on the agent's authority closed its mouth against any claim denying that such authority existed. The plaintiff was first advised by letter and by the return of their draft of defendant's intention to pay Bloom, and did not object thereto, but stated to the defendant that they were taking the matter up with Bloom in order to secure the remittance. The next letter written by the defendant to plaintiff again advised plaintiff of the intention of defendant to settle in full with Bloom, which the defendant so did. After all the money had been paid, for the first time the defendant is advised that no authority existed in Bloom to make collections on behalf of the plaintiff. We are well satisfied that the payment to Bloom under such circumstances discharged the debt to the plaintiff. See Mechem on Agency, vol. 1 (2d Ed.) § 932 et seq. As under the facts shown and by reason of the conclusion which we have drawn no recovery could be had by the plaintiff against the defendant, the question of the correctness of the finding of the court that there was no contractual relation between the plaintiff and defendant becomes immaterial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(33 Cal. App. 354)

WARDEN et al. v. CHOATE. (Civ. 1927.)

(District Court of Appeal, Second District, California. April 3, 1917.)

1. INJUNCTION 🔑252(6)—BOND—DAMAGES.

Where defendants in a suit for injunction made no motion to dissolve the temporary restraining order, but only resisted the order to show cause, as the temporary restraining order fell of its own weight at the time limited therein, being the time fixed for the hearing of the order to show cause, in an action on the undertaking given for damages sustained by reason of such restraining order, the court properly determined that no attorney's fees were incurred as damages by reason of the restraining order.

2. INJUNCTION 🔑252(4)—BOND—DAMAGES.

Where assessment certificates acquired on account of sale of property for delinquent street assessments were sequestered by a temporary restraining order, in an action on the undertaking given therein, in which it was alleged that by the restraint imposed plaintiffs had been prevented from securing a deed to a lot affected by one of the certificates, and had been prevented from accepting an offer made for such lot, it was not proper to allow damages therefor, where there was no allegation in the complaint or evidence that the lot was worth less after the restraining order had become of no effect than it was at any time during the pendency of the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 589, 590, 592-595.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Julia P. Warden and another against J. B. Choate. From a judgment for defendant and from an order denying a motion for new trial, plaintiffs appeal. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants. Carlyle Wynn, of Los Angeles, for respondent.

JAMES, J. Appeal by the plaintiffs from a judgment denying them any relief in this action, and also from an order denying a motion for a new trial. The defendant here, in March, 1914, brought an action against these plaintiffs and certain officials of the city of Los Angeles in which injunctive relief was asked for. A temporary restraining order was made pending the hearing of an order to show cause which was set for the 6th day of April, 1914. These plaintiffs appeared in response to the order to show cause and demurred to the complaint of the plaintiff (this defendant), and made a further showing by affidavit in opposition to the application for injunction pendente lite. At the time fixed as the return day on the order to show cause, the demurrer was considered by the court and sustained, and the action there ended. This action was prosecuted for the purpose of obtaining damages alleged to have been sustained by reason of the restraint imposed under the temporary restraining order. The action, however, is upon the alleged undertaking of the defendant here, who was plaintiff in the injunction suit, by which the plaintiff in that suit gave security against damages on account of the restraining order. The security was not in the form prescribed by the Code, to wit, by written undertaking, the order to show cause and restraining order as signed by the court reciting that "plaintiff having given cash bond in the sum of $300 to indemnify defendants against damage by reason of this restraining order," et cetera. The question as to whether the acceptance of money in lieu of such undertaking as is authorized by the Code to be given upon injunctions (Code Civ. Proc. § 529) was proper may be passed, and it may be considered that it was permissible for the court to require indemnity in that form.

[1] In the injunction action it was alleged that the plaintiffs here were the holders of certain property assessment certificates acquired on account of sale of such property for delinquent street-assessments in the city of Los Angeles, which certificates and the redemption proceeds from the same it was sought by the injunction suits to have sequestered or impounded in order that the plaintiff in that suit, he being a judgment creditor of the defendant C. D. Warden, might cause them to be subjected to satisfaction of his debt. The Wardens in this action alleged that they had incurred damages in the sum of $300, being money paid as counsel fees for the purpose of securing the dissolution of the temporary restraining order, and further that by reason of the restraint imposed they had been prevented from securing a deed to a certain lot affected by one of the assessment certificates and had been prevented from accepting an offer of $500 made to them for said lot. The court in this case determined by its findings that no amount of attorney's fees had been incurred or paid out by these plaintiffs for the purpose of securing a dissolution of the temporary restraining order. It does not appear from the evidence taken, as set out in the reporter's transcript, that the plaintiffs made any motion to dissolve the temporary restraining order, but that the whole of their efforts were directed to resisting the order to show cause. At the time fixed as the return day in the order to show cause they appeared, and their demurrer at that time to the complaint of the plaintiff (this defendant) was sustained. The temporary restraining order fell of its own weight at the expiration of the time limited therein, to wit, at the time fixed for the hearing of the order to show cause. In such a case the court properly determined that no attorney's fees were incurred as damages by reason of the temporary restraining order. See San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651; Curtiss v. Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111. It is contended that the answer of the defendant here admitted that some amount of attorney's fees had been incurred on the behalf alleged; but taking the answer altogether in its various allegations, we find that it contains an allegation denying that any damage at all was sustained on the part of the plaintiffs by reason of the temporary restraining order.

[2] Neither was it proper to allow damages on account of the second alleged cause therefor, to wit, by reason of loss alleged to have been incurred on account of the inability of the plaintiffs to accept an offer of $500 for the lot as before mentioned. There is no allegation contained in the complaint, and neither does the evidence support any such condition, that the lot was worth any less after the restraining order had become of no effect than it was at any time during the pendency of the restraint imposed by that order. We conclude that the judgment of the court was proper, and is supported by the record presented.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(33 Cal. App. 357)

PEOPLE v. CLAYTON. (Cr. 388.)

(District Court of Appeal, Third District, California. April 3, 1917.)

1. Criminal Law ⟹1063(4)—Appeal from Judgment—Question Presented—Insufficiency of Evidence.

Upon appeal from judgment in a criminal case, without making motion for new trial, announcement having been made in open court as provided by Pen. Code, § 1239, and notice for transcript of record having been given pursuant to section 1247, assignment that evidence was insufficient to support conviction was reviewable, and evidence may be considered for any of the purposes of the appeal, in view of Const. art. 6, § 4½, providing that no judgment shall be set aside "unless, after an examination of the entire cause, including the evidence," the court shall be of opinion that a miscarriage of justice has occurred, and St. 1909, pp. 1083 to 1086, altering system of appeals, do not change the rule formerly existing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2673, 2680.]

2. Criminal Law ⟹1104(6)—Appeal—Application for Transcript—Sufficiency.

Notice prescribed by Pen. Code, § 1247, asking court to direct reporter to transcribe parts of record necessary for criminal appeal need be in no particular form, it being only necessary to set forth in general terms grounds of appeal and points relied on and designating particular portions of record necessary to be transcribed; hence fact that appellant states that he "thinks" that all the testimony is necessary does not invalidate notice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2776.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

George Clayton was convicted of grand larceny, and upon a suggestion of diminution of the record, on appeal from judgment, applies for further transcription and certification of testimony under Pen. Code, § 1247c. Application granted.

Ralph H. Lewis, and Grover W. Bedeau, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Upon a suggestion of diminution of the record, the defendant has applied to this court for a further transcription and certification of the testimony taken at the trial. Pen. Code, § 1247c. The application is supported by the affidavit of the defendant. The Attorney General opposes the application for reasons to be hereinafter stated.

[1] The defendant was, on the 21st day of November, 1916, found guilty by a jury, in the superior court of Sacramento county, of the crime of grand larceny. On the 24th day of said month the court pronounced its judgment of sentence upon the defendant, adjudging and decreeing that he be imprisoned in the state penitentiary at Folsom for the term of ten years. Thereupon G. W. Bedeau, counsel for the defendant, announced in open court:

> "That the defendant appealed * * * to the District Court of Appeal in and for the Third Appellate District from the final judgment of conviction, made, rendered, and entered herein this day and from the whole thereof."

On the 29th day of November, 1916, counsel for the defendant filed with the clerk of the court a written document purporting to be the notice prescribed by section 1247 of the Penal Code, upon which, when legally sufficient in all respects, a trial court is authorized and required to order the phonographic reporter who reported the case to transcribe such portions of the notes as in its opinion may be necessary fairly and fully to present the points relied upon by the appellant. Said notice set forth a number of the grounds, including that of the insufficiency of the evidence to support the verdict, which are enumerated in section 1181 of the Penal Code as the grounds upon which an application for a new trial may be made and granted. In addition to the grounds mentioned, the notice also contained the following statement of the points upon which the defendant intended to rely:

> "(1) Inadmissible and prejudicial statements made by witnesses for the prosecution, irrelevant to the issue, which served to poison the minds of the jury against defendant and prevent him from having a fair and impartial trial; (2) that the chief deputy district attorney, during the course of the trial, and during the course of his closing argument to the jury therein, was guilty of misconduct prejudicial to the defendant and which was intended to and did prevent this defendant from having a fair and impartial trial."

The notice then concludes with the prayer or request that the court direct the phonographic reporter who reported the case—

> "to transcribe all evidence and proceedings and all objections and exceptions made during the trial, and all rulings made thereon adverse to defendant, and exceptions made thereto, and all remarks of the judge or district attorney, made during the course of the trial and during argument in the presence of the jury, to which defendant objected and excepted."

The notice proceeds:

> "Defendant, in his opinion, thinks it necessary in order to fairly present all his points on appeal, that the phonographic notes of the testimony of all witnesses, all proceedings, rulings, and exceptions had and taken at said trial, and the closing argument of the chief deputy district attorney be transcribed."

As much of section 1247 of the Penal Code as is relevant to the inquiry presented here reads:

> "Upon an appeal being taken from any judgment or order of the superior court, to the supreme court or to a district court of appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant, or the district attorney when the people appeal, must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken. The court shall, within two days after the filing of such application, make an order directing the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the court may be necessary to fairly and fully present the points relied upon by the appellant."

The position of the Attorney General in opposition to the allowance of the application herein asked for is: (1) That the paper or writing purporting to be the notice required by the above section for the transcription of all the testimony is legally insufficient, that is to say, that it does not comply with the requirements of said section; (2) that the point that the evidence is insufficient to support the verdict cannot be reviewed upon an appeal from the judgment, but only upon an appeal from an order denying a new trial, and that, as the defendant made no motion for a new trial, and so elected to rely for a review of his case solely on an appeal from the judgment, there is no necessity, so far as the question of the insufficiency of the evidence to uphold the verdict is concerned, for a transcription and certification to this court of all the testimony and proceedings of the trial.

We will first consider the point last above stated.

Prior to the adoption of the present method of taking appeals in criminal cases, it was requisite, in order to take such an appeal, to file with the clerk of the court in which the action was tried a notice stating the appeal from the judgment or order or from both, and serving a copy thereof on the adverse party. See Pen. Code (Ed. 1906) § 1240. Such appeal, if not from the judgment only, upon the judgment roll alone, was required to be supported by a bill of exceptions. See Pen. Code (Ed. 1906) § 1170. Section 1171 of said Code, as it then read, specified the points to the decision of which exceptions might be taken by the defendant. Under the then system of appellate procedure in criminal cases, as we shall presently see, the defendant could, upon an appeal from the judgment, rely on any of the exceptions specified in section 1170 of the Penal Code, it being necessary, of course, for him to have preserved and presented his exceptions in the manner prescribed by section 1171 of said Code, as it then read.

The Legislature of 1909, however, introduced radical changes in the system. Sections 1170, 1171, 1172, 1173, 1174, 1175, and 1177, all relating to certain exceptions which might be taken to rulings upon certain matters and to bills of exceptions and the manner of their preparation and settlement, were in the year mentioned repealed (Stats. 1909, pp. 1083 to 1086), and a number of new sections, prescribing a different method of taking appeals and preparing the record thereon, were substituted in lieu of the former system. By the change so effected the defendant may now take an appeal from the judgment by announcing personally or through his attorney in open court, at the time the judgment is rendered, that he appeals from the same; and from any appealable order after judgment by announcing in open court at the time the same is made that he appeals from the same. Pen. Code, § 1239. Thereupon the clerk must immediately enter in the minutes of the court the announcement of the appeal. The record on appeal must then be prepared, in pursuance of the notice required to be given, in accordance with the provisions of section 1247, supra, and the judge must then certify the same as required by section 1247a of said Code.

Under the former system there was no express provision of the Penal Code specifying the points which might be reviewed in criminal cases on an appeal from the judgment. Section 1181 then, as the same section does now, specified certain grounds upon which a new trial might be asked for and granted.

In the case of the People ex rel. Smith v. Keyser, 53 Cal. 183, the relator, having been convicted of a felony and duly noticed an appeal from the judgment and the order denying him a new trial, presented a bill of exceptions to the trial judge, who refused to settle the same for the reason that it was not presented within time. The defendant applied to the Supreme Court for a writ of mandate to compel the trial judge to settle the bill. The court said:

> "We are of the opinion that the bill of exceptions ought to have been settled by the judge. The defendant may appeal from the judgment, without having made a motion for a new trial; and on the appeal he may rely upon any of the grounds of exception mentioned in section 1170 of the Penal Code, and in such case he must have a bill of exceptions, settled as provided in section 1171."

The conclusion thus announced was reaffirmed by the Supreme Court in Walker v. Superior Court, 135 Cal. 369, 67 Pac. 336, and People v. Walker, 142 Cal. 90, 93, 75 Pac. 658.

We can discern no just ground for holding, from any change made by the Legislature of 1909, or by any subsequent Legislature in the procedure relative to appeals in criminal cases and the preparation of the records thereon, that there is now, under the existing system, any less reason for the application of the rule laid down in People v. Keyser, supra than there was prior to the reform in the procedure referred to. It is true that the ground that the evidence is insufficient to sustain the verdict was not referred to by section 1170, as it then existed, but said section did specify, among others, including that of exceptions to rulings on questions involving the admissibility of evidence, a number of grounds or exceptions which were then and are now reviewable on an appeal from the order, and nowhere in the Penal Code was there a provision expressly authorizing such review of those exceptions. As before declared, there is not now, and, so far as we are otherwise advised, there never has been, any express provision in the Penal Code specifically enumerating and so restricting the number or nature of the points which may be reviewed on appeal from the judgment. Upon principle, it seems to us, there is every reason why the assignment that the verdict is not supported by the proofs should be reviewable on such an appeal. If, without express authority therefor, it may with reason be held proper, as the Keyser Case holds, that exceptions to rulings upon evidence may be reviewed on an appeal from the judgment, then a fortiori it is proper so to review the question whether the evidence is of sufficient strength to support the verdict; for the appeal from the judgment involves a direct attack thereon, while a motion for a new trial is a mere collateral assault upon the judgment. Quite consistently, therefore, and indeed most naturally, the question whether the verdict is sufficiently supported would arise on an appeal from the judgment, to nullify which or the verdict itself is always the very object of an attack thereon, even where such attack is collaterally made, as on a motion for a new trial.

The Attorney General declares, however, that:

> "Wherever an appeal from a judgment only has been taken, the only papers which go up

to the appellate court are prescribed by section 1246 of the Penal Code."

That section provides for the transmission by the clerk of the trial court to the appellate court, upon an appeal being taken thereto, of the papers and proceedings which, properly speaking, constitute the judgment roll in a criminal case, and they must be so transmitted whether the appeal is from the judgment or from the order denying a new trial or from both. They now constitute the clerk's record, and are so designated, and were formerly included in the bill of exceptions as a necessary part of the record on appeal. As a matter of course, it is indispensably necessary that the record, whatever its prescribed form, should show that a judgment against the appellant had been rendered, whether the appeal be from the judgment or the order or both; otherwise there would be nothing in the record to show that the court below had done anything which would occasion an appeal.

The cases of Turner v. Bauer, 28 Cal. App. 312, 152 Pac. 308, and Mankins v. Forward M. Syn., 28 Cal. App. 285, 152 Pac. 313, cited by the Attorney General, are wholly inapplicable to any question presented here. In those cases it is merely held, as obviously no other conclusion could be announced, that where the appeal is from the judgment on the judgment roll alone, the only recourse for the ascertainment of the facts is to the findings, and that in such case it will be presumed that the evidence justified the findings.

But there is still another consideration which, it seems to us, makes it not only proper, but quite necessary, in almost all cases, that the record on appeal should contain all the material and important testimony received at the trial, and this arises from the provisions of section 4½ of article 6 of the Constitution. That section, as is now pretty generally understood, provides that no judgment shall be set aside, or new trial granted in any case, on the ground of errors in instructing the jury or in the rulings of the court on the evidence or in the matters of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Thus the appeal courts, as should be so, are expressly enjoined from reversing causes for error occurring in the trial of the case, however obvious and glaring, unless the evidence is of such a character as clearly to disclose that an affirmance would result in a miscarriage of justice. The importance, therefore, of presenting to the court to which the appeal has been taken all the testimony upon the vital points in the case is, if for no other reason than for that purpose, plainly apparent and readily to be apprehended. A reviewing court would hardly be in a position to determine whether a miscarriage of justice would follow the affirmance of a case in which the trial court had made egregious error in its rulings or instructions unless the evidence in full was before it, thus enabling it to determine, after a review thereof, whether the evidence appeared to be so conclusive of the defendant's guilt as to justify it in reaching the conclusion that an affirmance of the result arrived at by the jury would not produce a miscarriage of justice. But, as declared above, we think the testimony when brought up on an appeal from the judgment may be considered for any of the purposes of the appeal.

[2] 2. The notice filed by the defendant for the transcription of all the material testimony was in time and legally sufficient. No particular form of notice is required. All that is necessary is that the defendant shall, within the time prescribed, file a notice containing a statement setting forth in general terms the grounds of the appeal and the points upon which he relies, and designating therein the particular portions of the reporter's notes it will be necessary to have transcribed to fairly and fully present the points relied upon. This he has done, by designating all the testimony taken at the trial. The fact that he stated in the notice that he "thinks" or is of the "opinion" that all the testimony is necessary to the full and fair presentation of the points upon which he relies does not detract from the force or impair the efficacy of the notice for the purpose for which such a notice is required to be filed. In fact, it seems to us that the "designation" in any such case can be the result only of the opinion or belief or thought of the defendant that the testimony designated is necessary for the purposes of his appeal.

It follows from the foregoing views that the application for further transcription of the testimony in this case must be granted. It is accordingly ordered that the phonographic reporter who reported the case shall, within 15 days from the date of the filing of this opinion transcribe all such portions of the testimony taken and received at the trial of this case as have not already been transcribed and incorporated in the record now on file herein in this court, together with such portions of the address to the jury by the chief deputy district attorney as may be claimed to have been legally unwarranted and prejudicial to this defendant's substantial rights and as are not incorporated in the transcript now on file herein in this court, and to which remarks the said defendant duly excepted.

We concur: CHIPMAN, P. J.; BURNETT, J.

(33 Cal. App. 394)

PLATNAUER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SACRAMENTO COUNTY et al. (Civ. 1600.)

(District Court of Appeal, Third District, California. April 6, 1917. Rehearing Denied by Supreme Court June 4, 1917.)

CONTEMPT 🔑68—COUNTIES 🔑197—APPEAL—COSTS.

Code Civ. Proc. § 1027, allowing costs to the prevailing party on appeal, and section 1032, allowing similar costs where an inferior court's decision is reviewed in a special proceeding, do not authorize taxing costs against a judge whose judgment of contempt is set aside, nor authorize collection of such costs from the county, especially where no claim therefor was presented to the county board of supervisors as required by Pol. Code, §§ 4075 and 4078.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 238–241; Counties, Cent. Dig. §§ 309–311.]

Petition by R. Platnauer against the Superior Court of County of Sacramento and Charles O. Busick, Judge thereof. On motion to disallow costs and to strike out. Motion to strike out granted.

A. M. Seymour, J. S. Daly, and R. Platnauer, all of Sacramento, for petitioner. Meredith, Landis & Chester, of Sacramento, for respondents.

BURNETT, J. A judgment was rendered by said superior court finding petitioner guilty of contempt, and, upon petition to this court, said judgment was set aside upon the ground that the conduct of petitioner was not such as to justify said finding. 163 Pac. 237. Petitioner thereupon filed in this court a memorandum of his costs incurred in the above-entitled proceeding, which respondent has moved the court to strike out "upon the ground that the decision and judgment of the court in said matter did not award costs to the petitioner, and upon the further ground that costs are not recoverable by petitioner in any event in said matter and are not authorized or allowed by law."

Petitioner claims that he is entitled to his costs by virtue of sections 1027 and 1032 of the Code of Civil Procedure. The former provides:

> "The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court," etc.

Section 1032 is:

> "When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case."

But this is not the ordinary action to which said sections of the code apply. It was directed against a court of record for the purpose of reviewing a judicial determination of that tribunal. In such cases the court is not liable for damages or for costs. The rule is stated in 23 Cyc. 567, as follows:

> "As a general rule no person is liable civilly for what he may do as a judge while acting within the limits of his jurisdiction, nor is he liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and in such cases there is no liability even though he exceeds his authority. The overwhelming weight of authority is to the effect that, where a judge has full jurisdiction of the subject-matter and of the parties, whether his jurisdiction be a general or limited one, he is not liable civilly when he acts erroneously, illegally, or irregularly, and he is not chargeable with costs resulting from his erroneous rulings, or the cost of a proceeding to prohibit erroneous action on his part."

It has even been held that he is not liable when he acts from malicious or corrupt motives. 23 Cyc. 569. Here, it may be said, there is no contention nor evidence that the court acted from anything but proper motives. Nor is there any doubt that it had jurisdiction of petitioner and of the subject-matter. It, however, acted erroneously in finding from the facts that a contempt had been committed. It is true that its judgment was annulled on certiorari for excess of jurisdiction, but, after all, it presented a case, in the opinion of this court, of reaching a wrong conclusion from the premises involved therein. However, petitioner admits that no cost can be allowed against the judge or the court, but he contends:

> "That inasmuch as the statute is mandatory, and that he must be allowed his costs, and, seeing that they have been incurred in connection with the maintenance of the superior court of Sacramento county, the same should be paid by the county, and that respondent should be directed to draw an order on the treasurer of Sacramento county for the amount."

In support of this view he cites State v. Whitaker, 45 La. Ann. 1299, 14 South. 66; Haviland v. White, 7 How. Pr. (N. Y.) 154; and People v. Flake, 14 How. Pr. (N. Y.) 527.

The first of these involved the violation of an ordinance of the city of New Orleans. The judge of the recorder's court refused to allow "a suspension appeal," and it was held that his course was totally unwarranted. As to the costs it was said by the Supreme Court:

> "Although the action of the city judge in the matter was unjustifiable, reasons of public policy protect him from being made to pay the costs. They must be borne by the city of New Orleans."

The point involved in 7 How. Pr. (N. Y.) 154, was whether the provision of the statute as to costs applied to certiorari proceedings. After "a good deal of consideration and considerable hesitation," the court reached the conclusion that it was a case for costs, but it is to be observed that there were adversary parties in the litigation, and the costs were awarded against the losing party.

The Flake Case, supra, was similar to State v. Whitaker, supra. It was held that the referees or commissioners of highway acted as judges and constituted a court of inferior jurisdiction within the meaning of the Code of New York. In speaking of the action of said commissioners in the matter it was said:

> "Their error is an error of judgment, at least in the view of this court, and no obliquity of motive is to be imputed to them. They should not, therefore, be charged with the costs of the appeal."

It was further held that the appellants should not be charged with the costs, and the final conclusion of the court was announced in these words:

> "On the whole, I think the proper direction, under all the circumstances of the case, is that the costs of the relator in this court, as of an action at issue, or an issue of law, be awarded against and collected of the town of Westfield, and that the amount thereof be collected by a tax, as a part of the town charges of that town, in the next levy of taxes."

Thus it appears that two of these cases seem to afford some countenance to the contention of petitioner herein, but we can find no law in this state that authorizes us to make the order which petitioner seeks.

The county itself was not a party to the action. Besides, the superior court is an agency of the state rather than of the county. It is the superior court of the state of California in and for the county of Sacramento. Again, it is difficult to understand how said costs were incurred "in connection with the maintenance of the superior court." But if we assume that petitioner has a claim against the county for his outlay, he must in the first instance present it to the board of supervisors for allowance. If they reject it, he can then maintain the proper action for its recovery. Sections 4075 and 4078, Pol. Code.

As we are satisfied that no allowance of costs should be awarded in this proceeding, the motion to strike out is granted.

We concur: CHIPMAN, P. J.; HART, J.

(33 Cal. App. 331)

SWEENEY v. BOARD OF TRUSTEES OF AUBURN SCHOOL DIST. OF CITY OF AUBURN, PLACER COUNTY. (Civ. 1652.)

(District Court of Appeal, Third District, California. March 27, 1917.)

1. MECHANICS' LIENS 🔑113(2) — BUILDING CONTRACTS—RIGHTS OF MATERIALMEN.

Under Code Civ. Proc. § 1184, providing that upon notice of materialmen, etc., the owner of property not subject to mechanics' liens shall withhold from the contractor sufficient money to cover such claims, a school district may withhold from a contractor's executrix sufficient money to cover claims filed by materialmen previous to the executrix's demand for payment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148.]

2. MECHANICS' LIENS 🔑228 — BUILDING CONTRACTS—RIGHTS OF MATERIALMEN.

The right of a contractor's materialmen under Code Civ. Proc. § 1183, to sue on a bond insuring construction of a school building, etc., does not exclude their right to share in money withheld from contractor by the school district pursuant to section 1184.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 411.]

Petition for writ of mandate by Mary Sweeney, executrix under last will of George S. Hayes, against the Board of Trustees of Auburn School District of the City of Auburn, Placer County. Writ denied.

P. H. Johnson and W. H. Ashby, both of Sacramento, for petitioner. Meredith, Landis & Chester and Chas. A. Swisler, all of Sacramento, for respondent.

CHIPMAN, P. J. Mandate. It appears from the petition that on March 29, 1915, defendant entered into a written contract with plaintiff's testate by which he agreed to furnish the materials and erect for defendant a school building for the agreed price of $35,725; that before entering upon the performance of said work the said Hayes filed with defendant a good and sufficient bond in a sum not less than one-half the total amount payable by the terms of said contract, which said bond was duly executed, filed, and approved according to the requirements of the act approved May 1, 1911 (St. 1911, p. 1422), entitled "An act to amend * * * 'An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal or other public work,'" approved March 27, 1897, "and was given for the purpose of securing the payment of such claims"; that the said Hayes duly performed all the conditions of said contract and completed said building on or about February 12, 1916, and said building was duly accepted by defendant and used thereafter as a public school building; that the whole sum of $35,725 is long past due, and there remains unpaid thereon the sum of $10,844.75; that at all times mentioned there was in the hands of and subject to the order of defendant, appropriated for the specific purpose of paying said indebtedness, more than sufficient to pay said balance of $10,844.75; that the final certificate of the completion of said building of the architect of defendant duly issued and is in the hands of defendant; that all payments on said contract were made by warrants drawn by defendant payable to said Hayes; that there is still due, owing, and unpaid to said Hayes on said contract the sum of $10,844.75 for the payment of which petitioner has duly demanded of defendant the warrant for said sum, but defendant has refused and still refuses to issue the same. The death of said Hayes and appointment of plaintiff as executrix of his last will are alleged.

A general demurrer was filed, and also an answer. Among other facts it is alleged in the answer that a large number of persons, naming them, "claim to have furnished materials in the construction of said school building or to have rendered and performed work, labor and services thereon." It is further alleged as follows:

> "(5) That each and all of said persons have heretofore and had prior to any demand being made on the respondent by the said petitioner herein, or the said George S. Hayes, for an order or warrant for the payment of any sum whatever payable under said contract, made demand upon and filed with respondent notices that they had respectively performed labor, or furnished materials, or both, to the said George S. Hayes, or to other persons claiming to have been acting by authority of said George S. Hayes, and stating in general terms the kind of labor and materials and the name of the person to, or for whom, the same was done or furnished, or both, and of the whole agreed to be done or furnished, or both; that such notices were respectively delivered by each and all of the said persons, firms, and corporations hereinbefore named and left with respondent and were in writing; that each and all of said notices demanded of respondent that it withhold from the said George S. Hayes sufficient money due, or that might become due, to said George S. Hayes to answer such claims and each and all of said respective claims. That said notices in all respects complied with section 1184 of the Code of Civil Procedure.
>
> "(6) Avers that the claims of said various persons and the amounts specified in the notices of the said various persons hereinbefore named filed and left with respondent exceed the sum of $21,000.
>
> "(7) Avers that neither the respondent, Auburn school district, nor the board of trustees of said Auburn school district, nor any member of said board of trustees has any knowledge, information, or belief as to, and is ignorant of the merits of, the respective claims of the hereinbefore named persons, firms, and corporations to the balance of said moneys payable under said contract, and does not know to whom said balance should be paid."

It was agreed by counsel at the argument that such alleged notices were duly given as alleged, and that the sole question to be determined is whether they justified the defendant in refusing to issue the warrant demanded by plaintiff.

Section 1184 of the Code of Civil Procedure reads as follows:

> "Any of the persons mentioned in the preceding section, except the contractor, may at any time give to the owner a notice that they have performed labor or furnished materials, or both, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both, and any of said persons who shall on the written demand of the owner refuse to give such notice shall thereby deprive himself of the right to claim a lien under this chapter. Such notice may be given by delivering the same to said owner personally, or by leaving it at his residence or place of business with some person in charge, or by delivering it to his architect, or by leaving it at the latter's office with some person in charge. No such notice shall be invalid by reason of any defect in form: Provided, it is sufficient to inform the owner of the substantial matters herein provided for. *Upon such notice being given it shall be lawful for the owner to withhold, and in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim and any lien that may be filed therefor including the reasonable cost of any litigation thereunder.*"

[1] The question now here arises out of that part of the section quoted in italics. This section has long existed substantially in its present form, with the exception that by the amendment of 1911 (Stats. 1911, p. 1315) there was introduced the following in the last paragraph:

> "And in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for," the owner shall withhold, etc.

The nature and effect of the notice referred to in the statute as it stood prior to the amendment of 1911 was stated in Diamond Match Co. v. Silberstein, 165 Cal. 282, 288, 131 Pac. 874. It was there said that it was intended to serve as an "equitable assignment"; that the notice "is a form of equitable subrogation regulated by statute" and entitled the persons serving the notice to receive so much of the money due the contractor as would satisfy the claims of the persons giving notice"; that the "right to a recovery of the money so garnished by the notice does not depend upon the establishment of a lien," but is "a cumulative" remedy. The decisions of the Supreme Court settling the foregoing principles are cited in the opinion.

The case of Miles v. Ryan, 172 Cal. 208, 157 Pac. 5, was a case similar to the one in hand. It was there pointed out that, under the decisions of which Mayrhofer v. Board, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451, is an example, neither the Constitution nor the statute gives laborers or materialmen any lien against public buildings, and in the opinion of the court it is shown why in the very nature of such cases no lien should be given, and that the rights of laborers and materialmen must be determined by the section 1184, Code of Civil Procedure. Quoting the provision above italicized, the court said:

> "The provision in the last quotation referring to property not subject to the liens was added by the amendment of 1911. It merely put in statutory form the previous decisions of this court. In other respects the section is substantially the same as it was prior to said amendment. It has been held that the proceeding authorized by this section is substantially an equitable garnishment by the claimant of the fund due to the contractor from the owner (Bates v. Santa Barbara, 90 Cal. 543 [27 Pac. 438]), and that it secures to the person giving the notice a claim on the funds due which is paramount to that of the contractor, or any person claiming under him by assignment or attachment made after the service of such notice (First National Bank v. Perris Irr. Dist., 107 Cal. 55 [40 Pac. 45]; Newport, etc., Co. v. Drew, 125 Cal. 585 [58 Pac. 187]; Long Beach School Dist. v. Lutge, 129 Cal. 409 [62 Pac. 36])."

To the foregoing cases may be added Clark v. Beryle, 160 Cal. 311, 116 Pac. 739; Dorris v. Alturas School Dist., 25 Cal. App. 30, 142 Pac. 795; Suisun L. Co. v. Fairfield

School Dist., 19 Cal. App. 587, 595, 127 Pac. 849.

Miles v. Ryan, supra, involved the priority of right between the labor claimant and an attaching judgment creditor who had served his notice of garnishment or attachment upon the owner before the laborer had served his notice upon the owner. The court held that the attachment took priority. But it very clearly appears that, had the laborer's notice been served before the attachment, his claim would have been held good against the fund in the hands of the owner belonging to the contractor by reason of the notice and section 1184.

[2] It is further contended that the remedy given laborers and materialmen to resort to the bond given under section 1183 is exclusive. In the Diamond Match Co. Case, supra, it was shown that the money garnished by means of the notice does not depend upon the establishment of a lien but is a cumulative remedy. The lien provided for is found in section 1183, as is also the bond required to be given. The one is no more exclusive than the other, nor is the remedy by notice less cumulative to the one than to the other. Goldtree v. City of San Diego, 8 Cal. App. 505, 97 Pac. 216. See a very careful and timely opinion as to the purpose and scope of the amendatory act of 1911 in Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15.

The writ is denied.

We concur: BURNETT, J.; HART, J.

(33 Cal. App. 365)

PEOPLE v. SLAUGHTER. (Cr. 368.)

(District Court of Appeal, Third District, California. April 4, 1917. Rehearing Denied by Supreme Court June 2, 1917.)

1. Indictment and Information 🔑75(2) — Sufficiency—Clerical Error.

An indictment charging that accused wrongfully, etc., "accomplish" an act of sexual intercourse, etc., is not erroneous because not using the words "did accomplish."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 204.]

2. Jury 🔑70(6)—Special Venire.

Under Code Civ. Proc. §§ 226, 227, authorizing additional jurors to be summoned when the regular venire is insufficient, the court in a criminal case may summon special venire before the regular jurors are exhausted, where all regular jurors were examined before names were drawn from the special venire.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 322, 330.]

3. Jury 🔑133—Competency of Jurors.

In a criminal case doubt as to a juror's competency should be resolved in defendant's favor.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 586–598.]

4. Jury 🔑110(14) — Objection to Juror — Failure to Peremptorily Challenge.

Defendant in a criminal case cannot complain because a juror was accepted over his objection where he might have eliminated him by a peremptory challenge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 520.]

5. Jury 🔑103(3) — Competency of Juror — Formation of Opinion.

Accepting a juror in a criminal case who stated that he could lay aside an opinion derived from newspaper reports and short conversations and decide the case on the evidence *held* not reversible error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 463.]

6. Witnesses 🔑396(1) — Explanation of Contradictory Statements.

In prosecution for unlawful sexual intercourse, prosecutrix may explain circumstances under which she wrote letters and signed an affidavit contradicting her direct testimony and elicited upon her cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261, 1262.]

7. Criminal Law 🔑680(1)—Reception of Evidence—Order of Proof.

Receiving evidence of other similar acts out of order is not reversible error where the particular offense relied on for conviction was stated at the beginning of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1609, 1613.]

8. Criminal Law 🔑822(1)—Instructions—Construction as a Whole.

An instruction authorizing conviction if the offense occurred at any time on a specified day is not erroneous because there was evidence of two offenses on such day, where another instruction specifically limited such general language to one of such offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994, 3158.]

9. Criminal Law 🔑789(14)—Instructions—Reasonable Doubt.

An instruction that other similar acts may be considered to determine whether it was probable the act charged was committed is not erroneous because authorizing a conviction upon a probability of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1919, 1960, 1967.]

10. Criminal Law 🔑789(4)—Instructions—Reasonable Doubt.

An instruction that one witness' testimony may establish any fact necessary to be proved if believed beyond a reasonable doubt is not erroneous, although awkwardly expressed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1880, 1909, 1960, 1967.]

11. Criminal Law 🔑829(9)—Requested Instructions—Presumption of Innocence.

Refusing a requested instruction in a criminal case that the presumption of innocence is an "instrument of proof" *held* not erroneous, where another instruction clearly charged that such presumption is not a mere form, but attends defendant through all stages of the trial, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

12. Criminal Law 🔑859 — Trial — Jury's Requests to Have Evidence Read.

Where jurors in a criminal case after retiring requested that certain evidence be read them, the reporter was instructed to locate it, and jury told how long it would probably take, and they expressed opinion that they might agree without such evidence, which they did, defendant's rights under Pen. Code, § 1138, providing that information desired by jury must be given in presence of defendant, etc., are not violated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1600, 2064.]

13. Rape 🔑54(1) — Sufficiency of Evidence—Uncorroborated Testimony.

A prosecutrix's uncorroborated testimony may sustain a conviction for unlawful sexual intercourse.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 83.]

14. Rape 🔑52(1) — Sufficiency of Evidence.

Evidence consisting chiefly of a 15 year old prosecutrix's testimony, which was impeached by contradictory letters and affidavit and others witnesses, *held* to sustain a conviction for unlawful sexual intercourse.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71, 72, 76.]

15. Criminal Law 🔑1158(1)—Appeal and Error—Reviewing Evidence.

Const. art. 6, § 4½, prohibiting reversals unless court concludes the error resulted in a miscarriage of justice after examining the entire case, including the evidence, does not authorize the appellate court to weigh the evidence and judge the credibility of witnesses in a criminal case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3070, 3071, 3074.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Madison Slaughter was convicted of unlawful sexual intercourse, and appeals. Affirmed.

Rehearing denied by Supreme Court. See People v. Davis, 147 Cal. 346, 81 Pac. 718; Burke v. Maze, 10 Cal. App. 206, 211, 101 Pac. 438, 440.

Wm. H. Schooler, of San Francisco, and Madison Slaughter, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. We are not unmindful of the grave importance of the questions involved in the determination of this appeal. We are appreciative of the significance of the various circumstances connected with the charge and the trial to which our attention has been earnestly invited. We have given serious attention especially to the reiterated and emphatic declaration that appellant did not receive that fair and impartial trial which is the unquestionable right of every American citizen, and we have considered as carefully as possible the various specified particular grounds for that contention. It is undoubtedly true that a charge of this kind is likely to make such an impression on the minds of many people in the vicinity as to unfit them for that calm, impartial, and deliberate action which the law demands of every juror. The mere accusation when given wings, as usually happens in such cases, excites the prejudice, arouses the resentment, and disturbs and impairs the judgment of a part of the community, and there is danger, of course, that the unfair and hostile attitude toward the defendant thereby engendered may reach the jury box and even the judge upon the bench. The fact that the one accused is a minister of the gospel intensifies the situation and increases the probability of unfavorable and malevolent impressions and sentiments. Even upright and righteous persons with a due conception of the importance and sanctity of this high calling are sometimes too easily moved to give credence to a story impugning the chastity of one filling the holy office of the ministry, and therefore also too ready to contribute to the creation of an unfavorable environment for the dispassionate determination of the guilt or innocence of the accused. It is more emphatically true that in every community there are some small souls who by reason of their sinister and malignant opposition to the cause of religion and through a depraved desire to cripple the efficiency of religious efforts and to destroy confidence in its advocates and promoters, with avid glee welcome every imputation, especially of the kind involved herein, against the character and standing of a minister of the gospel. These people generally also hasten to prejudge the case and with feverish anxiety seek to inoculate as many as possible of the community with the virus of their own prejudice and hatred. These and other unfavorable considerations were, no doubt, at work in the community wherein the defendant was tried and convicted, and probably quite a number of the citizens had irrevocably determined his guilt before a witness was heard in court.

However, we feel satisfied that the vast majority of the people of Butte county, moved by the spirit of fair play and a desire that there be no unwarranted interference with the orderly processes of the law, were in that mental and moral frame of mind essential to the impartial administration of justice as between the plaintiff and defendant.

But, what is more to the point, we are convinced from an examination of the record that there was no such prejudice or hostility on the part of the trial judge or of any of the jurors nor was there any misconduct on the part of either nor any such acts or omissions during the course of the trial as would legally justify this court in setting aside the verdict. We go further, and say that in none of the contentions of appellant do we find sufficient merit to warrant any interference with the judgment of the lower court, as will more fully appear while we proceed to notice the specific points which are urged upon our attention with great ability and impressiveness in the four different briefs filed in his behalf, three of which bearing his own signature were undoubtedly prepared by a former astute member of the bar now sojourning at San Quentin.

[1] The indictment is grammatically defec-

tive in using the word "accomplish" instead of "accomplished" or "did accomplish," but while the district attorney thus manifested a degree of carelessness it is perfectly apparent that the defendant suffered no prejudice by reason of the defective averment. The charging part of said instrument is as follows:

> "The said Madison Slaughter on or about the 7th day of November, A. D. 1915, at the county of Butte and state of California, and before the finding of this indictment wrongfully, unlawfully, willfully, and feloniously accomplish an act of sexual intercourse with one Gertrude Lamson, * * * a female under the age of 18 years, to wit, the age of 15 years," etc.

If any one at all familiar with the English language could not understand that the intention was to charge that the said Madison Slaughter "did accomplish" the act on said date, his sanity would be the proper subject for investigation. And yet, with great earnestness and apparent sincerity, it is argued that the cause should be reversed for this verbal inaccuracy. We are spared any further comment, however, for the reason that the identical point was decided in the case of People v. Haagen, 139 Cal. 115, 72 Pac. 836, wherein it was said:

> "We do not think there is any merit in this contention."

[2] The jurors drawn on the regular venire were insufficient to complete the jury, and a special venire was issued. This is made the subject of criticism and complaint by appellant, but the practice is authorized by the Code and sanctioned by the decisions of the courts. Sections 226 and 227, Code Civ. Proc.; People v. Sehorn, 116 Cal. 508, 48 Pac. 495; People v. Suesser, 142 Cal. 359, 75 Pac. 1093. In the Sehorn Case it was said:

> "There may, no doubt, be cases where, as was said in Levy v. Wilson, 69 Cal. 111 [10 Pac. 272], the drawing of the entire jury from the box would be 'more consistent with the correct administration of justice'; but it has frequently been held, with respect to both grand and trial jurors, that after the venire drawn from the regular jurors had been exhausted the court may order additional jurors to be summoned from the county at large, and that such proceeding is valid—at least, unless there has been a gross abuse of discretion."

There is nothing in the case here to show that the discretion thus vested in the trial court was not properly exercised. No doubt, the special venire was ordered to save time and expense, and we are not authorized to conclude that appellant suffered any prejudice thereby. The fact that the order was made before all the jurors on the preceding venire had been examined is of no moment, since such examination was completed before any name was drawn from the special venire. The procedure was, at most, an irregularity which worked no damage.

[3-5] Complaint is made that the court improperly overruled defendant's challenge to certain jurors for bias. Of the 12 selected it is not pretended that such objection could be made to more than two. These are John Finning and T. R. Boalt. As to the others there can be no possible controversy. The court might well have excused Mr. Finning, although he declared that he could and would disregard his opinion and be controlled entirely by the evidence and the instructions. However, his was a doubtful case, and there should be no hesitation in resolving such doubt in favor of the defendant. But, for the reason that he accepted the juror while still having five peremptory challenges, appellant is in no position to complain of the ruling. The point is covered and controlled by the cases of People v. Durrant, 116 Cal. 196, 48 Pac. 75; People v. Schafer, 161 Cal. 576, 119 Pac. 920; Scragg v. Sallee, 24 Cal. App. 139, 140 Pac. 706; and People v. Perry, 25 Cal. App. 338, 143 Pac. 798. Therein this and the Supreme Court approved the doctrine stated in Thompson on Trials, § 120, as follows:

> "It is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges; if his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means, he has no grounds of complaint."

It is true that his peremptory challenges were finally exhausted, but not until he had accepted Mr. Finning, and he was sworn to try the case. In People v. Riggins, 159 Cal. 113, 112 Pac. 862, relied upon by appellant, it appears—

> "not only that the defendant exhausted all his peremptory challenges, but that by reason of the rulings of the court he was forced to accept McKeen, a juror objectionable to him and challenged by him for cause, and also that he asked the privilege of challenging McKeen peremptorily, and that his request was denied."

The rule is one not only of expediency, but of justice. The peremptory challenge affords an auxiliary or additional method for getting rid of an objectionable juror. If the defendant feels that a juror is disqualified, he may challenge him for cause, but the court may not concur in that view. If so, and the limit of peremptory challenges has not been reached, the defendant must avail himself of that remedy, or else be deemed to have waived his objection. When the peremptory challenges have been exhausted, the situation, of course, is quite different, as he then has only the one remedy, and in case of an adverse ruling he may have it reviewed by the appellate court. Such is the instance of juror Boalt. On his direct examination he testified that he had an opinion in regard to the case, and, asked as to how it was formed, he answered, "By newspaper talk and talking on the streets;" and, in reply to the question, "In what other manner if any was this opinion formed?" he said, "I have heard a few words that took place here; I heard of some parties who talked with parties that were here who quoted me about ten words." If it be argued that he meant by these answers that his opinion was influenced by the ten words that had been repeated in his presence, we cannot assume that they were prejudicial to appellant, since it does not appear what they were. Besides, in the further course of the examination he stated that his opinion was founded entirely upon newspaper reports and street gossip, and still further that his opinion was based only upon "what little I read in the paper." It was therefore for the trial court to determine what was the source of his opinion and the decision is binding upon this court. Indeed, the examination of the juror presents an instance for the application of the rule laid down in People v. Ryan, 152 Cal. 371, 92 Pac. 853, and People v. Edwards, 163 Cal. 752, 127 Pac. 58, and other decisions. In the former it is said:

> "The trial court must decide which of the answers most truly shows the juror's mind."

Indeed, so far as we can judge from the cold record, Mr. Boalt was unbiased and entirely disposed to be fair and just. He declared several times that he would lay aside any opinion that he might have and be guided entirely by the evidence and the instructions of the court, and that he would act fairly and impartially in the case. As we read the record, we are satisfied there is no just ground for complaint as to the selection and impanelment of the jury.

[6] Among the many questions presented as to the admissibilty of evidence, we notice first the ruling of the court in relation to the explanation by the prosecutrix of an affidavit and two letters made and written by her. These instruments were secured by the defendant and offered in evidence on her cross-examination.

The first letter was addressed to Mr. Kennedy, one of the counsel for appellant, was dated February 19, 1916, and was as follows:

> "I am writing this of my own free will, and under no one's influence. I have done a very great wrong which I am very sorry for and want to correct. I have told an outrageous lie. I don't know whether any one will speak to me or not; I hope they will. That what I have charged against Mr. Slaughter is an absolute lie, which I want seen to and done away with soon as possible. And I will say with the oath of God I will never tell another lie to any one of any kind again as long as I lives. I was very angry when I told this lie and the second one I told it to encouraged me so much I kept it up. Now I deny it, and deny it forever. Remember no one has influenced me in any way only to tell the truth, unless it was the partys that got me in this mess."

The other letter was directed to "Mr. and Mrs. Slaughter and Girls," and was of similar tenor. It concluded with the declaration:

> "I am sorry to the bottom of my heart and soul and experience has been a very dear teacher to me and I mean to begin over again and live a new good right life."

The affidavit is clearly in the language of an expert, and not such as would have been chosen by the prosecutrix. Therein, among others, were the statements that said letters contained the truth; that she was not influenced by Mr. Kennedy to write the same, but did so of her own free will; that said statement was made to right a great wrong; that she never had sexual intercourse with defendant at any time or place, and that he had always acted toward her "in a proper, gentlemanly, and straightforward way"; that the affidavit was made to rectify a great wrong, and, while made at the request of Guy R. Kennedy, it "has been read to me, and the entire contents of the same is the truth, the whole truth, and nothing but the truth." The witness also testified on said cross-examination as to declarations she had made to Mr. Schooler, one of the attorneys for appellant, denying any improper relations with Mr. Slaughter. Over strenuous objections the witness was permitted to explain these various statements and to detail the circumstances under which they were made. The purpose was, of course, to show the undue influence that was exerted in behalf of appellant and to minimize or nullify the effect upon her credibility of her different contradictions. It was the theory of the plaintiff that a conspiracy existed in which the mother, father, and defendant with his attorneys participated, designed to coerce the witness into a renunciation of her charges and an abandonment of the prosecution. On redirect examination the people therefore, in support of the contention, were permited to show that she was told her mother's health was bad, and that she would cause her death if she persisted in the prosecution; that defendant himself brought her father, Frederick Lamson, to his daughter, and the father said: "There, see what you have done; you will kill your mother"; that one of the defendant's attorneys came in the nighttime to her home to use his influence upon her; that her mother told her the defendant should not be prosecuted; that statements were made by defendant's attorneys calculated to induce the belief that she would get into trouble if she insisted upon the charge against Mr. Slaughter and some other circumstances of similar tenor were related by the witness. To illustrate this line of examination we may set out her statement of what her father said to her:

> "He had told me that he believed my story and that he had believed it all along, but for me not to say anything or not to tell mamma that he did, or to tell anybody, and during the time mamma was having these spells he said: 'Whatever she said to answer "Yes" and never to dispute her in anything,' and he said that I would probably be the cause of her death, anyway."

We think there was no violation therein of the familiar rule permitting a witness to explain contradictory statements. It would be strange if her mouth were closed as to the circumstances and inducements of the transaction called out on cross-examination for the purpose of impeaching her veracity and destroying her credibility. Some portions of said testimony may have been objectionable, but there was no motion to strike them out, and the questions themselves were entirely proper. Of course, the only purpose of such examination is as we have indicated, and her recital of certain statements made to her was not to be considered as evidence of the truth of said declarations. If this was not made entirely clear to the jury, it was the fault of appellant in not requesting a specific direction to that effect.

In People v. Smallman, 55 Cal. 185, on the cross-examination of the prosecuting witness, defendants, for the purpose of affecting her credibility, offered an affidavit made and signed by her, but written by one Carey, who presented and read it to the witness. On the direct examination the witness was asked as to the circumstances under which the affidavit was made, and what conversation she had with Carey about it. The defendants objected to any conversation of witness with Carey in relation to this affidavit which was had in the absence of the defendant. The court overruled the objection, and admitted the evidence. The Supreme Court said:

> "We see no error in this ruling. It was proper to ask the witness as to every matter which occurred in relation to and in connection with, the affidavit."

In People v. Wessel, 98 Cal. 352, 33 Pac. 216, the court said:

> "To contradict the testimony of the prosecutrix, who was a child of eleven years, the defense read her testimony before the committing magistrate, in which it was claimed she had made statements inconsistent with her evidence on the trial. Thereupon the prosecution recalled the prosecutrix and asked her to explain the discrepancies. This course was too plainly proper and of too common practice to justify the presentation of the question here."

In Bradford v. Woodworth, 108 Cal. 684, 41 Pac. 797, it was said:

> "It was proper to permit plaintiff to explain in rebuttal the telegram which had been introduced by the defendant to contradict his testimony."

See, also, People v. Glover, 141 Cal. 233, 74 Pac. 745; Risdon v. Yates, 145 Cal. 212, 78 Pac. 641; Hoggan v. Cahoon, 31 Utah, 172, 87 Pac. 164; Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494.

The prosecution adopted a circuitous method of obtaining the explanation and asked of the witness many unnecessary questions, but circumlocution or volubility is not necessarily error. The witness was not lacking in intelligence or assurance, and a simple question as to why she made such contradictory statements would probably have produced the explanation and avoided the necessity for such protracted and wearisome examination. However, the defendant opened the door for an investigation of the reasons that moved and influenced the witness to make such contradictory statements, and we find therein no prejudicial error. The cases cited as to this point by appellant do not sustain his contention.

In Wagner v. People, 30 Mich. 384, the evidence brought out on the cross-examination was incompetent, although admitted without objection, and it was correctly held that this hearsay evidence was not subject to modification or explanation on the redirect examination.

The later Michigan case, People v. Hanifan, 98 Mich. 32, 56 N. W. 1048, supports respondent's position here. Therein it was held that:

> "Where, on the trial of a respondent for larceny, his counsel show on the cross-examination of one of the people's witnesses that the witness had some trouble with the respondent subsequent to the alleged larceny, and that he would like to get even with respondent, it is proper to permit the witness, on his redirect examination, to explain the nature of the trouble."

In Atherton v. Defreeze, 129 Mich. 364, 88 N. W. 886, where the relevant part of a conversation was received, it was held that on cross-examination it was not proper to introduce another part of the conversation which had no connection with the issue involved, and had no bearing whatever upon the part that was relevant.

The case of Garey v. Nicholson, 24 Wend. (N. Y.) 350, is of similar import. Referring to the rule that, where a part of a conversation is introduced in evidence by one party the other has a right to call for the whole conversation, the Supreme Court of New York said:

> "That, however, must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification, and, if not so restrained, might operate as a waste of time. Other subjects might be introduced having no connection with the subject-matter of the suit."

Commonwealth v. Keyes, 11 Gray (Mass.) 323, is to the same effect. In reference to the complaint of the defendant that she was debarred from proving the residue of a conversation of which a part had been produced by the prosecution against her, it was declared by the Supreme Court of Massachusetts:

> "The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of inquiry or investigation. Every remark or observation made upon those topics is to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied. 1 Green. Ev. §§ 201-218."

A great many other rulings of the court as to the admissibility of evidence are severely criticized by appellant. We do not feel called upon to notice them specifically, although they have been carefully examined. Some of them, it may be said, are of doubtful propriety, but it could hardly be otherwise, considering the mass of testimony and the multitude of objections. However, as before stated, we find in none of the rulings any warrant for a reversal of the judgment Each side was very swift to object to questions propounded by the other, and thereby the time of the trial was greatly extended, and the labor of the trial judge was largely increased. In the heat of the contest, also, counsel indulged in frequent interruptions and in occasional acrimonious suggestions which, no doubt, tried the patience of the court, but we believe the trial was conducted with due regard for the proprieties of juridical procedure.

[7] That other acts of a similar nature were permitted to be shown out of order was not error in view of the fact that at the beginning of the trial the district attorney made and stated the election of the prosecution as to the particular offense for which a conviction was asked. People v. Koller, 142 Cal. 624, 76 Pac. 500.

[8] Earnest objection is made to this instruction given by the court:

> "The indictment in this case charging defendant with the offense for which he is now on trial was filed January 31, 1916. In that indictment it is alleged that the offense was committed by defendant on or about the 7th day of November, 1915, and before the finding of the indictment. It is not necessary to prove the commission of the offense now on trial at the precise time or date alleged in the indictment, but it is sufficient to prove its commission at any time on November 14, 1915, if the evidence proves beyond a reasonable doubt that defendant on said last-mentioned date has been guilty of the offense of rape charged in the indictment."

It is not claimed that the people are confined to the precise date contained in the indictment, and it is admitted that ordinarily the instruction would be unobjectionable, but it is insisted that by reason of the fact that there was evidence of two separate offenses on said date of November 14th the instruction authorized a conviction if a part of the jury believed that one and the remaining jurors believed that the other was established, although there was no concurrence of the 12 as to to either of said declared offenses. There would be much force in this criticism were it not for the fact that this instruction was qualified by another reading as follows:

> "I will instruct you now that wherever in these instructions I have referred to the act as charged of November 14, 1915, I have referred to the act charged as having been committed on a chair in the dining room as charged in the evidence as the only act upon which he is now on trial."

This was not inconsistent with the former, but a definite limitation of the more general language, and it removed any probability of the result apprehended by appellant. People v. Besold, 154 Cal. 370, 97 Pac. 871.

[9] In instruction No. 42 the jury was directed that they might consider previous acts similar to the one charged in the indictment as tending to show the disposition of the defendant towards the prosecutrix and "for the purpose of ascertaining whether it is or is not more probable that the act of sexual intercourse charged to have been committed on November 14, 1915, was committed and for no other purpose." There is no merit in the contention that thereby the jurors were instructed that they might convict upon a probability of guilt. It signified no more than an instruction that they might consider such evidence as bearing upon the question of appellant's guilt or innocence of the charge made in the indictment. If they were to consider it at all, it is difficult to understand how it could be regarded except as relating to the probability of guilt. As to the rule requiring the jury to be convinced beyond a reasonable doubt of the defendant's guilt in order to convict they were fully and repeatedly instructed. It may be said that a similar instruction to the one before us was approved in People v. Mathews, 139 Cal. 530, 73 Pac. 416.

[10] Instruction No. 40 was to the effect that in such prosecution the testimony of one witness is sufficient to establish any fact necessary to be proved if believed by the jury beyond a reasonable doubt. There can be no fault found with the principle therein declared, although it is somewhat awkwardly expressed. The jury, though, could not have been misled by it.

[11] The defendant requested an instruction as to the presumption of innocence. Therein was an expression that "this presumption is an instrument of proof," and it is contended that this specific affirmation ought to have been brought to the attention of the jury. It is perfectly clear, however, that the consideration which should be accorded to this presumption was fully set forth in several instructions given by the court. That it was not designated as an "instrument of proof" or "evidence" is a mere verbal criticism without merit. People v. Linares, 142 Cal. 17, 75 Pac. 308; Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. The fact is that the rejected instruction would have added nothing to the following which was given:

> "The jury is instructed that the defendant comes before you clothed with the presumption of innocence, and that such presumption is not a mere form to be disregarded by the jury at its pleasure, but it is a substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases, and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit him, unless the evidence in this case convinces you of his guilt as charged beyond all reasonable doubt; and you are compelled under your oaths to carry this presumption in your minds during every stage of the trial, and give the defendant the benefit of it until such time as you may be convinced beyond all reasonable doubt of his guilt, as charged in the specific offense elected by the prosecution, that of November 14, 1915."

The foregoing was given at the request of appellant, and leaves nothing to be desired on the subject. Indeed, the jury were fully and correctly instructed on every material phase of the case, and no just criticism can be made of the court in reference to the instructions given or refused.

[12] After the submission of the cause and the jury had deliberated for several hours they returned, and, through their foreman, made a request to have a portion of the testimony read. The proceedings in relation to it are shown by the record as follows:

> "Foreman Darrell: If the court please, we wish to apologize to your honor and the attorneys and the court officials and others present

for causing you to convene court at this time, but there are certain points in the evidence upon which we do not agree, and we deem it necessary that the evidence be read. The clerk has the memoranda for the evidence we desire. The Court: Yes; I see. Mr. McCallum, you have seen that memoranda, have you? Show it to Mr. Schooler. (At this time Mr. Schooler examines note containing request for testimony.) The Court (to the reporter): How long would it take you, Mr. McCallum, to prepare yourself to read that to this jury? (The testimony requested by the jury to be read included the testimony of Gertrude Lamson, cross and direct, and that of Thomas Whidden and Mrs. Whidden.) (At this time the reporter stated that in order to go over the entire direct and cross examination of Gertrude Lamson, of Thomas Whidden and of Mrs. Whidden, which testimony extended continuously over a period of approximately four days, that he might be able to locate the particular testimony desired in an hour, but in order to look over all the testimony mentioned by the jury and to locate it in its entirety with the required certainty necessary, it would take perhaps several hours, and that to read the entire testimony mentioned, thus entirely avoiding the danger of omitting any portion of that mentioned by the jury, that it would require at least three days' time.) Foreman Darrell: If the court please, it is just a slight portion of the evidence of the witness referred to in the memoranda we desire. The Court: I see, but we have to give the reporter some time to look it up. I will have to give him some time to report to me that he has found it. You see that big stack of books before him there, gentlemen; they contain the evidence that he has to seek through and get the line and the sentences that you want in order to cover your request fully. Foreman Darrell: Providing we determine to get along without this testimony, if, after debating the matter further, we can proceed without this particular evidence, then what? The Court: It is for you, gentlemen of the jury, when you get ready to report a verdict, if you find a verdict, to notify the officers, and they will notify the rest of us. Foreman Darrell: My point was this, that I do not believe that those who desire the reading of this portion of the testimony—in fact, I am sure that they were not aware that it would take any considerable time to produce that. There was simply a question that arose upon which we could not agree. As stated in the memoranda, we were under the impression that it required only a few moments, as it was a very small part of the evidence that was given by those three parties that we wanted. The Court: I do not know of anything to do only to let you go to your jury room and let the reporter go to work and find the testimony that you want, and when he finds it we will report to you. You can now return to your jury room. (In accordance with the foregoing proceedings, after the jury retired again to their jury room to deliberate further, the reporter proceeded to locate through the testimony of the foregoing named three witnesses, covering some 1,000 or 1,200 pages of shorthand, the portions thereof covered by the memoranda submitted to the court by the jury and awaited a further call from the jury.) At this time, to wit, 9:10 o'clock a. m. on this 13th day of May, 1916, after having been out all night, the jury returned into the courtroom, and the following proceedings are had."

Then follows the announcement of the verdict in the usual manner without any further reference to said testimony.

Section 1138 of the Penal Code provides:

"After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called."

It is the claim of appellant that to his prejudice he was deprived of the substantial right to which he was entitled by this statute, and therefore his conviction should be reversed. His contention is not supported by the record. The statute must, of course, have a reasonable construction. No one but the reporter could furnish the information, and he could not do so without laborious investigation. He made the effort and located the testimony, but at what time he was prepared to read it the record does not show. It may have been after the verdict was reached by the jury. At any rate, there was no disposition apparently on the part of said reporter or of the trial judge to withhold from the jury what they requested and preparation was made to comply with the request. But it is manifest that the jury, after further consultation, concluded that they did not need the additional information and they could and did agree upon a verdict without waiting to have the said testimony read. As seen, it had been stated by the foreman that they might thus be able to agree and we must conclusively presume, in the absence of any showing to the contrary, that they were entirely satisfied to forego the reading, believing that it would not affect their conclusion as to the guilt of the defendant. There is nothing in the matter to indicate any improper conduct on the part of any officer of the court or of the jury, nor can it be said that any harm was thereby done to appellant.

[13-15] It is insisted with frequent repetition that there is no proof of the act upon which the district attorney elected to rely. In this appellant is entirely mistaken. The evidence is set out in the brief of the Attorney General. The salacious story need not be repeated. The testimony of the prosecutrix is direct and positive as to the consummation of the offense at the time and place alleged. Her credibility was, of course, matter of argument before the jury and the trial court. The considerations suggested affecting her veracity were, no doubt, forcibly presented at the proper time in that tribunal, but they failed of their purpose, and we are in no position to say that she did not tell the truth when she attempted to relate the occurrence in question.

Appellant is also in error when he asserts that the uncorroborated testimony of the prosecutrix is insufficient to warrant a conviction. There are some early decisions to that effect, but such is not the law as now recognized in this state.

In People v. Logan, 123 Cal. 414, 56 Pac. 56, it is said:

"Upon the trial of a defendant accused of rape, if the evidence of the prosecuting witness is sufficient to support the verdict, the truth or falsity of her evidence is a matter for the jury, and a verdict of conviction will not be disturbed, notwithstanding conflicting evidence for the defendant, and notwithstanding the circumstances and conditions forming part of the res gestæ of the offense are unusual, and not entirely convincing."

It is true that her testimony should be clear and convincing, but it is for the jury and the trial judge to determine whether it fulfills that requirement, and the record here shows that their conclusion was against the contention of appellant. We may say also that there was some circumstantial corroboration of the testimony of the prosecutrix to which, no doubt, some heed was given. Manifestly, the jury should exercise the greatest care and circumspection in considering the evidence in cases of this character, as was aptly said in People v. Price, 26 Cal. App. 550, 147 Pac. 591. They were so instructed in the present instance, and we cannot say they failed to observe the admonition.

Many circumstances tending to discredit her testimony are pressed upon our attention. It is urged that she was strongly impeached and discredited by her own voluntary and repeated repudiation of the charge, that it is so inherently as well as circumstantially improbable, and the great preponderance of the evidence is to the effect that the testimony given by her on the trial of the case is absolutely false. Hence it is argued that the verdict must be the result of passion and prejudice, and "a conviction upon such evidence would be a blot upon the jurisprudence of the country and a libel upon jury trials." People v. Hamilton, 46 Cal. 540.

That she had made contradictory statements was, as we have seen, the subject of explanation, and the value of it as a probative fact was for the jury. That on behalf of the defendant there was much evidence in irreconcilable conflict with the testimony of the prosecutrix cannot of itself justify us in setting aside the verdict. These considerations are amply discussed in People v. Kaiser, 119 Cal. 458, 51 Pac. 702, People v. Lewis, 18 Cal. App. 364, 123 Pac. 232, People v. Preston, 19 Cal. App. 679, 127 Pac. 660, People v. Crawford, 24 Cal. App. 403, 141 Pac. 824, and People v. Rongo, 169 Cal. 75, 145 Pac. 1017, and no further comment is deemed expedient. But if we could say that her story is inherently improbable, we should, of course, have no hesitation in branding it as false and malicious and awarding appellant the relief he seeks.

In support of his contention that her charge is incredible, appellant calls attention to the peculiar and unusual circumstances attending each occasion of immorality as related by the prosecutrix, and the improbability of the story is enhanced and emphasized, so it is claimed, by—

> "the established good character of the defendant for decency and morality, prohibiting the belief that he did the monstrous and depraved things the prosecutrix in her destructively self-contradictory testimony says he perpetrated against her virtue. Surely the defendant's good character as a minister of Christianity established by 33 years of constant devotion to the maintenance and advocacy of religion and morality should be and is a powerful circumstance indicating the great improbability of the accusation that has been made against him at the sinister instigation of his enemies, by a woman who it must be conceded is not 'above suspicion and reproach.' Says a learned court: 'Character under all circumstances is the best earthly inheritance. It is a shield to the innocent when unjustly accused.' United States v. Emerson,. 6 McLean, 406 [Fed. Cas. No. 15,051]."

The considerations thus forcibly set forth are of great significance and potency, but we need not dwell upon them at length. As to the peculiar circumstances of the various delinquencies, we may say they do not stamp the recital of the prosecutrix with inherent improbability, but they furnish the basis for a persuasive argument against the truth of her statements, and, no doubt, this feature of the case was conscientiously considered by the jury. It does, indeed, seem strange and almost incredible that any man in his senses would commit such an offense under such circumstances, but we cannot say that it is so unbelievable that the jury had no legal right to accept the story told by the prosecutrix. People v. Moore, 155 Cal. 241, 100 Pac. 688. The profession to which he belonged was a circumstance also vastly in favor of appellant's innocence. No higher calling ever enlisted the services of mankind, and it must be said that nearly all who are engaged in this great work are worthy of the respect and confidence of all upright people, but they are subjected to peculiar temptations along the line of this regnant impulse, and occasionally one falls, and some of them, of course, are "wolves in sheep's clothing." We need hardly say that there are many historical examples of similar and other crimes committed by persons of high standing in the community under circumstances more strange and startling than are revealed in the case before us. It is especially true of this character of offenses. It is the old story, as old as the history of the race, of man yielding to the almost irresistible coercion of the strongest instinct of animal life. Indeed, we have the authority of Paul, the greatest preacher that ever lived, that there is a constant strife between the carnal and the spiritual forces for supremacy in man's nature, and he himself found it necessary to be constantly on his guard lest he become a castaway. Cases equally as strange have come under the observation of all of us, and many of them could be readily recalled.

Of course, this might have been an unjust conviction. Mr. Slaughter may have been the victim of a foul conspiracy. If so, a monstrous wrong has been committed, but we are not in a position so to determine or so to declare. The responsibility of passing upon such considerations is not lodged with us. Finding, as we do, sufficient evidence to support the verdict and an absence of prejudicial error in the record, and having no means of determining that there was a miscarriage of justice, we can do nothing else than affirm the judgment; for it is not true, as contended by appellant, that under Amendment 4½ of article 6 of the state Constitution we are authorized to weigh the evidence and judge of the credibility of the witnesses, and thus virtually try the case anew. That amendment has been the subject of frequent exposition, and we need not add to the decisions. However, we may say that in view of the record it is impossible for us to be "satisfied" that an injustice was done to the defendant. We cannot say, as declared by appellant, that the verdict was the result of "the impassionate clamor of the mob, of the intemperate indignation of the multitude," or that it was influenced by "the mad assaults of a sensational and hysterical public press," but we are required to hold, rather, that it was the conscientious judgment of a jury anxious to do right and to vindicate the law, like "the true judicial opinion" of which appellant speaks, resembling "the magnificent nobility of the great ocean in its mighty grandeur, calm and dispassionate in rest, eternal in power." It is true that the law "condemns with intransigeant denunciation a verdict or decision that is induced by passion or prejudice and exacts from the courts a stringent supervision, as well as a liberal exertion of remedial power to redress a grave wrong destructive of justice and the supremacy of the law." But the mandate is equally insistent that the courts content themselves with the exercise of the power committed to their hands by the Constitution and the statutes, and that they refrain from an unwarranted interference with the prerogatives and duties assigned to other agencies by the deliberate action of the sovereign power of the state.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(33 Cal. App. 291)

McGINN v. REES et al. (Civ. 1849.)

(District Court of Appeal, First District, California. Dec. 30, 1916. Rehearing Denied by Supreme Court May 21, 1917.)

1. Appeal and Error ⚷865—Question Presented—Motion to Set Aside Judgment.

Appeal from order refusing motion to set aside default judgment not made under Code Civ. Proc. § 473, but on ground of lack of jurisdiction, presents only the question of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3462–3466.]

2. Judgment ⚷138(3)—Default—Vacation—Failure to Serve Complaint with Summons.

Failure to serve copy of complaint with summons, as required by Code Civ. Proc. § 410, will warrant vacation of default judgment for lack of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 254.]

3. Judgment ⚷138(3)—Default—Vacation—Variance between Complaint and Copy Served.

The fact that copy of complaint served with summons differed from complaint filed in omitting one of the names of the defendants, where this was stated in the summons, did not violate Code Civ. Proc. § 410, requiring service of copy of complaint with summons, so as to warrant vacation of default judgment for lack of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 254.]

4. Process ⚷156 — Defective Service — Time for Objection.

If defendant desired to test sufficiency of service of copy of complaint with summons, she should have appeared and made appropriate motion at the trial, instead of waiting until judgment was taken against her and then claiming it a nullity because of minor differences between complaint filed and copy served.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 211.]

5. Process ⚷158—Service—Motion to Set Aside.

A motion to set aside service of summons will be denied unless defendant's substantial rights were affected.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 218–220.]

6. Process ⚷164(3)—Amendment to Proof of Service—Fictitious Defendant.

Where complaint named a defendant as John Doe R. and default judgment was taken against Mark R., being defendant's true name, and he being served with process, motion to amend proof of service to correspond with the judgment should have been granted.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 245, 246.]

7. Judgment ⚷18(3) — Pleading to Support—Name of Defendant — Failure to Amend—Fictitious Defendant.

The fact that complaint was not amended so as to state defendant's true name, where defendant was sued under a fictitious name, was a mere irregularity, and did not invalidate the judgment, where the real defendant was served with process, and court had jurisdiction of subject-matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 36.]

8. Judgment ⚷18(3) — Complaint to Support—Prayer for Judgment.

The fact that the body of the complaint seeks no personal judgment against defendant, in an action to foreclose a mechanic's lien, did not invalidate judgment, where the prayer of the complaint demanded personal judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 36.]

9. Appeal and Error ⚷188—Necessity of Objection—Motion to Amend Return of Process.

Where defendant failed to object to plaintiff's motion to amend return of process because of failure to state grounds, appellate court will not entertain such objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1190–1204.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by George W. McGinn against Mrs. Helen Rees and others. Judgment for plaintiff. Defendant named appeals from order refusing to set aside judgment and open default, and plaintiff appeals from order refusing to permit amendment of return of summons and from order vacating judgment as to defendant Mark Rees. Judgment for plaintiff against defendant named affirmed, and orders refusing permission to amend return of summons and opening default of defendant Mark Rees reversed.

John T. Williams and John D. Harloe, both of San Francisco, for plaintiff. Stafford & Stafford, of San Francisco, for defendant Helen Rees.

PER CURIAM. This is an action to foreclose a lien for street work. According to the caption of the complaint the action is against Helen Rees, John Doe Rees (her husband), and four fictitious defendants. Helen Rees, it is alleged in the complaint, is the owner of the property upon which the lien is claimed, and she alone entered into the contract with plaintiff for the performance of the street work. John Doe Rees is not alleged to be a fictitious defendant, but he and the four fictitious defendants, it is averred, claim some right or interest in the property, but which is subordinate to plaintiff's claim. In the prayer of the complaint judgment is demanded against the defendants for $377.75, with interest and costs, and for a foreclosure of plaintiff's lien. Summons was served on Helen Rees and Mark Rees, and a judgment by default for the amount demanded was entered against said defendants and the requested decree granted. Within about three months after the entry of the judgment each of the above-named defendants, specially appearing for that purpose, moved the court to set aside the judgment. Such motion was made, not under the provisions of section 473 of the Code of Cicil Procedure, but upon the ground that the court was wholly without jurisdiction to enter the same. The plaintiff also upon due notice requested permission to amend the proof of service of summons on Mark Rees. The court refused to grant the motion to set aside the judgment against Helen Rees, and refused to permit the plaintiff to amend the return of summons, but granted the motion to vacate the judgment as to Mark Rees. The plaintiff and defendants respectively prosecute appeals from these orders. These appeals are all embraced in one record, and will be considered together.

[1] Several of the points made in their briefs by Helen and Mark Rees could be considered only upon an appeal from the judgment or upon a motion made under the terms of section 473 of the Code of Civil Procedure, and not upon the motions giving rise to these appeals, which simply test the question of the jurisdiction of the court.

[2] The ground upon which Helen Rees relies for a reversal of the order denying her motion to vacate the judgment against her is that in effect she was not served with a copy of the complaint on file in the action as required by section 410 of the Code of Civil Procedure. A copy of the complaint must be served with the summons. S. P. R. Co. v. Superior Court, 59 Cal. 471. That case was approved in State v. Harrington, 31 Mont. 298, 78 Pac. 485, where the court held that when a summons was served without a copy of the complaint the court was without jurisdiction.

[3-5] In the present case there were a number of trivial differences between the complaint on file and the one served, the most important of which was the omission from the latter of one of the names of the defendants contained in the former, but as the summons served on Helen Rees with the copy of the complaint contained the omitted name, we take the view that there was not such a failure to comply with the terms of section 410 as would result in a lack of jurisdiction in the court of the person of said defendant. If she had desired to test the sufficiency of the service, she could have appeared and by an appropriate motion had that question settled at once. Arroyo D. D. Co. v. Superior Court, 92 Cal. 47, 52, 28 Pac. 54, 27 Am. St. Rep. 91. We think she could not wait until judgment was taken against her, and then claim that it was a nullity because of minor differences between the complaint filed and the copy served upon her. Brum v. Ivins, 154 Cal. 17, 96 Pac. 876, 129 Am. St. Rep. 137; Drake v. Duvenick, 45 Cal. 455. And even on a motion to set aside the service of summons, unless her substantial rights were affected—which does not appear to be the case here—such a motion would be denied. Fraser v. Oakdale L. & W. Co., 73 Cal. 187, 14 Pac. 829.

As to the appeal by Mark Rees, it appears from the return that the summons with a copy of the complaint was served on this defendant, but that the name of Mark Rees did not appear in the complaint or summons. In this state of the record, without any amendment thereof, plaintiff took by default a decree of foreclosure and a judgment for $377.75 with interest and costs, not only against Helen Rees, but also against Mark Rees. On the hearing of the motion made by Mark Rees to vacate the judgment against him he made no showing or claim that he was not served with summons, or that he was not the person intended to be sued by the name John Doe Rees. He depended—or in any event, according to the motion and the grounds thereof, was compelled to depend—on the point that from the face of the record it would not be presumed that John Doe Rees and Mark Rees were the same person, and therefore the action appearing to be against John Doe Rees, the court was without jurisdiction to render a judgment against Mark Rees.

If it appeared from the face of the record, as contended, that one person was served, and a judgment was obtained against a stranger to the action, although served with summons, it would, no doubt, be held that the court was without jurisdiction of the person so served, and that such judgment might be annulled at any time upon motion. But that is not this case, for here, although it is not so alleged, it would seem to appear from the name itself that John Doe Rees was a fictitious defendant, and this inference is strengthened by the fact that John Doe Rees in the complaint, and Mark Rees in the judgment, are referred to as the husband of the defendant Helen Rees.

[6] But however that may be, prior to the hearing of the motion to set aside the default of Mark Rees the plaintiff had moved the court for permission to amend the return of proof of service of summons so as to make it show that Mark Rees was the person sued as John Doe Rees, and that Mark Rees was in fact served with summons. This proposed amendment was in conformity with the facts; it was in support of the judgment, and in our opinion it ought to have been granted. Morrisey v. Gray, 160 Cal. 390, 117 Pac. 438; Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145. With the return amended as proposed the record would then have shown that Mark Rees was the person referred to and intended to be described in the complaint by the name of John Doe Rees, in which event the judgment could not be regarded as void on its face and consequently subject to be set aside at any time on motion.

[7] Perhaps, as suggested, if the plaintiff desired to obtain judgment against Mark Rees, the complaint should have been amended by substituting his true name for that by which he had been sued; but failure in this respect amounted to no more than an irregularity, for which the judgment might have been reversed on appeal. McKinlay v. Tuttle, 42 Cal. 570; Alameda Co. v. Crocker, 125 Cal. 101, 104, 57 Pac. 766. The court had jurisdiction of the subject-matter, and when Mark Rees was served as a defendant sued by the name of John Doe Rees, which appears to be the fact, the court aquired jurisdiction of his person. Campbell v. Adams, 50 Cal. 203; Baldwin v. Morgan, 50 Cal. 585.

[8] While it is true that in the body of the complaint no personal judgment was sought against Mark Rees, nevertheless the judgment, although of that nature, is not void, for the reason that the prayer of the complaint demanded a personal judgment against him for the amount of the contract price of the work performed together with the incidental costs. If there had been no such demand, the judgment here entered might be regarded as subject to the attack now made upon it, but there is a conflict of the authorities upon that question. Chase et al. v. Christianson, 41 Cal. 253; George v. Nowlan, 38 Or. 541, 64 Pac. 1; Sache v. Wallace, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.) 807, and notes, 118 Am. St. Rep. 612, 11 Ann. Cas. 348; Murdock v. De Vries, 37 Cal. 527; Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073.

[9] Plaintiff's motion to amend his return fails to state the grounds upon which it was based. It does not appear that the defendant objected to the hearing of the motion on that ground, and apparently the objection is here made for the first time, for which reason we cannot entertain it.

For the foregoing reasons the judgment against defendant Helen Rees is affirmed, and the orders refusing plaintiff permission to amend his return of summons and opening the default of defendant Mark Rees are reversed.

LENNON, P. J. The judgment appealed from is affirmed, and the orders, refusing plaintiff permission to amend his return of summons, and upon the default of defendant Mark Rees, are reversed, for the reason stated in opinion filed December 30, 1916 (24 Cal. App. Dec. 52), which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

(33 Cal. App. 350)

CONNELL CO. v. JENNER. (Civ. 1901.)

(District Court of Appeal, Second District, California. April 3, 1917.)

1. Master and Servant 🔑80(15)—Compensation—Findings.

Findings that defendant employé was engaged at a specified salary but that for two months he procured credit for a larger monthly salary without plaintiff employer's consent, the excess being later charged back to him, negatives the conclusion that his salary was increased.

2. Master and Servant 🔑80(15)—Action for Compensation—Pleading.

Allegations that defendant was employed at a specified monthly salary in 1912 *held* supported by findings that such a contract was made in 1909, and had not been changed with plaintiff employer's consent.

3. Master and Servant 🔑80(5) — Action for Compensation—Pleading.

Under a common count for money had and received plaintiff employer may have amount of salary due defendant employé determined in order to ascertain the balance due it from collections made by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 114.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Connell Company against Arthur Jenner. From an adverse judgment, plaintiff appeals. Reversed.

Stephens & Stephens, of Los Angeles, for appellant. Kendrick & Ardis, J. C. Craig, and Edward Winterer, all of Los Angeles, for respondent.

JAMES, J. Appeal by the plaintiff taken from an adverse judgment and presented on the judgment roll.

The complaint of plaintiff contained statements of four alleged causes of action, the first two only of which need to be considered. In the first cause of action it is alleged that on the 1st day of February, 1912, and subsequent thereto, defendant was employed by the plaintiff under an arrangement by which defendant was to devote his time and services in the business of the plaintiff for a salary of $100 per month, with an additional sum of $20 per month to be paid to him for the use of an automobile. In this cause of action it was further alleged that defendant had received and collected from debtors of the plaintiff the sum of $443.86 in excess of the amounts which he had earned by reason of the agreement aforesaid, and which excess sum of money he had refused to pay to the plaintiff upon demand. The second cause of action was in the form of a common count for the same amount of money as money had and received by the defendant to and for the use of the plaintiff. By way of answer the defendant alleged that on or about the 1st day of March, 1909, he entered into an agreement with the plaintiff to render services for the compensation of $100 per month, and that in May, 1909, there was added to his compensation the sum of $20 per month for the use of his automobile. He alleged that that arrangement was to continue for a period of one year, but that he continued to render services until December 31, 1910, without any further agreement for a different compensation, and that he collected and received up to December 31, 1910, the sum of $120 per month according to the agreement, although he alleges that his services were worth the sum of $150 per month. He then alleged that about the 1st day of December, 1910, he notified the manager of the company that, if he continued to work for the plaintiff company, "he must have $150 per month," and that he would retain that amount out of moneys collected by him, and that plaintiff nor its manager made any objection thereto; that defendant continued to serve the plaintiff and to retain the sum of $150 per month; that his services continued up to the 15th day of March, 1913. The court made findings by which the facts were determined to be that on or about the 1st day of March, 1909, the defendant was employed by the plaintiff at the monthly compensation of $100, and that about the 1st day of May, 1909, an agreement was made allowing to defendant $20 per month additional for the use of an automobile, and that defendant continued in the employ of plaintiff until the 6th day of March, 1913. Further facts are found in the following terms:

> "That in the month of December, 1910, the defendant demanded of the plaintiff that his salary be thereafter raised to the sum of $150 per month for his services and for the use of his said automobile; that said demand was made of the plaintiff through the secretary and treasurer of the plaintiff, one Madge H. Connell; that thereupon the said Connell failed to refuse said demand, and failed to accede to said demand, and failed to discharge the defendant from the employ of the plaintiff; that thereafter, at the direction of the defendant, the bookkeeper for the plaintiff, entered upon the books of plaintiff in the account of said defendant for the months of January and February, 1911, a credit to the defendant of $150 for each of said months as salary. Thereafter the fact of said entries was brought to the attention of the said Connell, who voiced objections to the same to the defendant, and called the attention of the president of the plaintiff thereto; that said president thereupon instructed the defendant that he had no right to raise his own salary, and pursuant to the instructions of said president, on the 28th day of February, 1911, a charge was made upon said books against the defendant in the sum of $60 for excess in salary; that at all times thereafter said account upon said books of defendant was credited with the sum of $120 per month and no more; that said books were at all times open to the inspection of the defendant, and were inspected by him, and he had knowledge of the fact of all of said entries; that thereafter, up to the time of the termination of the employment of the defendant, the defendant and said Connell continued to quarrel and dispute with each other as to the amount of the salary of the defendant."

It was further found that it was not true that the defendant was employed for the period of one year, "or for any other definite period of time." It was also found that the defendant had collected the sum sued for by the plaintiff, and that such sum was in excess of the amount of money which would be due him under the compensation as agreed of $120 per month. It was further found that it was not true that defendant's services were worth $150 per month, but that it was true that about the 1st day of December, 1910, the defendant notified the manager of the company that, if he continued to work after the 31st of December, he must have $150 per month, and that plaintiff nor its said manager made any objection at that time, and that the defendant was credited with the sum of $150 per month for the months of January and February, 1911. This finding then follows:

> "That it is true that the services of the said defendant after January 1, 1911, continued during all the time from that date until on or about the 15th day of March, 1913, with full knowledge on the part of the manager of the plaintiff and of its directors. But it is not true that said services continued with full knowledge that the defendant has given notice that he would serve the company only on the condition that he was paid or allowed to draw from the company $150 per month during the time that he served the plaintiff."

[1-3] The findings, as will be noted, were somewhat contradictory. The substance, however, of the findings, to our minds, clearly negatives the conclusion that the defendant at any time was serving the plaintiff company under any different arrangement as to compensation than that originally entered into by him. Up to the time that he sought to secure an increase in compensation there

was no dispute as to the terms of his employment, and if he continued to work for the plaintiff without any agreement consented to by the plaintiff which would change that compensation, we think that it must be inferred as a legal conclusion that he consented to work for the compensation theretofore agreed upon. It appears from the findings that, while a credit of $150 per month was entered for two months, that credit was not authorized by the plaintiff company, and that the excess was charged back to the defendant, and that he continued to work many months thereafter with the accounts on the books of the company showing a credit of compensation as originally agreed upon only, and that he had knowledge of the fact that the books were so kept. Counsel for respondent argue that the plaintiff declared upon an express contract which the court found to be different from that alleged; but we do not think that such is the effect of the findings. At any rate, under the allegations of the second alleged cause of action, plaintiff was entitled to have ascertained the amount due to the defendant in order to have fixed the amount which it was alleged he had collected and not accounted for.

By a supplemental complaint the plaintiff sought to set up certain facts regarding a judgment of the justice's court wherein the assignor of the defendant had brought suit on behalf of the defendant to recover from the plaintiff certain money alleged to be due, and by reason of which judgment it was asserted defendant was estopped from claiming any offset against the demand of the plaintiff. We do not think that that judgment was properly pleaded in bar under the condition of the issues; but, in the view we have taken of the case, that matter becomes immaterial here.

The judgment is reversed in order that a new trial may be had.

We concur: CONREY, P. J.; SHAW, J.

(33 Cal. App. 317)

LAPIQUE v. PLUMMER et al. (Civ. 2231.)

(District Court of Appeal, Second District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

Appeal and Error 🔑631 — Transcript of Judgment Roll—Necessity of Printing.

Code Civ. Proc. §§ 953a, 953b, and 953c, as effective August, 1914, regulating the preparation, etc., of phonographic reports and transcripts on appeal, did not apply to an appeal from a judgment upon the judgment roll alone, and such a record must be printed under the direct provisions of Supreme Court rule 7 (119 Pac. xi).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2766–2770.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by John Lapique against Eugene R. Plummer, Catherine Agoure, and others. From a judgment dismissing the action as to Catherine Agoure, plaintiff appeals. Appeal dismissed.

John Lapique, of Orange, in pro. per. O'Melveny, Stevens & Millikin and Stuart O'Melveny, all of Los Angeles, for respondent.

PER CURIAM. This is an appeal upon the judgment roll from a judgment of dismissal of the action as to respondent, Catherine Agoure, as administratrix of the estate of Pierre Agoure, deceased, entered upon an order of court sustaining her demurrer to the second amended complaint, without leave to amend.

As stated, the appeal is upon the judgment roll alone, a transcript of which is presented by a certified typewritten copy. No authority is found, either in the rules of the court or in the statutory provisions of the Code, for this method of bringing up the record, where it consists solely and alone of the judgment roll. In the cases there specified sections 953a, 953b, and 953c, Code of Civil Procedure, provide for the preparation, certification, and filing of phonographic reports and transcripts of records to be used on appeal; but these sections do not apply to the transcript where the appeal is from the judgment upon the judgment roll alone.

> "The provision that the transcript need not be printed applies only where the appellant has availed himself of section 953a, and the latter section relates and applies only to cases where a reporter's transcript is prepared and settled." Harpold v. Slocum, 168 Cal. 364, 143 Pac. 609.

Hence, it follows that in cases where there is no substitute for the bill or reporter's transcript prepared under section 953a there is no statutory exemption from the necessity of printing the transcript, as required by rule 7 (119 Pac. xi) of the Supreme Court on the subject, which must prevail. For this reason, the appellant is not entitled to a hearing of the appeal, which should be and it is dismissed.

Our opinion is based upon the sections of the Code as they were in August, 1914, when the transcript herein was filed.

(33 Cal. App. 807)

LAPIQUE v. WALSH. (Civ. No. 2230.)

(District Court of Appeal, Second District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by John Lapique against Frank E. Walsh, administrator of the estate of Laurent Etchepare, deceased. From a judgment dismissing the complaint, plaintiff appeals. Appeal dismissed.

John Lapique, of Orange, in pro. per. H. H. Appel and Horace Bell, both of Los Angeles, for respondent.

PER CURIAM. It appearing that the facts in this case are identical with those involved in civil No. 2231, entitled John Lapique, Appellant, v. Eugene R. Plummer et al., Respondents, 165 Pac. 56, wherein an opinion was this day filed dismissing the appeal, it is ordered, upon the authority of the opinion so filed in said last-mentioned case, that the appeal herein be, and the same is, dismissed.

(33 Cal. App. 807)

LAPIQUE et al. v. AGOURE. (Civ. No. 2229.)

(District Court of Appeal, Second District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by John Lapique and others, as surviving copartners, etc., against Catherine Agoure, administratrix of the estate of Pierre Agoure, deceased. From a judgment dismissing the complaint, John Lapique appeals. Appeal dismissed.

John Lapique, of Orange, in pro. per. O'Melveny. Stevens & Millikin and Stuart O'Melveny, all of Los Angeles, for respondent.

PER CURIAM. It appearing that the facts in this case are identical with those involved in civil No. 2231, entitled John Lapique, Appellant, v. Eugene R. Plummer, et al., Respondents, 165 Pac. 56, wherein an opinion was this day filed dismissing the appeal, it is ordered, upon the authority of the opinion so filed in said last-mentioned case, that the appeal herein be, and the same is, dismissed.

(96 Wash. 439)

QUILP GOLD MINING CO. v. REPUBLIC MINES CORP. et al. (No. 13751.)

(Supreme Court of Washington. May 19, 1917.)

1. MINES AND MINERALS 🔑55(5)—CONTRACTS—CONSTRUCTION—TITLE.

Under a contract providing that upon forfeiture defendant was to give a good and sufficient deed, conveying to plaintiff all ore bodies of every description lying east of the west line of the Q. claim extended down vertically and lying south of the north end line of the Q. claim extended down vertically, and which may apex within the lines of the S. claim, *held* that as the claims overlapped in their original survey, and the amount of such overlap was included in the patent to the S. claim, but excepted from the approximate northwest corner of the Q. claim by a later patent to it, plaintiff was, upon forfeiture, entitled as to defendants to all ore bodies the apex of which was within the S. claim lying south of the north end line of the Q. claim extended vertically down, and east of the west line extended vertically down, determined to be the line from the point where the north end line of the Q. claim intersects the east line of the S. claim; thence along and coincident with the east side line of the S. claim, from the point of intersection to the southeast corner of the S. claim; thence along and coincident with the south end line of the S. claim to the point of intersection with the west side line of the Q. claim as surveyed; thence southerly along the west side line of the Q. claim as surveyed to its southerly end line.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 155, 162.]

2. MINES AND MINERALS 🔑31(1)—EXTRALATERAL RIGHTS—COMPLIANCE WITH STATUTE.

As Congress has prescribed the conditions upon which extralateral rights may be acquired, a party dealing with mining locations must bring himself within those conditions or else be content with simply the minerals beneath th surface of his own territory.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 75.]

3. MINES AND MINERALS 🔑31(2)—RIGHT TO VEIN HAVING APEX WITHIN CLAIM.

Under Act Cong. May 10, 1872 (Rev. St. U. S. § 2319 et seq. [U. S. Comp. St. 1916. § 4614 et seq.]) the end lines of a mining claim are required to be projected parallel with each other and crosswise of the general course of the veins within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downwards, the vein may be followed outside of the vertical side lines.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 76.]

4. MINES AND MINERALS 🔑31(2)—RIGHT TO FOLLOW A VEIN ON ITS DIP.

If the apex of a vein crosses one end line and one side line of a lode mining claim as located thereon, there is the right to follow the vein on its dip beyond the side line.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 76.]

Department 2. Appeal from Superior Court, King County; E. K. Pendergast, Judge.

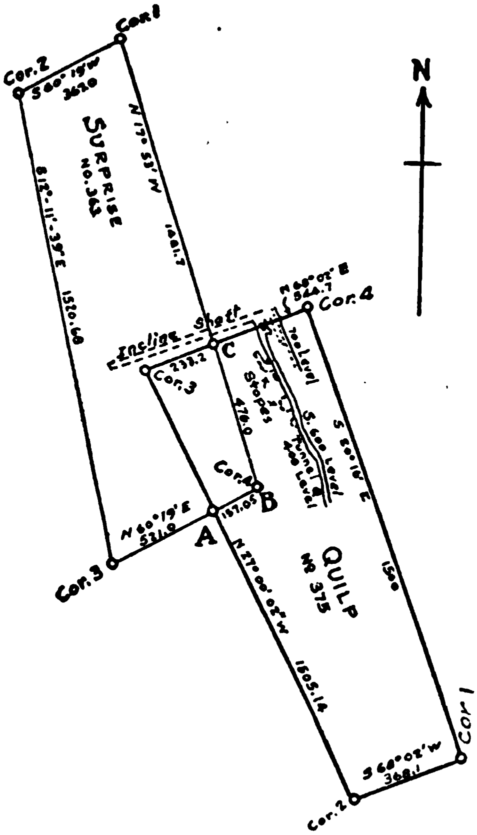
Action by the Quilp Gold Mining Company against the Republic Mines Corporation and others. There was a judgment for plaintiff containing certain exceptions and provisions, from which it appeals. Reversed, with directions.

Voorhees & Canfield, of Spokane, for appellant. A. J. Laughon, of Republic, for respondents.

HOLCOMB, J. This is an appeal from parts of a judgment and decree in an action brought by appellant against the Republic Mines Corporation and the other respondents and defendants claiming under it, to establish the ownership of appellant in and to the Quilp lode mining claim, government survey No. 375, in and to all lodes, veins, ores, minerals, ore bodies and deposits of ore lying within the surface boundaries of the Quilp lode mining claim, extended vertically downward, and to declare that respondents and defendants have no right, title, estate, interest, claim, or right of possession therein, and to enjoin and restrain them from asserting any right therein and from entering or trespassing thereon or mining or removing the ores therein, and to quiet the title of the appellant in all ore bodies of every description lying east of the west line of the Quilp mining claim, extended vertically downward and lying south of the north end line of the Quilp mining claim extended down vertically and which may apex within the lines of the Surprise lode mining claim, and to compel the execution and delivery of a deed of conveyance by respondents to appellant of all the ore bodies above described according to the terms and conditions of a certain contract made and entered into between appellant and the Republic Mines Corporation or Imperator Company.

The pleadings and issues in the case are very multifarious and intricate, some of them being immaterial or of only incidental importance as the case comes here and in view of our disposition of the case. Upon the trial of the action the court entered a decree in favor of the appellant generally, but containing certain exceptions and provisions from which appellant prosecutes this appeal.

Appellant produced proofs to sustain substantially the following facts: For many years prior to the month of October, 1912, appellant had been, and ever since has been, the owner of the Quilp lode mining claim, survey No. 375, in Ferry county, Wash., and during such time the Republic Mines Corporation and its successors in interest have been the owners of the Lone Pine, Last Chance, and of the Surprise lode mining claim, survey No. 363, a prior location and claim in that county. The Quilp and Surprise claims overlap in their surveys. The relative situation of the two claims is shown by the following map or diagram to which reference is made:



This diagram shows the courses and distances of the end and side lines of each claim, the location of the corners thereof, and the amount of the two claims that are in conflict. The area in conflict as to location on the surface is the equilateral figure A B C 3 on the diagram, which area was conveyed by patent from the government to the Surprise lode mining claim and was specially excepted from the grant in the patent from the government to the Quilp lode mining claim. But this territory is not in dispute here, and does not include any of the ore bodies in dispute. During the year 1910 appellant had given an option or bond upon the Quilp lode mining claim to one J. L. Harper, by whom it was assigned to defendant Imperator Quilp Company, hereinafter called the Imperator Company. In working this bond within the Quilp Lode Mining claim the Imperator Company, in running a tunnel from the south in the 400-foot level of the Quilp lode mining claim, encountered a body of ore on the 400-foot level. The tunnel and the ore encountered marked "stopes" are approximately located on this diagram. On August 20, 1912, the Imperator Company being then in default upon its bond to appellant, the latter declared the bond forfeited and the rights of the Imperator Company within the Quilp lode mining claim terminated. Previous to this time the Republic Mines Corporation had begun the excavation of an incline shaft north of the north end line of the Quilp claim, the location of which is indicated upon the diagram. In the summer of 1912 appellant was informed that the Republic Mines Corporation had drifted into and was taking out and removing ores at the 600-foot level of the Quilp, which ores were taken from within the vertical boundaries of the Quilp lode mining claim.

Believing that it was the owner of this ore body which was being removed by the Republic Mines Corporation, appellant directed the prosecution of an action to restrain and enjoin the Republic Mines Corporation from mining or extracting ores from within the surface lines of the Quilp lode mining claim extending vertically downwards. This suit, which was subsequently brought, was referred to in the trial of the action as the apex suit. The Republic Mines Corporation at this time and the Imperator Company when being operated were both under the management of J. L. Harper. When Harper was advised that the appellant was about to begin an action against the Republic Mines Corporation to enjoin it from taking out and removing the ores from within the Quilp lode mining claim, the Imperator Company, at his direction, commenced an action in the superior court of Spokane county on October 15, 1912, against the Quilp Gold Mining Company, for the recovery of the sum of $410,000, which action was referred to in the trial as the fraud action. On August 31, 1912, the Quilp Company had commenced an action in the superior court of Spokane county against Harper, the Imperator Company, and the North Washington Power & Reduction Company, another Harper corporation, for the sum of $4,100, claimed to have been due as royalties under the first bond given by the Quilp Company to Harper, and held by the

Imperator Company, and not paid to the Quilp Company in accordance with the terms of the bond, as was contended by the Quilp Company. This action was pending at the time of the commencement of the apex suit. The apex suit referred to was begun on October 17, 1912. The question of the ownership of the ores, then being taken out and removed by the Republic Mines Corporation and Harper from within the surface lines of the Quilp claim extended vertically downward, was therein involved. The plaintiff in that action, appellant here, claimed the same by reason of its ownership of the ground, and the defendant Republic Mines Corporation set up an ownership in the ore body itself by reason of the alleged fact that the vein wherein the ore body was situate had its apex within the surface lines of the Surprise claim, and that therefore the Republic Mines Corporation, under the doctrine of extralateral rights, had a right to follow and remove these ores wheresoever the same should be situated. In the apex suit the plaintiff further demanded judgment for $100,000 damages for trespass upon the Quilp claim by the defendants. The apex suit came on for hearing upon a temporary injunction during the pendency of the action, and was partially heard by the court upon oral testimony, and such proceedings were had that, on November 20, 1912, an order was entered temporarily restraining and enjoining the Republic Mines Corporation from taking or removing any such ores pending the trial of the action upon the merits. Some of the antecedent facts are here recited as tending to show the situation existing at the time of the execution of the contract sued upon and their bearing thereon.

While these various actions, except the present one, were pending, and on May 2, 1913, a contract was entered into between the Republic Mines Corporation, the Imperator Company, and the appellant, which is the contract upon which appellant bases this action. In this contract, after reciting the ownership of the Quilp and Surprise claims and their location with reference to each other and the existence of the three several controversies and pendency of the three several suits and the desire of each and all to settle all controversies, the parties agreed: (1) That the Imperator Company would pay the Quilp Company certain sums of money on or before January 1, 1914, with other deferred payments, and that upon such payment the Quilp Company would execute and deliver to the Imperator Company a good and sufficient deed of conveyance of the Quilp lode mining claim, with all the dips, spurs, angles, etc., together with certain personal property. (2) That if the Imperator Company should fail to make any payment within the time specified, then the contract should become forfeited and all payments made by the Imperator Company prior to such forfeiture should be forfeited to the Quilp Company as liquidated damages. (3) That the Imperator Company might, so long as it complied with the contract, enter upon the Quilp claim and mine and work the claim and extract ores, provided that, if it so did, it should pay plaintiff Quilp Company as royalty 20 per cent. of all net mill or smelter returns and 50 cents per ton flat rate upon said ore extracted from said Quilp claim. (4) That the Imperator Company should cause the smelter or mill treating said ores to send royalties to the Quilp Company at its office, and should cause the mill or smelter to send smelter returns to the Quilp Company. (5) That the royalties paid to the Quilp Company should apply toward the extinguishment of the purchase price of the claim. The sixth paragraph is not material. (7) It was agreed by the Imperator Company and the Republic Mines Corporation, with the consent of the Quilp Company, that the Republic Mines Company might enter into all that part of the Quilp claim which lay north of a line drawn parallel with the south end of the Surprise claim and running east and west across the Quilp claim and intersecting the east line of the Surprise claim at a point 142 feet northwesterly from corner No. 4 of the Surprise claim, and might mine, extract, mill, and smelt the ores therefrom to any depth in following the vein during the life of the agreement, upon payment to the Quilp Company of a royalty of 20 per cent. of the net smelter returns and 50 cents per ton flat rate for all ores so mined, and that the mills or smelters should send the royalty to the Quilp Company at its office, and the royalty should apply upon the purchase money the same as if the ore had been mined and smelted by the Imperator Company. (8) It was agreed that the Republic Mines Corporation would commence work and would mine or smelt from the territory agreed upon not less than 750 tons of ore per month until all moneys due under the contract should have been paid, and if it failed to mine, ship, mill, or smelt said tonnage for a period of two months, then it should forfeit its right to occupy and operate the territory. (9) The Republic Mines Corporation agreed that, in case it should fail to mine, extract, mill, and treat ores in accordance with the contract to such an extent that its rights thereunder should be forfeited under the provisions heretofore set forth, then upon such forfeiture it would, by good and sufficient deed executed by it, convey to the Quilp Company all ore bodies of every description lying east of the west line of the Quilp mining claim extended down vertically and lying south of the north line of the Quilp mining claim extended down vertically and which may apex within the lines of the Surprise lode mining claim.

The ninth paragraph of the contract is the important and critical portion thereof. By the twentieth paragraph it was agreed that all the suits and actions theretofore mentioned then pending between the various parties should be dismissed with prejudice and without costs to any of them, and that the injunction then existing against the Republic Mines Corporation in the suit of the Quilp Company against it should be dissolved, and the Quilp Company and its bondsmen exonerated and released from all claims for damages. By the twenty-first paragraph it was agreed that every clause, covenant, and condition in the agreement should extent to and be binding upon the successors and assigns of the respective parties.

Upon the execution of this contract stipulations for the dismissal with prejudice of the suits pending were executed, and judgments of dismissal with prejudice and without costs were entered. The Imperator Company entered into possession of the Quilp claim generally, and the Republic Mines Corporation began to mine ore from that portion of the Quilp claim described in paragraph 7 of the contract and which is referred to by the parties and in the brief as the disputed territory. On February 13, 1912, the Republic Mines Corporation, then owing to its miners some $14,000 unpaid labor bills, had entered into an agreement with the miners by which its property was being operated by a trustee under a contract to disburse the moneys derived from the mining operations in certain specified ways. The royalties on the ores extracted from the Quilp claim, both in and outside the disputed territory, were regularly paid the Quilp Company, but no payment other than the royalties was ever made to the Quilp Company.

On August 15, 1913, the Republic Mines Corporation and the Imperator Company made a mining bond to J. L. Harper, under which their interest under the contract of May 2, 1913, together with the Surprise claim and other claims, was agreed to be conveyed to Harper for $600,000, and thereupon Harper went into the full possession of the Quilp claim. Thereafter the Republic Mines Corporation was adjudged to be insolvent and a receiver was appointed, and later, in a bankruptcy proceeding, it was adjudged to be bankrupt by the United States District Court, and a trustee in bankruptcy appointed. On June 19, 1914, the stockholders of the Republic Mines Corporation passed a resolution, reciting that the contract of May 2, 1913, was invalid as to it for want of authorization or notification by the stockholders of the corporation, and rejected and disaffirmed the contract and caused notice of their action to be sent to respondent Bailey, then trustee in bankruptcy of the Republic Mines Corporation, and to the Quilp Company. Soon after receiving notice of this action by the stockholders of the Republic Mines Corporation, respondent Bailey placed a bulkhead in the tunnel leading from the Quilp shaft to the disputed territory, thereby excluding appellant from that portion of the Quilp claim, and ever since has claimed title to these ore bodies adverse and superior to the contract of May 2, 1913. In August, 1914, he refused to remove this obstruction or permit its removal.

By their answers the defendants made several defenses: (1) They denied that the Republic Mines Corporation executed the contract because of a want of ratification or authorization thereof by the stockholders; (2) they averred that the contract was fraudulently entered into and was a fraud on the rights of the Republic Mines Corporation and its successors in interest; that (3) the contract was so unconscionable, harsh, and unjust that the appellant should be denied relief of specific performance under it; that (4) the contract was without consideration because in truth the ledge from which the ore was being extracted had its apex within the surface lines of the Surprise claim. These defenses were met by denials and by plea of ratification and estoppel by conduct as to defenses 1 and 2, and by failure to do equity as to defense 3.

Upon the trial of the cause the court, with ample evidentiary support, upheld the execution of the contract, its honesty and the absence of fraud, its fairness and enforceability, the adequacy of the consideration therefor, and the default of the defendants thereunder, and granted appellant generally the relief demanded, and decreed that the respondents convey to appellant the body of ore within the disputed territory lying within the Quilp claim north of a line 142 feet north of the south end of the Surprise claim and parallel with the southern line projected. The court, however, in the decree found that the vein containing the ore body to be conveyed to appellant dips towards the east and will in all likelihood, on its dip and in its downward course, be found to pass through and beyond indefinitely the vertical plane extending through the easterly side line of the Quilp claim, and thereupon entered a decree which cuts the ledge in question into three segments, the first being from the apex of the ledge to the line B C extended vertically downward (see diagram), which segment is awarded to respondents and which is undoubtedly correct; the second being from the line B C to the line from corner No. 4 of the Surprise claim to corner No. 2 of the Quilp claim extended vertically downward, which was awarded to appellant, and the third being from the last-mentioned line easterly to the utmost depth of the ledge, which was awarded to the respondents. The disputed territory as to surface area is therefore that south of the projected line from a point 142 feet north of the south end line of the Surprise claim parallel therewith and extended vertically downward and east of a line from point B to corner 2 of the Quilp claim. The court further decreed that the Quilp claim is subject to an easement in favor of the respondents of a right of way across the Quilp claim to the territory lying easterly of the Quilp claim, with the right of ingress, egress, and regress through the same for the purpose of removing ores from the third segment. The court further undertook to establish the surface boundaries of the Surprise claim and Quilp claim, and found the location and dip of the vein on the surface, and undertook to establish a new end line of the Surprise claim erected at a point 142 feet northerly from the point B on the line B C, where the lode appears to cross the east side line thereof, all of which appellant contends is wholly beyond the issues and the evidence in the action, and is erroneous, and from which it appeals.

[1] Starting from the proposition that it was found and determined that the Republic Mines Corporation had not complied with the contract of May 2, 1913, that the contract was enforceable and not founded in fraud or unconscionable, and that the corporation had forfeited its rights under the contract, which adjudications respondents have not attacked, we observe by paragraph 9 of the contract that, upon such forfeiture, the Republic Mines Corporation was required to give a good and sufficient deed, executed by it, conveying to the Quilp Company all ore bodies of every description *lying east of the west line of the Quilp mining claim extended down vertically and lying south of the north end line of the Quilp mining claim extended down vertically, and which may apex within the lines of the Suprise lode mining claim.* The only question to determine, then, is what is the true construction and meaning of the foregoing italicized description. It is conceded that there is an ore body extending below the Quilp mining claim the apex of which is within the lines of the Surprise mining claim some distance northerly of corner 3 of what was originally the Quilp mining claim. The dip of that lode from its apex seems to have been southerly and easterly and to have struck the easterly line of the Surprise claim about 142 feet in distance north of point B or corner 4 of the Surprise claim.

[2, 3] In dealing with this question we must keep in view that we are dealing with contractual rights of the parties, and also that the parties in contracting with reference to the matter had in view their statutory rights as provided by the mining statutes of the United States. Congress prescribed the conditions upon which extralateral rights might be acquired; and a party dealing with mining locations necessarily must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his own territory. These mining claims or rights are acquired by virtue of the act of Congress of May 10, 1872, found in Revised Statutes, § 2319 and following (U. S. Comp. St. 1916, § 4614 et seq.), which are the statutes in force to-day. These statutes had been thoroughly and plainly construed by decisions of the United States Supreme Court, and their applications were well known. Under these statutes the end lines of a mining claim are required to be parallel. The side lines are not required so to be. The end lines of a mining location are required to be projected parallel with each other and crosswise of the general course of the veins within the surface limits of the location, and whenever the top or the apex of the vein is found within the surface lines extended vertically downwards, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map or diagram of the location as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface. Iron Silver Min. Co. v. Elgin Min. Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Del Monte Min. Co. v. Last Chance Min. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87; Walrath v. Champion Min. Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170. These provisions of the law the parties to the contract of May 2, 1913, were presumed to know, and in fact from the nature of the provisions of their contract we assume they did actually know.

The trial court took the view, as shown by his notes to the decree in this case, that the Surprise and Quilp claims have but one common identical side line and boundary, namely, the line B C described on the diagram, which line B C is in part the east boundary side line of the Surprise lode and in part the west boundary side line of the Quilp, and that the parties contracted with reference thereto because they decided in the contract that the workings were to be north of the point where the vein on the Surprise claim crossed the west side line of the Quilp claim. But the court evidently erred in supposing that the parties contracted with reference to the ore bodies only lying east of the line B C. For one thing, as was said in the Del Monte Mining Company Case, supra, these side lines may be curved lines or irregular lines; and by referring to the diagram in this case it will be seen that the established westerly line of the Quilp claim cannot logically be construed to be anything but a broken or irregular line extending northerly, with westerly bearings, from corner 2 at the south to the point A where it intersects the Surprise claim end line; thence easterly to the point B which is corner 4 of the Surprise claim end line as established and granted in its patent; thence northerly to the point C in the north end line of the Quilp claim, and there terminates. To be consistent this must be considered the entire westerly line of the Quilp claim. The north end line then begins at the intersecting point of the Surprise claim side line, point C, and extends easterly to corner 4. The easterly side line is then the straight line running southerly with a bearing to the east to corner 1 of the Quilp claim. Thus the

Quilp claim has two parallel end lines as required by the statute and two side lines, one of which is presumably a straight line on the easterly side and the other a broken, irregular line on the westerly side. We can see no uncertainty or ambiguity in the language of the contract describing the lines and the ore bodies to be conveyed.

We thus construe the contract as providing most comprehensively in paragraph 9 that all ore bodies of every description lying east (or easterly) of the west (or westerly) line of the Quilp claim extended down vertically, and south (or southerly) of the north end line of the Quilp claim extended down vertically, include all ore bodies within the Quilp claim east of the line from 2 to A, A to B, and B to C, and south of the line from C to corner 4, and necessarily, of course, south of the line from A to B. This is in harmony with the decisions in Del Monte Min. Co. v. Last Chance Min. Co., supra, and Iron Silver Min. Co. v. Elgin Min. Co., supra, and other decisions of the Supreme Court of the United States.

[4] It is evident that some of the litigation pending at the time of the execution of the contract here involved presented the question of where the right of the Republic Mines Corporation as the owner of the Surprise claim, and of the vein which has its apex therein, terminated. It is contended here, and no doubt was in the other litigation which was ended by the contract, that the east side line of the Surprise claim was the side and not the end line with reference to its vein, and that it had the right to pursue the vein and all its dips, spurs, and angles indefinitely so far as it might extend, although it might pass under the entire length of the Quilp claim. A glance at the diagram showing the apex and trend of the Surprise vein shows that it would be indeed difficult to determine whether the east side line of the Surprise claim was in fact a side line or the end line, for the vein strikes the east side line in its trend from the north at a sharp or acute angle. Under the federal statute under which mining claims are located there is no command that the side lines shall be parallel, but it is required and it has been determined by the Supreme Court of the United States that the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. As was said in the Del Monte Case, supra:

> "He may pursue the vein downwards outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel in order that going downwards he shall acquire no further length of the vein than the planes of those lines extended downward enclose. If the end lines are not parallel, then, following their planes downward his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth. In view of this purpose and effect of the parallel end lines it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights."

And it was further said in that case that, if the apex of a vein crosses one end line and one side line of a lode mining claim as located thereon, there is the right to follow the vein on its dip beyond the side line—citing other cases. Respondents quote from the above case as follows:

> "Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines."

But respondents do not quote the next paragraph of that decision as follows:

> "But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the 'right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.'"

And the court continues its limitation as follows:

> "This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. * * * The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all the statute provides. Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line."

It was further held in that case that the only exception to the rule, that the end lines of the location as the locator placed them established the limits beyond which he may not go in appropriation of a vein along its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those the locator calls his side lines are his end lines, and those which he calls the end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established as his location.

Now it must be apparent that there was considerable dispute and controversy as to whether the Republic Mines Corporation, the owner of the Surprise claim, was entitled to follow the vein which apexed within its claim any further than the located east side line of the claim, or might follow it and work it in its trend downward and to the south, to the south end line as located on the Surprise claim extended westerly. This situation was evidently the cause of the original dispute and litigation between these parties. But whatever was the reason for their controversies, under the broad and comprehensive terms of the contract entered into, all the ore bodies which apexed within its claim lying east of the west side line of the Quilp claim and south of the north end line of the Quilp claim, extended indefinitely, so far as the owner (and its successors and assigns) of the Surprise claim was concerned, were to be conveyed unreservedly and become the property of the appellant upon the default and failure of respondents to perform the contract of May 2, 1913. And this adjustment was purely a matter of contract, regardless of the precise legal extralateral rights or terminal rights of the owner of the Surprise lode, in full contemplation of all the conditions, and with perfect competency so to contract.

With this construction of the contract it is evident that the court erred in decreeing that the appellant was entitled to a conveyance of all ore bodies only lying east of the line B C of the Quilp mining claim.

The court seems to have granted and decreed to the Republic Mines Corporation and its successors the right of ingress and egress across that part of the Quilp claim to and from the ore body included within the disputed territory, because of granting the right to that territory to the respondents. Respondents, not being entitled to the ore bodies lying within that territory or beyond it easterly and southerly, are not entitled to any right of way for ingress and egress to and from the same.

The judgment or decree is reversed, with instructions to enter a decree in favor of appellant, granting to it all the right, title, interest, and estate, claim, and right of possession to all the ore bodies the apex of which lies within the Surprise claim, lying south of the north end line of the Quilp mining claim extended vertically down, and east of the west line extended vertically down, determined to be the line from the point where the north end line of the Quilp mining claim intersects the east side line of the Surprise mining claim; thence along and coincident with the east side line from the above point of intersection to corner No. 4 of the Surprise mining claim; thence along and coincident with the south end line of the Surprise mining claim from corner No. 4 to the point of intersection with the west side line of the Quilp mining claim as surveyed; and thence southerly along the west side line as surveyed of the Quilp mining claim to corner No. 2 of the Quilp mining claim; and that the respondents be enjoined and restrained perpetually from asserting any right therein, and from entering or trespassing thereon or mining or removing the ores therein, and quieting the title of appellant in all ore bodies of every description lying within the above-described area as to its surface lines extended vertically downward.

Appellant will recover costs below and of appeal.

ELLIS, C. J., and FULLERTON, MOUNT, and PARKER, JJ., concur.

(96 Wash. 329)

JACKSON et al. v. BATEMAN. (No. 13700.)

(Supreme Court of Washington. May 18, 1917.)

TAXATION 🔑734(7)—SALE FOR DELINQUENCY—RIGHT TO ATTACK FORECLOSURE SALE—LACK OF NOTICE—STATUTE.

Where land sold on foreclosure of a delinquent tax certificate was assessed from 1909 to 1914, inclusive, in the name of Bessie Jackson, who during such years was in possession of the property by herself or by tenant, the party who purchased on foreclosure knowing that the property was hers, and, by a clerical error in transcribing the names from the assessor's roll to the treasurer's roll, Bessie Jacobson was named as the owner of the property for 1912, and the county treasurer issued a certificate of delinquency naming Bessie Jacobson as the owner, and the foreclosure was had against Bessie Jacobson, the owner, having been given no notice of the proceeding, could attack the sale upon tendering taxes, interest, and costs; service by publication upon the person named on the treasurer's roll not being sufficient to give the court jurisdiction under Rem. Code 1915, § 9257, providing that the name of the person on the treasurer's roll as the owner for the purpose of the chapter shall be considered as the owner of the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470, 1471.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Bessie Jackson and another against E. S. Bateman. From a decree for plaintiffs, defendant appeals. Affirmed.

L. E. Kirkpatrick, of Seattle, for appellant. Oliver Hulback, of Seattle, for respondents.

MOUNT, J. This action was brought by the respondents to set aside a judgment foreclosing a delinquent tax certificate and to set aside a deed issued by the treasurer upon such foreclosure. Upon the trial of the case the court entered a decree as prayed for. The defendant has appealed.

The facts are as follows: The real estate for which the deed was issued was owned prior to the foreclosure sale by Bessie Jackson and her husband. They allowed the taxes to become delinquent for the years 1910, 1911, 1912, and 1913. The property was assessed upon the assessment roll for these years in the name of Bessie Jackson, but, by a clerical error in transcribing the names from the assessor's roll to the treasurer's collection roll, Bessie Jacobson was named as the owner of the property for the year 1912. The county treasurer issued a certificate of delinquency, naming Bessie Jacobson as the owner, and the foreclosure was had against Bessie Jacobson. The sale was made, and the deed issued pursuant to that foreclosure. Bessie Jackson, the owner of the property, was not served with summons, and did not know of the foreclosure until after the deed had been issued. She thereupon tendered to the appellant the amount of taxes, interest, and costs, and demanded a deed to the property, which was refused. This action was thereupon brought to set aside the treasurer's deed, for the reason that the foreclosure was void as to her.

In addition to the facts stated, the trial court found that the defendant, the appellant here, had been personally acquainted with Bessie Jackson ever since she purchased the property, that Bessie Jackson, either in person, or by tenant, had occupied the premises even since the purchase, and was so occupying the premises at the time of the foreclosure, and that the appellant knew that the lots in question had not been assessed to Bessie Jacobson, but that the lots had been assessed upon the assessor's roll to Bessie Jackson.

The sole contention of the appellant is that the service by publication upon the person named upon the treasurer's roll is sufficient to give the court jurisdiction to sell the land. He relies upon the provision of the statute (Rem. Code, § 9257) as follows:

> "The names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this chapter shall be considered and treated as the owner or owners of said property. * * *"

And it is argued that the foreclosures of delinquent tax certificates are proceedings in rem, and that, when the statute is strictly followed, foreclosure is valid. A number of cases to that effect are cited in the brief. But we think that rule does not apply to the facts in this case. Under the statute (Rem. Code, § 9113) it is the duty of the assessor to list the real estate, "showing the names and owners, if to him known, and if unknown, so stated." The assessor knew the owner when this property was assessed for taxation, and listed it as the property of Bessie Jackson for all of the years from 1909 to 1914, inclusive. The assessor is also required by that section to extend and certify the rolls to the county auditor. After the rolls are delivered to the county auditor, and the taxes are extended thereon, they are certified by the county auditor to the county treasurer. Section 9217, Rem. Code. The county treasurer is required to collect the taxes. By an error in extending the assessor's rolls, the name of the owner was changed from Bessie Jackson to Bessie Jacobson upon the treasurer's rolls. The statute (Rem. Code, § 9254) requires that the holder of a certificate of delinquency shall give notice to the owner of the property described in the certificate that he will apply to the superior court for judgment foreclosing the lien against the property mentioned. Section 9255, Rem. Code, provides that this summons shall be served in the same manner as summons in a civil action.

While this court has many times held that these tax proceedings are proceedings in rem, it is necessary that notice be given as required by statute. In Carney v. Bigham, 51 Wash. 452, at page 455, 99 Pac. 21, at page 22, 19 L. R. A. (N. S.) 905, we had occasion to construe the provision relied upon by the appellant, and hereinabove quoted, and we there said:

> "This section makes it clear that the person to whom the property is assessed is the only person other than the true owner against whom a valid foreclosure proceeding may be had in the courts, and that the insertion by the treasurer of the name of a person different from that appearing on the assessment rolls as the owner does not authorize the holder of the certificate to foreclose the lien by making such person a party defendant unless he be the true owner. On the contrary, the holder must at his peril foreclose against the person named on the treasurer's rolls as the owner of the property, or he must foreclose against the true owner."

It is a conceded fact that there was a clerical error in transcribing the assessment roll to the treasurer's collection roll. The name of Bessie Jackson was erroneously transcribed as Bessie Jacobson. The treasurer's certificate of delinquency was issued in the name of Bessie Jacobson. The property was assessed upon the assessor's rolls from the year 1909 to the year 1914, inclusive, in the name of Bessie Jackson. Bessie Jackson, during all these years, was in possession of the property, either by herself or by her tenant. The appellant, when he purchased the property, knew that it was the property of Bessie Jackson. He was acquainted with her, and the result of the foreclosure was an apparent fraud upon her, because she was given no notice of the proceedings. She was entitled, under the statute, to have the property assessed in her name, and the collection made in her name. She was at liberty to rely upon the statute to the effect that notice of some kind would be served upon her, either personally or by publication. This was not done, and she had no actual notice of the foreclosure until after it had resulted in a sale. The effect was in the nature of a fraud upon her, which, we think, invalidated the foreclosure proceedings, and she was therefore at liberty to attack the sale upon tendering the taxes and interest and the costs of the foreclosure proceedings.

We are satisfied that the trial court properly set aside the judgment of foreclosure.

The judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON and PARKER, JJ., concur.

(96 Wash. 303)

VIOLETTE v. QUEEN INS. CO.

(No. 13765.)

(Supreme Court of Washington. May 17, 1917.)

1. INSURANCE 🔑665(2) — CANCELLATION OF POLICY—SUFFICIENCY OF EVIDENCE.

In an action on a fire policy, evidence *held* sufficient to warrant a jury finding that the policy was not canceled before the fire, though plaintiff, one of whose policies had been canceled, acted on the mistaken impression that the policy sued on was the one canceled.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709.]

2. INSURANCE 🔑165 — PROPERTY INSURED — DESCRIPTION OF LOCATION.

A fire policy covered liquors, etc., described as contained in a two-story brick building with composition roof. Insured occupied one room in such building as a saloon and the adjoining room as a restaurant. In the rear of these two rooms was a wooden building, physically attached to the brick wall of the main building, and with a door leading therefrom into the restaurant. It was known as insurer's "liquor room," and was used wholly in connection with the main building. Prior to the issuance of the policy liquor had been stored there to some extent, and after its issuance it was used for that purpose to a larger extent. *Held*, that such so-called liquor room was a part of the building described in the policy, and liquors stored therein were covered by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 351.]

Department 2. Appeal from Superior Court, Chelan County; William A. Grimshaw, Judge.

Action by J. B. Violette against the Queen Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McCarthy, Edge & Davis, of Spokane, and Kemp & Baker, of Wenatchee, for appellant. C. B. Hughes and Hughes, Sumner & Adams, all of Wenatchee, for respondent.

PARKER, J. The plaintiff, Violette, seeks recovery upon a fire insurance policy issued to him by the defendant, insuring his stock of liquors kept for sale at his saloon in Leavenworth, in Chelan county. The policy was issued August 1, 1914. The fire occurred, resulting in total loss of the goods insured on December 30, 1914. Trial in the superior court for Chelan county resulted in verdict and judgment in favor of the plaintiff, awarding him $1,560, from which the defendant has appealed to this court.

[1] It is first contended in appellant's behalf that the policy was canceled at the instance of the respondent on December 12th, some two weeks prior to the occurrence of the fire. This contention involves nothing but a question of fact, as we view it, which was determined by the jury in favor of respondent. It seems to be rested upon alleged admissions and contentions made by respondent inconsistent with his claim under this policy. This apparently inconsistent attitude of respondent grew out of his misunderstanding of what was said and done by himself and Robert B. Field, the agent of appellant and other insurance companies at Leavenworth, looking to the cancellation of one of several policies on his stock of liquors, which policies had been issued by Field as agent of the several insurance companies. It is plain that on December 12th respondent requested Field to cancel one of the policies, and that, laboring under the impression that it was this policy which was canceled in pursuance of that request, he sought pro rata recovery for his loss from the other companies, when it developed that one of the policies so sought to be recovered upon had been canceled by Field, instead of this policy. Field testified that this policy was not canceled, nor requested to be canceled, by respondent. Appellant did not tender back to the respondent the premium which would have remained unearned on this policy until long after the fire, which premium had been paid in full shortly after issuing the policy and long before the fire. All of the policies had been left with the agent Field for safekeeping. In fact respondent did not see any of the policies until after the fire. There was simply an understanding that the policies be issued and so retained. It seems quite plain to us that the jury were fully warranted by the evidence in concluding that this policy was not canceled before the fire as claimed by appellant. We think this branch of the case needs no further discussion.

[2] It is further contended in appellant's behalf that the larger part of the goods destroyed was at the time in a room not in the building described in the policy as being the location of the insured goods, and that therefore such portion of the goods was not covered by the policy. This involves the question of whether or not this room was a part of the building described in the policy. The jury, by answers to two interrogatories submitted to them, found that of the goods destroyed $1.450 worth were in the saloon room, while $4.920 worth were in the room claimed by appellant not to be a part of the building described in the policy. The jury awarded respondent $1,560 as the pro rata liability of appellant with other insurance companies having concurrent insurance upon the goods, finding, in effect, that the room claimed by appellant not to be a part of the building was in fact a part of the building, which question the court by its instructions submitted to the jury for decision. The goods and

their location were described in the policy as follows:

> "The following described property while located and contained as described herein, and not elsewhere, to wit: $2,500 on stock of wines, liquors, cigars, soft drinks and all other goods usually kept for sale in a first-class saloon; all while contained in the two-story brick building, with composition roof, situate on lot 3, block 1, Ralston addition to Leavenworth, Wash."

The walls of the main portion of the building were constructed of brick. It was about 80 by 90 feet in area upon the ground. It faced the street to the north. It had four rooms on the ground floor, the second floor being used as a hotel. Respondent's saloon proper occupied the east room on the ground floor, which was 18 by 80 feet. At the time of the fire, back of the saloon room and a portion of the room next west thereof, there was a room 18 by 30 feet, one story high. It was built of wood, with a roof of somewhat similar material as on the main building. This room had been used, since its construction several years prior to the fire, wholly in connection with the main building, both as a kitchen in connection with a restaurant in the room next west of the saloon room, and also as a liquor storeroom in connection with the saloon. It was known as "Violette's Liquor Room" long before the issuing of this policy. This room or structure was physically attached to the brick wall of the main building. Its sills projected into and were supported by the brick wall of the main building, and its roof was also attached to the brick wall. There was a door from the room next west of the saloon room leading into the liquor room and there was access from the saloon room to liquor room over a small porch through the rear wall of the saloon room and thence into the liquor room. Respondent held all three of these rooms under lease. While this outside room was known as "Violette's Liquor Room," it is not very clear as to what extent it had been used for storing his liquor prior to the issuance of this policy, though manifestly it had been then used to some extent for that purpose. After the issuing of the policy the liquor room apparently was used to a much larger extent for that purpose. It is plain that the policy would have covered all liquor belonging to respondent within the brick walls of the main building regardless of which room of the building such liquor might be in, since no particular room of the building is mentioned in the policy. Therefore the liquor room is no less a part of the main building so far as this policy is concerned by the fact that the only door from it directly into the main building led into the room next west of the saloon room. It is quite plain that the liquor room was never used for any purpose except in connection with the main building.

It seems plain to us in the light of these facts that there is ample warrant for the conclusion that this so-called liquor room was a part of the brick building described in the policy as being the location of the insured goods. As was well said by the Kentucky court in Prussian National Ins. Co. v. Terrell, 142 Ky. 732, 135 S. W. 416:

> "It must be borne in mind that a description in a policy of the building insured is never accompanied, or intended to be accompanied, by the particularity of an architect's plans and specifications. The purpose of the description is simply to identify in a general way the building insured."

In that case the building insured was described as a "brick gravel roof building." After the construction of the building, but before the issuance of the policy, a brother of the insured was permitted to construct a room on the roof of this building for his own use for an indefinite period, covering evidently only a part of the roof some 18 by 60 feet and 10 or 12 feet high, with a metal roof, the understanding being that the brother was to use it as long as he desired, and in the event he ceased to use it he had the right to tear it down or let it remain and become the property of the insured. This structure was held to be a part of the building insured. It is somewhat difficult to see that this structure was any more a part of the building insured, though constructed on top of it, than the structure called the liquor room here involved was a part of the building described in the policy.

In Gross v. Milwaukee Mechanics' Insurance Co., 92 Wis. 656, 66 N. W. 712, the policy involved insured goods "while contained in the one-story frame store building situated," etc. At the time the policy was issued the main building had a lean-to, or shed, in the rear, with a door opening into the main building. The two structures were used together. Thereafter the shed was moved about 20 feet back from the main building, and an addition was built back to within 3 feet of the shed which had been moved back, it being attached to the new addition by a platform nailed to both structures with doors for convenient passage from one to the other over the platform. Thereafter all the structures were used together. After noticing some of its earlier decisions, the court concluded that:

> "Such addition, former main building and shed, all connected and used together, constituted the one-story frame store building within the meaning of the policies at the time the loss accrued."

In Still v. Connecticut Fire Ins. Co., 185 Mo. App. 550, 172 S. W. 625, the policy involved was upon a "shingle-roof frame barn." A silo was built against the side of the barn, so that it had openings directly to the inside of the barn, though the structure itself was outside the walls of the barn. The silo was held to be part of the barn, the court observing:

> "Insurance is a matter of contract, and the intention of the parties, if it can be ascertained, must determine the sense in which terms employed are used. Of course if that sense is clearly expressed in the policy, then the written terms are binding and conclusive. But if the policy does not clearly express the meaning to

be attached to the terms used in describing the property insured, then resort may be had to the surrounding circumstances to ascertain the meaning. In doing so we must have in mind that a policy of insurance, so written as to require construction of its meaning, will be construed in favor of, rather than against, the insured. It is a contract drawn by the insurer, and, when it is open to two possible interpretations, that one will be adopted which is least favorable to the party drawing it. Belch v. Schott, 171 Mo. App. 357, 157 S. W. 658. The language of the policy should be construed, if practicable, so as to cover the subject-matter intended to be covered. 19 Cyc. 664."

The circumstances attending the issuance of the policy here involved point to an intention on the part of the insured, and also on the part of Field, the agent, to insure all of respondent's stock of liquors. This we think renders the above-quoted language of the Missouri court quite pertinent here.

The following authorities lend support to the conclusion that this so-called liquor room was in fact a part of the building described in the policy as the location of the insured goods: Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 South. 202; White v. Mutual Fire Assurance Co., 8 Gray (Mass.) 566; Westfield Cigar Co. v. Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026; Workman v. Ins. Co., 2 La. 507, 22 Am. Dec. 141; 1 Wood, Fire Insurance (2d Ed.) § 85; 2 Joyce, Insurance § 1739.

Counsel for appellant cite and place some reliance upon our recent decision in Johnson v. Franklin Ins. Co., 90 Wash. 631, 156 Pac. 567. Plainly we think that decision is of no controlling force whatever here, in view of the fact that the goods destroyed were at the time several blocks distant from their described location in the policy.

We conclude that the judgment must be affirmed. It is so ordered.

ELLIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

(96 Wash. 379)

WYNNE et ux. v. HARVEY et al.

(No. 13787.)

(Supreme Court of Washington. May 18, 1917.)

1. Physicians and Surgeons 🔑16—Malpractice—Liability of Physicians Individually Engaged.

Where two physicians have been individually engaged in the same case, each is answerable, not only for his own conduct, but for unlawful acts or omissions of the other, which, exercising reasonable diligence, he should have observed.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31.]

2. Physicians and Surgeons 🔑18(8)—Malpractice — Liability of Assistant Surgeon—Sufficiency of Evidence.

Evidence *held* insufficient to establish assistant surgeon's liability for his chief's negligence in failing to remove a sponge from an incision; it not being his duty by custom to keep track of sponges, and he not having been directed to do so, and his duties being to do as directed by the chief operator.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 43.]

3. Physicians and Surgeons 🔑18(9)—Malpractice—Question for Jury—Sufficiency of Evidence.

Evidence *held* sufficient to warrant submission to jury of question of surgeon's negligence in the use of silk thread in tying arteries during operation.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44.]

4. Physicians and Surgeons 🔑14(1)—Malpractice—Degree of Skill.

A surgeon was chargeable with reasonable care, skill, and knowledge in the use of silk thread in tying arteries and suturing ruptured intestines during operation.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21, 24, 25, 28–30.]

5. Physicians and Surgeons 🔑18(9) — Treatment After Operation — Question for Jury.

Patient's testimony as to surgeon's treatment after operation *held* sufficient to submit issue of surgeon's negligence to the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44.]

6. Evidence 🔑471(11)—Opinion Evidence—Treatment After Operation.

A patient, who is a layman, is possessed of sufficient knowledge to render competent his testimony as to commonplace conditions and effects concerning surgeon's negligence in treatment following operation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2161; Witnesses, Cent. Dig. §§ 833–836.]

7. Physicians and Surgeons 🔑15—Malpractice—Failure to Remove Sponge.

A surgeon's failure to remove a sponge before sewing up incision is negligence per se.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 32.]

8. Physicians and Surgeons 🔑15 — Malpractice — Failure to Remove Sponge — Exception to Rule—Evidence.

Surgeon's testimony that he did not know that a sponge had been left in an incision, and that no count of sponges had been kept by nurses, took the case out of exception to general rule holding surgeon not liable for removal of sponge where patient's life would be endangered by further exploration.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 32.]

9. Physicians and Surgeons 🔑18(8)—Malpractice—Cause of Injury — Sufficiency of Evidence.

Evidence *held* sufficient to show that injuries complained of were caused by surgeon's negligence in leaving a sponge in incision.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 43.]

Department 2. Appeal from Superior Court, Stevens County; A. W. Frater, Judge.

Action by Fred J. Wynne and wife against L. B. Harvey and others. Judgment for plaintiffs against defendants Harvey and Clark, and they separately appeal. Reversed, with instructions to dismiss action, as to appellant Clark, and affirmed as to appellant Harvey.

L. C. Jesseph, of Colville, for appellant Harvey. Graves, Kizer & Graves, of Spokane, for appellant Clark. Davis & Heil, of Spokane, and L. B. Donley, of Colville, for respondents.

HOLCOMB, J. On March 11, 1914, respondents Fred J. Wynne and Margaret Wynne, his wife, commenced this action against appellants Harvey and Clark and one Martha L. Cousins, a nurse, to recover damages for malpractice. For convenience, Margaret Wynne alone will hereafter be referred to as respondent.

The record shows that for some time prior to May 8, 1913, Margaret Wynne had been suffering from an enlarged uterus, and, her condition growing steadily worse, after consulting with several physicians, it was decided that an operation was necessary. On the above-mentioned date she was operated upon by appellant Harvey as operator in chief, with the assistance of appellant Clark and two nurses, one of whom was the defendant Cousins. After the incision had been made, it was discovered that her condition was very serious, and a large mass of pus was found in the ovarian tube. Because of these serious complications and the weakened condition of the patient, appellant Harvey deemed it necessary for the safety of the patient to bring the operation to an end as speedily as possible, and drainage tubes were inserted to draw off the pus, and the wound was immediately sewed up. Appellant Harvey continued to treat respondent for a period of six weeks thereafter. The operation did not seem to be very successful, as the wound refused to heal and a fistula was formed, which discharged impure matter, including a silk thread which had evidently been used in the operation of May 8th. Thereupon respondent Fred J. Wynne, becoming dissatisfied, discharged appellant Harvey, and employed appellant Clark. Shortly afterwards Clark, with the aid of a local anæsthetic, made a small incision in the abdominal wall below the first incision for the purpose of securing better drainage; and, because the original wound gave Mrs. Wynne great trouble and refused to heal, a third operation was performed by appellant Clark on August 18, 1913, to discover the reason therefor. Next to the inside of the abdominal wall there was found a small mop sponge, which had been overlooked in the operation performed by appellant Harvey on May 8th. Other evidence will be discussed when considering the different assignments of error to which it relates. After a trial on the merits, a motion for nonsuit was granted as to Martha Cousins, but a verdict for $5,000 was entered against Harvey and Clark, who now prosecute separate appeals.

In the complaint it is alleged that appellants were negligent: (1) In using silk thread, instead of catgut, in tying up the ends of arteries; (2) in the manner of treating and caring for the wound subsequent to the first operation; (3) in failing to remove the sponge from the wound. Since the lower court held that there was no evidence to show that appellant Clark was guilty of the first two grounds of negligence alleged, and so instructed the jury, in disposing of his appeal it is necessary to determine only if he was legally guilty of negligence because the sponge was left in the wound.

[1] Appellant Harvey had been treating respondent for some time prior to the first operation, but on account of the seriousness of the operation it was decided that Harvey should have an assistant, and appellant Clark was employed by respondent Fred J. Wynne in that capacity. In cases of this kind the rule is well stated in Morey v. Thybo, 199 Fed. 760, 118 C. C. A. 198, wherein it is said, concerning the liability of two physicians independently engaged:

> "Each, in serving with the other, is rightly held answerable for his own conduct, and as well for all the wrongful acts or omissions of the other, * * * which in the exercise of reasonable diligence under the circumstances he should have observed."

[2] Appellant Clark having had nothing to do with the sponges or mopping with them on the inside of the incision, as is shown by all the evidence, except the testimony of appellant Harvey that Clark mopped with a sponge down into the back of the abdomen to the uterus, immediately afterwards modified by his statement that he did not remember whether Clark did any mopping or not, it is obvious that Clark would not be liable for this negligence because of any wrongful act of his own. Clark's activities were confined mainly to the outside of the wound, and, since the duties of an assistant are to do as directed by the chief operator, and there was no showing that he was either directed to keep track of the sponges or that it was made his duty by custom to do so, it is apparent that, in the exercise of reasonable diligence under the circumstances, no duty devolved upon Clark to discover that the sponge was not removed, the omission of which would render him liable in an action for damages. The nonsuit should have been ordered as to him.

[3, 4] In considering Harvey's appeal, we find that the complaint alleged negligence in the use of silk thread, instead of catgut, in tying off the arteries, and the only evidence to sustain this allegation was that a piece of silk thread was discharged through the fistula which formed in respondent's body. Counsel for appellant Harvey moved the court to withdraw this issue from the jury's consideration, on the ground that there was no evidence to support the same, and now assign as error the action of the trial court in overruling such motion. Impliedly admitting that it was improper to use silk in tying off arteries, and to explain its presence, appellant Harvey claims that it was used in suturing a ruptured intestine, and produced evidence to show that in so doing silk was the proper and better material to use. While there was no direct evidence to show that silk was negligently used in tying off arteries, there was evidence to show that silk was negligently

used, as the thread discharged through the fistula was No. 12, which, according to the testimony of the experts, was far too large for use in suturing a ruptured intestine; the majority of the experts being of the opinion that in no event should silk thread of larger size than No. 3 or No. 4 be used for this purpose. Precisely what use was made of the silk thread, and where, was manifestly unknown to respondent, save by results. The exact place and manner of use were known to appellant Harvey, who used it, and he was chargeable with reasonable care, skill, and knowledge in its use. We do not consider this evidence a material variance from the allegations of the complaint, and there was, therefore, sufficient evidence to submit this issue to the jury's consideration.

[5, 6] It is also contended by appellant Harvey that there was no evidence to sustain the allegation charging him with negligence in his treatment of respondent subsequent to the first operation, and that this issue should not have been submitted to the jury. In reviewing the evidence, we find respondent testified that the dressings were sometimes changed by appellant Harvey and sometimes by a nurse named Miss Cousins; that a great many times Harvey was asked over the telephone to come to the hospital to attend to respondent, and that some of the times requested he would not come; that when no one was there except Miss Haynes, another attendant, the dressings were not changed at all, because she was not a graduate nurse; that on some occasions the dressings were in so long that the pus would dry on them; and that the drainage tubes were not sterilized every time the dressings were changed, but were simply wiped off. Appellant Harvey contends that, since respondent is a laywoman, she is not possessed of a sufficient degree of knowledge in the science of medicine and surgery to give competent testimony as to whether she received proper treatment after the first operation or not, and that the testimony above referred to is of no weight, and has no legal standing as evidence. While this may be true with respect to some of the more intricate problems incident to taking care of a patient convalescing from an operation, we do not think it applies to such commonplace conditions and effects as those testified to by respondent, and concerning which even a layman is possessed of knowledge sufficient to render his evidence on such a subject competent. The evidence was of conditions and obvious results therefrom, and was therefore evidence of facts, and not of conclusions, or mere opinions. This issue was therefore properly submitted to the jury.

[7, 8] Finally, it is urged by appellant Harvey that as a matter of law he is not liable for failing to remove the sponge from the wound, and that, even though he is, respondent has failed to prove that the presence of the sponge in her abdomen was the proximate cause of the injuries complained of. Although it is admitted by appellant Harvey that the failure to remove any foreign substance from an incision is negligence per se, it is strenuously urged that there is an exception to this rule in this: That it is not negligence for a surgeon to leave a foreign substance in a wound when in his professional judgment further exploration for such foreign substance would endanger the safety of the patient. It is therefore claimed that, the evidence showing that respondent was failing fast on the operating table, and that in his judgment it was necessary to sew up the wound at once in order to save her life, this case is brought within the exception. In Davis v. Kerr, 239 Pa. 351, 86 Atl. 1007, 46 L. R. A. (N. S.) 611, and Van Skike v. Potter, 53 Neb. 28, 73 N. W. 295, this exception is recognized; but in both these cases it was based on the ground that either the surgeon relied on the count of the sponges kept by the nurses, or that he knew the foreign substance still remained in the patient's body, and in his judgment the patient's safety would be greatly endangered by any further exploration to discover and remove the same. There being no evidence in the record that the sponges were counted by the attending nurses, or that appellant Harvey knew there was another sponge in the incision (he, in fact, testified that, had he so known, he might have removed it), the facts in this case do not bring it within the exception, conceding and approving for the sake of argument that such an exception exists. This, on principle, at present we doubt, but find it not necessary to decide.

[9] Nor do we discover any merit in the claim that there is not sufficient evidence to prove that the injuries complained of were caused by the interned sponge. It is not surprising that the evidence on this question is not very clear and convincing, for at best it is largely a matter of opinion and conjecture. There was proof tending to show that the sponge at the time of its removal was saturated with pus; that the result of leaving a foreign body in the abdomen would be that the tissues, if weakened, would fall prey to infective bacteria, causing a deposit of pus; that the wound would not heal over a foreign septic body; that a sponge covered with pus is likely to carry infection to other parts of the body; that respondent Margaret Wynne's condition became better after the removal of the sponge; and that the wound would not heal with the sponge in the abdomen.

The judgment is therefore reversed, with instructions that the action be dismissed as to appellant Clark, with costs to him. In so far as appellant Harvey is concerned, the judgment is affirmed.

ELLIS, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

(96 Wash. 434)

UNITED STATES WHALING CO. v. KING COUNTY et al. (No. 13952.)

(Supreme Court of Washington. May 18, 1917.)

1. Taxation 🔑98—Place of Taxation — Tangible Personal Property.

Tangible personal property is taxable at the place of its actual situs, even though it may be used by its owners in interstate commerce, and no distinction in this respect is made between vessels engaged in trade between the ports of the different states and other carriers.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 196-198, 200.]

2. Taxation 🔑98—Place of Taxation — Tangible Personal Property—Whaling Vessels.

Vessels used for whale fishing and not common carriers having their sole home port in the state of Washington where they are moored more than one-half the year, and where they receive the benefits and protection of the laws of the state, and where they are equipped for their only voyages, have acquired a situs and are subject to taxation at such port, although the domicile of their owners and their place of registration is without the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 196-198, 200.]

3. Stipulations 🔑18(7)—Construction.

In an action to enjoin the collection of taxes on whaling vessels, the statement in the stipulation that the vessels are only temporarily in the state of Washington, while it might be given effect as a statement of ultimate fact, is rendered but a conclusion or deduction, and must be disregarded where the actual facts are shown, and the court must accept such facts as determinative.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 51.]

En Banc. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Suit to enjoin the collection of a tax by the United States Whaling Company against King County and others. From a judgment of dismissal, the plaintiff appeals. Affirmed.

Huffer & Hayden, of Tacoma, for appellant. Alfred H. Lundin and Edwin C. Ewing, both of Seattle, for respondents.

FULLERTON, J. In this action the United States Whaling Company, a corporation, seeks to enjoin the collection of certain taxes levied for the year 1915, by the county of King, state of Washington, upon three steam whaling vessels known as Star I, Star II, and Star III, the property of the corporation. The pleadings are appropriate to the issues raised, and need not be further noticed. At the conclusion of the evidence introduced at the trial the court decided that the vessels had acquired an actual situs in the county of King, and were subject to taxation therein, entering a judgment of dismissal with costs against the complainant. This appeal is from the judgment so entered.

The facts were in part stipulated and in part shown by oral evidence given at the trial. The appellant corporation was organized under the laws of South Dakota, with its main office at the city of Huron in that state. It is authorized to transact business in the state of Washington in virtue of having filed its articles of incorporation with the secretary of state of the state of Washington, having appointed a statutory agent who resides therein, and having otherwise complied with the state laws relative thereto. The business of the corporation is under the direction of a board of directors, five in number, one of whom resides at Huron, S. D., one at Glasgow, Scotland, two at Sandefjord, Norway, and one at the city of Seattle, Wash. By its articles wide and diverse powers are conferred upon the corporation, among which is the power to engage in the business of whale fishing, and to dispose of the products thereof. Its articles also empower it to establish branch or business offices at a number of named places, at which the company can hold meetings of its stockholders and directors; among the places so named being Seattle, Wash. It is not disclosed that the corporation engaged in any business other than that mentioned. In the prosecution of this business it constructed the vessels named in the city of Seattle in the year 1912, causing them to be registered as of the port of Ketchikan, Alaska. The vessels are not engaged in the general carrying trade. At the opening of the whaling season of each year, about the beginning of May, they are fitted out at Seattle and sent north to Alaskan waters where they engage in whaling until the close of the season, about the 1st of October, when they are returned to the same place and moored for the winter months. The business in which the vessels are engaged is under the general direction of a manager who resides at Sandefjord, Norway. The manager either comes in person or sends a representative to Seattle at the beginning of each whaling season, and superintends the repairing and outfitting of the vessels; the repairs being made, the supplies purchased, and the crews, with the exception of the gunners, being hired at that place. The business is financed by Balfour, Guthrie & Co., from their branch office located at Seattle. This company likewise disposes of the products of the enterprise; the vessels themselves bringing their catches to a station established on the Alaskan coast, whence the manufactured product are carried to market by commercial carriers. No taxes are paid upon the vessels in the state of South Dakota, nor was it known by any of the witnesses that taxes were paid thereon in the territory of Alaska or elsewhere.

[1] The law is well settled that tangible personal property is subject to taxation in the jurisdiction in which it has its actual situs, regardless of the place of domicile of its owner. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L.

Ed. 1059, 3 Ann. Cas. 1100. It is equally well settled, also, that such property is taxable at the place of its actual situs, even though it may be used by its owner in interstate commerce, and no distinction in this respect is made between vessels engaged in trade between the ports of the different states and other forms of carriers. Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205; Southern Pacific Co. v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. Ed. 96. In the case of Ayer & Lord Co. v. Kentucky, this language was used:

> "The general rule has long been settled as to vessels plying between the ports of different states, engaged in the coastwise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerc has acquired an actual situs in a state other than the place of the domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

Our own cases are to the same effect: Northwestern Lumber Co. v. Chehalis County, 25 Wash. 95, 64 Pac. 909, 54 L. R. A. 212, 87 Am. St. Rep. 747; North American Dredging Co. v. Taylor, 56 Wash. 565, 106 Pac. 162, 29 L. R. A. (N. S.) 105; Pacific Cold Storage Co. v. Pierce County, 85 Wash. 626, 149 Pac. 34; Canadian Pac. R. Co. v. King County, 90 Wash. 38, 155 Pac. 416. In Northwestern Lumber Co. v. Chehalis County it is said:

> "Sound reasons exist for the right of the state to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and, if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this state. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue law of this state, personal property is taxed at its situs, and without reference to the residence of the owner."

So in North American Dredging Co. v. Taylor it is said:

> "If the trial court was right in holding the state of Washington to be the situs of the property, that fact is decisive of the case. * * * It is the general rule that vessels in state or interstate traffic with no established situs, but going in and out of a port upon a fixed run or as the necessities of the business engaged upon may demand, or when engaged upon no fixed schedule, but sailing from one port to another as a carrier of state, interstate, or international traffic, shall be assessed at the home port, or at the domicile of the owner. * * * However, a vessel may be assessed without reference to the home port or the residence of the principal owner or agent, when it is put to such use as to impress it with a local character. * * * There must be some reasonable limit to the rule that overcomes the ordinary rule of situs when applied to such property, and we think it must be found in the answer to the question whether the presence in Pierce county of the dredger was temporary or merely indefinite. If the former, it would probably not be taxable. If the latter, it would be, so long as it was there at a time when the levy was made and the lien attached."

In Pacific Cold Storage Co. v. Pierce County the rule was stated in the following language:

> "Stated in another way, the domicile of the owner fixes the situs of the vessel, where it does not appear that it has acquired an actual situs elsewhere."

The case of Canadian Pac. R. Co. v. King County was a controversy over a tax levied upon certain railway cars owned by the Canadian Pacific Railway Company, and which were daily delivered to the Northern Pacific Railway Company and by the latter company hauled over its own tracks from the International boundary line to the city of Seattle and back to such line. The court held the tax valid, announcing "the general rule to be that tangible personal property is subject to taxation by the state in which it is, no matter where the domicile of the owner may be."

[2] Applying these legal principles to the facts shown, we are constrained to hold these vessels subject to taxation by the taxing authorities of King county. Were they vessels engaged in a coastwise traffic, or in traffic between the port of Seattle and a foreign port, the question might not be entirely free from doubt. But the vessels are not common carriers in any sense of the term. They are fishing vessels, nothing more. They have but one home port. From this port they are fitted out and equipped for the only voyages in which they engage, and to it they return when the purposes of the voyages are accomplished. The business in which they are engaged occupies them less than half the year, and for the remainder of the year they are moored at their home port, where they receive the benefits and protection of the laws of the state. Clearly, it seems to us, if tangible personal property in the form of seagoing vessels can ever acquire a situs apart from the domicile of its owner, these vessels have acquired such a situs. This being so, they are subject to taxation at the place of the acquired situs.

[3] We have not overlooked the fact that it is recited in the stipulation that these vessels are only "temporarily in the state of Washington." But this is not controlling. Were it all that appeared the court would be warranted in treating it as the statement of an ultimate fact and giving it effect accordingly. Here, however, the actual facts are shown, of which this is but a conclusion or deduction. In such a case the Court must accept the facts shown as determinative, and disregard the conclusions which conflict therewith.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, MAIN, PARKER, HOLCOMB, CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(96 Wash. 374)

MARCONNIER et al. v. PRESTON.

(No. 13778.)

(Supreme Court of Washington. May 18, 1917.)

1. WILLS 🔑734(4)—LEGACY—INTEREST.

A general pecuniary legacy begins to draw interest at the time the testator intended it should be payable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1851.]

2. WILLS 🔑733(12) — CONSTRUCTION — LEGACIES—TIME OF PAYMENT—INTEREST.

A will giving testatrix's property in trust with directions to pay certain pecuniary legacies, without direction as to time of payment, made bequest to certain charitable and religious organizations, and in a residuary provision specified that the remainder of the property should be used to establish a home for aged persons. It further provided that the executors and trustees should pay the legacies as rapidly as business judgment might require, without sacrificing the estate, providing for legacies as much as possible out of notes and mortgages and certificates of corporate stock. Following this was a provision that bequests to charitable and religious organizations should be first paid, subject to the right of the executors and trustees, in case of sickness or misfortune of any legatee, to pay any legacy at any time. Payment was to be made without intervention of any court. It appeared that, if the pecuniary legacies were to draw interest beginning one year after the death of the testatrix, the amount which would go under the residuary clause would be diminished. *Held*, that testatrix intended that the pecuniary bequest should not be payable until such time as the executors and trustees, in the exercise of good business judgment and without sacrificing the estate, would be able to convert the estate into cash, or so much thereof as might be necessary to pay the legacies, and that therefore such legacies would not begin drawing interest until such time, though it was more than one year after testatrix's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1845.]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by A. C. Marconnier and others as executors of the last will and testament of Sarah L. Crowley, deceased, against E. Margaret Preston and another. From judgment for plaintiffs, named defendant appeals.

Gose & Crowe, of Walla Walla, for appellant. Sullivan & Christian, of Tacoma, for respondents.

MAIN, J. The purpose of this action was to obtain a construction of the last will and testament of Sarah L. Crowley, deceased. The plaintiffs were the executors and trustees named in the will. The defendants were two of the pecuniary legatees. The point at issue was whether the legacies bore interest beginning one year after the death of the testatrix. The trial in the superior court resulted in a judgment adverse to the contention of the defendants. From this judgment E. Margaret Preston, one of the defendants, alone appeals.

The appellant claims that the legacies bore interest beginning one year after the death of the testatrix. The respondents claim that the legacies do not bear interest until, in the exercise of good business judgment, and within a reasonable time, the estate can be converted into cash, and the money made available to meet the bequests.

[1] The common-law rule, no doubt, is that general pecuniary legacies draw interest after one year from the death of the testator, or testatrix, unless a contrary intention appears from the will. This rule arose in the ecclesiastical courts in England, was adopted by the common-law courts, and is based on the presumption that, within that time, the executor would be enabled to ascertain the condition of the estate, collect the assets, and be prepared to pay the legacies. In applying the rule it is generally held that the legacy begins to draw interest at the time the testator intended it should be payable. Sloan's Appeal, 168 Pa. 422, 32 Atl. 42, 47 Am. St. Rep. 889; Cline v. Scott's Ex'r et al. (Ky.) 32 S. W. 215; Osgood v. Lovering, 33 Me. 464; Bowdre v. Jones, 34 Ga. 399; Valentine v. Ruste, 93 Ill. 585.

[2] Inquiry, therefore, must be directed to the provisions of the will in question, in order that the intent of the testatrix may be ascertained. The will, after naming the respondents as executors and trustees, contains this provision:

> "I give, bequeath, and devise to my said executors and trustees all property which I may own at the time of my death, whether real, personal or mixed, which gift, bequest, and devise is in trust for the purposes herein enumerated and to fulfill and put into effect the gifts, bequests, and devises which I make herein."

Following this provision, there is a devise and bequest to Mary Lynch, the mother of the testatrix, with the requirement that the executors and trustees shall pay to Mary Lynch, during her lifetime, the sum of $300 per month, which is to be a preferred charge against the estate. Following the provision for the mother, there are numerous bequests to relatives and friends of the deceased. Of these there are approximately 16 in number, the amounts of which vary from $500 to $10,000, and total approximately $70,000. Following these legacies, there are bequests to certain charitable and religious organizations, aggregating approximately $12,500. Then follows the residuary provision, by which the remainder of the property of the testatrix was to be used for the purpose of establishing and maintaining, in the city of Tacoma, or in the immediate vicinity thereof, a home for aged persons, "upon condition and out of respect to the memory of my late beloved husband, that the same shall be known and designated as St. Joseph's Home for the Aged." Another provision in the will is this:

> "They [the executors and trustees] shall pay the aforesaid legacies as rapidly as good business judgment may require without sacrificing the estate, providing for legacies as much as possible out of notes and mortgages due me and cer-

tificates of stock in corporations. However, this is not intended as a limitation upon their powers, if in their judgment it is to the best advantage to sell any of the real estate or other property for such purposes, excepting, of course, the real estate devised for life to Mary Lynch and afterward to Gertrude L. Marconnier."

Following this is a provision that the bequests to the charitable and religious organizations shall—

"be first paid. Giving to my said executors and trustees power, however, if in their judgment it is advisable, owing to misfortune or sickness of any legatee, to pay any other legacy or legacies in whole or in part at any time."

The will contains a direction that the estate shall be managed and settled by the trustees, without the intervention of the court, except to admit the will to probate and to file an inventory, and that the executors and trustees shall not be required to give bond.

To the will is attached a codicil, the provisions of which it is unnecessary to review, because there is nothing therein that would shed light upon the question here at issue.

The testatrix died some time during the month of February, 1914, and on the 27th of that month the will was duly admitted to probate by the superior court of Pierce county, since which time the executors and trustees have been in the management and control of the estate.

No claim is made that the estate has not been properly managed. The reason that the bequests have not been paid is that, owing to business conditions, the estate, in the judgment of the executors and trustees, could not be converted into cash without great sacrifice. While the will specifies no time at which the legacies shall be paid, yet it is apparent, when all the provisions thereof are considered, that the testatrix did not intend their payment until such time as the executors and trustees, in the exercise of good business judgment, should be able to convert the estate, or sufficient thereof to meet the legacies, into cash, without sacrificing the estate. The executors and trustees are given large discretionary powers. The property is conveyed to them in trust, for the purposes specified in the will, as indicated by the paragraph from the will first above quoted. By the second quoted paragraph they are directed to pay the legacies as rapidly "as good business judgment may require, without sacrificing the estate." By the third quoted provision they are given power, if, in their judgment, it is deemed advisable, owing to misfortune or sickness of any legatee, to pay a legacy, or legacies, in whole or in part at any time.

As indicated by the residuary clause, one of the dominating purposes in the mind of the testatrix was the erection, in memory of her late husband, of a home to be known as St. Joseph's Home for the Aged.

If the pecuniary legacies draw interest beginning one year after the death of the testatrix, the amount which would go under the residuary clause would be diminished to the extent of the accumulation of such interest, and thereby the fund for the erection of the home for the aged would be impaired to that extent.

Considering all the provisions of the will, and endeavoring to ascertain therefrom the intention of the testatrix, we are of the opinion that it was her intention that the pecuniary bequests should not be payable until such time as the executors and trustees therein, in the exercise of good business judgment, and without sacrificing the estate, would be able to convert the estate into cash, or so much thereof as might be necessary to pay the legacies. It is true that the will nowhere specifies a particular date upon which the legacies shall be paid, nor that such legacies shall not draw interest after the expiration of one year from the death of the testatrix, but it is a cardinal rule of construction that the intention of the testator, or testatrix, shall be ascertained from the provisions of the will, and, when so ascertained, be given effect. There is no reason why the intention of the testatrix, when gathered from all the provisions of the will, should not be as controlling as if that intention were expressed in direct and specific language.

It is unnecessary to review, in detail, authorities, because the result of each case must depend largely upon the provisions of the will there being considered.

The judgment will be affirmed.

ELLIS, C. J., and CHADWICK, WEBSTER, and MORRIS, JJ., concur.

(96 Wash. 458)

MACARIO v. ALASKA GASTINEAU MINING CO. et al. (No. 13886.)

(Supreme Court of Washington. May 19, 1917.)

1. Mines and Minerals 🔑108 — Process Against Foreign Corporation — "Doing Business in State."

A New York corporation engaged in mining in Alaska is not "doing business" in Washington because maintaining an office there for buying supplies and forwarding them to it in Alaska, so as to enable a Washington court to obtain jurisdiction of it on a cause of action arising in Alaska by service on such purchasing agent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 232.]

2. Appearance 🔑9(6) — General Appearance—Petition for Removal of Cause.

Neither petition for removal of cause nor amendment thereof by leave is a general appearance, so as to give the court jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 50.]

3. Judgment 🔑137 — Default — Setting Aside on Court's Motion.

The default entered against defendant being void because the summons was without effect and defendant was not subject to suit in the state, the court could set it aside on its own motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 262-264.]

4. **Master and Servant** ⟹243(12)—**Injury to Servant — Liability of Superintendent.**

The master's superintendent of construction is not liable for injury from explosion to a laborer working under a foreman, where, had his general directions been followed, the accident would not have happened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 774.]

Holcomb, J., dissenting.

Department 2. Appeal from Superior Court, Ferry County; Mitchell Gilliam and Kenneth Mackintosh, Judges.

Action by James Macario against the Alaska Gastineau Mining Company and another. From an adverse order and judgment, plaintiff appeals. Affirmed.

John F. Miller, John T. Casey, and R. J. Boryer, all of Seattle, for appellant. R. S. Pierce and Lyons & Orton, all of Seattle, for respondents.

PARKER, J. The plaintiff, Macario, commenced this action in the superior court for King county seeking recovery of damages for personal injuries against the defendants' mining company and O'Neill, which personal injuries he claims to have suffered as the result of the negligence of the defendants while he was employed by the mining company under the direction of O'Neill, its foreman, in its mining operations in Alaska.

The mining company is a corporation organized and existing under the laws of the state of New York and is engaged in mining operations in Alaska, being duly authorized to do business therein under the laws of that territory. It has never complied with our statute relating to the doing of business in this state by foreign corporations. It claims that it never did business in this state of the nature that called for any such compliance on its part, and also that it never did business in this state of such nature that it can lawfully be subjected to the process of our courts. The plaintiff sought to have the superior court for King county acquire jurisdiction over the mining company in this action by service of summons upon Robert Munro as its agent in Seattle. The mining company appeared specially and moved to quash the service of the summons upon the ground that it was not doing business in this state of such nature as to enable our courts to acquire jurisdiction over it in this case. Trial before the court upon the issue of whether it was so doing business in this state resulted in findings and an order quashing the service of summons upon Munro as the company's agent and holding the service for naught. Defendant O'Neill was personally served with summons in Seattle, and the case proceeded to trial upon the merits as against him before the court sitting with a jury, when at the close of the evidence introduced in the plaintiff's behalf counsel for defendant O'Neill moved for a dismissal of the action upon the ground that the evidence introduced was insufficient to support any recovery as against him. This motion was by the court granted, and the jury discharged. The plaintiff has appealed from the order of the court quashing the service of summons upon Munro as agent of the mining company, and also from the judgment of dismissal in favor of defendant O'Neill.

Respondent mining company, while organized under the laws of the state of New York and having its head office in that state, is principally engaged in somewhat extensive mining operations in Alaska. Since the year 1912 Robert Munro, a resident of Seattle, has been its employé upon a regular salary. His title as such employé is "supply and forwarding agent." The mining company maintains an office in Seattle, which has been at all times since 1912 under Munro's charge with two other salaried employés under him. The duty of Munro has been to forward from Seattle supplies to the mining company at its place of operation in Alaska. These supplies would be purchased at different points in the states, shipped by rail to Seattle, some of them also being purchased in Seattle, when Munro, as representative of the mining company there, would attend to their transfer and shipment by boat to the mining company in Alaska. Munro apparently had considerable to do with the purchase of these supplies, especially the portion thereof purchased in Seattle. He had authority to make contracts of purchase at least to some extent, though apparently when purchases in any considerable sum were made he was required to submit the same to officers of the company either in New York or Alaska for approval before the final consummation of such purchases. There were large quantities of supplies thus forwarded from Seattle by Munro to the mining company in Alaska. This constituted the principal work of Munro for the mining company in this state. There were, however, other duties occasionally performed by him for the mining company, such as making hotel and transportation reservations for officers and employés of the company passing through Seattle on their way to and from Alaska. He also on two or three occasions by special direction from the Alaska office made arrangements for the care of injured workmen sent by the company to Seattle from Alaska for treatment, and on one occasion signed and verified an answer for the company in an action pending against it in the United States District court sitting at Seattle, and on another occasion by special direction from the Alaska office made arrangement with one of its injured workmen who was then in Seattle for a compromise of the workman's claim against the mining company. The foregoing summary, we think, constitutes a fair statement of all the business the mining company ever did in this state, and is as favorable to appellant's contentions as the record will admit of.

[1] It was conceded that Munro was the agent of the mining company for the purpose of doing all of the things above noticed, and that, if the doing of these things at Seattle constituted the doing of business in this state by the mining company to the extent that it thereby became subject to the process of the superior court for King county in this action, then the service of the summons upon Munro was an effective service upon the mining company in so far as the question of his agency alone is concerned. So the question here is: Was the mining company doing business in this state to the extent that it became subject to the process of our courts in this action?

Conceding for argument's sake, speaking generally, that this cause of action is transitory, being one which appellant may sue the mining company to recover upon in any court within whose jurisdiction he can find the mining company and procure lawful service of process upon it, let us have in mind that this cause of action arose, if at all, in Alaska, where the mining company is doing its principal business. It may be that, if a cause of action should arise in this state against the mining company growing directly out of an authorized agency act of Munro, the mining company could be sued thereon in the courts of this state, though its doing business in this state be limited to the particular act creating such cause of action, and though it should be held not to be engaged in business generally in this state. We think an examination of the authorities will show that the place of the arising of the cause of action has been generally regarded as of controlling force by the courts in determining the question of a defendant foreign corporation being subject to the process of the court wherein recovery is sought whenever the question of such foreign corporation doing business generally in the state in which it is sought to be sued is one of doubt. 19 Cyc. 1338, 1339.

Our problem then is, as we view it: Was the mining company doing business in this state to that extent which subjected it to the process of our courts as to any and all transitory causes of action maintainable against it? Our inquiry must necessarily take this broad scope, since every possible element of the cause of action here involved arose in Alaska and was wholly unconnected with any act or business transaction of the mining company in this state. So the jurisdiction of the superior court for King county is not aided in the least by the place of the arising of the cause of action as such jurisdiction would be aided had the cause of action arisen in this state.

The opinion of the Supreme Court of the United States in Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, we think, is decisive of this question. That was an action in the Circuit Court of the United States for the Eastern District of Pennsylvania, to recover damages for personal injuries occurring in Colorado, which were claimed to have resulted from the negligence of the railway company, an Iowa corporation. The railway company did not operate any railway lines in Pennsylvania, though it did some business there in the way of entering into contracts for transportation of persons and property over its lines west of Chicago, which business, as we view it, bore at least as intimate relation to the general business of the railway company as the business done by Munro in Seattle bore to the general business of respondent mining company. In holding that such business transacted in Pennsylvania by the railway company's agent did not constitute the doing of business by that company in Pennsylvania to the extent of subjecting it to be sued in Pennsylvania upon a cause of action for personal injury occurring in Colorado, Justice Moody, speaking for the court, said:

> "The eastern point of the defendant's line of railroad was at Chicago, whence its tracks extended westward. The business for which it was incorporated was the carriage of freight and passengers, and the construction, maintenance, and operation of a railroad for that purpose. As incidental and collateral to that business it was proper, and, according to the business methods generally pursued, probably essential, that freight and passenger traffic should be solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this incidental business the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers and freight to be transported over the defendant's line. For conducting this business several clerks and various traveling passenger and freight agents were employed, who reported to the agent and acted under his direction. He sold no tickets and received no payments for transportation of freight. When a prospective passenger desired a ticket, and applied to the agent for one, the agent took the applicant's money and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order, which gave to the applicant, upon his arrival at Chicago, the right to receive from the Chicago, Burlington & Quincy Railroad a ticket over that road. * * *
>
> "The question here is whether service upon the agent was sufficient; and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. * * *
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> "The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This view accords with several decisions in the lower federal courts. Maxwell v. Atchison, T. & S. F. R. Co. [C. C.] 34 Fed. 286; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.,

4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420 [38 L. R. A. 271]; Union Associated Press v. Times-Star Co. [C. C.] 84 Fed. 419; Earle v. Chesapeake & O. R. Co. [C. C.] 127 Fed. 235."

We think no decision rendered by this court is so directly in point here as to be of controlling force, though our decisions in the following cases are in harmony with and may be said to lend some support to the view that the mining company did not do business in this state to the extent that it became subject to being sued in our courts upon this alleged personal injury cause of action arising in Alaska: Rich v. Chicago, B. & Q. R. Co., 34 Wash. 14, 74 Pac. 1008; Arrow Lumber, etc., Co. v. Union Pac. R. Co., 53 Wash. 629, 102 Pac. 650; Smith & Co. v. Dickinson, 81 Wash. 465, 142 Pac. 1133. The decision of our federal District Court in Johanson v. Alaska Treadwell, etc., Co. (D. C.) 225 Fed. 270, also lends support to this conclusion.

Our decision in Lee v. Fidelity Storage, etc., Co., 51 Wash. 208, 98 Pac. 658, and Spokane Merchants' Association v. Clere Clothing Co., 84 Wash. 616, 147 Pac. 414, upon a casual reading may seem to lend some support to appellant's contention, but a critical examination of those cases will show that they both involved causes of action clearly arising in this state and such as the defendant corporations would be liable to be sued upon in this state regardless of whether they were doing business generally therein or not. Our decision in Sievers v. Dalles, etc., Co., 24 Wash. 302, 64 Pac. 539, may also seem to lend some support to appellant's contention. In that case, however, the defendant foreign corporation was held suable in this state by service upon its purser at Vancouver in this state upon the ground that its regularly receiving and discharge of freight and collecting charges therefor at Vancouver constituted the doing of business generally in this state. This, it seems to us, may be likened to a railway company maintaining its lines and a transportation business over them in a state other than the one of its creation. We note that the question apparently most seriously considered by the court in that case was as to the agency of the purser and as to his being such agent of the foreign corporation as could be served with process against it. The question of its doing business in the state such as to render it subject to the process of our courts apparently received but little consideration.

The authorities principally relied upon by counsel for appellant are the decisions of the Court of Appeals of Kentucky in International Harvester Co. v. Commonwealth, 147 Ky. 655, 145 S. W. 393, and the Supreme Court of the United States in the same case upon writ of error. International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479, where the decision of the Kentucky Court of Appeals was affirmed, holding that the International Harvester Company was doing business in the state of Kentucky to the extent that it was subject to the process of the courts of Kentucky and suable therein upon the cause of action involved. That was a prosecution upon an indictment against the harvester company, charging it with being a member of a pool or combination with other companies for the purpose of regulating and controlling the price of machinery and to enhance the cost thereof above its reasonable value, in violation of the statutes of Kentucky. The process issued was, in substance, the same as a summons in a civil action requiring the harvester company to appear and defend. It was served upon one Pace as the agent of the company within the jurisdiction of the Kentucky court in which the indictment had been returned. Some of the particular acts complained of in the indictment were charged to have been done by and through Pace as agent of the company, and it is plain that the offense was committed, or the cause of action, if we may call it such, arose in Kentucky. The business of the harvester company in Kentucky was that of selling harvester machinery, and was quite extensive and spread generally throughout the state. In deciding that case Justice Day, speaking for the court at page 586 of 234 U. S., at page 946 of 34 Sup. Ct., 58 L. Ed. 1479, said:

> "It is argued that this conclusion is in direct conflict with the case of Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. We have no desire to depart from that decision, which, however, was an extreme case."

It seems to us that, as the railway company's business in the Green Case was by the court differentiated from the harvester company's business in Kentucky, so may the business of respondent mining company in Seattle be differentiated from the harvester company's business in Kentucky. In other words, as the railroad company's business in Pennsylvania was regarded merely as incidental to its business in Colorado, so may the mining company's business in Seattle be regarded as merely incidental to its principal business which is in Alaska. The Harvester Company Case can also be differentiated from the Green and this case in that it was an action seeking to recover a penalty upon a cause of action arising in Kentucky.

The following decisions of the courts, we think, show that the liability of a foreign corporation to be sued in a state other than that of its creation because of its doing business therein, upon any and all transitory causes of action arising against it, and the liability of a foreign corporation to be sued in a state other than that of its creation because of its doing business therein, upon a particular cause of action arising in the state wherein it is sought to be sued, are two different questions; and the decision of the latter question is not necessarily determinative of the former. National Condensed Milk

Co. v. Brandenburgh, 40 N. J. Law, 111; Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co., 49 Neb. 537, 68 N. W. 929; Hiller v. Burlington & Mo. R. R. Co., 70 N. Y. 223; Nelson, Morris & Co. v. Rehkopf & Sons (Ky.) 75 S. W. 203; Simon v. So. Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492.

Some contention is made in appellant's behalf that because the mining company had some property in Seattle, consisting principally of office furniture of the value of approximately $500, that fact should be considered in aid of the jurisdiction of the superior court for King county and its power to subject the mining company to its process. The answer to such contention is that this is not a proceeding in rem, but an action to recover a personal judgment against the mining company. We are not here concerned with the question of jurisdiction to render a judgment in rem, but a judgment in personam. Plainly, we think, the fact of the mining company having property in Seattle is of no controlling force whatever in this case.

[2] Some contention is made in appellant's behalf that the mining company in effect entered a general appearance in this case. This contention seems to be rested upon the fact that after the commencement of the action in the superior court for King county the mining company, being a foreign corporation, petitioned for the removal of the case to the federal court, and before such removal was consummated amended its petition in that behalf showing somewhat more certainly than in its original petition that it was a corporation organized under the laws of the state of New York. Upon the approval of the bond for removal to the federal court by the superior court an order was entered containing recitals of some considerable length, among other things reciting that on motion of defendant mining company it was allowed by the court to amend its petition by interlineation. Counsels' contention seems to be that this leave of the superior court to amend the petition constituted a general appearance upon the part of the mining company. We cannot assent to this view. The petition to remove being in effect a challenging of the court's jurisdiction or rather a plea to oust it of jurisdiction, the remarks of the Appellate Court of Illinois in Pooler v. Southwick, 128 Ill. App. 264, seem to effectually answer this contention, as follows:

> "Such a plea to the jurisdiction of the court is amendable, and our liberal statute of amendments applies fully thereto. Midland Pacific Ry. Co. v. McDermid, 91 Ill. 170; Drake v. Drake [83 Ill. 526], supra. Hence a motion for leave to amend such a plea cannot be said to be a general appearance giving the court full jurisdiction. Such a rule would defeat the right to amend; for leave to amend can only be obtained by a motion to the court. It would be a contradiction in principle to hold that one may amend a plea to the jurisdiction of the court, but that if he asks leave to do so he thereby defeats the plea and gives the court full jurisdiction."

In Wabash Western Railway v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, it was held that a petition in general terms for removal of a cause to a federal court, without specifying or restricting the purpose of the defendant's appearance in the state court, is not, like a general appearance, a waiver of any objection to the jurisdiction of the court over the person of the defendant, and that the filing of a petition for removal is not a general appearance, but a special appearance only. If the filing of a petition for removal is not a general appearance, then manifestly an amendment of such a petition would not be a general appearance. It seems plain to us that the superior court for King county did not acquire jurisdiction over the mining company by virtue of any general appearance of that company. After the case was removed to the federal court it was remanded to the superior court by the federal court, and thereafter the mining company specially appeared and moved to quash the service of the summons, when the motion was disposed of in the superior court.

[3] Further contention is made in appellant's behalf that the trial court erred in setting aside the default entered against the mining company without formal motion in that behalf by the mining company. Since we have arrived at the conclusion that the service of the summons was wholly without effect as against the mining company and because it was not subject to being sued in this action in this state, it follows that the default entered against it was void, and that the trial court did not err in setting it aside upon its own motion, as it is insisted by counsel for appellant the court did. It would seem that such order should follow the setting aside of the service as a matter of course.

We are of the opinion that the order quashing the service of summons upon Munro as agent for the mining company must be affirmed. It is so ordered.

[4] It is contended in appellant's behalf that the trial court erred in dismissing the case for want of sufficient evidence to support any award of damages as against the defendant O'Neill. This disposition of the case upon the merits in favor of O'Neill seems to us so plainly correct that it calls for but little discussion. Respondent O'Neill was the salaried superintendent for the mining company in the construction of the tunnel in which appellant was injured by an explosion of a dynamite charge. The foreman, Miller, working under O'Neill, was in charge of the particular work in which appellant was one of the employés at work at the time he was injured. The injury occurred by the explosion of a dynamite charge during the work of a night shift. O'Neill was at that

time in bed asleep; and evidently had been for several hours. He was not present and knew nothing of what was being done there for some time preceding the occurring of the accident. We are unable to find in the record before us anything that points to any act of O'Neill as the proximate cause of the injury to appellant. It is true O'Neill was the superintendent and had given certain general directions concerning the performance of the work; but the evidence wholly fails to show that the accident was the result of following O'Neill's directions. Indeed, it is conclusively proven that the accident would not have happened had his directions been followed. We think this branch of the case needs no further discussion.

The judgment of dismissal in favor of O'Neill is affirmed.

ELLIS, C. J., and MOUNT and FULLERTON, JJ., concur.

HOLCOMB, J. I am unable to concur with the majority in the affirmance of the quashing of service of process upon the respondent mining company. It seems clear to me that the facts show that the agent Munro performed much of the corporation's necessary general business in this state. As to that part of the decision, I dissent.

(96 Wash. 415)

JACKMAN et al. v. GERMAIN et al.

(No. 13835.)

(Supreme Court of Washington. May 18, 1917.)

1. ADVERSE POSSESSION 🔑108 — SURVEY — LOST CORNER.

Whether a quarter section corner was a lost corner is immaterial, where defendant and his predecessors have held adversely up to that point for the statutory period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 624–628.]

2. BOUNDARIES 🔑53—ESTABLISHMENT—SURVEY.

A survey under Rem. Code 1915, § 3984, providing that landowners after notice to interested parties may employ a surveyor to locate section lines, etc., is not binding upon persons not participating, especially as Rem. Code 1915, c. 7, § 945 et seq., provides the method of establishing boundaries where the parties cannot agree.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 264–267.]

3. BOUNDARIES 🔑37(5) — ESTABLISHMENT — AGREEMENT.

In suit to quiet title, evidence that defendant agreed to the relocation of a boundary line fence, if plaintiff secured consent of a tenant, *held* not to establish a boundary line agreement where it does not appear that the tenant's consent was secured.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186–189, 193.]

4. BOUNDARIES 🔑33—ESTABLISHMENT—BURDEN OF PROOF.

In suit to quiet title, plaintiff, alleging a boundary line agreement, has the burden of proving it.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 146–152.]

5. ADVERSE POSSESSION 🔑50—ESTOPPEL.

In suit to quiet title, defendants are not estopped to claim title by adverse possession because they acquiesced in a change of a boundary line fence for several years while such dividing line was in litigation and where such change of location did not prejudice plaintiffs.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 255–261.]

6. ADVERSE POSSESSION 🔑27 — SUFFICIENCY OF EVIDENCE.

Evidence that defendant built a fence, cleared the land up to it, and for over ten years maintained such fence, establishes title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 121, 122, 652, 664, 684.]

Department 2. Appeal from Superior Court, Whatcom County; Guy C. Alston, Judge.

Action to quiet title by Stephen T. Jackman and Mary Jackman and Wallace Ackley and Mary Ackley against Walter T. Germain and Rose M. Germain, his wife, and John Botta. From a decree quieting title in plaintiffs Ackley and defendants Germain, the plaintiffs Jackman appeal. Affirmed.

Bixley & Nightingale, of Bellingham, for appellants. Hurlbut Neal, of Bellingham, for respondents.

MOUNT, J. This action was brought to quiet title in the plaintiffs to a strip of land about 250 feet wide, alleged to belong to the plaintiffs, as a part of the northwest quarter of section 13, township 40, range 2 east W. M., in Whatcom county. On a trial of the case, the court found that the defendants and their predecessors in interest had held the exclusive, open, and notorious possession of a part of the strip for a period of more than ten years, and for that reason quieted title to that part in the defendants, and to the balance of the strip in Ackley and wife. The plaintiff Jackman and wife have appealed from that part of the decree quieting title in the defendant Germain. It appears from the record that Jackman and defendant Botta located in section 13 in about the year 1883. They were the first settlers in that locality. The Jackmans located on the northwest quarter of section 13, and Botta on the southwest quarter of that section. Soon after they located upon the land, they employed one Judson, who was then a surveyor, to point out the lines and show them the corners. The land at that time was uncleared. It was covered with brush and timber. The section was an irregular section. The lines, as originally surveyed by the government surveyors, could be traced by blazes upon trees. Mr. Judson was unable to find any of the corners of the section. He traced out the west line of the section to a point about midway between the northwest and southwest corners. He found what was supposed to be a bearing tree, which indicated the quarter corner post. According to the field notes, the quarter corner post was located a distance of 2.64 feet from this tree. After that time, this tree was destroyed, and Mr. Botta planted a stone at the point, and claimed that this stone marked his northwest corner. This stone was afterwards known as the "Botta stone." After the section corners were found, Mr. Jackman insisted that the quarter corner stone set by Mr. Botta was not in the right place. Mr. Botta, however, maintained that it marked the corner. In the winter of 1900 and 1901, Mr. Botta built a fence, beginning at what he claimed was his northeast corner, and running thence west a distance of about 80 rods. He cleared his land up to this fence, and later extended the fence westward to what is commonly known as the "Botta corner." In the year 1911, Mr. Lyle a deputy county surveyor, was employed by some of the residents in the section to run out all the lines. Neither Mr. Botta nor his grantees took any part in this survey. Mr. Lyle ran the lines according to the government field notes, as he maintains, and located the quarter on the west line of the section, 249.7 feet south of the stone set by Mr. Botta. The defendant Germain at that time had purchased Mr. Botta's interest in the southwest quarter, and some negotiations were had between the Jackmans and Mr. Germain as to the removal of the fence, which had been there since 1900. Mr. Jackman desired the fence moved south to the line run by Mr. Lyle. Mr. Jackman claims that Mr. Germain agreed that the fence might be moved. Mr. Germain testified that he did not agree that the fence might be moved. He testified, however, that he agreed that, if Mr. Jackman would move the fence at his own cost, and would satisfy a tenant of Mr. Germain's, he would consent to the removal of the fence. He also testified that the tenant would not consent, and that he did not consent, to the removal of the fence. Mr. Jackman removed the fence, and placed it upon the line determined by the Lyle survey. A year or two later, parties in section 14 brought an action to establish the quarter corner post on the section line between sections 13 and 14. The parties to this action were not parties to that action. The action resulted in a judgment of the superior court of that county, determining that the Botta stone was the correct location of the quarter corner. Thereafter Mr. Germain tore down the fence on the Lyle survey, and moved it back to where it originally was. This action was then begun to quiet title to the land in dispute. The trial court found as follows:

> "That at all times between the latter part of 1900 and March, 1911, the said Botta and his grantees cultivated the east half of the land in dispute and were in the open, notorious and exclusive possession of same under claim that the same was a part of the land which had been granted by the United States government to said John Botta"

—and, for that reason, concluded that the plaintiff Jackman was not entitled to the east half of the strip. The appellants make four contentions upon the brief, to the effect: First, that the quarter corner on the west line of the section is a lost corner, and was legally established by the Lyle survey, and that the center line of that section was also established by that survey; second, that the Lyle survey was an official survey in substantial compliance with the provisions of section 3984, Rem. Code; third, that the Lyle boundary line was an agreed boundary between the parties; fourth, that the respondents were estopped to deny the title and right of possession in appellants, and that there was no adverse holding by the respondents.

[1] We shall briefly notice these contentions. Upon the first contention, appellants argue that the quarter corner on the west line of the section is a lost corner. The respondents claim that the corner is not lost, but was established when the line was run by Mr. Judson in the year 1883. The respondents further contend that, even if the corner was a lost corner, it was established by a judgment of the court between other parties. We think the question whether this corner was a lost corner or not is of no importance in the case if, as a matter of fact, Mr. Botta and his successors in interest have maintained it as the true corner and have held adversely to that line for a period of ten years or more. We shall notice that question later.

[2] It is next argued by the appellants that the survey made by Mr. Lyle in the year 1911 is an official survey by the county engineer, under section 3984, Rem. Code, and establishes the lines and corners. That section of the Code does not purport to be for the establishment of lost corners or lines, where such corners or lines are in dispute. It simply provides that the owners of any section of land in this state, after having given ten days' notice to all persons interested, may employ a surveyor to establish and relocate or perpetuate lines and corners of a section of land, and it provides the method of payment by such persons. But it does not purport to provide that such surveys are binding between persons who do not take part therein where corners or lines are in dispute. Chapter 7 of the Code, beginning at section 947, provides the method of establishing lines, corners, and boundaries of lands, where the parties cannot agree thereon. It is not claimed in this case that the provisions of that chapter were followed. In fact, they were not followed.

[3, 4] It is next argued that the boundary line between the adjoining lands of the appellants and respondents was established by agreement of the parties according to the Lyle survey. This was a disputed question of fact. The trial court, in commenting upon the evidence, made this statement:

> "Shortly after the survey Jackman consulted Germain, the then owner of the Botta tract, about the removal of the fence from the Judson survey to the Lyle survey. They had certain negotiations in that connection which finally culminated in Germain agreeing that if Jackman

would remove the fence to the Lyle survey at his own expense and satisfy Germain's tenant, who then had a lease for a term of years on the said southwest quarter, it would be satisfactory to Germain. The fence was thereupon placed on the boundary between the northwest and southwest quarters as established by the Lyle survey."

But the court did not find that Mr. Jackman did satisfy the tenant of Mr. Germain at that time, or at all, and we find no evidence in the record to the effect that he satisfied the tenant. Mr. Germain testified that they did not reach an agreement, and that when Mr. Jackman removed the fence upon the Lyle survey, it was without his knowledge or consent, and that he allowed it to remain there simply because a lawsuit was pending to determine the quarter corner post upon that section line, between other parties, and he awaited the result of that decision. After that decision was filed, he then tore down the fence, which he claims was wrongfully placed upon the Lyle survey by the appellants.

From a careful reading of the record, we are not disposed to hold that there was an agreement for the establishment of the boundary line. If there had been an agreement, then, under the authorities, that agreement would, no doubt, be good. Rose v. Fletcher, 83 Wash. 623, 145 Pac. 989, and cases there cited. But the burden was upon the appellants to establish that agreement, which, we think, has not been done.

[5] The appellants argue next that the respondents were estopped to deny the title and right of possession in the appellants, because they acquiesced for two or three years after the appellants had moved the fence. We think there is no room for estoppel, because appellants were not permitted to do anything to their disadvantage after having moved the fence upon the land now in controversy. The dividing line was in dispute. The appellants were claiming the land, and the respondents were also claiming it. The appellants, without knowledge of the respondents, tore down the fence and rebuilt it upon what they claimed to be the line. There was then a case pending which would determine the true boundary line. The respondents waited until a decision of that case was rendered, and when that case was decided, it fixed the line at where respondents claimed it was. We think, under these facts, there is no room for estoppel.

[6] Appellants lastly argue that there was no adverse possession, and for that reason the court erred in finding adverse possession. There is little or no dispute in the record that Mr. Botta, who owned the land at that time, maintained that the stone set by him, about the year 1885, was at the true quarter corner. In the year 1900 he built a fence, and cleared the land up to that line, and for more than ten years maintained the fence upon that line. He maintained the fence openly and notoriously, in opposition to the wishes of the appellants. His successors in interest afterwards claimed the land. One party was claiming the line was at a given place. The other party was claiming that it was another place, so it is apparent that there was an adverse holding on the part of the respondents, from the time the fence was erected, in 1900, until after 1911. This court has held that adverse possession for the statutory time, under a mistaken belief that a fence inclosing the land was on the true boundary line, with claim of ownership during such period, ripens into title by adverse possession. Wissinger v. Reed, 69 Wash. 684, 125 Pac. 1030. We are of the opinion that the trial court properly found that there was an adverse holding for a period of ten years.

The judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

(96 Wash. 336)

HALLORAN v. GERMAN-AMERICAN MERCANTILE BANK. (No. 13722.)

(Supreme Court of Washington. May 18, 1917.)

1. Brokers 🔑76—Right to Recover Payment to Owner as Consideration for Option Contract.

Where a real estate brokerage corporation paid the amount of a first payment received from a prospective purchaser for an option on the property to the owner to secure the execution of a contract by the owner giving the purchaser a right to consummate the sale, neither the corporation nor its assignee can recover such payment from the owner, as it would destroy the consideration which makes the contract binding upon the owner; the agreement between the broker and purchaser being immaterial.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 63.]

2. Brokers 🔑85(7)—Documentary Evidence—Earnest Money Receipt.

In an action by assignee of real estate broker to recover payment received from purchaser and paid by broker to owner as consideration for a contract giving purchaser the right to consummate the sale, the earnest money receipt given by the owner to the broker is material evidence, as tending to show that the payment was made by the broker as consideration for the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 112.]

Holcomb, J., dissenting.

Department 2. Appeal from Superior Court, King County; John M. Ralston, Judge.

Action by William Halloran against the German-American Mercantile Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

Peterson & Macbride, of Seattle, for appellant. Flick & Frater, of Seattle, for respondent.

PARKER, J. The plaintiff, William Halloran, as assignee of John Davis & Co., a real estate brokerage corporation, seeks recovery from the defendant, German-American Mercantile Bank, of the sum of $1,000, which he claims is held in trust for him by that bank. The defendant claims the $1,000 as a forfeited payment of earnest money made upon a prospective purchase by F. H. Brownell of the property owned by it, hereinafter described. The defendant also insists that the plaintiff's claim is in substance a commission claim for the sale of the property, rested upon a void contract, because not sufficiently evidenced in writing, as required by section 5289, Rem. Code. Trial in the superior court without a jury resulted in findings and judgment in favor of the defendant, denying the plaintiff any recovery, from which he has appealed to this court.

The following earnest money receipt, while appearing to be dated December 4, 1915, and evidently signed by John Davis & Co. on that date, was not signed by respondent until December 6, 1915.

"Seattle, Wash., Dec. 4, 1915.

"Received of F. H. Brownell one thousand dollars as earnest money, and in part payment for the purchase of certain real estate in King county, state of Washington, and particularly described as follows, to wit: Lot twelve, block five, of the Heirs of S. A. Bell's First addition to the city of Seattle, together with all improvements thereon, which we have this day sold to the said F. H. Brownell for the total purchase price of thirty-four thousand dollars, on the following terms, to wit: One thousand dollars as herein above receipted for and balance of thirty-three thousand dollars to be paid on or before January 15, 1916. * * * If * * * the purchaser refuses or neglects to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to John Davis & Co. to the amount of their regular commission, and balance, if any, to the owner of the property as liquidated damages. The property is to be conveyed by warranty deed free and clear of all incumbrances of every nature whatsoever, to the said purchaser or his assigns. Time is the essence of this contract.

"John Davis & Company,
"By B. J. Perkinson, Agents.

"I hereby agree to purchase the property on the above terms.

"————, Purchaser.

"We, the owners of the above-mentioned property, approve the above sale.

"German-American Mercantile Bank,
"By Ernest Carstens, Pres."

It will be noticed that this writing was not signed by the prospective purchaser, Brownell, though prepared in such form as to evidently contemplate that he was to sign it, if he contemplated being bound to purchase the property to any greater extent than as upon a mere option. We also note that the evidence fails to inform us whether or not Brownell ever received or accepted this writing as evidencing any contract on his part looking to the purchase of the property by him. We assume, however, for argument's sake, that he did pay to John Davis & Co. the $1,000 mentioned therein for the purpose stated, and in that manner became a party to the contract evidenced by the writing, to the extent of its thereby becoming at least an optional contract on his part. Looking to the whole of the writing, including the sentence following the signature of John Davis & Co. and the following blank line, manifestly provided for the signature of the purchaser, it may well be argued, as counsel for appellant do, that the writing evidences nothing more than an option contract on the part of Brownell, imposing no obligation on him to consummate the purchase, and subjecting him only to the liability of forfeiting the $1,000, should he fail to pay the balance of the purchase price on or before January 15, 1916. On December 6, 1915, John Davis & Co. paid to respondent $1,000, which we assume was this same $1,000, and received from respondent a receipt therefor reading as follows:

"Seattle, Wn., Dec. 6, 1915.

"Received of John Davis & Co. one thousand 00/100 dollars earnest money on 12 Block 5 (8th & Olive) of Heirs of S. A. Bell's First Add. to Seattle. Balance of $33,000 to be pd. by Jan. 15, 1916.

"$1,000.
German-American Mercantile Bank,
"By Ernest Carstens, Pres.'

Respondent refused to sign either of these earnest money receipts until it was actually paid this sum as earnest money looking to the purchase of the property by Brownell. Thereafter Brownell failed to make any further payments, and, the time for the payment of the balance of the purchase price having expired, all parties proceeded upon the assumption that Brownell had forfeited all right to make the purchase and to the $1,000 paid by him. Thereafter appellant acquired by assignment from John Davis & Co. all its rights under the earnest money receipt given to it by Brownell, and thereafter this action was instituted by appellant, resulting in judgment denying him recovery from respondent as above noticed.

Counsel for appellant proceed upon what is in substance a trust theory in claiming repayment of all of the $1,000 from respondent. This theory is rested upon the language of the earnest money receipt given to Brownell by John Davis & Co. that, "if the purchaser refuses or neglects to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to John Davis & Co. to the amount of their regular commission, and balance, if any, to the owner of the property as liquidated damages," together with the testimony concededly showing that the regular commission on a $34,000 sale would be $1,100. It is worthy of note in this connection that the earnest money receipt given by John Davis & Co. to Brownell is upon a printed form, in which the last above-quoted language therefrom appears in print. This fact seems to account for the language, which provides for forfeiture of the surplus of the $1,000 to the owner, which language is manifestly of no effect, in view of the conceded fact that there could in no event be any surplus over the commission. It is insisted that this testimony as to the amount of the regular commission on such a sale is not for the purpose of proving a commission liability on the part of respondent, but only to show the extent of the interest of appellant in the $1,000. This manifestly is for the purpose of avoiding the effect of § 5289, Rem. Code, requiring a commission contract to be in writing, which section, as we have held, means that the amount of the commission, as well as the other elements of the contract, must be evidenced in writing. Forland v. Boyum, 53 Wash. 421, 102 Pac. 34; Engleson v. Port Crescent Shingle Co., 74 Wash. 424, 133 Pac. 1030; Goodrich v. Rogers, 75 Wash. 212, 134 Pac. 947; Cushing v. Monarch Timber Co., 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1914C, 1239. As further evidencing this theory of counsel for appellant, we find in their brief the following:

> "Respondent did not bind itself to pay a commission, and did not in any way promise or agree to pay a commission. Appellant could not recover a commission unless it effected a sale; procuring an option merely does not entitle it to a commission."

[1] Now we may concede that, if this were a controversy betwen Brownell and John Davis & Co., the language of the earnest money receipt given to Brownell by John Davis & Co. would preclude him from recovering from John Davis & Co. the $1,000, since Brownell agreed to forfeit the earnest money so paid by him upon his failure to consummate the purchase. But whether the $1,000 shall be forfeited to and repaid to appellant, John Davis & Co.'s assignee, as against respondent, after having been voluntarily paid to respondent by John Davis & Co. to secure the execution of the contract by respondent, is quite a different question. To say that respondent shall return the $1,000 paid to it by John Davis & Co. in consideration of respondent entering into this contract, which counsel for appellant insists is only an option contract in favor of Brownell to purchase the land, would be to destroy the very consideration which makes the contract binding and effective as against respondent.

[2] It may be that the earnest money receipt given by respondent to John Davis & Co., would entitle John Davis & Co., to compel conveyance of the property to itself upon paying the balance of the purchase price as therein stated, but that is not asked for here. Indeed, that earnest money receipt is not assigned to this appellant who is here seeking relief. It is, however, material evidence in this controversy as showing, with other evidence, that the $1,000 was paid to respondent by John Davis & Co., as the consideration which rendered the contract binding upon respondent.

There is evidence in this record which seems to plainly show that John Davis & Co. was acting as the agent of Brownell in seeking the purchase of this property from respondent, and that Brownell agreed to pay John Davis & Co. a commission of $1,000 therefor upon completion of the purchase at the price of $34,000. This fact is not noticed here as a suggestion that John Davis & Co., was attempting to collect compensation from both Brownell and respondent. But it emphasizes the untenable position here taken by counsel for appellant.

We are of the opinion that under no view of the controversy can it be held that respondent is required to repay to appellant, as assignee of John Davis & Co., the $1,000 which was received by it in consideration of its entering into the contract giving Brownell the right to consummate the sale.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON and MOUNT, JJ., concur.

HOLCOMB, J. (dissenting). I am of the opinion that, the written agreement having been signed by respondent, according to its specific terms, upon the default of the option purchaser, the earnest money was, as stated in the agreement, "forfeited to John Davis & Co. * * * as liquidated damages."

Appellant, as assignee of the cause of action, should therefore recover. I therefore dissent.

(96 Wash. 317)

KUCHER v. SCOTT et al. (No. 13584.)

(Supreme Court of Washington. May 18, 1917.)

1. ESTOPPEL 🔑72—PERSON MAKING DAMAGE POSSIBLE.

Where one of two or more innocent persons must suffer by the acts of another, he who has placed it in the power of that other person to occasion the loss must sustain it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188.]

2. ESTOPPEL 🔑72—PERSON MAKING DAMAGE POSSIBLE.

Where the owner of realty, when the secretary of a mortgage brokerage house approached him with reference to renewal of the mortgage thereon, executed a note and mortgage made payable to the brokerage house, and delivered them to the secretary, who sold them to a purchaser who did not forward his check until the note properly indorsed had been received, the owner and mortgagor of the property, having placed it in the power of the secretary to commit wrong, was the one who should bear the loss rather than the purchaser of the second note and mortgage.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188.]

3. PRINCIPAL AND AGENT 🔑105(8)—AUTHORITY TO COLLECT MORTGAGE NOTE—COLLECTION OF INTEREST.

The mere fact that a mortgage brokerage house had collected the interest due on a mortgage for one of its clients as it became due from time to time did not authorize the company, unless it had possession of the note, to collect the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 374; Mortgages, Cent. Dig. § 838.]

4. PRINCIPAL AND AGENT 🔑105(7)—AUTHORITY TO COLLECT MORTGAGE NOTE—COLLECTION OF INTEREST.

The fact that a mortgage recited that it was payable at the office of a mortgage brokerage house did not authorize the company to collect the principal without possession of the note.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 374; Mortgages, Cent. Dig. § 838.]

5. PRINCIPAL AND AGENT 🔑105(8)—AUTHORITY TO COLLECT MORTGAGE.

A letter from a client of a mortgage brokerage house, inclosing the coupon for the last payment of interest on a mortgage, which became due before the letter was dated, which letter assumed that since the mortgage had become due "it had been closed," following the statement with a direction to remit with draft on New York, could not be construed as an authorization to the brokerage house to collect the principal; the brokerage house having been advised that the note would be sent to a bank for collection.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 374; Mortgages, Cent. Dig. § 838.]

6. PRINCIPAL AND AGENT 🔑105(5)—AGENT TO COLLECT MORTGAGE.

A mortgage brokerage house, which had authority from its client to collect the principal indebtedness on a mortgage when it became due, was not its client's agent for the purpose of making collection prior to the due date of the note and mortgage.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 374; Mortgages, Cent. Dig. § 838.]

7. ESTOPPEL 🔑72—PERSON WHO RENDERED DAMAGE POSSIBLE.

Where the mortgagor of land, the note and mortgage falling due in October, in September executed a new mortgage and note, intended for renewal, and delivered them to the secretary of the mortgage brokerage house which had negotiated both mortgages, and the secretary received a check in payment from the person to whom the renewal note and mortgage were to be assigned, but did not enter it on the books of the house, as a credit on the account of the assignee of the prior mortgage, as against such assignee the owner and mortgagor must sustain the loss caused by the dishonest practices of the secretary of the brokerage house.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188.]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by C. W. Kucher and another, against Richard M. Scott and Duncan W. Campbell. From a judgment for defendants, the named plaintiff appeals. Affirmed.

Roney & Loveless and Brightman & Tennant, all of Seattle, for appellant. Ralph E. Moody, of Portland, Or., and Wilson R. Gay and Douglas, Lane & Douglas, all of Seattle, for respondents.

MAIN, J. The plaintiffs, being the owners of certain real property in the city of Seattle which was covered by two mortgages, claiming that one of the mortgages was invalid, but not knowing which one, brought this action for the purpose of securing the cancellation of the void mortgage, whichever one it might be. The defendants are respectively the owners of the two mortgages. The trial resulted in a judgment adverse to the plaintiffs' contention. From this judgment, the appeal is prosecuted.

The facts which gave rise to the litigation are substantially these: For many years, A. Robinson & Co., had been engaged in the real estate, loan, and insurance business in the city of Seattle. All the transactions here involved were handled by this company, through its secretary, Wilbur S. Lewis, who, on March 9, 1915, committed suicide. On January 30, 1912, the appellant purchased from F. C. Riley and wife a dwelling house, and the lot, or lots, which it occupied. At this time, the property was subject to a mortgage held by one John Benson, in the sum of $4,000. This mortgage, and the note which it was given to secure, were made payable to A. Robinson & Co., and by it transferred to Benson. It was the custom of that company, when making loans, to have the note and mortgage made payable to it, and then indorse the note and assign the mortgage to the person advancing the money. The Benson mortgage was due three years after date, or on October 13, 1914. On September 9, 1912, this mortgage was purchased by Richard M. Scott, one of the respondents, and thereupon the note was indorsed to him, and the proper assignment of mortgage placed of record. The interest upon the mortgage was paid every six months, as it became due, to A. Robinson & Co., after the appellant had received a statement for the interest from that company. When the interest was paid, it was either sent by the company to Scott, or deposited to his credit in the State Bank of Seattle. Some months prior to the 13th day of October, 1914, the appellant was approached by Lewis with reference to a renewal, and, after some negotiation, on September 1, 1914, the appellant and wife executed a note and mortgage, payable to A. Robinson & Co., and delivered the same to Lewis. At this time, Lewis had informed the appellant that he was getting the money from a man who resided in Portland, Or., but the name was not disclosed. After the note and mortgage were received by Lewis, the note was indorsed and forwarded to Portland, Or., to the respondent, Campbell. Thereafter, and on the 5th day of September, Campbell drew a check payable to the order of A. Robinson & Co., and forwarded the same to it. Lewis apparently appropriated the money which had been received from Campbell, and, in the course of a few months, committed suicide. Subsequent investigation disclosed the relation of the company as affects the three parties involved in this litigation.

[1] This is one of those unfortunate cases in which one of three persons, all of whom acted in the utmost good faith, must sustain a loss in the sum of $4,000. It is an

old and settled maxim of the law that, where one of two or more innocent persons must suffer by the acts of another, he who has placed it in the power of that other person to occasion the loss must sustain it. Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; Parker v. Hill, 68 Wash. 134, 122 Pac. 618; Wiswell v. Beck, 92 Wash. 208, 158 Pac. 976.

[2] With this principle of law in mind, the case, so far as it involves the appellant and Campbell, will be first considered. The appellant executed the note and mortgage made payable to A. Robinson & Co., and delivered the same into the possession of Lewis, as secretary of that company. Campbell was requested by Lewis to forward his check before he received the note of the appellant, but this was not done. The check was not forwarded until the note, properly indorsed, had been received. Campbell had done no act by which he placed it within the power of Lewis to occasion the loss. On the other hand, the appellant had delivered to him the note and mortgage drawn in such form he could use them in any manner he saw fit. The appellant having placed it in the power of Lewis to commit the wrong is the one that should bear the loss, rather than Campbell.

There is much discussion in the briefs relative to the previous transactions of Campbell with A. Robinson & Co. It is true that, for a number of years, that company had either sold him securities, or, from time to time, had made loans for him. There is no evidence, however, that would justify the inference that A. Robinson & Co. was the general agent of Campbell for the purpose of making investments. Each transaction was considered separately, and was approved by Campbell.

There is also a somewhat extended discussion in the briefs over the question whether the note which Campbell received was a negotiable or a nonnegotiable instrument, but this question does not seem to us to be material. The case is ruled by the principle of law above stated.

[3] We will now consider the case of the appellant and respondent Scott. The latter was an army officer, and, at different times, stationed in the Philippines, and in various parts of the United States. Dating from about the year 1909, A. Robinson & Co. had handled a number of transactions for him, but in each case the particular transaction was submitted to Scott, and he either approved or disapproved of it. If he had money coming in to loan at times, he would write A. Robinson & Co., and ask relative to that company's investing or loaning the same for him. If he had money coming to him of which A. Robinson & Co. was cognizant, that company, at times, would write and suggest another loan or investment. At the time the appellant delivered to A. Robinson & Co. the note and mortgage which were dated September 1, 1914, that company did not have possession of the Scott note. In the month of August, prior to the time of the due date of the note, Scott wrote A. Robinson & Co. that, if the mortgage was to be taken up on October 13th when it became due, he would send the note to the State Bank of Seattle for collection. A. Robinson & Co. did not have possession of the note, the right to release the mortgage, or the possession of a release signed by Scott. The money received from Campbell was credited upon the books of the company to him, and not to Scott. There was no act of Scott which placed it in the power of Lewis to cause the loss, unless: (a) A. Robinson & Co. was Scott's general fiscal agent; (b) the right to collect and remit the interest authorized the collection of the principal; or (c) the fact that it was payable at the office of the company was sufficient authorization for its collection. The evidence will not sustain a contention that A. Robinson & Co. was the general agent of Scott for the purpose of making investments. As already stated, every transaction was submitted to Scott for his approval or disapproval. For some months prior to the time when the note and mortgage became due, there had been no transaction between him and the company. The mere fact that A. Robinson & Co. had collected the interest from time to time, as it became due, would not authorize that company, unless it had possession of the note to collect the principal. Jones on Mortgages, § 964; Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546; Chandler v. Pyott, 53 Neb. 786, 74 N. W. 263; White v. Meeker County Bank, 78 Minn. 286, 80 N. W. 1125.

[4] The fact that the mortgage recited that it was payable at the office of A. Robinson & Co. would not authorize that company to collect the principal thereof without the possession of the note. Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207; Stansbury v. Embrey, 128 Tenn. 103, 158 S. W. 991, 47 L. R. A. (N. S.) 980; Hollinshead v. John Stuart & Co., 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659.

[5, 6] Attention has been especially directed to a letter written October 22, 1914, from Ft. Du Pont, Del., which bears Scott's name, but which was not signed by him. In this letter, the coupon for the last payment on the mortgage, which became due on the 13th of that month, was inclosed. The letter assumed that, since the mortgage became due on the 13th, "the same has been closed." Following this was a direction to remit with draft on New York, but that letter cannot be construed as an authorization to collect the principal, since A. Robinson & Co. had been advised that the note would be sent to the State Bank of Seattle for collection, and it was subsequently sent to that bank. But if it be assumed that A. Robinson & Co. had authority to collect the principal indebtedness, when it became due, this would not constitute that company the agent of Scott for the purpose of making collection prior to the due date of the note and mortgage. Les-

ter v. Snyder, 12 Colo. App. 351, 55 Pac. 613; Jones on Mortgages (7th Ed.) § 964; Park v. Cross, 76 Minn. 187, 78 N. W. 1107, 77 Am. St. Rep. 630.

[7] From the facts stated, it appears that the note and mortgage became due on the 13th day of October, 1914. The new mortgage and note were executed and delivered to A. Robinson & Co. on the 1st day of September, 1914, and the $4,000 check was received from Campbell on the 8th day of that month. A. Robinson & Co., after receipt of the check from Campbell, did not enter it on their books as a credit upon Scott's account. It follows, therefore, that as against Scott, the appellant must sustain the loss.

Referring again to the question of agency, it is doubtless true that A. Robinson & Co. was the agent of each of the three parties for certain purposes. The only commission paid was by the appellant. Scott and Campbell were rather regarded by the company as customers, to whom securities might be sold, or from whom money could be obtained in making a loan; the commission, if any, in each instance coming from the person securing the loan, or the extension of a loan. The company had been the agent of Scott for a number of specific transactions, and for the purpose of collecting interest upon the $4,000 note, as well as other notes. It was not his agent for the purpose of releasing mortgages, or receiving payment of the principal indebtedness. The company, so far as the appellant and Campbell are concerned, was undoubtedly the agent of both for the purpose of completing a transaction such as filing a mortgage for record, seeing that the Scott mortgage was released, and returning the papers to the parties respectively entitled thereto, or retaining the same for safe-keeping.

The record in this case has been given careful attention; the greater portion of it having been read a second time. While it is regrettable that an innocent party must suffer a considerable loss, yet, under the law and the facts, this is a burden which must be borne by the appellant in this case.

The judgment will be affirmed.

ELLIS, C. J., and MOUNT, CHADWICK, and MORRIS, JJ., concur.

(96 Wash. 324)

GARDNER v. FREDERICK et al.

(No. 13623.)

(Supreme Court of Washington. May 18, 1917.)

1. CONTRACTS 🔑94(1)—FRAUD—FAILURE TO PERFORM FUTURE PROMISE.

Where the promisor undertakes to do something in the future, failure to perform the promise is not fraudulent, unless there was an intention at the time of making it not to perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420, 428, 430, 1160.]

2. DEEDS 🔑165—CONDITIONS—SUPPORT OF GRANTOR.

Where an aged parent conveys property to a son or daughter or other person in consideration of future support and care, and there is a willful and wrongful withholding of such support and care, in equity the contract may be rescinded, or, if rescission cannot be had, an action for damages will lie, though when the promise was made there was no intention not to perform it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 521.]

3. DEEDS 🔑162—CONDITIONS—SUPPORT OF GRANTOR.

Where an aged parent conveys land to her children in consideration of support and care, she is entitled to more than necessary physical comforts, the respectful and considerate treatment naturally prompted by the filial affection of a child.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 519.]

4. TRIAL 🔑105(1)—INSTRUCTIONS—SUBMISSION OF ERRONEOUS THEORY OF DAMAGES.

Where evidence as to damages went in without objection that it did not tend to prove the correct measure, and defendants met the evidence by counter evidence of the same character, it was not error to submit the question of damages to the jury on the theory of damages adopted by the parties, though not the correct legal theory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260, 261, 266.]

5. APPEAL AND ERROR 🔑999(1)—REVIEW — VERDICT.

Where the cause was tried to a jury, its verdict must control on appeal as to the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3915, 3917-3921.]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Sarah Elizabeth Gardner against Minnie Alice Frederick and Albert E. Frederick, husband and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 160 Pac. 754.

Clyde H. Belknap and Fred M. Williams, both of Spokane, for appellants. John M. Gleeson, of Spokane, for respondent.

MAIN, J. This action grew out of the alleged failure of the defendants to support and care for the plaintiff, in accordance with the terms of a contract made between the parties for that purpose. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of $4,000. Motion for a new trial being made and overruled, a judgment was entered upon the verdict. From this judgment, the appeal is prosecuted.

The facts necessary to an understanding of the questions presented are substantially as follows: For many years prior to the year 1909 the respondent and her husband owned and occupied a tract of land in Spokane county, consisting of approximately 100 acres. During the year 1909 Mr. Gardner died. The land mentioned was community property. Mr. and Mrs. Gardner had eight children, all of whom were grown and married at the time of their father's decease. After the death of Mr. Gardner, the mother and the children mutually entered into an arrangement whereby a mortgage in the sum of $6,000 was placed upon the farm, and the money distributed to the children. On the 27th day of March, 1913, the farm was conveyed to the appellants, the purchase price being $9,500. Of this purchase price $6,000 consisted in the assumption of the mortgage, $1,500 was distributed to the children, and $2,000 was paid to the respondent or her agent. On or about April 1, 1913, the respondent loaned to the appellants $1,500 of the $2,000 mentioned, and took a note therefor, due ten years after date, with 8 per cent. interest, payable semiannually. A written contract was also made at this time providing for the support and care of the respondent by the appellants during her lifetime. The consideration mentioned in this contract for such care and support was the release in whole or in part from the liability upon the note, depending upon the time of the death of the respective parties. Soon after the conveyance of the farm the appellants took possession thereof, and during the latter part of the month of July the respondent began making her home with them. This relation continued for a period of four or five months, when, the respondent being dissatisfied, the written contract above mentioned was canceled by mutual consent, as well as the will which had been made in aid thereof. After leaving the home of the appellants, the respondent lived about with her other children, and some time during the year 1915 the present action was instituted.

[1, 2] It is first claimed that the trial court should have taken the case from the jury upon the motion made by the appellants, because the complaint does not allege and the evidence does not show that at the time the contract for care and support was made there was then a preconceived intention on the part of the appellants not to perform it. The performance of the contract with reference to care and support was, of course, to take place in the future. It is doubtless a general rule that, where the promisor undertakes to do something in the future, the failure to perform the promise is not fraudulent, unless there was an intention at the time of making it not to perform. That rule, however, is not applicable to cases of this kind. The rule in this state, as well as the great weight of authority, is to the effect that, where an aged parent conveys property to a son or daughter, or other person, in consideration of future support and care, and there is a willful and wrongful withholding of such support and care, in equity the contract may be rescinded, or, if rescission cannot be had, an action for damages will lie. Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629; Gustin v. Crockett, 51 Wash. 67, 97 Pac. 1091; Hewett v. Dole, 69 Wash. 163, 124 Pac. 374; Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768; Bogie v. Bogie, 41 Wis. 209; Davis v. Davis, 135 Ga. 116, 69 S. E. 172; Carpenter v. Carpenter, 66 Hun (N. Y.) 177, 20 N. Y. Supp. 928; Shover, Administrator, et al. v. Myrick, 4 Ind. App. 7, 30 N. E. 207.

In this case rescission could not be had, because a portion of the land prior to the institution of the action had been sold and conveyed by the appellants to a third person. Under the authorities cited the action for damages could be maintained, if there was a willful and wrongful refusal to provide the care and support contracted for, even though at the time the promise was made there was not then, in the minds of the appellants, an intention not to perform it.

It is contended further that the evidence was not sufficient to take the case to the jury upon the question as to whether there had been a willful and wrongful failure on the part of the appellants to perform the contract. The respondent at the time the contract was made was approximately 72 years of age. The appellants were husband and wife, and Mrs. Frederick was the daughter of the respondent.

[3] It may be that there is no substantial evidence that the appellants failed to furnish the respondent, during the time that she resided with them, the necessary physical comforts, but in contracts of this character the law contemplates more than physical comfort. The aged parent is entitled to respectful and considerate treatment, such as would naturally be prompted by the filial affection of a child. Without setting out in detail here the testimony involving an apparently somewhat bitter controversy between near relatives, it may be said that the evidence was sufficient to justify the jury in believing that the appellants did not show to the respondent, during the time that she resided with them, that respectful and kindly consideration to which she was entitled. There is some evidence that there was a deliberate attempt to withhold from her that gentle sympathy which not only would be prompted by filial affection, but which the law, in cases of this character, demands.

It is also claimed that the contract for support was separate and distinct from the sale and transfer of the land. It is true that the contract for support deals only with the note, and does not refer to the land. There was, however, an abundance of evidence, to support the verdict of the jury, which went in without objection, to the effect that the care and support of the respondent during her lifetime was a part of the consideration for the conveyance of the farm. Whether this oral testimony was admissible, under the rule that does not permit a written contract to be varied by parol, is not here for consideration, and we express no opinion thereon. Had the testimony been objected to, the question would have been squarely presented.

Complaint is also made of the instruction given by the trial court, defining the measure of damages. If we correctly understand the objection to this instruction, it is that the court did not take into consideration the value of the benefits the contract and will conferred on the appellants, but the evidence shows without conflict that the written contract and will were canceled by mutual consent. The instruction correctly submitted to the jury the theory of the measure of damages upon which the case was tried.

[4] The evidence offered by the respondent as to the damages was not objected to, because it did not tend to prove the correct measure of damages. The evidence having gone in without objection, and the appellants having met this evidence by counter evidence of the same character, it was not error to submit the question to the jury upon the theory of damages adopted by the parties, even though it may not have been the correct legal theory.

As to whether the rule of damages, in cases of this character, is the difference between the market value of the land and the price paid, or the reasonable cost of the support and care of the aged person, during the life expectancy, no opinion is here expressed. That question was not raised in the trial court, and is not presented here.

[5] There are other assignments of error, but we think what has been already said covers all the questions in the case. It must not be forgotten that the cause was tried to a jury, and, even though, upon the record, we might be of a different opinion upon the facts, the verdict of the jury must control.

The judgment will be affirmed.

ELLIS, C. J., and FULLERTON, CHADWICK, and MORRIS, JJ., concur.

(96 Wash. 386)

TALKINGTON v. WASHINGTON WATER POWER CO. (No. 13793.)

(Supreme Court of Washington. May 18, 1917.)

1. ELECTRICITY 🔑19(7)—INJURY TO INFANT—NEGLIGENCE—QUESTION FOR JURY.

For the jury is the question of negligence of an electric company, which maintained a highly charged uninsulated wire 34 feet above the ground, only a few inches above the comb of the roof of a large grain warehouse with a lean-to, the roof of the main part having slope of 32 degrees, and that of the lean-to extending to within 8 feet of the ground, and accessible from the top of cars on a side track, having a slope of only 16 degrees, boys of the town having in some degree been in the habit of playing on the roof, and a boy of ten, playing with others thereon, having like them taken off his stockings, and climbed to the top of roof, and taken hold of the wire, thinking, as he said, that it was a telephone wire.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11.]

2. ELECTRICITY 🔑19(12)—INJURY TO INFANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question of the contributory negligence of the boy is also for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11.]

3. DAMAGES 🔑132(8)—PERSONAL INJURY—EXCESSIVE VERDICT.

A verdict for $5,500 for injury to a boy ten years old, by grasping a high power electric wire, both hands being severely burned, from which he suffered great pain for two months, requiring dressing by a physician 43 times, and leaving them deformed and their usefulness permanently impaired to a considerable extent, cannot be said to be so excessive as to show prejudice and passion of jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 379.]

Department 2. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

Action by J. A. Talkington, guardian ad litem for Willard Talkington, a minor, against the Washington Water Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 160 Pac. 754.

Post, Russell, Carey & Higgins, of Spokane, for appellant. Merritt, Lantry & Merritt, of Spokane, for respondent.

PARKER, J. The plaintiff seeks recovery of damages for personal injuries for his ward, Willard Talkington, a minor ten years old, claimed as the result of the negligence of the defendant power company in maintaining the highly charged uninsulated wires of its electric power line at a place where children would be likely to come in contact therewith, and where Willard Talkington did come in contact therewith and received serious injury. Trial in the superior court for Lincoln county resulted in verdict and judgment in favor of the plaintiff, awarding damages against the defendant in the sum of $5,500, from which it has appealed to this court.

At the time in question appellant maintained in the town of Harrington an electric power line carrying about 2,300 volts. This line was supported on poles in the usual manner, except where it passed over the comb of the roof of a grain warehouse belonging to a milling company some 34 feet above the ground in a northeasterly and southwesterly direction, the comb of the roof running east and west. The line passed over the comb near the center of the building. It descended somewhat from the poles to a point 15 inches above the comb of the roof, where it was attached to a bracket as upon the poles, the warehouse and bracket thus serving the purpose of a pole. The warehouse with its lean-to was about 60 feet wide and some 200 feet long. The lean-to ran the entire length of the south side of the building, and was some 12 feet wide. The roof on the main portion of the building had a slope of 32 degrees, while the roof of the lean-to had a slope of only 16 degrees. The eaves of the lean-to at the southwest corner were only 8 feet above the ground, while at the southeast corner they were about the height of an ordinary box car above the ground. This was because of the contour of the ground along the south side of the building. A spur track of the Great Northern Railway ran along parallel to and near the east end of the building, so that when a box car was standing on this track opposite the end of the lean-to its top was nearly level with the lower part of the roof and only 32 inches therefrom. Because of this one could easily step from the roof of the car onto the roof of the lean-to. Boys of the town had been in some degree in the habit of playing on the roof of the lean-to and also on the roof of the main building on that side for some time previous to the time Willard Talkington received his injuries and previous to the time when appellant attached its line to the comb of the building. It is not very plain as to how frequently boys played upon the roof of the building, but in any event it occurred several times during the period two or three years previous to the accident here involved, according to the testimony of several witnesses. The boys would gain access to the roof by climbing onto freight cars standing at the end of the lean-to and easily stepping therefrom onto the roof, it being a common occurrence for box cars to stand there. The boys would also sometimes gain access to the roof by leaning a plank from the ground up onto the eaves of the lean-to at the southwest corner, where the eaves were only 8 feet from the ground. There is no direct evidence in the record showing that appellant or any of its agents had any actual knowledge of the fact that boys played upon the roof, though plainly appellant was charged with knowledge of the surrounding physical facts relative to the accessibility of the roof. There is some evidence that boys had been directed to keep away from the warehouse by the milling company's agents. Yet a number of the boys who played upon the roof seemed to have never been so ordered to keep away. While the warehouse was not the property of appellant, it apparently was maintaining its wires upon the roof by consent of the owner. One of the things the boys did in playing upon the roof was to take off their shoes while on the comparatively flat lean-to roof and climb up the steeper portion of the roof to the comb. This apparently could be done with comparative ease by a boy using both his hands and feet. Yet there would be somewhat of a spirit of competition between them as to who could walk up the steeper roof without using his hands. We are not advised as to how often this occurred, but apparently about as often as boys went upon the roof to play. At the time Willard Talkington was injured several boys, including himself, climbed upon the roof over a box car standing at the end of the lean-to. Some had climbed up the steeper part of the roof to the comb, including Willard Talkington. He reached the comb near appellant's power line wires, and evidently while standing he took hold of one or possibly two of the wires to steady himself, when he received a severe shock, grievously burning both his hands, falling unconscious, and rolling down the roof, where he was caught by another boy on the roof of the lean-to. There is some testimony indicating that Willard Talkington was warned to keep away from the wires, but there is room for argument that this warning was given him at the very instant he did so. He himself testified upon the trial that he thought they were telephone wires. What his belief was in this respect must be viewed, of course, in the light of his being only ten years old.

[1, 2] It is contended by counsel for appellant that in the light of these facts it should be absolved from negligence, and that Willard Talkington should be held guilty of contributory negligence, and that the trial court erred in declining to so rule as a matter of law upon appellant's motions, which were timely made in that behalf. The question of appellant's negligence and Willard Talkington's contributory negligence are so intimately related that it is necessary to consider them together. It may be that appellant would be held free from negligence as a matter of law, viewed as affecting its liability to mature persons, and yet its negligence be such as would call for the leaving of that question to the jury for decision as affecting its liability to minors of tender years. The same, in substance, may be said relative to the question of contributory negligence of a mature person as compared with the question of contributory negligence of a minor of tender years.

We are to remember that, while this power line was maintained at a place where it might be well argued mature persons would not be expected to go so as to come in contact with it, and also that its appearance would in some degree suggest danger to mature persons, it was nevertheless a very dangerous, silent, and even deadly agency, and one which did not display its dangers and make them so readily discernible as running machinery, high places unprotected by railings, or other similarly apparent dangers. These suggestions show the wisdom of the rule that the degree of care required of the owner of a power line highly charged with electricity to so place it that it will not come in contact with people is greater than in the placing and using of machinery and appliances which readily suggest their dangers. In Card v. Wenatchee Valley Gas & Elec. Co., 77 Wash. 564, 567, 137 Pac. 1047, 1048, we quoted with approval from Croswell on the Law Relating to Electricity, at section 234, as follows:

> "The amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger. If but little danger is incurred, as, for instance, when the wires carry only a harmless electric current, such, for instance, as the telegraph or telephone current, only ordinary care may be required. While if the wires carry a strong and dangerous current

of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, or if a harmless wire is in dangerous proximity to a high tension wire, a very high degree of care, indeed, the highest that human prudence is equal to, is necessary. This is particularly true of electric light and electric railway wires, which carry a high tension current often of great danger. The rule is thus stated in a case in Massachusetts: 'The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject-matter, the danger and force of the material under the defendant's charge.'"

Having this general rule in mind, together with the fact of the tender age of Willard Talkington, the accessibility of this roof as a place for boys to play, the attractiveness of it as a place for boys to play, and the proximity to the roof of appellant's highly charged power line, we cannot escape the conclusion that there is room for reasonable minds to reach different conclusions both as to appellant's negligence in placing its power line wires there and Willard Talkington's contributory negligence in going there, even though he be technically a trespasser as against the milling company, the owner of the warehouse.

Our decision in Sweeten v. Pacific Power & Light Co., 88 Wash. 679, 153 Pac. 1054, we think, lends support to this conclusion though that case may be differentiated somewhat from this case. The situation there involved was as follows: The light company's highly charged power line passed along a public alley about 27 feet from the ground, supported upon poles in the usual way. There was a cottonwood tree growing in the alley, so that its branches came in contact with the power line wires and wore off the insulation. Boys were accustomed to play in the alley and about the tree and also to climb the tree. The light company was regarded as being charged with knowledge of this fact. A boy climbing the tree in play came in contact with the wires, was injured, and the light company was held liable. It seems to have been the duty of the light company under its ordinance to cause its wires to be insulated. In holding the light company liable, Judge Ellis, speaking for the court, said:

> "The appellant's negligence was established beyond a reasonable doubt. It permitted a highly charged wire, passing through a tree in a public alley where it knew children were wont to play, to become uninsulated and so remain for weeks and, as the evidence shows, possibly for years. It was not only charged with knowledge of the fact that the insulation was worn, since the undisputed evidence shows that any sort of inspection would develop that fact, but it also had actual notice of that fact, and had been warned of the incident danger. It took no steps to remedy the situation."

While this court was not there deciding the question as a matter of law, this quotation from the opinion indicates its views of how conclusive the proof was showing the light company's negligence. It seems to us that this view of the court touching the situation in that case is quite in harmony with and lends support to the view that the facts in this case are at least such as to make the question here presented one of fact for the jury to decide.

Counsel for appellant cite and place reliance upon the decision of this court in Graves v. Washington Water Power Co., 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452. In that case a boy was injured by a highly charged electric wire of the company attached to the framework of a bridge some 35 feet above the ground. He was climbing up the latticed iron pier after some birds' nests, which were up under the bridge above the wire. Coming in contact with the wire, he was injured by the electric current. While there is evidence in that case showing that boys had played to some extent around the foot of the bridge piers, apparently none had ever been known to climb up there. We also think it was somewhat more difficult for boys to climb up where the injured boy did climb than for boys to go upon the roof of this warehouse, and that it was somewhat more unlikely that boys would climb up the bridge pier than that they would go upon the roof of this warehouse to play.

In a note to Temple v. McComb City Elec. Light & Power Co., 11 L. R. A. (N. S.) 449, the learned editors, having there collected and reviewed a number of decisions touching this question, observed:

> "As to the duty to guard against danger to children in placing electric wires, no rule can be enunciated that would be accepted by all courts. As in the 'turntable' cases and those involving other 'attractive nuisances,' the authorities are in irreconcilable conflict. It would seem, however, that reason and humanity alike support the rule laid down in the above case, that those dealing with such an extremely dangerous agency as electricity should, in stringing their wires in places where it is reasonably probable that children will go, be charged 'with the very highest degree of skill and care' to protect the children from injury while in the vicinity of such places, even though they may be trespassers."

There are a great many decisions of the courts dealing with this question from which it could be well argued both that the situation here involved presents a question of law and that it presents a question of fact. We have carefully examined all of them cited by counsel for appellant and also others coming to our attention, and as we view them they all depend upon their own peculiar facts, and that it is next to impossible to formulate any general rule that can become a trustworthy guide in cases which are very close to the line between questions of law and fact, other than the rule that to become a question of law it must be one in the deciding of which all reasonable minds must necessarily agree. We cannot see our way clear to hold that this is such a case. We are of the opinion that the trial court correctly left the questions of defendant's negligence and of Willard Talkington's contributory negligence to the jury.

[3] It is contended that the verdict is excessive to the extent of showing prejudice and passion on the part of the jury. We are unable to so decide from the record before us. Both of Willard Talkington's hands were severely burned, from which he suffered great pain for a period of some two months. The wounds required dressing by a physician 43 times. Both hands were left deformed, and their usefulness permanently impaired to a considerable extent. We cannot see the hands. They were exhibited to the court and the jury upon the trial, and the impairment of their use exhibited to the court and jury by his efforts at picking up and taking hold of articles.

Contentions made relative to instructions given and refused we think are not well founded. What we have already said, we think, answers these contentions.

The judgment is affirmed.

ELLIS, C. J., and HOLCOMB and FULLERTON, JJ., concur.

(96 Wash. 284)

GARRISON et ux. v. NEWTON et ux.

(No. 13679.)

(Supreme Court of Washington. May 16, 1917.)

1. Appeal and Error 🔑1041(3)—Harmless Error.

In action to rescind a land purchase contract for delay in perfecting title, amendment of defendants' answer to allege that defendants had been busily engaged in perfecting title to the land, etc., and asking judgment against plaintiffs by way of cross-complaint, objected to because of surprise, and involving a new issue, was not prejudicial error, where plaintiffs were offered continuance on terms, but preferred to go to trial; the amendment being germane to the issues in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4108.]

2. Vendor and Purchaser 🔑144(2)—Perfecting Title—Reasonable Time.

Where a contract of sale of land does not make time of its essence, the vendor is entitled to reasonable time in which to perform his contract as to perfecting title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 272–274.]

3. Vendor and Purchaser 🔑144(2) — Action by Vendee to Rescind—Evidence.

In action by vendee to rescind because of delay by vendors in perfecting title, evidence *held* to show that the delay of 2½ months complained of was warranted by consent of vendees to vendors' efforts to perfect such title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 272–274.]

4. Vendor and Purchaser 🔑101—Time for Complying with Contract.

After a vendor has waived the essence clause of a contract, the purchaser will not be in default until after a demand has been made upon him for compliance with his contract and a reasonable time has elapsed in which to comply with the demand.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170–174.]

5. Vendor and Purchaser 🔑114—Perfecting Title—Waiver of Delay.

A vendee, having encouraged vendors' efforts to perfect title, and having acquiesced in delay in perfecting title, may not assert a breach of the contract on vendors' part in failing to convey at the time agreed on.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 202–204.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Harry B. Garrison and wife against William Newton and wife. From judgment for defendants, plaintiffs appeal. Affirmed.

William L. Waters, of Seattle, for appellants. John H. Perry, of New York City, and Dan Landon, of Seattle, for respondents.

FULLERTON, J. On November 29, 1912, William Newton and Katherine S. Newton, his wife, as vendors, entered into an executory contract with Harry B. Garrison and Katherine S. Garrison, his wife, as purchasers, for the sale of—

"the following described lands and premises, situated in Wasco county, state of Oregon, to wit: The east 25 acres of the northeast quarter of the northeast quarter of section 21 in township 1 north, range 13 east."

The terms and conditions agreed upon were as follows:

"The consideration therefor is the sum of $2,000.00, of which $500.00 has been paid in cash, the receipt whereof is hereby acknowledged, $500.00 shall be paid on or before one year after the date hereof, $500.00 shall be paid on or before two years after the date hereof and $500.00 shall be paid on or before three years after the date hereof, said deferred payments to bear interest at the rate of seven per cent. per annum, payable annually, principal and interest to be paid at the bank of French & Co. in Dalles City, Oregon.

"In addition to the conveyance of said property from the first parties to the second parties, the first parties further agree to sell and convey, and do hereby sell and convey unto said second parties for said consideration above mentioned a right of way for a road from the northeast corner of said premises across property belonging to the first parties and described as the southwest quarter of the southwest quarter of section 15, township 1 north, range 13 east, which said right of way shall be along the west line of said land last described, and shall be 16 feet in width, and the first parties shall put the same in passable condition for traffic without expense to the second parties, provided, always, that in case the right of way along the west line of said land should not be practical or satisfactory to the second parties, then said right of way shall be located across said premises along a practical and satisfactory route to be determined by said parties. Otherwise the third man to be selected.

"The first parties hereby covenant and agree to and with the second parties that upon payment of the sums of money hereinbefore mentioned that they will execute and deliver to said second parties, their heirs or assigns, or any one designated by them, a good and sufficient warranty deed for said premises above mentioned, and a deed for a right of way for a road as above provided, which said deed shall warrant the said premises free and clear from all incumbrances whatsoever, and the first parties agree to furnish to said second parties without additional compensation an abstract of title for said premises showing the same to be the property of the first party free and clear from incumbrances thereon.

"The second parties for themselves, their heirs and assigns, agree to and with the first parties to pay the sums of money above mentioned at the times and places hereinbefore stated."

The plaintiffs promptly met all payments falling due, until final payment of $500, with interest, falling due November 29, 1915, which sum they deposited in escrow on that date in the banking house of French & Co., and made demand for their deed and abstract of title. A deed from defendants to plaintiffs and an abstract of title were transmitted by defendants to the bank. Examination of the deed showed that it had been drawn upon a form used in the state of Washington, and was inadequate under the Oregon laws. An examination of the abstract disclosed that there was outstanding against the property a mortgage for $1,000, that the land had been sold for the delinquent taxes of 1912, and of the subsequent taxes none except those for the year 1913 had been paid. The vendors were notified of the defects in the title, and demand was made that the title be cleared and a quitclaim deed executed for the right of way for a road provided for by the contract. At the same time a proper form of deed for the state of Oregon and a quitclaim deed for the right of way were prepared and forwarded to the defendants for execution. The deeds were executed by defendants and returned to the bank, but defendants insisted the mortgage was only a technical matter, and they would have it removed just as soon as they were in a position to do so. Finally plaintiffs, on January 18, 1916, about 50 days after they had deposited their final payment in escrow, notified defendants that, in view of their failure to perform, plaintiffs had determined to rescind the contract, and this action for rescission was instituted on February 10, 1916. The court found that plaintiffs were not entitled to a rescission, and gave judgment against them for the final payment due under the contract. The plaintiffs appeal.

[1] Appellants assign as error the action of the court in permitting respondents to amend their answer on the trial by setting up an allegation that respondents had, from November 29, 1915, to February 16, 1916, with the full knowledge and consent of appellants, been busily engaged in perfecting title to the land in controversy, and that they had been delayed by reason of the dilatoriness of the attorney who represented both the mortgagee and the appellants; and by way of cross-complaint asked judgment against appellants for the sum of $535. The amendment was objected to on the ground of surprise and that it involved a new issue after the issues had been fully settled. The court offered to grant a continuance, on terms, to abide the final outcome. The appellants, in view of the ruling as to terms, preferred to go to trial. We think there was no prejudicial error committed. The amendment was germane to the issues in the case, and its allowance does not show any abuse of the discretion reposed in trial judges in such matters. Moreover, the plaintiffs proceeded with the trial without taking advantage of a continuance offered them by the court.

The only other error assigned is the granting of a nonsuit against appellants. This involves a consideration of the evidence, which is made up in large part of the correspondence passing between the parties and their attorneys, and necessitates a frequent recurrence to dates. The evidence shows that at the time of entering into the contract in 1912, respondents were the owners of some 68 acres of land in Wasco county, Or., upon which there was a mortgage of $1,000 to the Oregon State Land Board. In selling appellants 25 acres of this land the contract provided for a right of way 16 feet wide across the remaining 40, since otherwise appellants would have no outlet to the public highway. In June, 1915, respondents conveyed the 40-acre tract to one Payne, subject to the mortgage to the Oregon State Land Board and subject to his agreement with the appellants for a right of way across this tract. Payne gave respondents a purchase-money mortgage for $4,200 on the land thus conveyed to him. Some time in November, 1915, prior to the maturity of the contract between appellants and respondents, the latter, by letter, began efforts to secure the release of the 25-acre tract from the State Land Board mortgage. On November 30, 1915, the board responded as follows:

"Replying to yours of the 27th inst., in order to secure release of 25 acres from your mortgage, it will be necessary for you to take the matter up with W. H. Wilson, of The Dalles, attorney for the board in Wasco county, and when his recommendation is received as to the amount necessary to be paid, the matter will be submitted to the board for consideration."

On the same date as the letter from the board to respondents, Wilson, as the attorney employed by appellants to examine the title, wrote respondents as follows:

"Yesterday Henry B. Garrison was here to close up his contract with you. * * * He deposited the balance due from him, namely, $535.00, in the bank of French & Co., with directions to the bank to pay the money over to you upon the receipt of a deed for the land and a quitclaim for the right of way for a road and an abstract for the 25 acres showing clear title. This morning French & Co. advised me that they had received the deed. I have examined the deed and I find that it is on a Washington blank, and that it is not good in this state. I have, therefore, prepared a new deed on an Oregon form, which I am sending herewith. Will you and Mrs. Newton please kindly execute this deed * * * and forward it to French & Co. I have also prepared a quitclaim deed for the right of way for a road mentioned in your contract. * * * The 25-acre tract is covered by the state mortgage for $1,000, and before Mrs. Garrison can accept the deed from you the 25 acres must be released from the state mortgage. I do not know what the state land board will require as a payment in order to release this tract, but a payment of some kind will have to be made. I imagine that it will not be less than $250.00, probably more than that amount."

On December 3d, respondents replied as follows:

"I have received your deeds and complied with your request. Now, regarding the state mortgage. The parties now owning the land object to me paying off the mortgage, as they bought the land subject to the state loan. So you can see my position, while I am willing to do anything I can to satisfy Mrs. Garrison. I understand the state of Oregon does not want their money, as long as the security is ample, and in this case there is no question as to the amount of security. Now, Mr. Wilson, I hope you will see your way clear to either release the 25 acres or accept the abstract without any payment on mortgage, as the abstract is good except a technical point."

This letter was answered by Wilson on December 9th, to the effect that the board would not release the 25 acres without a payment of some kind, and suggesting that respondents pay off the whole mortgage of $1,000 to the state and protect themselves by taking an additional mortgage for that sum from Payne. Respondents replied on December 11th, as follows:

"In reply to yours of recent date will say in answering your suggestion of paying off part of the mortgage, it seems as it would complicate matters considerably and I hope there will be some way found that we can get around this matter. As to paying the full amount of the mortgage, I am not in a position to do that at present, as you know money matters are a little close with all of us and as you know records show I sold that 40 acres subject to this mortgage to Mr. Payne, it would be very unjust to Mr. Payne for me to foreclose this mortgage, which I could not do. Now, Mr. Wilson, would you accept a contract from me guaranteeing and protecting Mr. Garrison in regard to the loan until I can pay off this mortgage, which I will do just as soon as I get payments from Mr. Payne. You know, I am holding a $4,000.00 second mortgage on that place. This contract can be made A1. Or if I will have the 40 acres reappraised by some of the best citizens and farmers of your community and their reappraisement shows ample security for the thousand dollars will you release the 25 acres, as we understand the matter is now up to you? Of course, this will be extra expense to me, but I am willing to bear this extra expense in order to adjust matters, providing Mr. Garrison will not accept the contract above mentioned.

"Hoping one of the above suggestions will meet with your approval, I am."

On December 16th Wilson wrote respondents that the land board would not release the 25 acres without some kind of a payment, and on the following day again wrote them as follows:

"Mr. Garrison objects to the title of the 25 acres which you sold to him because it is covered by the mortgage held by the state land board for $1,000, and also the property was sold for delinquent taxes for 1912, amounting to $14.60. Of course, these objections can be overcome by your procuring a release of the 25 acres from the state land board mortgage and by redeeming from the tax sale. Mr. Garrison objects to the right of way because the 40 acres across which the right of way runs is covered by the mortgage of the state land board for $1,000; also the second mortgage to you for $4,000, and it has not been opened up to travel as required by the agreement. As I understand Mr. Garrison, he refuses to accept either the deed for the 25 acres or the deed for the right of way for the road for the reasons stated above."

Nothing further was done by respondent William Newton until after his return to Seattle from a business trip to Spokane, when on January 10, 1916, he wrote Wilson as follows:

"I have just returned to the city and would now be very glad to have this matter straightened up. Now, Mr. Wilson, what is the least payment you will accept on the state mortgage or what will the state take in cash for the release of the 25 acres and right of way, leaving the mortgage as it is, as a foreclosure is possible this fall, and I would rather deposit a certain amount of cash to the state credit than effect the mortgage on Mr. Payne's account. I hope you will be as lenient as possible."

Wilson answered that the least payment he could recommend for the board to accept for a release would be $250. On January 14th, respondent Newton wrote Garrison as follows:

"Now, in regard to that abstract: I want to ask you if you will not accept the abstract as it is for the present, as it is absolutely good with only a technical point of law to cloud it, and that will be removed and everything clear just as soon as I am in a position to lift the $1,000.00 mortgage. You understand Mr. Payne assumed the full $1,000.00 state mortgage, when he bought the 40 acres, and which is on record at The Dalles, showing that the 40 acres is held for the $1,000.00 state loan. I hold a $4,000.00 as second mortgage, so am also responsible. There is absolutely no danger to you. Or, to convince you of my honest efforts, I will be willing for you to hold back $50.00 or $100.00 until I can lift the mortgage. Now, Mr. Garrison, there is nothing gained for you or me by holding out on these trivial points; we could both work to better advantage if we are friends and understand one another. I will do anything within reason that you may suggest, to show that I want to do what is right, but Mr. Garrison, I am not in a position just now to lift that mortgage, and I do want to get this matter straightened out satisfactory to both of us. Please let me hear from you at your earliest convenience regarding this matter."

In response to this letter appellant Garrison sent the following reply and notice of rescission:

"You evidently now wish me to pay the money and accept your deed with the $1,000.00 mortgage unpaid, or the land released from the mortgage, without the right of way being either selected or improved, with the $4,000.00 second mortgage against the right of way. In other words, to take the property practically as it is and look to Mr. Payne to pay off the mortgage and improve the right of way. * * * In the meantime, on Dec. 6, 1916, I had an opportunity to lease this property and again on Jan. 4, 1916; * * * to those people I have been unable to give any reply on account of the uncertainty about closing the deal. * * * In fact, you say that you are 'not in a position just now to lift that mortgage.' * * * In view of this admission on your part and your failure to say anything about the right of way, its selection or improvement, or the delinquent taxes still unpaid, I think it is useless for us to go any further. It seems that I have waited in vain since November 29, 1915, and kept my check good at bank since 29th of Nov. for you to get busy on. I have waited in vain. * * * We have accordingly, in view of all these facts, concluded to and do hereby give you notice that we have rescinded the contract."

On receipt of this notice of rescission respondents at once made application through Wilson, the local attorney for the board, for a release of the 25 acres, but the application was held up until early in February because of the failure of respondents to inclose a remittance of the amount tendered for a release. The board agreed to the release for the sum of $500, which sum was forwarded by respondents upon notification, and a release duly executed on February 16, 1916. The delinquent tax sale against the property was redeemed by respondents on February 28, 1916.

Respecting the right of way for a road over the Payne 40, there was in evidence a contract between Payne and appellants, executed on November 29, 1915, making provision therefor to the satisfaction of the latter. The appellants, however, claimed that Payne's mortgage of $4,200 to respondents created an incumbrance upon this right of way. To obviate this respondents executed a release of their mortgage as to the right of way agreed upon by Payne and appellants, and this release was recorded in Wasco county on February 16, 1916. The abstract of title was brought down to date and certified on March 3, 1916, showing clear title to the property in respondents.

[2] It will be observed that the title was not perfected until subsequent to the commencement of this action for rescission, but that the respondents in their answer tendered a sufficient warranty deed and abstract, showing clear title, and brought the same into court. It appears from the evidence that respondents were making an effort, beginning at a date prior to the maturity of the contract, to get their title in a shape to be satisfactory to the appellants. They did not understand in the beginning that more would be required of them than the securing of the release of the mortgage to the land board, and they were in good faith endeavoring to accomplish that. Learning that appellants insisted that respondents' mortgage from Payne was an incumbrance on appellants' right of way, and that the 1912 taxes were a lien against the land at the date of the contract, respondents promptly took measures to release their mortgage as against the right of way and to redeem from the lien of the 1912 taxes. They had completely cleared the title within 2½ months of the date on which appellants were entitled to a good and sufficient deed. The contract did not make time of its essence, and it is the rule of law in such cases that a vendor is entitled to a reasonable time in which to perform his contract. Whether or not the 2½ months taken by respondents to perfect their title was a reasonable time it is unnecessary to decide in view of the attitude of the parties. The appellants did not promptly rescind at the time when they were entitled to performance, but waived such right by their acquiescence in the efforts of respondents to effect a release of the mortgage incumbering the land. It is true the appellants asked respondents to pay off the blanket mortgage covering another tract in addition to that contracted for by appellants, and that, on being informed that this could not be done, they gave notice of rescission. But respondents were endeavoring all the time to get the 25-acre tract of appellants released from the mortgage at the smallest outlay possible for themselves, and, when they found that could not be done for less than a payment of $500 on the mortgage debt, they promptly paid that sum. That appellants were willing to grant time appears from the cross-examination of Mr. Garrison:

> "Q. After you learned there was a mortgage of $1,000 did you or did you not consent and approve of Mr. Newton's proceeding to get a release from that mortgage as to that 25 acres of land? A. Yes, I did. I wanted him to."

After allowing the respondents a month and a half in which to clear title, and just as arrangements to accomplish that object were being brought to a head, notice of intended rescission was given. Following closely upon the filing of the complaint, respondents were able to tender a perfect title so far as the incumbrances were concerned. Their legal title had always been perfect.

[3-5] We think there was sufficient showing of consent to delay in performance to warrant the time taken in which to perfect the title. There was no showing of injury to the appellants other than their statement in one of their letters that they would have been able to lease the land if they had had perfect title. The land had never been occupied or cultivated by appellants, but had evidently been bought for speculative purposes and allowed to lie idle. There was no proof of depreciation in value between the date for performance and the time of trial. The principle of law applicable to the state of facts existing in this case is expressed in Opsjon v. Engebo, 73 Wash. 324, 131 Pac. 1146, as follows:

> "The rule is well settled in this state that, after a vendor has waived the essence clause of a contract, the purchaser will not be in default until after a demand has been made upon him for a compliance with his contract and a reasonable time has elapsed in which to comply with the demand. Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026; Douglas v. Hanbury, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096; Walker v. McMurchie, 61 Wash. 489, 112 Pac. 500. We have also held that the time in which to perform a written contract may be waived as well as extended by parol. Whiting v. Doughton, supra. The appellant, having encouraged the prosecution of the suit to quiet title to the lot, and having acquiesced in the delay in tendering the deed and abstract of title, was not in a position to assert a breach of the contract upon the part of respondents in failing to convey the lot at the time agreed upon. Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634; Hawes v. Swanzey, 123 Iowa, 51, 98 N. W. 586; Bales v. Williamson, 128 Iowa, 127, 103 N. W. 150."

Respondents had a cross-complaint in the action, asking for judgment for $535, the amount of final payment and interest due on the contract. The appellants conceded that sum was due from them if the contract should be enforced.

We think the findings and conclusions of the court are supported by the evidence. The judgment based thereon is affirmed.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

(96 Wash. 313)

CLARK-LLOYD LUMBER CO. v. PUGET SOUND & CASCADE RY. CO.

(No. 13393.)

(Supreme Court of Washington. May 18, 1917.)

1. Trial 🔑252(20)—Instructions—Sustaining Evidence.

In an action against a railroad for injury to a shore line, with consequential damages to plaintiff's mill site, an instruction going to the minimization of damages, or the cost of removing the cause of the injury, was improperly given in the absence of testimony to sustain it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610.]

2. Damages 🔑163(4)—Evidence—Injury to Banks of Stream — Avoidable Consequences.

In an action by a lumber company against a railroad for injury to a shore line, with consequential damages to a boom site and a mill site, by dumping material along the shore in constructing the railroad, it is incumbent upon the lumber company, if it sustains the issue tendered by the road that the cause of the injury was removable, to show that the contour of the shore cannot be restored, and the amount of damages resulting to its property by reason of the road's interference with its boom site.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 459.]

3. Damages 🔑110—Measure of Damages—Injuries to Shore Line.

If the shore line of a stream usable by a lumber company as a boom and mill site cannot be restored by removal of waste matter dumped there by a railroad in building its road, and by the putting in of a "dead man," the lumber company's measure of damages is the difference in the value of the property before and after the work was done.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 273–278.]

4. Damages 🔑217 — Instructions—Injury to Shore Line.

In a lumber company's action against a railroad for damages to a shore line and consequential damages to boom and mill site, by dumping material along the shore, in considering the issue of damages, the jury should be cautioned to treat the property as a mill site and boom site, and not as an operating property.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556–559.]

5. Damages 🔑174(3)—Evidence—Injury to Shore Line.

In a lumber company's action against a railroad for injuries to a shore line, and consequential injuries to a mill site and boom site, by dumping material along the shore, to meet the issue whether plaintiff should have removed the cause of the injury the road may show the practicability of restoring the contour of the shore and the cost of restoration, including the cost of installing a "dead man."

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 464, 467.]

6. Damages 🔑110—Measure of Damages—Avoidable Consequences.

If a lumber company whose shore line was injured by a railroad, a boom site, and mill site, suffering consequential injuries, could have removed the cause of the injury, the dumping of material along the shore, the measure of the lumber company's damage is the reasonable cost of doing the work.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 273–278.]

En Banc. Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

On rehearing. Former opinion reversed, and judgment reversed and remanded for new trial.

For former opinion, see 159 Pac. 774.

Kerr & McCord, of Seattle, for appellant.
Ryan & Desmond, of Seattle, for respondent.

CHADWICK, J. Both parties to this action petitioned for a rehearing. Respondent contending for its judgment, and appellant contending that the question of the cost of removing the débris from the cove had not in fact been litigated and in reality had been expressly excluded by the court. We were possibly misled by what we conceived to be the position of appellant when the case came on for argument, but, be that as it may, we are convinced, after reargument and a re-examination of the record, that our final holding is not to be justified. The writer of the opinion fell into error.

However, we adhere to our former opinion, 159 Pac. 774, in so far as it construes the contract, and holds that respondent has a right of action which is not barred by the statute of limitations. We also hold to our ruling that the mill and boom are a part of one property, and that, if the value of the mill site is impaired by a destruction of the boom, it is a proper subject for a jury to inquire into.

From the beginning respondent and appellant have pursued their respective contentions upon widely divergent theories—the one that its property had been practically destroyed, and that the loss was incurable except by way of money damages; and the other that the contract gave it a right to construct its road even to the destruction of respondent's boom site; that the boom and mill were separate properties; that no damage had resulted, and if these defenses were not well sustained, the action was barred by the statute of limitations.

It is respondent's contention that the testimony amply sustains its assertion that its property has been all but destroyed, and that the true measure of damage is the difference in its value before and after appellant completed its work.

At the former hearing counsel for appellant argued that such was not the true measure of damages. Admitting the general rule, it was urged that it does not pertain if there is testimony tending to show that the cause of the injury is removable, in which event the law works an exception to the general rule, and will allow no more than the reasonable cost of removing the cause.

Counsel for respondent argues that all of the rights of appellant were saved by the trial judge, who instructed the jury on the issue of employing artificial means to restore the anchorage, as follows:

> "In considering the damage or injury, if any, sustained by the plaintiff in the removal of said stump or stumps, you will take into consideration whether or not another anchorage can be found or created which will furnish a firm and secure anchorage for said fin boom at a place which will serve as efficient as said stump or stumps and the cost of finding or creating such new anchorage and attaching said boom thereto."
>
> "In considering the question of whether or not the plaintiff has sustained any damage by the deposit of waste material in the indenture or cove in which the head of said boom was held, you will take into consideration the fact of whether or not the deposit of such waste material has affected or destroyed the efficiency of said indenture or cove as a protection for said fin boom and whether or not the same can by artificial means be made to furnish secure protection for said boom, and, if such can be done, the cost of constructing such artificial work."

But we hardly think this instruction goes to the possibility of removing the waste of rock and earth. Nor will it operate to save to respondent the right to insist upon its verdict. There are two all-sufficient reasons: First, There was no testimony to sustain it; and, second, the court, by an express ruling made in the course of the trial, withheld that issue from the jury. A witness was asked:

> "Q. What would be the expense per cubic yard to remove rock or earth from that location by scow? A. Well, the loose rock would be loaded on the scow for about 65 cents a yard, put on the scow. Q. Would there be any additional expense in unloading or depositing it from the scow?
>
> "By Mr. McCord: What rock are you referring to?
>
> "By Mr. Ryan: Any rock that might be necessary to remove from that vicinity. There is testimony that the cove was filled up.
>
> "By Mr. McCord: I object to all of this testimony as irrelevant, incompetent, and immaterial; not proper rebuttal testimony; not the proper measure of damages; not the proper measure of determination."

Whereupon the court ruled:

> "It is not the theory the plaintiff has prosecuted the action upon."

Counsel for respondent abandoned his inquiry, saying:

> "It is not but the defendant has offered some testimony to show conditions, it could be made in a state it was before for a nominal amount. If the court considers it not material in the light of the present case, we don't care to introduce it."

[1] Although the court afterwards permitted the witness to answer, the subject seems to have been dropped by counsel. As we now understand, counsel on both sides insist that this testimony did not go to the question whether the waste and débris could be removed, but was intended to show that appellant could have removed the waste material, when constructing its roadbed, by loading it upon a scow and hauling it away instead of dumping it over the bank, and into the river. With this understanding we feel no hesitation in overruling our former directions, and the judgment will be reversed upon the ground that there was no testimony to sustain the instruction going to the minimization of damages or the cost of removing the cause of the injury.

[2-4] It will be incumbent upon respondent, if it sustains the issue tendered, to show that the contour of the shore cannot be restored and the amount of damage resulting to its property by reason of appellant's interference with its boom site. If it be shown that the property cannot be restored by removal of the waste and the putting in of a "dead man," the measure of damage would be the difference in the value of the property before and after the work was done. In considering this issue, the jury should be cautioned to treat the property as a mill site and boom site, and not as an operating property; the mill which formerly occupied the ground having been burned before appellant constructed its road.

[5] To meet this issue, appellant may show, in addition to meeting the general issue, the practicability of restoring the contour of the shore and the cost of such restoration, including the cost of installing a "dead man."

[6] If the jury finds for the appellant upon this issue, the measure of damage will be the reasonable cost of doing the work.

Reversed, and remanded for a new trial.

ELLIS, C. J., and HOLCOMB, MOUNT, MAIN, WEBSTER, MORRIS, and PARKER, JJ., concur.

(96 Wash. 342)

HAYES v. OSBORN. (No. 13728.)

(Supreme Court of Washington. May 18, 1917.)

1. FORCIBLE ENTRY AND DETAINER 🔑5—TENANT'S RIGHT TO RELIEF—STATUTE.

To entitle a tenant to relief by action under the forcible detainer statute (Rem. Code 1915, § 811), the dispossession or interference with the tenant's enjoyment of the premises by the landlord or one claiming under him need not be total; it being enough if the tenant is dispossessed of some material part of the premises.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 23-28.]

2. APPEAL AND ERROR 🔑1008(2)—REVIEW—QUESTION OF FACT.

Whether the partial dispossession of a tenant by the employé of the grantee of the landlord was so material as to entitle the tenant to relief in his action under the forcible detainer statute (Rem. Code 1915, § 811) was a question of fact for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964.]

Department 2. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Action by John F. Hayes against L. A. Osborn. From a judgment for plaintiff, defendant appeals. Affirmed.

David Herman, of Spokane, and C. G. Jeffers, of Ephrata, for appellant. Daniel T. Cross, of Ephrata, for respondent.

PARKER, J. This is an action wherein the plaintiff, Hayes, seeks restoration of the possession of premises from the defendant, Osborn, under our forcible detainer statute (section 811, Rem. Code), alleging that the defendant, during the temporary absence of the plaintiff from the premises and without right so to do, entered upon the premises, and took and retained possession thereof. Trial in the superior court for Grant county without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

Respondent was in possession of the premises under a lease containing the following:

> "The first party [owner], her assignees, grantees, or heirs, have the right to go upon said premises at any time and perform such work thereon as she or they may deem advisable which does not prevent the second party from carrying out this lease."

The provisions of the lease seem to plainly give respondent the right to the possession of all the land and buildings thereon, subject only to this reserved right in the owner. Appellant claims to have gone upon the land as an employé of the grantee of the owner for the purpose of doing work thereon for him. Appellant took with him upon the land, stock, farm, implements, and household goods, and proceeded to occupy a vacant house and outbuildings upon the land, which house and outbuildings were not then being used by respondent, but which he had the right to use under the lease. Appellant also proceeded to plow up some of the pasture land which respondent had the right to use under the lease.

[1] The principal contention made in appellant's behalf is that appellant's acts were not such a material dispossession of respondent or not such an interference with his right of enjoyment of the premises as support the maintenance of this action in view of the terms of the lease. As to what extent of interference by a landlord with his tenant's enjoyment of the leased premises will support an action of this nature is sometimes quite difficult of determination, but we think the law is that the dispossession or interference with the tenant's enjoyment of the premises need not be a dispossession of all the premises to entitle the tenant to relief by this kind of an action. It is enough if the tenant is dispossessed of some material part of the premises. Jones, Landlord and Tenant, §§ 354, 355.

[2] The question here is one of fact. We do not see our way clear to interfere with the trial court's conclusion.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

(96 Wash. 309)

KALIVAS v. NORTHERN PAC. RY. CO.

(No. 13837.)

(Supreme Court of Washington. May 17, 1917.)

1. EVIDENCE 🔑594—TESTIMONY OF INTERESTED PARTY—BINDING FORCE.

Courts trying cases without juries are not bound by the uncontradicted testimony of an interested party; the court being authorized to weigh the evidence and to determine the facts the same as a jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431.]

2. APPEAL AND ERROR 🔑1012(1)—REVIEW—FINDINGS.

The findings of the trial court, which tried the case without a jury, will not be disturbed on a review de novo, unless the evidence preponderates against such findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992.]

3. MASTER AND SERVANT 🔑278(18)—INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries to its section hand, injured while riding on a gasoline propelled hand car when a wrench fell off the car and derailed it, evidence *held* insufficient to show defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 969, 971.]

4. MASTER AND SERVANT 🔑210(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A railroad's section hand riding on a gasoline driven hand car in front on the lookout for trains assumed the risk of being injured when a wrench somehow fell off the front of the car and derailed it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 554.]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by George Kalivas against the Northern Pacific Railway Company, a corporation. From a judgment dismissing the case, plaintiff appeals. Affirmed.

Hibschman, Dill & White, of Spokane, for appellant. Cannon & Ferris, of Spokane, for respondent.

MOUNT, J. Action for personal injuries. The case was tried to the court without a jury. At the conclusion of the plaintiff's evidence, and upon defendant's challenge to the sufficiency thereof, the trial court found that the defendant had not been guilty of negligence, that the plaintiff had assumed the risk, and, for those reasons, dismissed the case. The plaintiff has appealed.

It appears that on August 5, 1915, the appellant was in the employ of the Northern Pacific Railway Company, as a section hand. Part of his duties were to inspect the tracks upon the section, and to keep the lights and the section of the railway in order. On that date the appellant and the section foreman were proceeding over the section on a hand car equipped with a gasoline motor. The gasoline motor was contained in a box which ran the length of the car and through the center of it. On each side of the box was a trough, or rack, for the purpose of holding tools which were necessary to be carried upon the car. This car was the usual and customary car used on inspection trips. The tools carried upon it were a crowbar, a spike maul, a track wrench, and shovels. On the day of the accident, while upon an inspection trip, the appellant and the foreman of the section crew were riding upon the motorcar. The foreman was sitting about the middle of the car on the box covering the motor, engaged in operating the motor, while the appellant was sitting on the opposite side, on the front end of the car, with his feet hanging down in front. While the car was traveling at about ten miles an hour, on a slightly up grade, the track wrench which was upon the car fell off the front end of the car, derailing the car, and injuring the appellant. The evidence does not show upon which side of the motorcar the track wrench was placed. It does not show who placed the wrench upon the car.

[1, 2] It is argued by the appellant that it was the duty of the foreman to see that tools were properly placed upon the car, and that it was the foreman's duty to see that the tools did not fall off the car. We find no evidence in the record to show whose duty it was, upon this occasion, to see that this tool did not fall off the car. All that is shown is that the tool was on the car, that, in some unaccountable way, it fell off in front, when the car was going up grade, and that it derailed the car. Appellant contends that it was the duty of the foreman to look out for the safety of the appellant, and that, when it was shown that the wrench fell off the car and derailed the car, sufficient negligence was shown to warrant a finding in favor of the appellant. This argument is based upon the assumption that sufficient facts were shown to warrant the court in submitting the case to a jury. Conceding this to be so, if the case had been tried to a jury, it does not follow that, when the case is tried to the court without a jury, the court is bound to find as a jury might have found, because it is a well-established principle of law that courts are not bound by the uncontradicted testimony of an interested party. Gosline v. Dryfoos, 45 Wash. 396, 88 Pac. 634. The court is authorized to weigh the evidence, and to determine the facts the same as a jury, and the findings of the trial court will not be disturbed upon a review de novo, unless the evidence preponderates against such findings.

In the case of Andy Jim v. Chicago, Milwaukee & St. Paul Railway Co., 160 Pac. 295, in referring to this question, we said:

> "We are to be reminded that this is not a question of nonsuit at the close of plaintiff's evidence upon a jury trial; hence our problem is not whether the evidence was sufficient to carry the case to the jury, had it been tried before a jury, but whether or not the trial court correctly decided the case upon the merits as a question of fact; for the court's decision was, in effect, a decision upon the merits of appellant's entire case, though made in response to a motion for judgment against appellant made at the close of the evidence introduced in his behalf."

In Lambuth v. Stetson & Post Mill Co., 14 Wash. 187, 44 Pac. 148, this court said:

> "When the trial is before a jury, the court cannot weigh the testimony upon a motion for a nonsuit, for the reason that it cannot weigh it at any time; but when the trial is without a jury, the court must eventually weigh the testimony for the purpose of determining where the preponderance is, and there is no reason why it should not so weigh it at the earliest possible time when the rights of the plaintiff will not be cut off by its so doing; and when the plaintiff has introduced all of his proof and rested, no right of his will be cut off if the court then determines what has been proven. It cannot be presumed that plaintiff's case will be strengthened by the evidence put in by the defendant. If, when plaintiff had submitted his evidence, the defendant had rested without putting in any proof, it is clear that the court would have had to determine the questions of fact made by the pleadings upon a preponderance of the testimony. Hence, under the rule contended for by the appellant, the court might be put in the anomalous position of denying the motion for a nonsuit and immediately thereafter, upon the refusal of the defendant to put in any proof, deciding the case in his favor."

After carefully reading the record in this case, we are of the opinion that no negligence was shown on the part of the respondent. The car was the usual car used in such work, and operated as usual. The tools were the usual tools carried on such trips. They were loaded and carried as usual, and no tools had ever before fallen off under such conditions. It was not shown that it was the duty of the section foreman to guard the track wrench, and see that it did not fall off from the car. The section foreman was engaged in operating the little gasoline engine which ran the car. The appellant's position was on the front of the car, where he was required to look out for on-coming trains, and it was, no doubt, as much his duty to watch the wrench as it was the duty of the foreman. So far as the record shows, the fault, if any, in not observing the wrench, when it was about to fall, was that of the appellant, rather than of the section foreman.

[3, 4] We conclude, therefore, that the trial court did not err in finding that there was no negligence proven against the respondent, and that the appellant assumed whatever risk there was in riding on the car.

The judgment is therefore affirmed.

ELLIS, C. J., and PARKER, HOLCOMB, and FULLERTON, JJ., concur.

(96 Wash. 372)

DELLER v. LONG et ux. (No. 13771.)

(Supreme Court of Washington. May 18, 1917.)

APPEAL AND ERROR 🔑671(3) — RECORD — QUESTION PRESENTED.

Where the record on appeal did not purport to contain all of the evidence, nor to be an agreed statement of facts, but stated that it merely contained plaintiff's evidence, the only question presented was whether the findings supported the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2869.]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by L. K. Deller against A. C. Long and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Louis A. Dyar, of Spokane, for appellants. Harry M. Morey, of Spokane, for respondent.

WEBSTER, J. The single issue presented to the superior court in this case was whether the defendants by verbal contracts expressly guaranteed to pay plaintiff's assignors a fixed and stipulated net price for a number of boxes of apples which had been delivered to the defendants. It was the contention of the defendants that the apples had been received by them as commission brokers in the usual course of business, and that no guaranty of price had been made. The issue was purely one of fact. The trial court made findings to the effect that the contracts actually entered into between the parties were as alleged by the plaintiff, namely, that the defendants guaranteed a fixed net price for the apples. Defendants appeal.

The certificate to the statement of facts recited:

> "The above and foregoing statement of facts contains all of the material facts, matters and proceedings heretofore occurring in the plaintiff's case only in said cause, and not already a part of the record therein, and contains all of the plaintiff's evidence oral and written therein."

The record does not purport to contain all of the evidence produced upon the trial, nor does it appear from the certificate that such portion of the record as is brought here contains all of the material facts, matters, and proceedings occurring at the trial and not already a part of the record, nor that it contains such thereof as the parties have agreed to be all that are material. Under such a certificate, it must be presumed that the statement does not include all of the material facts. Taylor v. Andres, 83 Wash. 684, 145 Pac. 991; State ex rel. Miller v. Seattle, 45 Wash. 691, 89 Pac. 152; Kirby v. Collins, 6 Wash. 297, 32 Pac. 1060.

In this condition of the record, it is impossible to try the case de novo on the facts. The findings clearly support the judgment, and this is the only question we are at liberty to review. Pack v. Peabody, 58 Wash. 76, 107 Pac. 839; Lohman v. Claussen, 55 Wash. 408, 104 Pac. 624.

We conclude that the judgment must be affirmed.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

(96 Wash. 394)

LAUER v. FREUDENTHAL. (No. 13796.)

(Supreme Court of Washington. May 18, 1917.)

1. COURTS 🔑475(5) — COMITY—PENDING ACTION IN ANOTHER STATE.

In an action alleging a decree and stipulation for the appointment of a receiver and settlement of property rights in a divorce action in Montana and praying for a judgment for one-half the value of property alleged to have been concealed by the defendant, it not being alleged that any of the property so secreted was or ever had been in the state of Washington, and no effort having been made to reach any specific property belonging to defendant in the state of Washington, and it appearing that the divorce action was still pending in Montana, and that by express provision in the decree plaintiff is given permission to apply to that court to secure her rights in any property which defendant may have fraudulently concealed when the property settlement was made, and that the identical matter attempted to be litigated in this state had already been considered by the court in Montana, and that no property belonging to respondent had been discovered since the entry of the Montana decree which had not been accounted for in the property settlement, the court under the doctrine of comity properly refused to entertain the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1236, 1237, 1250–1257, 1259.]

2. WORDS AND PHRASES—"COMITY."

Although comity is not a rule of law, but of practice, convenience and expediency, it is more than mere courtesy, which implies only deference to the opinion of others, as it has a substantial value in securing uniformity of decision and in discouraging repeated litigation of the same question.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Comity.]

Department 1. Appeal from Superior Court, Spokane County; Walter M. French, Judge.

Action by Lily F. Lauer against I. L. Freudenthal. Judgment for defendant, and plaintiff appeals. Affirmed.

Noffsinger & Walchli, of Kalispell, Mont., and Samuel R. Stern, of Spokane, for appellant. J. E. Erickson, of Kalispell, Mont., and Harry L. Cohn, of Spokane, for respondent.

WEBSTER, J. In June, 1915, respondent and appellant were husband and wife and resided in the city of Whitefish, Mont. On June, 13, 1915, in the district court for the eleventh district of Montana holding terms in Flathead county, appellant commenced an action against respondent for a divorce and a division of property. On June 28, 1915, respondent filed his answer in the action and entered into a stipulation with appellant providing for the appointment of a receiver to take charge of all the property and effects of the parties. The receiver was duly appointed. The case was immediately heard, and a divorce was granted appellant as she prayed.

The decree, among other things, contained the following provisions:

> "That said plaintiff may apply to this court at any time hereafter for such order or relief as to the court may seem proper, for the purpose of discovering property improperly or fraudulently transferred or concealed, and for the purpose of reaching any property which might properly belong in whole or in part to the plaintiff."

It was further provided in the decree that the receivership should be continued in force for the purpose of collecting and distributing the property of the parties in accordance with their stipulation. Later, appellant applied to the court for permission to examine respondent touching his property holdings, it being claimed that he had not made a full, fair, and complete disclosure to appellant of all of his property. The application was granted, and respondent appeared and was examined at length concerning the property owned by him. On the following day a stipulation was entered into by the terms of which respondent agreed to pay appellant $3,500, and to pay her counsel the sum of $750 for his services in the case. No further steps were taken in the cause, and the record is silent as to whether the receivership had been closed.

[1] In September, 1915, respondent, while sojourning in the city of Spokane, was served with the summons and complaint in this action. Appellant, after setting forth in the complaint the divorce action in Montana, the stipulations entered into between the parties, and the decree entered in the cause, alleged in substance that respondent, prior to and at the time of the settlement of the property rights of the parties, had fraudulently secreted and withheld from appellant property of the value of at least $20,000, that appellant was entitled to one-half of this amount, and prayed judgment for the sum of $10,000. It was not alleged that any of the property claimed to have been secreted by respondent was or ever had been in this state, and no effort was made to reach or subject any specific property belonging to respondent alleged to be in the state of Washington. At the trial in the superior court, it affirmatively appeared from the evidence offered by appellant that all of the matters and things sought to be litigated in this jurisdiction had been fully inquired into and carefully investigated by the district court of Montana, and the evidence sought to be introduced in appellant's behalf was the identical evidence which had theretofore been submitted to the district court of Montana. No evidence was offered tending to prove that any property belonging to respondent had been discovered since the entry of the decree in the divorce action, which had not been disclosed to the receiver and to the court. At the conclusion of appellant's case, the court, on motion, directed a verdict in favor of respondent. Appellant brings the case here.

It appearing that the divorce action was still pending in the district court of Montana, and that by express provision in the decree appellant is given permission to apply to that court for the purpose of securing her rights in and to any property which respondent may have fraudulently concealed from her at the time the property settlement was made, and that the identical matter attempted to be litigated in this state had already been submitted to and considered by the district court of Montana, and that no property of any character belonging to respondent had been discovered since the entry of the decree which had not been accounted for in the property settlement, we are of the opinion that the disposition made of the case in the lower court was correct. In the circumstances disclosed by this record, it would seem that the doctrine of comity between states calls for the refusal on the part of the courts of this state to entertain the action. To do otherwise would be for the courts of this state to review a portion of the proceedings had in the district court of a sister state in a cause still pending in that court.

[2] "Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question." Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

(96 Wash. 397)

ALLEN v. WALLA WALLA VALLEY RY. CO. (No. 13799.)

(Supreme Court of Washington. May 18, 1917.)

JUDGMENT ⟹239—**SEVERAL DEFENDANTS.**

Where, in consolidated actions against a railway company for personal injuries due to the horse driven by one plaintiff becoming frightened and running away and colliding with defendant's street car, it appeared that the other plaintiff was merely riding in the buggy at the time of the accident and was not in a position to exercise authority or control over the driver, and did not appear that he failed to exercise such care to protect himself as the attending circumstances demanded, a verdict against the driver because of contributory negligence did not preclude the other plaintiff from recovering.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 417.]

Department 1. Appeal from Superior Court, Walla Walla County; Edward C Mills, Judge.

Consolidated actions by Bert Allen and another against the Walla Walla Valley Railway Company, a corporation. From judgment for the plaintiff named, defendant appeals. Affirmed.

Sharpstein, Pedigo, Smith & Sharpstein, of Walla Walla, and John A. Laing, of Portland, Or., for appellant. Homer I. Watts, of Athena, Or., and W. H. Fouts, of Asotin, for respondent.

WEBSTER, J. This is an action to recover damages for personal injuries. Respondent at the time of the accident was riding in a buggy with his stepson Mike Pierce. The horse which was being driven by Pierce became frightened, ran away, and collided with one of appellant's street cars. Respondent and Pierce were both injured, and each brought an action for damages against appellant. By stipulation of the parties the actions were consolidated for the purpose of trial. The jury returned a verdict in favor of respondent for the sum of $1,000, but in the case in which Pierce was plaintiff found in favor of the railway company. Appellant's motion for judgment notwithstanding the verdict being denied and judgment having been entered upon the verdict, it brings the case here.

No errors are assigned based upon the admission or rejection of evidence, instructions given or refused by the court, or the insufficiency of the evidence to support the verdict. Counsel for appellant, on page 3 of their opening brief, make this statement:

> "Intending to present to this court the question only as to whether or not, when a verdict has been rendered and judgment based thereon entered in the consolidated cases upon the same testimony at the same trial and by the same jury in favor of the appellant company, the appellant company was not also entitled to a judgment in its favor notwithstanding the verdict, against the defendant and appellant here, we do not deem it necessary to burden this brief with as much of the record of the case as we would otherwise do."

The concluding paragraph of the brief is as follows:

> "We therefore respectfully submit that, the verdict and judgment having been rendered in these consolidated actions in favor of the defendant street railway company and against the plaintiff Pierce, the motion made by the defendant company for judgment in its favor as against the plaintiff Allen notwithstanding the verdict in favor of the plaintiff Allen should have been granted, and that the judgment appealed from should be reversed, with instructions to the lower court to enter judgment in favor of the appellant and against the respondent."

Again, in the reply brief counsel for appellant say:

> "On page 3 of our opening brief, we stated that we intended to present to this court only one question, and stated the question. * * * We claimed in that brief, and now assign as error, that the lower court erred in not granting our motion for judgment notwithstanding the verdict, in our favor and against respondent, because of the fact that the same jury, impaneled and sworn to try both cases consolidated for that purpose, had, on the same trial and same evidence, decided against plaintiff Pierce."

Later in the reply brief it is said:

> "Respondent contends that the principle of the Doremus Case does not control, and we contend that it does, and this is the whole question involved in this appeal."

Thus, it will be seen that appellant's sole contention is that, inasmuch as the jury trying the consolidated cases returned a verdict against Pierce, the driver of the horse, respondent, who was riding with him in the buggy at the time of the accident, is thereby precluded from recovering in this case; and that the court should so hold as a matter of law. This position is palpably unsound and untenable. Doremus v. Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, referred to in appellant's briefs, was a case where the plaintiff brought an action aginst the Oregon Railroad & Navigation Company and Samuel Root, to recover damages for personal injuries alleged to have been caused solely by the negligence of Root while acting as conductor on one of the defendant railroad company's freight trains. It was alleged in the complaint that Root by virtue of his employment had charge and control of the train on which he was acting as conductor, and that he negligently, carelessly, and recklessly permitted the train to run past a siding, well knowing that by so doing the train was likely to collide with the train on which the plaintiff was employed as fireman, and that by reason of this negligence on the part of Root the injuries complained of by plaintiff were suffered. The sole negligence relied upon by plaintiff was that of the defendant Root, and the railroad company was sought to be held liable on the doctrine of respondeat superior. The jury returned a verdict against the railroad company only, and the trial court ruled that the verdict in that form should be considered as a verdict in favor of the defendant Root. Judgment was entered in favor of Root against the plaintiff for the amount of the former's costs, and a judgment was entered against the railroad company in favor of the plaintiff for the amount of the verdict returned against it. The railroad company appealed. This court held that the defendants were in no sense joint tort-feasors, and that their liability to the plaintiff rested upon entirely different grounds, the employé being sought to be held because he committed the act which caused the injury, while the liability attempted to be imposed upon the employer, the railroad company, rested upon the doctrine of respondeat superior; that, the gravamen of the action being the alleged negligence of the employé Root, no recovery could be had against the railroad company unless it was established and found by the jury that Root was guilty of negligence; that, the jury by its verdict having exonerated Root of the negligence charged in the complaint, the company was by that very fact also absolved from liability. In other words, the holding was to the effect that the liability of the railroad company depended upon the negligence of Root, and, if he was found to be free from fault, the company of necessity was also blameless. See Sterick v. Northern Pac. Ry. Co., 39 Wash. 501, 81 Pac. 999.

In the case now under consideration, the question of whether the contributory negligence of Pierce is to be attributed and imputed to Allen depends entirely upon the relationship in which they stood to each other at the time of the accident. The rule adopted by this court and the one sustained by the weight of authority is to the effect that, where one is riding in a vehicle with another as his guest or companion and is injured by the negligence of a third person, the contributory negligence of the driver is not imputable to the injured person, unless the latter at the time of the injury was in a position to exercise authority or control over the driver, or failed to exercise such care to protect himself as under the attending circumstances was incumbent upon him. In the latter instance, it is hardly proper to say that the doctrine of imputed negligence is involved. Where one fails to exercise reasonable care and prudence for his own protection and safety and this failure contributes in an appreciable degree to causing the injury of which he complains, he is, strictly speaking, answerable for his own negligence. So that the doctrine of imputed negligence is based upon the single question of whether the occupant of the vehicle was in a position to exercise authority or control over the driver in respect to the matter in which the driver was negligent. The basic thought upon which the doctrine or principle of imputed negligence rests is that the relationship of master and servant or principal and agent must exist between the driver and the occupant at the time of the injury. In the absence of such a relationship, the negligence of the one will not be attributed to the other. Beach v. Seattle, 85 Wash. 379, 148 Pac. 39; McCanna v. Silke, 75 Wash. 383, 134 Pac. 1063; Field v. Spokane, Portland, etc., R. Co., 64 Wash. 445, 117 Pac. 228; Cathey v. Seattle Elec. Co., 58 Wash. 176, 108 Pac. 443; Wilson v. Puget Sound Elec. Co., 52 Wash. 522, 101 Pac. 50, 132 Am. St. Rep. 1044; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76; Brabon v. Seattle, 29 Wash. 6, 69 Pac. 365.

The trial court, by instructions of which no complaint is made, submitted to the jury the question of the relationship existing between Pierce and Allen at the time of the accident, and whether the negligence of the former was under the evidence in the case to be attributed to the latter. The verdict of the jury in favor of the respondent must therefore be considered as a finding by the jury that he did not possess any authority or control over Pierce with reference to the matter wherein the jury evidently found that he was guilty of contributory negligence. Consequently, the two verdicts rendered in the action are in no sense inconsistent, nor does the fact of Pierce's contributory negligence necessarily preclude a recovery on the part of the respondent. If Pierce was guilty of negligence contributing to his injury, clearly he was not entitled to recover. But unless this negligence on his part was, under the circumstances of the case, imputable to Allen, and the jury found that appellant was guilty of negligence as charged in the complaint, Allen was equally clearly entitled to a recovery. The naked fact, therefore, that the jury returned a verdict against Pierce, evidently upon the ground of contributory negligence on his part, does not carry with it the conclusion as a matter of law that the respondent was not entitled to recover in his case. For these reasons the principle announced in the Doremus Case is not applicable to this case.

This seems to dispose of the only question presented for our consideration.

The judgment is affirmed.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

(96 Wash. 282)

COLVIN et al. v. CLARK. (No. 12038.)

(Supreme Court of Washington. May 14, 1917.)

1. Appeal and Error 🔑533(1)—Record—Memorandum Opinion.

In an action at law, a memorandum opinion of the trial judge is not properly a part of the transcript, and cannot be considered as findings of fact or conclusions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2339.]

2. Trial 🔑404(5)—Findings of Fact and Conclusions of Law.

Under Rem. Code 1915, § 367, requiring the court to make findings and conclusions in all actions at law, such findings have the same legal effect as the verdict of a jury, and are treated as such.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 961.]

3. Trial 🔑393(1)—Findings of Fact.

The intent of Rem. Code 1915, § 367, requiring findings of fact, etc., is that such findings shall be formal, so that exceptions can be made, and the attention of the trial judge called specifically to a wrong finding or an unsupported conclusion, this giving him the opportunity to correct any patent errors; exceptions in such cases being the counterpart of a motion for new trial, where cases are tried to a jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 920.]

4. Trial 🔑388(2)—Findings—Suits in Equity.

In suits for equitable relief, findings of fact and conclusions of law are not essential, however helpful they may be to the appellate court, for the case is tried de novo, without reference to the opinion or conclusions of the trial judge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 909.]

5. COSTS ⟹234, 236—ON APPEAL.

Costs on appeal follow a reversal or substantial modification.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 892-905, 907.]

On recall of remittitur. Prior decision affirmed.

For prior decision, see 83 Wash. 376, 145 Pac. 419.

PER CURIAM. The remittitur in this case was recalled upon petition of the respondent, in which it was suggested that the court had overlooked certain motions which were made a part of the petition, and which should not have been decided without some affirmative expression of the court. The motions were: (1) For leave to file a supplemental transcript, showing the complete record in the court below; (2) that the judgment of this court be suspended, pending the making of findings of fact and conclusions of law by the trial judge; (3) for a rehearing on the merits; and (4) for a retaxation of costs.

The thing sought to be done is to supply a memorandum opinion rendered by the trial judge, and to have the same considered as a finding of fact and a conclusion of law. The memorandum opinion was filed with the petition. The attention of the court is directed to the case of Mallory v. Olympia, 75 Wash. 245, 134 Pac. 914, where it is said:

> "The court not making findings, but sustaining the contention of the city in a memorandum decision in which it was said: * * * This decision, while not made as a finding, is in the nature of a finding of fact and conclusion of law upon the issues submitted to the lower court, and will be here treated as such."

[1-3] Since the case of King County v. Hill, 1 Wash. 63, 23 Pac. 926, the rule has been that a memorandum opinion of a trial judge was not properly a part of the transcript, and would not be considered as findings or conclusions. The necessity for findings of fact and conclusions of law is found in the statutes of the state (Rem. Code, § 367), which provides that in all actions at law the court shall make findings and conclusions. Such findings have the same legal effect as the verdict of a jury, and are treated as such. It is the intent of the statute, also, that such findings shall be formal, so that exceptions can be made, and the attention of the trial judge called specifically to a wrong finding or an unsupported conclusion, this giving him the opportunity to correct any patent error; exceptions in such cases being counterpart of a motion for a new trial, where cases are tried to a jury. In this case, appellant requested findings, so that proper exceptions could be entered. To now hold that the memorandum opinion of the trial judge is a finding of fact and conclusion of law would leave us in the situation of denying the right of appellant to try out the merit of his case on appeal, for no exceptions were filed by him, and our only duty, under a long line of cases, would be to affirm the judgment on the finding. In Gould v. McCormick, 75 Wash. 61, 134 Pac. 676, 47 L. R. A. (N. S.) 765, Ann. Cas. 1915A, 710, and in Gust v. Gust, 70 Wash. 695, 127 Pac. 292, the court held that such a memorandum could not be considered as findings of fact and conclusions of law.

[4] The remark of the court in the Mallory Case, supra, was inadvertent, as well as unnecessary, for the suit was for equitable relief. In such cases findings of fact and conclusions of law are not essential, however helpful they may be to the appellate court, for the case is tried de novo, without reference to the opinion or conclusions of the trial judge. Slyfield v. Willard, 43 Wash. 179, 86 Pac. 392; White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003; Knowles v. Rogers, 27 Wash. 211, 67 Pac. 572; Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490; Enos v. Wilcox, 3 Wash. 44, 28 Pac. 364; Kilroy v. Mitchell, 2 Wash. 407, 26 Pac. 865.

[5] It follows that our opinion as rendered in Colvin v. Clark, 83 Wash. 376, 145 Pac. 419, must stand. This disposition of the case makes it unnecessary to pass upon the question of costs, for, under the settled practice, costs follow a reversal or a substantial modification.

(96 Wash. 333)

GRANGER TELEPHONE & TELEGRAPH CO. v. SLOANE BROS., Inc.

(No. 13718.)

(Supreme Court of Washington. May 18, 1917.)

1. EMINENT DOMAIN ⟹2(6) — DAMAGE TO PROPERTY.

The right of a telephone and telegraph company under its franchise to maintain poles in a highway is qualified by the paramount right of the county authorities to keep the highway in reasonable condition for ordinary use by the public, and the damage which necessarily follows to such licensee from an improvement of the highway without negligence by the county authorities would not be a taking or damaging of property within the meaning of Const. art. 1, § 16, which provides that no private property shall be taken or damaged for public or private use without just compensation having been made.

2. COUNTIES ⟹93—DAMAGE TO PROPERTY.

It follows that if the county is not liable, the contractor, who was the agent of the county in doing the work and had agreed to do the work in accordance with the plans and specifications of its contract with the county, and under the direction and superintendence of the county engineer, would not be liable, in the absence of negligence.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 121.]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Granger Telephone & Telegraph Company against Sloane Bros., Incorporated. Judgment for defendant, and plaintiff appeals. Affirmed.

B. L. Hubbell, of Kelso, for appellant.
Turner, Hartge & Turner, of Seattle, for respondent.

MOUNT, J. The facts in this case are not in dispute. They may be briefly stated as follows: The appellant had a general franchise from Wahkiakum county to erect and maintain telephone and telegraph lines on the county roads of that county. Appellant erected certain telephone lines over one of the county roads by setting poles in the highway and placing thereon its telephone and telegraph lines. After this had been done, the county decided to improve the highway, and did so, by letting a contract to the respondent to do the work. The respondent, under the direction of the county engineer, as provided for in the contract, and without any negligence, proceeded to improve the road in accordance with the county plan. In doing this work some of the appellant's telephone poles were caused to fall by necessary excavations. The appellant, in order to replace the poles, expended the sum of $711.34. The appellant then brought this action to recover damages in that sum from the contractor. Upon these facts the trial court denied a recovery, and the plaintiff has appealed.

[1] The appellant argues that its property was placed upon the highway where it had a right to be; that, under the provisions of section 16 of article 1 of the Constitution, which provides that no private property shall be taken or damaged for public or private use without just compensation having been made, it is entitled to recover in this action. The argument proceeds upon the theory that, being rightfully in the highway with its telephone poles, the county had no right to damage these poles without just compensation being made therefor. It is true that the appellant had a right in the highway, by reason of the franchise, but that right is necessarily a qualified right. It cannot be reasonably argued that the county authorities may grant the right to a public service corporation to occupy a highway to the exclusion of the public, or the exclusion of the right of the county authorities to improve the highway so that it may be used by the public. A franchise granted upon a highway such as this would necessarily be qualified by these rights. Where the right is such qualified right, it follows that the county authorities, in the discharge of their duties to control the highway, may keep it in reasonable condition for ordinary use by the public, and the damage which necessarily follows to a licensee from an improvement of the highway would not be a taking or damaging of property within the meaning of the constitutional provision above quoted. The rule is stated in 13 R. C. L. at section 82 as follows:

"It is almost uniformly held that a gas or water company laying its mains and service pipes under the streets of a municipality acquires no vested right to an undisturbed location, but holds subject to the paramount right of the public to make such changes in the surface and subsoil of the street as may be required by the public interest; and hence any damage inflicted without negligence on the owner of the mains and pipes in the prosecution of a public improvement under the direction of the proper authorities is, in the absence of a statute or an express contract allowing recovery, damnum absque injuria. This is equally true though the statute or ordinance under which the work is done provides for compensation to abutting owners, and though in making the improvement the municipality exercises its right of eminent domain. And a municipal contractor constructing such a public improvement is not liable for unavoidable injuries so inflicted. Moreover, a city has no right directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the waterpipes, gas pipes, telegraph, telephone and electric light poles, drains or conduits, or railway tracks that may necessarily be interfered with in laying its sewers in the streets."

And at section 87 the rule is stated:

"Public service corporations occupying a street under a franchise are held to have acquired their rights on the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade or other improvement in its streets. Hence, in the absence of negligence or wantonness on the part of the city, such a corporation cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes, tracks, or other appliances, in order to accommodate them to the new grade. So the power of the municipality to change the grade of its streets whenever and as often as the public needs and convenience require is not affected by the fact that a street is occupied by a railroad company under a franchise. Ordinarily, also, the obligation rests on a railway company so situated to make its tracks conform to the established or changed grade of the street. But these ordinary powers and obligations may be enlarged or restricted by legislation or agreement, and this will be determined by the statutes and contracts having application to the case in hand."

Many authorities are cited to support this text. See, also, Columbus Gas Light & Coke Co. v. Columbus, 50 Ohio St. 65, 33 N. E. 292, 19 L. R. A. 510, 40 Am. St. Rep. 648, and Scranton Gas & Water Co. v. Scranton, 214 Pa. 586, 64 Atl. 84, 6 L. R. A. (N. S.) 1033, 6 Ann. Cas. 388, and note on page 390.

[2] It follows, of course, that if the county itself is not liable, the contractor, which was the agent of the county for doing the work and had agreed to do the work in accordance with the plans and specifications of its contract with the county, and under the direction and superintendence of the county engineer, and where no negligence occurred in doing the work, would not be liable. Kaler v. Puget Sound Bridge & Dredging Co., 72 Wash. 497, 130 Pac. 894.

We conclude, therefore, that the constitutional provision has no reference to this character of damages, and the trial court was right in dismissing the action.

The judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

(96 Wash. 422)

FRAZEY v. CASEY. (No. 13885.)

(Supreme Court of Washington. May 18, 1917.)

1. Mortgages 🔑292(2) — Assumption by Purchaser—Personal Liability.

Under Rem. Code, § 3409, as to negotiable instruments, providing that no person is liable on the instrument whose signature does not appear thereon, one who has orally contracted to assume a mortgage as part of the purchase price of land is not liable in action at law on the note secured by such mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 766, 790.]

2. Mortgages 🔑280(3)—Assumption by Purchaser—Validity of Oral Agreement.

A verbal promise of a purchaser of mortgaged property to assume and pay the mortgage debt will be enforced in equity at the instance of either the grantor or the holder of the mortgage, and such assumption need not be in writing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 742, 744.]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Charles J. Frazey against Louis Gilbert and others. From a judgment, defendant J. T. Casey appeals. Reversed.

Heber McHugh, C. J. Smith, John T. Casey, and Tucker & Hyland, all of Seattle, for appellant. Myers & Johnstone, of Seattle, for respondent.

MOUNT, J. This is an action at law upon a promissory note. The plaintiff had judgment below against each of the defendants. The defendant Casey has appealed.

The facts are as follows: On March 13, 1911, the defendants Louis Gilbert and Catherine Gilbert, his wife, executed and delivered their promissory note to respondent for $850, with interest at 8 per cent. On the same date, a mortgage upon tract 20, Rainier Beach Garden Tracts, in King county, was given by Gilbert and wife to secure the payment of the note to respondent Frazey. Thereafter, on June 20, 1913, Gilbert and wife sold the mortgaged land to appellant, John T. Casey, for $3,300. Mr. Casey assumed, as part of the purchase price, the note for $850 due to respondent Frazey, also another note for $1,000, which was secured by a first mortgage, and paid $500 in cash. He gave a third mortgage to Gilbert and wife for $950. The deed from Gilbert and wife to Casey did not mention the mortgages, but a contract was prepared by Gilbert and wife, and delivered to Casey to be signed. The contract provided for the assumption by Casey of all the obligations against the property. Mr. Casey did not sign the contract, but accepted the deed, which did not mention the mortgages. The contract of assumption was oral. On the trial of the case Mr. Casey testified that he purchased only the equity of Gilbert and wife in and to the real estate, but we are satisfied, from the evidence, that he agreed to purchase for $3,300, which was to be paid as follows: $500 in cash; $950 secured by a third mortgage; and he assumed the obligations against the property, being two mortgages, one for $1,000, in favor of Mr. Cole, and the other for $850, the latter securing the note sued on in this case. The complaint, which is in the ordinary form upon a promissory note, does not mention the fact that a mortgage was given to secure the note. It makes Mr. Casey a party by the following allegation:

> "That after the execution of said promissory note, and, to wit, on the 19th day of January, A. D. 1914, the defendant John T. Casey purchased certain real estate from the other defendants, and as part of the purchase price of said property said Casey assumed and agreed to pay the said promissory note."

In answer to the complaint, Casey denied that allegation. It is apparent that the action is at law upon the promissory note. Section 3409, Rem. Code, provides:

> "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name."

[1, 2] Under this section of the statute, Mr. Casey's signature must appear upon the note before he may be held liable thereon. Mr. Casey was not a maker of the note. He did not indorse it, and, if this section means what it says, it is difficult to understand how Mr. Casey may be held liable in an action at law upon the note, which he did not sign or indorse. The court below was of the opinion that the holder of the note could maintain an action at law against Mr. Casey upon his oral assumption, because Mr. Casey assumed the mortgages upon the property when he purchased it from the defendants Gilbert and wife. The respondent, Frazey, relies upon the rule in equity that, where a purchaser of mortgaged property assumes and agrees to pay the mortgage debt, equity will enforce payment, either at the instance of the grantor or the holder of the mortgage. There is no doubt of that rule in this state. In Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892, quoting from Devlin on Deeds, this court stated the rule as follows:

> "It is not necessary that the promise of the grantee to assume the payment of an incumbrance as a part of the consideration for which the deed is made should be in writing. A verbal promise to do so is valid, and equity will enforce it either at the instance of the grantor or the holder of the mortgage."

To the same effect see Solicitors' Loan & Trust Co. v. Robins, 14 Wash. 507, 45 Pac. 39, and Ordway v. Downey, supra, and cases there cited. But those were cases in equity, where the mortgagee was foreclosing the mortgage. In such cases the mortgagee has a right to pursue his remedy against the mortgaged property, and against those who have agreed to pay the debt, but no case is cited to us where, in an action at law upon a promissory note, a person not a maker or an indorser may be held liable under a statute like ours.

Upon the face of the statute we see no escape from the conclusion that where the holder of a note secured by a mortgage waives the mortgage, and brings an action at law upon the note, he may not enforce payment against a person who has not signed the note, either as maker or indorser.

We have no doubt of the right of the defendants Gilbert and wife, under the facts stated, to proceed against Mr. Casey for the full purchase price of the property. The contract between them is an independent contract, which is not available to the respondent in an action at law upon the note, because Casey did not sign or indorse the note. Mr. Casey, by not signing or indorsing the note, had a right to assume that the mortgages would be foreclosed, and the property sold, and the proceeds thereof applied upon the mortgage, before he could be held personally liable.

The judgment, as to appellant Casey, is therefore reversed.

ELLIS, C. J., and PARKER, FULLERTON, and HOLCOMB, JJ., concur.

(96 Wash. 403)

CITY OF SPOKANE v. KNIGHT.

(No. 13809.)

(Supreme Court of Washington. May 18, 1917.)

1. Criminal Law ⇨564(3)—Venue—Circumstantial Evidence.

In criminal cases, venue may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1279.]

2. Criminal Law ⇨564(3)—Sufficiency of Evidence—Venue.

In a prosecution for automobile speeding, testimony that the offense occurred on certain streets, "in the city," etc., *held* circumstantially to prove the venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1279.]

3. Municipal Corporations ⇨707 — Jury Question—Speed of Auto.

A motorcycle policeman's testimony regarding the speed of defendant's automobile as determined by a tested speedometer attached to his motorcycle *held* to sustain a conviction for automobile speeding.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

4. Criminal Law ⇨304(12)—Judicial Notice—Municipal Ordinance.

In a prosecution for automobile speeding, the Spokane municipal court takes judicial notice of an ordinance pleaded in the information by number and title, and the superior court, having appellate jurisdiction of such a case will also judicially notice it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 708, 2951½.]

5. Criminal Law ⇨656(9) — Trial — Comment of Court.

In a prosecution for automobile speeding, the court's explanatory statement, comparing a motorcycle policeman's speedometer with weighing scales, when refusing to strike out testimony regarding the readings of such speedometer on a motorcycle of a traffic policeman, *held* not such a comment on the evidence as requires reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1533.]

Department 2. Appeal from Superior Court, Spokane County; O. M. Easterday, Judge.

Prosecution by the City of Spokane against J. M. Knight for automobile speeding. From a conviction defendant appeals. Affirmed.

Carl W. Swanson, of Spokane, for appellant. J. M. Geraghty, Alex M. Winston, and Arthur L. Hooper, all of Spokane, for respondent.

MOUNT, J. The appellant was convicted upon a charge of exceeding the speed limit in the city of Spokane, in violation of Ordinance No. C 1832 of that city. He was tried upon the charge, first, in the police court of that city, and was convicted and sentenced to pay a fine of $10 and costs. He appealed from that judgment to the superior court of Spokane county, and, after a mistrial, was again convicted and sentenced to pay a fine of $10 and costs. Upon this appeal, he makes several contentions, which will be noticed in their order.

[1, 2] It is first contended that the venue was not sufficiently proved, by reason of the fact that no witness testified that appellant traveled with his automobile at a speed faster than 20 miles per hour in the city of Spokane. It is true no witness made the direct statement that, at the time appellant was driving his automobile, he was in the city of Spokane, but a number of witnesses testified that he was in "the city" and upon certain streets, naming them, all of which are city streets of the city of Spokane. This court has held, in a number of cases, that venue, like any other fact, may be found upon circumstantial evidence. State v. Fetterly, 33 Wash. 599, 74 Pac. 810; State v. Gilluly, 50 Wash. 1, 96 Pac. 512; State v. Kincaid, 69 Wash. 273, 124 Pac. 684; State v. Chin Sam, 76 Wash. 612, 136 Pac. 1146; State v. Dooley, 82 Wash. 483, 144 Pac. 654; State v. Libby, 89 Wash. 27, 153 Pac. 1058, 155 Pac. 746.

In State v. Kincaid, supra, we said:

> "There was no direct statement by any witness that the crime was committed in Whatcom county. The rule, however, is established by overwhelming authority that venue, like any other fact, may be found upon circumstantial evidence; and that, where it may be reasonably inferred from the evidence that the crime was committed in the county designated in the information, the venue is sufficiently established."

From the record in this case, it may not be reasonably inferred that the crime was committed in any other place than in the city of Spokane. The witnesses all assumed that the act was committed within the city of Spokane and there can be no doubt upon that question.

[3] Appellant next argues that the evidence is insufficient to sustain the verdict, because it does not show that the appellant operated his automobile more than 20 miles per hour. An officer of the city testified, in substance, that he took the speed of the appellant by means of a motorcycle, to which was attached a tested speedometer; that he he took appellant's speed from Garfield street to Sherman street, a distance of more than a thousand feet, maintaining an equal speed at a constant distance of about 50 feet behind the appellant, and his speedometer registered 30 miles an hour; that, between two other streets, upon the same occasion, he took his speed, and the speedometer on his motorcycle registered 27 miles per hour. This same witness testified that his speedometer had been tested as often as three times a week, and was found to be correct. The appellant testified that he had a speedometer on his automobile, which he testified was correct, and which showed that he was traveling at less than 20 miles per hour. There was some evidence that speedometers are not accurate, and get out of order, and it is argued by the appellant that the officer's speedometer may have been out of order, and did not register the speed correctly; but that was a question for the jury. Speedometers, like other machines, may get out of order; but, where they are tested regularly, they may be relied upon with reasonable certainty to determine accurately the rate of speed at which a machine is driven. It cannot be said therefore that, because speedometers may be out of order, rates of speed may not be measured by instruments manufactured for that purpose, and which usually give approximately correct rates of speed. The question was one for the jury.

[4] Appellant next argues that the court erred in taking judicial notice of the ordinance. The ordinance was pleaded in the information by number and title. The case was brought in the municipal court in the city of Spokane. That court was required to take notice of the ordinance, and the superior court, being a court of appellate jurisdiction in this particular case, was also required to take notice of the ordinance. Seattle v. Pearson, 15 Wash. 575, 46 Pac. 1053; Spokane v. Griffith, 49 Wash. 293, 95 Pac. 84.

[5] It is next argued that the court erred in commenting upon the facts. After the evidence relating to speed and the speedometer had been introduced, appellant made a motion to strike this evidence, and, after an argument thereon in the presence of the jury, the court said:

> "If I want to take something and put it on scales down here, and the scales indicated a certain weight, I would say that that was the weight. Now, of course, I do not verify that. I simply say by the scales. The scales are not always right we know. We know that scales are not always made with accuracy, and some scales are more accurate than others. I will deny the motion."

It is contended by the appellant that this was a comment upon the evidence. The court, when it made this statement, was giving a reason for denying the motion. It was not intending to say that the speedometer was accurate, but was comparing speedometers with weighing scales as an illustration of the court's holding upon the question of the admissibility of the evidence relating to speed as measured by the speedometer. What the court meant here is evident, and that is, that the weight of an article, as shown by scales, is evidence of the fact of weight and that, as applied to this case, the rate of speed measured by the speedometer is evidence of that fact. It is not conclusive, but is sufficient to go to the jury. We think the statement made was not such a comment upon the facts as would warrant a reversal of the case, even though made in the presence of the jury. The court was not instructing the jury at the time the statement was made. It was simply giving counsel its views upon the question which had been argued by counsel for both appellant and respondent.

We find no error in the record.

The judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON, PARKER, and HOLCOMB, JJ., concur.

(96 Wash. 407)

HARTLEY v. LASATER et ux. (No. 13823.)

(Supreme Court of Washington. May 18, 1917.)

1. Highways 🔑177—Action for Injuries—Proximate Cause.

In an action for injuries sustained when plaintiff on motorcycle was struck by defendants' automobile on attempting to pass in front of it to go upon an intersecting street, aside from other questions, if defendants were driving their automobile at an excessive rate of speed, and such was the proximate cause of the accident, plaintiff would have a right to recover.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 466.]

2. Negligence 🔑83—Action for Injuries—Last Clear Chance.

As the doctrine of last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectually act upon the impulse to save another from injury, or the proof of circumstances which will put the one charged to implied notice of the situation, and to invoke the doctrine the court must grant the negligence of plaintiff and find that his negligence "had terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him," that appellants knew and appreciated his danger and could, in the exercise of reasonable care, have avoided injuring him, the doctrine does not apply where the contributory negligence began and culminated without the lapse of appreciable time or where the negligence of both parties was concurrent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115.]

3. NEGLIGENCE 🔑141(9)—ACTION FOR INJURIES — LAST CLEAR CHANCE — QUESTION FOR JURY.

Whether an instruction upon the doctrine of last clear chance should be given is a matter of law for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 392.]

4. HIGHWAYS 🔑172(1) — ACTION FOR INJURIES—LAST CLEAR CHANCE.

Although the doctrine of last clear chance is applicable in actions for injuries caused by the negligent operation of automobiles, persons driving and riding upon the highways are in the exercise of lawful and equal rights, and the law puts no greater burden upon them than that of ordinary care not to injure one another, having regard for the dangerous character of the machinery and locality.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460.]

5. HIGHWAYS 🔑176—NEGLIGENCE PER SE —VIOLATION OF RULES OF THE ROAD—STATUTE.

Although Rem. & Bal. Code, § 5569, provided that a vehicle passing another going in the same direction should pass to the right, it is not negligence per se to drive on the wrong side of the road in passing another vehicle.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465.]

6. HIGHWAYS 🔑184(2)—NEGLIGENCE PER SE —VIOLATION OF RULES OF THE ROAD—STATUTE.

One who violates the law of the road by driving on the wrong side assumes the risk of such an experiment and is required to use greater care than if he had kept on the right side of the road, and, if a collision takes place under such circumstances, the presumption is against the party who was on the wrong side, but the presumption is prima facie, and has the effect only of casting the burden of justifying his position upon the man who was on the wrong side.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 472, 473½.]

7. HIGHWAYS 🔑177—ACTION FOR INJURIES—PROXIMATE CAUSE.

Although an automobile may be traveling at a rate of speed prohibited by law, unless the excessive speed of the car was the proximate cause of an injury the driver is not liable for such negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 466.]

8. HIGHWAYS 🔑184(3)—ACTION FOR INJURIES—QUESTION FOR JURY.

In an action for injuries sustained when plaintiff on motorcycle was struck by defendants' automobile on attempting to pass in front of it to go upon an intersecting street, whether the plaintiff exercised due care for his own safety when he turned across the path of the automobile without looking or without giving any warning sign *held* for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 473, 473½.]

9. NEGLIGENCE 🔑12—ACTION FOR INJURIES —DEGREE OF CARE REQUIRED IN EMERGENCIES.

Men who act in emergencies are not to be held to that strict accountability that the law demands of those who act deliberately, nor are they to be penalized because they did not do what, in the light of subsequent events, or in theory, would have avoided the accident; but the law may under such circumstances excuse an act which, if done deliberately or after a lapse of time sufficient for reflection, would make the actor answerable as for a willful tort.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 14.]

Department 1. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Roy Hartley against Harry Lasater and wife. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial.

Will H. Fouts, of Asotin, and Reynolds & Bond and Gose & Crowe, all of Walla Walla, for appellants. Sharpstein, Pedigo, Smith & Sharpstein, of Walla Walla, for respondent.

CHADWICK, J. This action was brought to recover damages for injuries sustained in an accident upon a highway. Respondent's case shows that he was riding south on a motorcycle. Appellants were riding in an automobile in the same direction, and a short distance behind. Respondent was just to the right of the center of the road. Appellants were to the left of the center. The presence of appellants was unknown to respondent, who suddenly cut across the road in front of their machine. Respondent alleges that he was going at about twelve miles an hour. It is alleged, and circumstances are relied on to prove, that appellants were going at an excessive rate of speed. It was respondent's intention to leave the main highway, and go onto a road intersecting at an angle of about 25 degrees. The machines collided at the intersection of the roads. All parties suffered some shock and injury. Respondent brought this suit to recover damages. Each party alleges the fault to be in the other. From a verdict and judgment in favor of respondent, appellants have appealed.

Many errors are assigned. Most of them go directly to, or are predicated upon, the contention that the facts proven are insufficient to sustain a verdict and judgment, or that they conclusively show negligence on the part of respondent, and that such negligence was the proximate cause of the injury.

[1] Inasmuch as we have concluded to send the case back for a new trial, we feel that discussion, further than to say that we think the case was for the jury, is unnecessary. Aside from all other questions, if appellants were driving their automobile at an excessive rate of speed, and such was the proxi-

mate cause of the accident, respondent would have a right to recover.

The court instructed the jury upon the doctrine of the last clear chance as follows:

> "If you find that the plaintiff had negligently placed himself in a perilous situation, and that the driver of the defendants' automobile, by the exercise of reasonable care, could have seen and should have seen the perilous situation of the plaintiff in time to have avoided injuring him, by the exercise of reasonable care on the part of the driver of the automobile, then such negligence on the part of the plaintiff will not defeat his right to recover, if the negligence of the plaintiff had terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him.
>
> "But if you find that the plaintiff negligently placed himself in a dangerous situation, and that the driver of the automobile could not, and should not, in the exercise of reasonable care, have seen his perilous situation in time to have avoided injuring him, or if you find that the plaintiff's negligence, if any, had not terminated or culminated in a situation of peril from which the exercise of reasonable care on his part would not thereafter extricate him, but that he could have, by the exercise of ordinary care, extricated himself from the perilous situation, but failed to exercise such care, then the plaintiff cannot recover."

[2] In the abstract, no objection could be urged to these instructions; but we think there is no testimony to sustain them. It is true that appellants knew of respondent's presence and position; but it does not follow that they are to be charged with a knowledge of his intent, suddenly, and without warning, to turn across the path of their automobile. We have given attention to the whole evidence and are convinced that the accident happened so quickly that there was neither time nor opportunity for appellants to act upon the last clear chance. Last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectually act upon the impulse to save another from injury, or the proof of circumstances which will put the one charged to implied notice of the situation.

There was no duty upon appellants to slow down, or to take such care as the doctrine of the last clear chance demands, until they were put to the hazard of choice by some act of respondent. When respondent changed his position, he relieved appellants, unless the facts would warrant the court and jury in saying that there was sufficient time between his act and the impact for appellants to realize his peril and to avoid it. To invoke the doctrine of the last clear chance, we must grant the negligence of respondent, and find that his negligence "had terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him"; that appellants knew and appreciated his danger and could, in the exercise of reasonable care have avoided injuring him. A mere statement of the rule reveals its inapplicability to a case where the contributory negligence began and culminated without the lapse of appreciable time. The doctrine is not applied where the negligence is concurrent. Scharf v. Spokane & Inland Empire R. Co., 92 Wash. 561, 159 Pac. 797

> "The doctrine [last clear chance] is recognized in this state, but this case does not fall within its limits. That doctrine, speaking in a broad way, applies when one negligently gets himself into a dangerous situation, or a trap, as it were, from which he cannot extricate himself, and, being there, another negligently runs upon, collides with, or in some other manner injures him. It does not apply when, as in this case, the injured party's negligence is progressive, and actively continues up to the point of collision. In such case, the negligence of the other party is not subsequent to and independent of the injured party's contributory negligence. It is contemporaneous with it to the last instant. It operates to produce the result in connection with the other negligence, and not independently of it." Moran v. Smith, 114 Me. 55, 95 Atl. 272, 273.

[3] Whether an instruction upon the last clear chance is proper to be given is a matter of law for the court. Dotta v. Northern Pac. R. Co., 36 Wash. 506, 79 Pac. 32.

[4] Although a new branch of the law, it is held as frequently as the cases arise that the doctrine of the last clear chance is applicable in actions brought to recover for injuries caused by the negligent operation of automobiles. Berry, Automobiles (2d Ed.) § 146; Chase v. Seattle Taxicab & Transfer Co., 78 Wash. 537, 139 Pac. 499; Mosso v. Stanton, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A, 943; Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892; Stephenson v. Parton, 89 Wash. 653, 155 Pac. 147. But it is as universally held that persons driving and riding upon the highways are in the exercise of lawful and equal rights, and the law puts no greater burden upon them than that of taking ordinary care not to injure one another, having regard for the dangerous character of the machine and the locality. Therefore, unless it be shown that the one charged knew, or, having consideration of all the circumstances, ought to have known, of the peril of another in time to avoid the injury, he is not to be held under the doctrine of the last clear chance. To say that one ought to have known of the peril of another is but a restatement of the rule of implied notice. The doctrine is sufficiently elaborated in the cases referred to. We know of none charging a defendant where he did not, and could not from the nature of things, appreciate the danger in time to avoid the accident, or where the circumstances were insufficient to charge him with notice.

While it is not intended that one person may kill another simply because he is negligent, it is likewise not intended to hold one for an injury unless he can be charged with knowledge, in fact or in law, sufficiently prior in time to have given him, in the exercise of ordinary care, time to avoid the accident. In a case where a warning was given by the waving of a handkerchief, the court, having in mind the facts of the case, said:

> "After that he had to take in the situation, coordinate his muscles, and stop the car, going at 10 miles an hour, in the time it took the automobile to go half its own length. This is too short a time. Human beings cannot be expected to act with the speed of electricity. Nor will it avail anything to attempt to lengthen the time in which the motorman had to act by claiming the automobile was or may have been going very slow. The slower it went, the greater reason the motorman would have for thinking it was going to stop before it entered upon the track." Lewis v. Metropolitan St. R. Co., 181 Mo. App. 421, 168 S. W. 833.

[5] Appellants contend that they intended to pass respondent at about the point where the roads intersected. Since the case is to be remanded, we feel warranted in saying that although the law, as it was when the accident occurred, provided that a vehicle passing another vehicle going in the same direction should pass to the right (Rem. & Bal. Code, § 5569), we have held that it is not necessarily negligence per se to drive on the wrong side of the road; for, aside from the universal custom of passing a vehicle going in the same direction on the left-hand side of the road, it is now provided by statute that it shall be done. Whether an automobile is rightfully or wrongfully on either side of the road is a relative question to be decided with reference to the facts of the particular case.

[6] Granting that appellants were not in the act of passing respondent, the rule is:

> "One who violates the law of the road by driving on the wrong side assumes the risk of such an experiment and is required to use greater care than if he had kept on the right side of the road. If a collision takes place under such circumstances, the presumption is against the party who was on the wrong side. But the presumption is prima facie, and has the effect only of casting the burden of justifying his position upon the man who was on the wrong side." Berry, Automobiles (2d Ed.) § 171, citing Segerstrom v. Lawrence, 64 Wash. 245, 116 Pac. 876.

[7] It is also held that, although an automobile may be traveling at a rate of speed prohibited by law, unless the excessive speed of the car was the proximate cause of an injury the driver is not liable for such negligence. Berry, Automobiles (2d Ed.) § 145.

[8] Whether the respondent exercised due care for his own safety when he turned across the path of the automobile without looking or without giving any warning sign is a question for the jury. Hillebrant v. Manz, supra; Ludwigs v. Dumas, 72 Wash. 68, 129 Pac. 903; Lewis v. Seattle Taxicab Co., 72 Wash. 320, 130 Pac. 341.

We have said that respondent tried his case upon the theory of excessive speed. To sustain the instructions upon the last clear chance, resort is made to the testimony of the appellant wife, who says that she was driving not to exceed 22 miles an hour. It is then argued that, being behind respondent, as he says, and not abreast of him, as she and the three other occupants of the automobile say they were, she had ample time to stop her car, slacken the speed, or sound the horn; that, if any one of these things had been done, the accident would not have occurred; and that in the doing of one of these things lay her last clear chance. Resort to the same source reveals testimony that the driver did take her chance. If the testimony of the appellants and their witnesses be true, the brakes were put on and the car was suddenly swerved to the left when the danger became apparent.

[9] Men who act in emergencies are not to be held to that strict accountability that the law demands of those who act deliberately. Nor are they to be penalized because they did not do what, in the light of subsequent events, or in theory, would have avoided the accident. The instinct of self-preservation and the instinct to refrain from harming others are always present in emergent situations affecting personal security. These impulses prompt that which is done, and what is done is usually that which should have been done, or all that could have been done. Hence the law will excuse an act which, if done deliberately or after a lapse of time sufficient for reflection, would make the actor answerable as for a willful tort.

As we view this case, the only question is that of proximate cause. Respondent's case was tried out on the theory that appellants were driving their car at an excessive rate of speed, and that such was the proximate cause of the injury. Appellants contend that they were driving at about 20 miles an hour, and that respondent turned with no care for his own safety and is himself to blame. The issue is proximate cause.

Reversed and remanded for a new trial.

ELLIS, C. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

(96 Wash. 425)

CITY OF SEATTLE v. GIBSON. (No. 13913.)

(Supreme Court of Washington. May 18, 1917.)

1. DRUGGISTS 🔑1—POWER TO REGULATE.

The state or other proper authorities, under police power, may regulate or prohibit the sale of liquors or poisons, or articles that may be deleterious to the health of a community, and may prescribe the qualifications of persons who may deal therein.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 1.]

2. CONSTITUTIONAL LAW 🔑209—PRIVILEGES AND IMMUNITIES.

Persons equally qualified are entitled to the same privileges under the law, and a statute or ordinance is void which interferes with or abridges the privileges and immunities of citizens who are equally entitled to the protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678.]

3. CONSTITUTIONAL LAW 🔑240(1)—DRUGGISTS 🔑2—EQUAL PROTECTION OF THE LAW—CITY ORDINANCE—VALIDITY.

In view of Rem. Code 1915, §§ 8445, 8452, 8459, 8462, 8463, as to registered pharmacists and their licenses, and Const. art. 1, § 12, prohibiting laws granting special privileges and immunities, an ordinance licensing drug stores, under which application for license to act as druggists was referable to a license committee, which in its discretion might investigate and report either favorably or unfavorably to the council, which had discretion whether or not to pass an ordinance granting a license, was illegal, as providing for a discretion purely arbitrary as to who should be granted a license to conduct a drug store; such business not being in itself an unlawful business.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 693, 697, 698; Druggists, Cent. Dig. § 1.]

Parker and Holcomb, JJ., dissenting in part.

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

H. F. Gibson was convicted of violating an ordinance of the City of Seattle, and appeals. Reversed, and prosecution ordered dismissed.

Peterson & Macbride, of Seattle, for appellant. Hugh M. Caldwell and Thomas J. L. Kennedy, both of Seattle, for respondent. Preston & Thorgrimson, of Seattle, amici curiæ.

MOUNT, J. The appellant was convicted upon a charge of conducting a drug store and pharmacy in the city of Seattle, in violation of an ordinance of that city. He has appealed from a judgment imposing a fine.

There is no dispute in the facts. The appellant was conducting a drug store and pharmacy in the city of Seattle. He was qualified to operate and conduct a drug store and pharmacy under the laws of this state. He held a certificate issued by the state pharmacy board. Prior to his arrest, he had paid $10 to the city, and made a demand for a license, but without complying with the ordinance providing therefor. The contention of the appellant in the lower court, and in this court, is that the ordinance is void, being in contravention of section 1, Fourteenth Amendment to the Constitution of the United States.

The ordinance in question is an ordinance relating to the licensing of drug stores and pharmacies in the city of Seattle, and the revocation of such licenses, and providing penalties for violation of the ordinance. Section 1 of the ordinance defines the word "person," as used in the ordinance. Section 2 provides that it shall be unlawful for any person within the city of Seattle to carry on, conduct, or operate a drug store or pharmacy without first procuring a license to do so, and also provides that the fee for such license shall be fixed at $10 per annum, payable in advance. Section 3 of the ordinance is as follows:

"Every 'drug store and pharmacy license' shall be granted by ordinance of the city council, and no license shall be granted unless the applicant therefor shall have filed with the city comptroller a petition in writing, addressed to the city council, signed by the applicant, and setting forth the name in full of the applicant, and in case of a corporation, the names of the officers of such corporation, the street name and number of all entrances to the place of business, the name under which said business is to be carried on, whether the applicant is the owner or the lessee of the premises, the length of time the applicant has been a resident of the city, and in the case of an individual the place of residence of such applicant, and in the case of a corporation, the location of the principal office or place of business of such corporation, which said petition shall be made on a blank form to be furnished by the city comptroller.

"The city comptroller shall report the petition to the city council, which shall refer the same to the license committee, which committee shall consider such petition and may, in its discretion, investigate any of the matters set forth therein, and report its findings and recommendations thereon to the city council, and if said committee recommends that said petition be granted shall accompany such recommendation with a proposed ordinance granting the license petitioned for.

"Upon the taking effect of any ordinance granting such license, the city comptroller shall, upon the presentation to him of the receipt of the city treasurer showing payment of the license fee herein required, issue to the petitioner the license granted by said ordinance.

"Any license issued under authority of the city council as herein provided shall be kept posted in a conspicuous place in the room in which the licensee carries on or conducts his business, and alongside of the certificate of registration of the licensed pharmacist in charge thereof."

Section 4 provides that no license issued under the authority of the ordinance shall be transferable or assignable, and no rebate or refund of money paid for a license shall be made. Section 5 provides that the city council may at any time revoke any license issued under authority of the ordinance, but before such revocation the person holding such license shall be notified in writing of the intention of the city council to revoke the same, and may be heard in opposition to such revocation, if he so desires; that any person whose license has been revoked shall not be again licensed to carry on or conduct a drug store or pharmacy in the city of Seattle for a period of one year The city council is authorized, after a proper hearing, to suspend any license issued under authority of the ordinance for a period of not exceeding 60 days. Section 6 provides that any person violating or failing to comply with the provisions of the ordinance shall be deemed guilty of a misdemeanor, and, on conviction, fined, in any sum not exceeding $100, or imprisoned in the city jail for a term not exceeding 30 days, or both fine and imprisonment. Section 7 provides when the ordinance shall take effect.

The ordinance was passed by the city council on the 31st day of July, 1916, approved on the 4th day of August, 1916, and became effective 30 days thereafter. It will be noticed that this ordinance provides that an applicant for a license to do business as a druggist and pharmacist must file a petition with the city comptroller, and that:

"The city comptroller shall report the petition to the city council, which shall refer the same to the license committee, which committee shall consider such petition and may, in its discretion, investigate any of the matters set forth therein, and report its findings and recommendations thereon to the city council, and if said committee recommends that said petition be granted shall accompany such recommendation with a proposed ordinance granting the license petitioned for."

It is plain from this provision of the ordinance that the license committee is vested with discretion to report either favorably or unfavorably to the city council. If this discretion is exercised favorably, and a recommendation that a license be issued is made by the license committee, it shall report an ordinance granting the license petitioned for. The ordinance also provides that every license shall be granted by ordinance of the city; that is, before an applicant for a license may receive the same, a special ordinance must be passed, granting a special privilege, and the passage of such ordinance rests wholly in the discretion of the city council.

The ordinance in question here makes no provision for determining the qualifications of an applicant. It does not require the license committee, to whom the petition is referred, to investigate any of the facts stated in the petition of the applicant. The committee may investigate, or not, as its discretion dictates. In short, the ordinance leaves to the license committee the authority arbitrarily to grant or reject a petition for a license to operate or conduct a drug store and pharmacy. This discretion is purely arbitrary under the ordinance, because no standard of qualification, nor rule, is fixed upon which an investigation may be made. The ordinance recites that the committee may, in its discretion, investigate any of the matters set forth in the petition, and, if it may investigate these matters in its discretion, it may not investigate them at all, and may report according to its desire.

In the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, where an ordinance of the city of San Francisco made it unlawful for any person or persons to carry on a laundry within the corporate limits of the city and county of San Francisco, without first having obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone, the Supreme Court of the United States held that such an ordinance was void, because it was purely arbitrary, and acknowledged neither guidance nor restraint. That court there said:

"There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will."

In the case of Los Angeles County v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75, where an ordinance prohibited cemeteries in the city and county of Los Angeles, and provided that no one could establish a cemetery without the permission of the county supervisors, it was held that the ordinance was void. The court there said:

"It would hardly be contended that an ordinance declaring it to be unlawful to engage in the business of farming or merchandising in the county without the permission of the supervisors would be a reasonable exercise of legislative power, or could reasonably be said to be exercising the power to regulate. The supervisors may impose a license, the payment of which shall be a condition to the enjoyment of the privilege of engaging in lawful occupations; they may regulate the manner of conducting the business, if it be of a character tending to be injurious; but if the business be lawful, and having no injurious tendency, they cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business, the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business. We do not think it was ever intended by the people in ordaining the section of the Constitution referred to, or of the Legislature in the statutory enactment, to include, in the power to make and enforce regulations, a power purely personal and arbitrary."

In State v. Mahner, 43 La. Ann. 496, 9 South. 480, where an ordinance was passed by the city of New Orleans relating to the keeping of cows, the ordinance vested arbitrary power in the city council. The Supreme Court of Louisiana said:

"The discretion vested by the ordinance in the city council is in no way regulated or controlled. There are no conditons prescribed upon which the permit may be granted. It is within the power of the city council to grant the privilege to some, to deny it to others. The discretion vested in the council is purely arbitrary. It may be exercised in the interest of a favored few. It may be controlled by partisan considerations and race prejudices, or by personal animosities. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented."

[1-3] Counsel for the city argue that the city council has power to control occupations which are perhaps useful, but which may be evil to the public, such as the selling of liquor, trading stamps, dispensing of poison, etc., and that such occupations may not be engaged in as a matter of common right, and may be regulated, or may be entirely prohibited. There can be no doubt that the state, or other proper authorities, under police power, may regulate or prohibit the sale of liquors or poisons, or articles that may be deleterious to the health of a community, and may prescribe the qualifications of persons who may deal therein; but it does not follow that the state or a municipal corporation

may say that one person may, and that another person, equally qualified, may not, engage in a lawful business, because that would be to discriminate, and not to regulate or prohibit. We have no doubt of the right of the city to require certain qualifications of applicants, not inconsistent with state law, and to provide how those qualifications may be determined; but it may not say by special act that one person, or set of persons, may engage in any particular lawful calling, to the exclusion of all other persons. Persons equally qualified are entitled to the same privileges under the law, and a statute, or an ordinance, is void, which interferes with or abridges the privileges and immunities of citizens who are equally entitled to the protection of the law. There can be no reasonable escape from the conclusion that this ordinance provides for a discretion which is purely arbitrary, and therefore an illegal method of determining who shall and who shall not be granted a license to conduct a drug store or pharmacy.

It cannot be reasonably contended that the business of conducting a pharmacy or drug store is in itself an unlawful business. The keeping of a pharmacy or drug store has always been regarded as a legitimate business, and persons engaged therein are engaged in a legitimate enterprise. Some of the articles they deal in are, no doubt, poisons. The selling of such articles may be regulated, or prohibited; but to say, without qualification, who shall and who shall not engage in the drug business, is not a regulation of the business itself. The statute of the state, at section 8445, Rem. Code, authorizes any person who is a registered pharmacist to engage in the drug business. In the case of a druggist, the applicant for a license must show to the board of pharmacy the possession of certain qualifications. Section 8452 requires the state board of pharmacy to supervise the practice of pharmacy in the state. Section 8459 requires druggists to keep a record of the sales of poisons and spirituous or malt liquors. Section 8462 provides that any license under the act may be revoked for cause, upon a sworn complaint, upon notice to the licensee and upon a hearing. Section 8463 provides for appeal from an order revoking a license. So it is plain that the business of conducting a pharmacy or drug store in this state is a lawful business, under the laws of the state, and therefore neither state nor city, under the guise of regulation, may delegate to any person, or set of persons, the right to arbitrarily designate one who may enter the business, and, in their discretion, reject another, equally qualified, who may desire to enter the business, because neither may grant privileges which, upon the same terms, may not equally belong to all citizens. Section 12, art. 1, state Constitution.

An ordinance like this, which provides for a special privilege dependent upon the arbitrary discretion of a city council, or a committee of that body, is, as was said in State ex rel. Garrabad v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948, "entirely un-American and in conflict with the principles of our institutions and all modern ideas of civil liberty. It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights." We are satisfied, upon both reason and authority, that this ordinance is void.

The judgment appealed from is therefore reversed, and the cause ordered dismissed.

ELLIS, C. J., and FULLERTON, J., concur.

PARKER, J. (dissenting in part). I concur in the result reached in the foregoing opinion, but dissent from the view seemingly expressed therein that a city has power to determine the qualifications, moral or otherwise, of persons who may conduct a drug store, or determine the qualifications of persons who may practice pharmacy. The state has enacted laws for the determination of the qualifications of pharmacists, and when it issues a license to one it has determined is so qualified, the city plainly cannot curtail the right which the license confers. Aside from the strict practice of pharmacy, the conducting of a drug store, being as the opinion states a lawful business, is no different than the conducting of a grocery or dry goods store, in so far as is concerned the city's power to say who may or who may not own or conduct it. It may be that a city can levy a license tax upon such a business for the purpose of raising revenue, and it is possible that a city may in some measure regulate the manner in which it shall be conducted; but, however this may be, I am firmly convinced that the city cannot say who may or who may not own or conduct a drug store or a pharmacy any more than it can say who may or who may not own or conduct a grocery or dry goods store. That the city cannot do the latter is to my mind too self-evident to admit of argument. I want to reverse the judgment of conviction rendered by the superior court because, as I view it, the city has by enacting this ordinance arrogated to itself the power to determine who are privileged to follow this lawful business. To say that this is a flagrant usurpation of power is to my mind stating the case none too strongly against the city.

HOLCOMB, J. I concur with the opinion of Judge PARKER.

(96 Wash. 344)

In re NORTHLAKE AVE.

WAYLAND et al. v. CITY OF SEATTLE.

(No. 13736.)

(Supreme Court of Washington. May 18, 1917.)

1. Eminent Domain 🔑202(6)—Evidence—Admissibility—Assessment Rolls.

In condemnation proceedings under the rule that tax rolls are not competent evidence of the value of property in actions not pertaining to the question of taxation, where value is the sole issue sought to be proved, assessment rolls, showing the value of property sought to be condemned, were not rendered admissible and independent evidence as declarations against interest because the city condemning the land had a part in making up the assessment rolls thereon, although perhaps admissible if necessary to contradict assessing officers called as witnesses by either side.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541.]

2. Evidence 🔑48—Judicial Notice—Common Knowledge—Valuation for Taxation.

It is a matter of common knowledge, of which the courts take judicial notice, that the valuations placed on property by assessors for purposes of taxation are relative rather than actual, and that the functions of the board of equalization are not to correct insufficient or excessive valuations as a whole, but are to correct erroneous valuations as applied to an individual or a community of individuals, so that the individual or the community of individuals are not called upon to bear either more or less than their just proportion of the burden of taxation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 70.]

3. Eminent Domain 🔑202(6)—Secondary Evidence—Assessment Rolls.

In condemnation proceedings on sole issue of market value, tax assessment rolls are inadmissible because they are, at best, but secondary evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541.]

4. Eminent Domain 🔑202(1)—Evidence—Admissibility.

In condemnation proceedings under the rule that only the land physically invaded can be considered in assessing damages or benefits, the court properly refused evidence to show that land condemned had additional value because of shore lands separated from the land in question by a street, and not used in common with such land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541.]

5. Eminent Domain 🔑202(2, 3)—Review—Issue of Market Value.

In condemnation proceedings on issue of market value of property condemned, the admissibility of evidence of price paid for land in the same vicinity is largely in the discretion of the trial court, and will be reviewed only for manifest abuse.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541.]

6. Eminent Domain 🔑202(1)—Evidence—Return of Appraisement in Probate Court.

In condemnation proceedings on the issue of market value of land condemned, the return showing the appraisement of the value of such land in probate proceedings, which were res inter alios acta and not binding on those not parties to them, was properly excluded.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541.]

7. Eminent Domain 🔑203(1)—Evidence—Admissibility—Specific Damage.

In condemnation proceedings, on the issue of market value, while the property owners were entitled to show that the land taken bordered on an improved street as tending to enhance its value, and with reference to the land not taken, among other elements of damage, the fact that, by the segregation of the part sought to be condemned, the remaining land would be left without a paved or graded street, they could not show as an element of specific damage the amount their property had been assessed for the improvement of the existing street, where the work was done by the municipality, as they recover this sum in the enhanced market value of the property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542.]

8. Eminent Domain 🔑203(1)—Evidence—Admissibility—Specific Damage.

The property owners could not show the probable cost of new grade and paving as a specific element of damage to the land remaining, as the duty to make such improvement is a municipal duty, and its cost cannot be imposed upon private property beyond the amount of benefit, so that the property owner does not therefore contribute to the expense from his own resources; he but refunds to the city in one kind of property that which the city has, from the necessities of the case, conferred upon him in property of another kind.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542.]

9. Eminent Domain 🔑203(1)—Measure of Damages—Future Improvement Assessments.

The cost of grading and paving a street that may thereafter be assessed upon abutting property is too uncertain, remote, and contingent to be recovered as damages in a condemnation proceeding brought to condemn land for the creation of the street.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542.]

10. Appeal and Error 🔑1058(1)—Review—Reversible Error.

In condemnation proceedings, where the relation of land to a railway was sufficiently shown and it was evident that the land could be connected with the railway track by a spur running in any one of a number of different directions, as a map showing the manner by which the property could be connected with the existing railway by the construction of a spur track was of no special probative value and merely cumulative, its exclusion was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200.]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Condemnation proceedings by the City of Seattle, opposed by Margaret Wayland and others. From the judgment the named defendant and others appeal. Judgment affirmed.

Carkeek & McDonald, of Seattle, for appellants. Hugh M. Caldwell, Walter F. Meier, and Howard A. Hanson, all of Seattle, for respondent.

FULLERTON, J. The city of Seattle by ordinance provided for widening and extending a street situated within its boundaries known in the record as Northlake avenue. The work required taking and damaging certain tracts of land owned in severalty by a number of persons. This action was brought to condemn the necessary land and to ascertain the just compensation required to be paid to the several owners. Among the tracts of land taken and damaged were tracts belonging to the appellants in this action, who appeal because dissatisfied with the award made them. The errors assigned all relate to rulings of the court excluding evidence offered to show the value of the property taken.

[1] The appellants, Wayland, Monks, and Magnesia Asbestos Supply Company, in presenting their case to the jury offered in evidence the assessment roll of King county, showing the values placed on their properties by the county assessor, and the values upon which they had paid taxes, for some five years immediately prior to the trial. The rejection of this proffered testimony is the first error assigned. The appellants concede the general rule, that tax rolls are not competent evidence of the value of property in actions not pertaining to the question of taxation, where value is the sole issue sought to be proved, but they contend for an exception to the general rule. They rely on the fact that it is the city of Seattle which is condemning, and that the city has had a part in making up these assessment rolls, in that it has had a representative on the county board of equalization during the period of time covered by the proffered rolls. In other words, it is contended that the rolls were admissible as declarations against interest. There are cases, from jurisdictions where the property holder is required by law to file with the assessor a sworn statement showing the character of the property owned by him with an estimate of its value, which hold that such sworn statement is competent evidence, in an action between the owner and a stranger when the value of the property is an issue, to contradict the owner and as a declaration against interest; but the cases on the question, even as thus limited, are by no means uniform. However, we think the rule, if conceded, could have no application to the question here presented. The city as the representative of the public performs many functions, more or less widely related, acting through separate and independent officers, and it may be questioned, we think, whether the acts and declarations of its officers in the performance of one of such functions could, in any case, be evidence against it while in the performance of another. But clearly it cannot be so when the functions are so distinct that its acts in the one in no manner stultify or annul its acts in another. Had the city in the present instance called its assessing officers as witnesses, and had they testified in contradiction of the assessment rolls, doubtless the appellants could have questioned them concerning their former representations, and, had they remained obstinate, could have introduced the rolls to contradict them, or they could have made their own witnesses and taken their opinions as to the values of the property. But the assessment rolls were not independent evidence of the values of the property on the issue as here presented.

[2] Again in this jurisdiction the assessor places his own values on real property for the purposes of taxation. It is a matter of common knowledge, of which the courts can take judicial notice, that the valuations placed thereon by such officers for such purposes are relative rather than actual, that the functions of the board of equalization are not to correct insufficient or excessive valuations as a whole, but are to correct erroneous valuations as applied to an individual or a community of individuals, so that the individual or the community of individuals are not called upon to bear either more or less than their just proportion of the burden of taxation.

[3] For these reasons, and for the further reason that the evidence is at best but secondary, the courts maintain the rule that assessment rolls are not independent evidence of the market value of real property in cases where such market value is the sole question at issue. The principles apply to the present case, and the court did not err in its rulings.

[4] The appellant Magnesia Asbestos Supply Company makes the further contention that the court erred in refusing to permit it to show that its land had an additional value by reason of the fact that it owned adjacent shore lands abutting upon Lake Union which gave the land a water outlet. This land was separated from the lands a part of which was taken by a street and was not included as lands taken or damaged in the petition to condemn. The tracts were not used in common, and the most that could be said concerning them is that they could be so used by making use of the intervening street. The general rule is that it is only the tract of land physically invaded that can be considered in assessing either damages or benefits. In re Queen Anne Boulevard, 77 Wash. 91, 137 Pac. 435, and we are clear that there was no such relation between the two tracts as to require the jury to consider the one in estimating damages to the other. See, also, Seattle v. Dexter Horton Tr. & Sav Bank, 90 Wash. 661, 156 Pac. 844.

[5] A witness called to testify as to the value of the property of the last-named appellant was at first permitted to state the price he had paid for lands in the same vicinity, although some distance from the land in question. Afterwards, on motion

of the city, the testimony was withdrawn from the consideration of the jury, and error is assigned thereon. The trial court was of the opinion that the properties were not sufficiently similar in character, and were too widely separated to render the evidence of probative value. These are matters on which no general rules can be laid down, and when and when not such evidence is admissible must rest largely in the discretion of the trial court, to be reviewed only for manifest abuse. We find no error in the ruling.

[6] The appellant Wayland offered to show that the property taken in which she was interested had recently been administered upon in the probate court; that in the course of administration it had been appraised by the three disinterested competent persons appointed by the court as appraisers, and that an inheritance tax had been paid to the state, based on the values shown by the appraisment—and proffered the return showing the appraisement as evidence of the value of the property. The trial court rejected the offered proofs, we think rightly. Many of the reasons for the rejection of the tax rolls are applicable to this return, but in addition the probate proceedings with reference to this proceeding fall within the maxim of res inter alios acta, and can in no way be binding upon or be evidence against those who were not parties to them.

[7] The appellants Quinn, Rominger, and Shelton, assign error upon the rulings of the court refusing to permit them to show as an element of damages (we quote the language of their brief)—

> "that the streets in front of their property were already graded, and that in case of a change of grade they would have to pay another assessment for the regrading of the street, and that the cost of the first grade was a proper element to be allowed them as gross damages."

With reference to the land taken the appellants were entitled to its fair market value. To establish such value they were entitled to bring before the jury every fact and circumstance relating to the land which would fairly and reasonably tend to enlighten them as to such value, and if the land so taken had bordering upon it a graded and paved street, undoubtedly they were entitled to show this fact as an element tending to enhance its value. So with reference to the land not taken, they were entitled to show, among other elements of damage, the fact that, by the segregation of the part sought to be condemned, the remaining land would be left without a paved or graded street. But as we read the record, the court did not deny them these privileges. What it did deny them was the privilege of showing as specific elements of damage the amount their property had been assessed for paving the existing street and the amount their property would probably be assessed for paving the new street. We think it clear that neither of these was the element of specific damage. If the appellants had graded and paved the streets at their own cost, such cost might have been shown on the principle which permits the price at which the land was bought to be shown, namely, as a circumstance tending to show the market value of the land. But the appellants neither graded nor paved the street at their own cost. The work was done by the municipality, and the appellants paid according to the benefits the work conferred upon their property. This sum they recover in the enhanced market value of the property, and to permit them to recover the amount paid as a specific element of damage would be to permit a double recovery for the same injury. In re Harrison Street, 74 Wash. 187, 133 Pac. 8.

[8, 9] The probable cost of a new grade and new paving is not recoverable for two reasons: In the first place, the duty to grade and pave a street in this jurisdiction is a municipal duty. The cost cannot be imposed upon private property except in those cases where the property is benefited by the work, and then only in an amount which does not exceed the benefits. The property owner does not therefore contribute to the expense from his own resources; he but refunds to the city in one kind of property that which the city has from the necessities of the case conferred upon him in property of another kind. In the second place, the cost of grading and paving a street that may thereafter be assessed upon abutting property is too uncertain, remote, and contingent to be recovered as damages in a condemnation proceeding brought to condemn land for the creation of the street. The city may or may not cause the street to be graded or paved, or, if it does, it has a wide choice of methods; it may establish the grade upon one line or another, and may order it paved to one width or another, and with any one of a variety of materials the cost of which will vary with the character of grade and materials chosen. Unless these are known in advance, which was not the case here, there is no basis upon which the jury can estimate the cost. City of Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

[10] The appellants Eason and Eayson own land adjacent to the track of a railway company. They introduced evidence tending to show that their property was available for manufacturing purposes, and its location with reference to the railway company's track, and tendered in evidence a map on which was delineated a line showing the manner by which the property could be connected with the existing railway by the construction of a spur track. The court refused to permit the map to go to the jury, and the appellants excepted. The map could properly have been submitted to the jury, but we think the refusal of the court to admit it was nevertheless not reversible error.

The surroundings were shown and, from the position of the land relative to the existing railway track, it is evident that the land could be connected with the railway track by a spur running in any one of a number of different directions. The map, therefore, had no special probative value, and it is impossible to conceive that the verdict of the jury would have been different had the map been submitted to them. The material inquiry was the relation of the land to the railway, and, as this was sufficiently shown by other evidence in the record, the evidence offered was merely cumulative. This we have held is not necessarily a ground for reversal, and, considering its slight probative value, we cannot so hold in this instance. Warren v. Kearney, 63 Wash. 369, 115 Pac. 739; Klodek v. May Creek Logging Co., 71 Wash. 573, 129 Pac. 99.

Our conclusion is that the judgment should be affirmed. It is so ordered.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

(96 Wash. 295)

SARUSAL v. SEUNG et ux. (No. 13635.)

(Supreme Court of Washington. May 17, 1917.)

1. Master and Servant 🔑6—Contracts of Hiring—Period—Presumption.

In contracts of hiring the fact that wages are to be paid by the day, or other given period, is a mere evidential circumstance, which, standing alone, tends to prove that there was a hiring for that period, but the presumption so raised is not absolute, and, if there are other circumstances impairing its weight, the circumstance has little probative force.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 6.]

2. Master and Servant 🔑8(1)—Contract of Employment—Hiring for Job.

Where a Chinaman employed to salvage damaged canned salmon went to a Filipino and employed him to secure Filipino laborers for the job, agreeing to pay the laborers $1.90 a day, and to pay the Filipino 10 cents a day for each laborer, the Filipino to furnish his own timekeeper and foreman, the size of the job being such that it would probably take 50 days with from 260 to 300 men to finish it, the Filipino was employed for the duration of the job, and the Chinaman had no right arbitrarily to terminate the contract at the end of the third week, as he attempted to do, and, by paying for past service, to avoid liability for the rest of the time contemplated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8, 17.]

3. Contracts 🔑319(1)—Partial Performance.

Where a Chinaman employed a Filipino to secure laborers at certain wages for a job, the fact that the Filipino was not permitted fully to perform his contract by furnishing laborers till the job was done was no good reason why he should not recover to the extent he was permitted to and did perform it, and to the extent the benefit of such partial performance was accepted and retained.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493, 1493½.]

4. Contracts 🔑322(3)—Sufficiency of Evidence.

In an action by a Filipino against a Chinaman for breach of contract, whereby the Filipino was to secure laborers at $1.90 a day for the Chinaman, evidence *held* insufficient to sustain the court's finding that some of the men secured by the Filipino were paid by him less than $1.90 a day.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1534.]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by V. N. Sarusal against John Seung and Mrs. John Seung, doing business as Ah Seung. From a judgment for plaintiff, defendants appeal. Cause remanded, with direction to modify the judgment.

Turner, Hartge & Turner, of Seattle, for appellants. J. Kalina, of Seattle, for respondent.

ELLIS, C. J. This is an action to recover for services claimed by plaintiff to have been performed by him for defendants in pursuance of an oral contract.

It is alleged, in substance, that about October 1, 1915, plaintiff agreed to furnish to defendants about 260 men for a period of about 50 working days to clean salmon cans, the men to receive $1.90 a day, the work to commence about October 18, 1915; that it was understood that plaintiff should have complete charge of the men, should keep books showing the actual work done and number of men employed, should employ a timekeeper at his own expense, and keep a correct schedule of the time put in by the men so hired; that it was further agreed that plaintiff should have for his services in the premises 10 cents a day for each man so engaged for a period of about 50 days during which time the job lasted. It is then alleged that in performance of this contract plaintiff secured the services of 263 men at $1.90 a day each for about 50 days, took charge of these men, acted as superintendent, employed a timekeeper, and paid him from his own funds, and that defendants accepted these services until December 6, 1915; that plaintiff so earned $1,315 under the contract, but defendants have paid him only $552.30, leaving a balance of $762.70 due and unpaid, for which balance, with interest, judgment is prayed.

The cause was tried to the court without a jury. The court found the contract substantially as alleged, and specifically, that it was to continue for a period of about 50 days, or for as long as would be required to complete the job of cleaning cans, and that plaintiff was to receive for his services 10 cents a day for each man so engaged during the time the job lasted. The court further found that plaintiff has performed the contract, secured the services of more than 263 men at $1.90 a day each, some of the men being paid a less rate per day; that he has spent much time and money in securing men, has acted as superintendent, and put in a timekeeper; that the work commenced about October 18, and continued to December 9, 1915; that the work was accepted by defendants; that plaintiff has received for his service $183.50; and that there is a balance due him of $500. Judgment was rendered for plaintiff for that sum and costs. Defendants appeal.

The dominant claim of appellants is that the contract was for an indefinite time at daily wages, hence terminable at will by either party; that it was terminated by appellants after three weeks; and that payment was then made in full. A brief review of the evidence touching the purpose and terms of the contract is necessary. Respondent is a Filipino. Appellants are Chinese. Nearly all of the witnesses belonged to one or the other of these races. The real meaning intended to be conveyed by many of them is difficult to gather. It sufficiently appears, however, that one Horner was employed by a steamship company and insurance companies to save as much as possible of certain damaged canned salmon. He in turn employed appellant John Seung to procure men for the work. Appellant Seung was to have the management of the men through his own foreman and timekeeper, though Horner had the right to discharge the men as he saw fit. Seung employed a large number of Chinese, but, needing more men, applied to respondent to secure for the work as many Filipinos as possible. It seems clear that Seung at the beginning thought he could attain the best results by keeping the laborers of the two races separate under the direct management of foremen of their own respective kind. The only intelligible evidence as to what the actual contract here involved was is found in respondent's testimony, and is as follows:

"On October 17, 1915, Mr. John Seung came to my place down at 655 Weller street, and he came inside to my store and said, 'Hello, Sarusal.' 'Hello, Mr. Seung,' I said. He said, 'I was here yesterday, but the boy said you are not here.' He said, 'You are working?' I said, 'Yes, sir.' I asked him, 'What you want to see me about, Mr. Seung?' Mr. Seung said, 'I come to see you because I want some boys going to work.' I asked him, 'What kind of work, Mr. Seung?' He said, 'Just cleaning salmon cans; can you get me somebody?' I said, 'Yes, sir.' 'Well, how much you going to pay the boys wages, Mr. Seung?' I said; and I said, 'You pay by the day or your pay by the month?' He said, 'I pay by the day; I could not pay by the month, because this job I think will not last much longer.' Well, I said, 'How much you going to pay the boys wages by the day?' Mr. Seung said, 'I pay the boys wages of $1.90 per day, and I give you 10 cents per day for each man,' he said, 'but you are to put your own foreman and your timekeeper to carry all of your men, because I want to put my own foreman and timekeeper to carry my men.' 'They are all Chinamen,' he says, 'because I don't want it mixed up, because then it is too much trouble,' he says. I said, 'All right, Mr. Seung, I am satisfied, but can you make me some agreement, Mr. Seung?' Mr. Seung explained to me, he said, 'Well, Sarusal, this kind of job is much different from Alaska, because in Alaska the boys are working by the season, and they give you agreement for the boys there in Alaska that are working by the season, but this job pay by the day, and I think agreement is no use.' Mr. Seung say that. 'That about the only thing I want,' I said. And Mr. Seung said, 'I keep my promise on what I said because my word is more good than an agreement.' Mr. Seung said that. And from that time I engaged to give him men at that time, and I told him, 'Everything you said, Mr. Seung, I am satisfied, but I want to know when the boys going to start to work.' Mr. Seung said, 'I come again and let you know when they are going to start to work, but anyhow,' he said, Mr. Seung said, 'you get the boys as much as you can; Mr. Seung say that."

He further testified Seung then told him from 260 to 300 men would be required to finish the job in about 50 days. Though Seung denied that he made any contract with respondent, and insisted that he contracted with another Filipino named Morano, he did not claim that the agreement, with whomsoever made, was materially different from that above imported.

Counsel for appellants plant themselves squarely upon the ground that this was a hiring without any agreement as to duration, with wages payable by the day; that it was therefore a hiring by the day, hence terminable by either party at the end of any day. We shall consume no space by an analysis of the many authorities cited, since, if the premises are sound, the conclusion within certain limits may be conceded. But it seems to us that in stating the premises counsel have confused the terms upon which respondent was authorized to employ the men with the terms upon which respondent himself was employed. Respondent was only authorized to hire men by the day. They were to be paid by the day. In actual practice the men were paid at the end of each week; the money for the purpose being furnished to respondent by Seung. Seung himself could only hire men by the day, since Horner had reserved the right to discharge any man hired, and in fact, as the evidence shows, did discharge men at the rate of 40 to 50 a day. It is undisputed that men were daily leaving and others were daily taken on.

[1] In contracts of this character the fact that wages are to be paid by the day, or other given period, is a mere evidential circumstance which, standing alone, tends to prove that there was a hiring for that period. But the presumption so raised is by no means absolute. If there are other circumstances impairing its weight, that circumstance has little probative force and readily yields.

Cronemillar v. Duluth-Superior Milling Co., 134 Wis. 248, 114 N. W. 432. Here the very nature of the service undertaken by respondent—the intention of the parties to be gathered from the terms and purpose of the agreement—indicates that as long as any of the men furnished by him remained on the job respondent was to receive for his services in securing and overseeing them pay at the rate of 10 cents a day for each man while so employed. He was not to be paid a fixed sum by the day as were the men, but was to be paid for each man, and his pay as to each man was to be determined by the number of days that man worked. All this is demonstrated by the stipulations that he was to employ his own foreman and his own timekeeper at his own expense, and carry his own men on a separate pay roll—stipulations wholly inconsistent with the idea of an employment from day to day or by the day. Respondent sent men to Tacoma, Bremerton, and Port Blakely to secure men. He employed a foreman and a timekeeper. It is hardly conceivable that he would have gone to this trouble and expense had he understood that his employment was from day to day and terminable at the end of any day. The whole conversation above quoted shows that neither party had any such intention.

[2] The very nature of the service undertaken and the mode of computing his pay so as to make it commensurate with the service rendered show an employment of respondent for the duration of the job. It follows that appellant had no right arbitrarily to terminate the contract at the end of the third week, as he attempted to do, and by paying respondent for past service avoid liability for the rest of the time contemplated while retaining men secured by respondent. Respondent, so far as the evidence shows, was ready, able, and willing to continue their superintendence through his own foreman and timekeeper, and at his own expense. Appellant could not, merely for his own convenience, relieve respondent from these duties, and thus avoid payment for services, the fruits of which he still retained.

[3] But appellants urge that respondent is not suing as an employment agent. This is true, but a part of his service was to secure men. Had he been permitted to fully perform his contract, it is obvious that he might have secured all of the Filipinos at any time employed on the job from beginning to end. He would thus have earned and could have recovered on the basis of all the men he could secure as contemplated in the agreement. The fact that he was not permitted to fully perform his contract is no good reason why he should not recover to the extent he was permitted to and did perform it, and to the extent the benefit of that performance was accepted and retained.

It is next contended that there was no evidence that any of the men secured by respondent remained on the job till it was completed, and no evidence as to how long any of them remained. The evidence on this point is far from satisfactory. It is admitted that at the end of the first three weeks Seung took over the men, placed them under his own foreman and timekeeper, and thereafter carried them on his own pay roll. Morano, who for the first three weeks acted as respondent's foreman, and thereafter remained as a common laborer for Seung, testified that all of these men and more remained to the end. But the evidence is overwhelming that throughout the whole work many men, as high as 40 and 50 every day, were discharged and others hired. Morano either did not mean what he seems to have said or his testimony in this regard is incredible. Ah Fong, appellants' foreman who had charge of the men after the first three weeks, and who must have had more accurate knowledge than any other witness, referring to Sarusal's men, testified:

> "Q. Did most of them come back or most not come back? A. Some of them come back. Lot of them get another job. Q. Do you know how many of them came back? A. I don't know; about 30 or 40 men. Q. And about how many right along every day? A. Yes, sir; some they work a half day to two or three days. No good. Just take them off the job. All lazy men take off. One day Mr. Horner take a whole bunch off, about 80 or 90 men."

He was appellants' witness, and plainly appellants' partisan. It seems to us that he meant to convey the idea that only 30 or 40 of Sarusal's men remained throughout the work. One Wadsworth, who was employed by Seung as a sort of watchman on Saturdays, when the men were paid off during the last four or five weeks of the work, testified that about 150 of Sarusal's men returned after the first three weeks, but most of them worked but a short time, and that the men were continually changing. Though his testimony is almost as unintelligible as that of the Chinese, it is evident that he did not mean to imply that all of the 150 who returned remained on the work. It seems to us that the only tangible evidence as to the number of men who remained to the end of the work was that of Ah Fong, and that the respondent should only have been allowed pay after the first three weeks on the basis of 40 men.

Appellants next contend that the contract was made with Morano, not with respondent, and that Morano by acquiescing in the taking over of the men by Seung and thereafter continuing in Seung's employment as a common laborer consented to the termination of the contract. We shall not discuss the evidence on this point further than to say that it strongly preponderates in favor of the court's finding that the contract was made with respondent. Morano was respondent's foreman. There is no evidence that he was respondent's agent in making the contract or that he had any authority to consent to its termination.

[4] Appellants also claim that respondent himself breached the contract by paying to some of the men less than the agreed price per day of $1.90, and that appellant was thus justified in terminating the employment. The evidence that some of the men were paid less than the specified amount was mainly hearsay. On the other hand, respondent, his

foreman, and his timekeeper all testified positively that every man was paid the full $1.90 a day. The court's finding that some of the men were paid less seems to us contrary to the preponderance of the evidence.

Upon the whole record we are satisfied that respondent is entitled to recover an amount equal to 10 cents a day for each of the 40 men who remained on the work for a period of 29 days during which it appears the work continued after the first three weeks. This would amount to $116.

The cause is remanded, with direction to so modify the judgment. Appellants may recover their costs on this appeal.

MORRIS, CHADWICK, MAIN, and MOUNT, JJ., concur.

(96 Wash. 352)

In re ENNIS' ESTATE.

LOVE, WARREN & MONROE CO. et al. v. ENNIS et al.

(No. 13761.)

(Supreme Court of Washington. May 18, 1917.)

1. Executors and Administrators 🔑256(5)—Allowance of Claims—Appeal—Claims for Less than Supreme Court's Jurisdictional Amount—Constitution.

Under Const. art. 4, § 4, denying appellate jurisdiction to the Supreme Court in civil actions for the recovery of money or personalty when the original amount in controversy does not exceed $200, none of the claimants against a decedent's estate for sums under $200 could prosecute an independent appeal from the judgment disallowing all claims filed with the administratrix, and they did not have an appealable interest, and therefore appeal of such other claimants was not subject to dismissal for failure to serve notice of the appeal on the claimants for less than $200, since service of notice is required on those only who, in addition to appearing in the action, have some right of appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 854–856, 915–917.]

2. Executors and Administrators 🔑93(2)—Authority to Carry on Business.

An executor, under powers conferred by will, may carry on the business of his testator, if such testamentary power is conferred in distinct and positive terms.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

3. Executors and Administrators 🔑93(1)—Continuance of Intestate's Business—Parol Direction.

Intestate's parol direction that his son be intrusted with the carrying on of his business, and that, on settlement of the estate, the son be paid $1,000 over and above his distributive share, was not legally sufficient justification for the personal representative to continue the business, under management of the son, for the benefit of the family or estate, since a personal representative has no power to continue the business of a decedent unless expressly authorized by will, statute, or order of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

4. Executors and Administrators 🔑93(1)—Authority to Continue Business.

Where the superior court, pursuant to an administratrix's petition showing the consent of all the heirs, under Rem. Code 1915, § 1497, made an order authorizing and empowering her to sell the stock of goods in decedent's store at private sale in such manner as might seem best to her, such order merely authorized the disposal of the stock, and did not authorize continuance of the business to the extent of replenishing the stock.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

5. Principal and Agent 🔑100(6)—Agent for Administratrix — Management of Intestate's Store.

Intestate's son, managing his store after intestate's death in accordance with intestate's parol wish and the agreement of the heirs, was merely the agent of intestate's administratrix, who was bound by his acts within the apparent scope of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 272.]

6. Principal and Agent 🔑137(1)—Agency by Estoppel.

Where intestate's administratrix, employed in intestate's store when goods ordered by intestate's son, the manager of the store, were coming in, and who, after admitted knowledge of the claims for the goods, did not repudiate them, but promised that they should be paid, and subsequently obtained an order of court permitting a reduction sale of the goods over the counter, and on the sale disposed of the goods, payment for which she seeks to resist on the ground that the son made the purchases without her knowledge or consent, is estopped to assert that she was not bound by the acts of the son, her agent managing the store.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492, 494.]

7. Executors and Administrators 🔑93(1)—Continuance of Business.

The general rule that a personal representative cannot continue a decedent's business has some limitations, as where the executor is the residuary legatee, etc.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

8. Executors and Administrators 🔑93(1)—Temporary Continuance of Business—Power of Court—Statute.

Under Rem. Code 1915, § 1497, providing that if it be made to appear to the satisfaction of the court that it will be for the interest of the estate to allow the executor or administrator to sell some or the whole of the personal estate at private sale, the court may so order, the courts of Washington have power to authorize the temporary continuance of a decedent's business by his personal representative, the order authorizing payment of costs of sale as a part of the expenses of administration, but an order of sale does not justify the purchase of additional merchandise to the extent of keeping the stock intact, or more than is necessary to enable the administrator to sell the remaining stock to best advantage.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

9. Executors and Administrators 🔑271—Continuance of Business — Rights of Creditors.

Trade creditors who furnish decedent's business with merchandise in violation of the rule that a personal representative cannot purchase additional merchandise to keep the stock intact, though authorized to continue the business temporarily to close it out, are restricted to that part of the estate assets embarked in the business to which they contributed, unless their rights against the general assets have been enlarged by estoppel depriving the heirs and general creditors of the right to assert their prior claims against the general assets.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1044–1051.]

10. Executors and Administrators 🔑93(1) — Carrying on Business — Governing Principle.

The authority of a personal representative to carry on decedent's business under order of the court is governed by the same principles which apply in case of conducting a business under testamentary powers.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

11. Executors and Administrators 🔑93(1) — Consent of Heirs and Creditors to Conduct Business—Estoppel.

The consent of adult heirs that the administrator may carry on decedent's business estops them to enforce personal liability against the administrator for losses incurred by him in such business, a rule which extends to general creditors, who, as beneficiaries of the estate, expressly consent that the administrator may carry on the business.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

12. Executors and Administrators 🔑93(1) —Consent to Carry on Business—Liability to Trade Creditors—Estoppel.

Where the heirs and general creditors of decedent consent that his business may be carried on by the administrator as a business venture, they are estopped to dispute the liability of the trade assets of the estate for debts incurred therein by the administrator, the sole extent to which trade creditors are entitled to take advantage of the principle of estoppel.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

13. Executors and Administrators 🔑93(1) —Continuance of Decedent's Business—Acquiescence of General Creditor—Estoppel as to Trade Creditors.

Where the holder of a substantial general claim against decedent's estate must have been cognizant that his business was being conducted by his son and administratrix as a going business, its failure to take any action to assert its right estopped it from claiming, as against trade creditors who sold goods to the business, though it never expressly consented to a continuance of the business.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

14. Executors and Administrators 🔑93(1) —Carrying on Decedent's Business—Liability of General Assets to Trade Creditors.

Though the fact that decedent's business was carried on after his death with the consent of the heirs and administratrix was sufficient to estop them from disputing the prior rights of trade creditors in the trade assets, it did not estop them to deny the liability of the general assets to the trade creditors, who had no right to be placed on an equality with those existing at decedent's death, and entitled to share in the estate as it then existed, since they contracted with the administratrix chargeable with notice as to any limitation on her powers to bind the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

15. Executors and Administrators 🔑93(1) — Conduct of Decedent's Business — Rights of Trade Creditors.

Trade creditors, who, after decedent's death, deal with his personal representative carrying on his business, are chargeable with notice as to any limitation on the representative's powers to bind the estate, dealing with the representative on his personal credit and on the credit of the business conducted by him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

Department 2. Appeal from Superior Court, Grays Harbor County; Geo. D. Abel, Judge.

In the matter of the Estate of A. C. Ennis, deceased, Love, Warren & Monroe Company, Western Dry Goods Company, Bauer Bros., and others presented claims for allowance to Emma C. Ennis, administratrix, Hayes & Hayes, Bankers, general creditors, resisting. From a judgment disallowing and rejecting the claims, the named claimants appeal. Reversed, with directions to allow the claims as preferred claims against moneys in the hands of the administratrix derived from sale of a stock of merchandise.

Wettrick, Anderson & Wettrick, of Seattle, and W. W. Keyes, of Tacoma, for appellants. Hogan & Graham and E. E. Boner, all of Aberdeen, for respondents.

FULLERTON, J. A. C. Ennis died intestate on January 23, 1911, leaving surviving him his widow, Emma C. Ennis, and four adult children. His estate consisted of a stock of general merchandise at Elma, Wash., appraised at $4,000, and realty in the cities of Spokane and Centralia appraised at $11,250. The widow was appointed administratrix of the estate on March 11, 1911, and made weekly publication of her notice to creditors from April 7 to May 5, 1911. Aside from about $800 of indebtedness for goods in the store, which was taken care of by the widow's advancement of personal funds and by the proceeds of sales of merchandise from the store, the only indebtedness existing at the time of the death of A. C. Ennis was a note for $2,000, with accrued interest, executed to Hayes & Hayes, Bankers, and a claim for $400 due the son Mark Ennis for money loaned to the deceased. All the heirs, following the death of A. C. Ennis, agreed among themselves that:

> "Donald Ennis might operate the dry goods store at Elma, Wash., in the same manner as if he owned the same, and that, when it came to final distribution of the estate, the store or stock of merchandise should go to the said Donald Ennis and be distributed to him at the appraised value, said Ennis to be allowed in the distribution an extra $1,000 over and above the amount to which he was legally entitled, and if after the allowance of such $1,000 extra to the said Donald Ennis, the said stock of goods would be in excess of what the said Donald Ennis was entitled to under said arrangement, then the said Donald Ennis would pay the other heirs pro rata such excess."

On February 23, 1912, after the store had been conducted by Donald Ennis for more than a year without an order of court, the administratrix and all the heirs presented a petition for an order of private sale of the merchandise containing the following recitals:

> "That by an agreement among the heirs it was thought advisable to keep said store running during the administration of the estate, with a view to making some profit to the estate to aid in paying of any debts against the estate and the expenses of administration; but that, owing to the continued depression in business, it has been impossible to realize anything in the way of profit from the business, and it is not thought by us advisable to continue said business. * * * Wherefore we, your petitioners, being all the heirs of above-entitled estate, pray an order of this [court] permitting and empowering the administratrix of said estate to sell said stock of goods at private sale in such manner as may seem to her for the best interests of this estate."

Upon this petition the court, on March 4, 1912, made its order:

> "* * * That said administratrix Emma O. Ennis be and she is hereby authorized and empowered to sell said stock of goods at private sale in such manner as may to her seem best, and of her actions make due report to this court."

The business as conducted by Donald Ennis not proving profitable at Elma, it was shifted to Centralia in the month of August, 1913, and in the period between October and December of that year Donald incurred debts in the sum of $3,824.82 for merchandise placed in stock at the Centralia store. Donald Ennis was taken ill in December, 1913, and died January 16, 1914. In February, 1914, the administratrix and all the remaining heirs presented to the court a petition for authority to sell off the stock at a reduction sale over the counter, upon which the court made the following order:

> "It now appears that the administratrix in the above-entitled matter has petitioned the court for an order to sell at reduction sale, over the counter, under a sales manager, the stock of dry goods belonging to said estate at Centralia, Wash., and pay said sales manager 10 per cent. of the gross receipts of said sale and the incidental expenses necessary for putting on such sale, and that when said sale has been completed, the remaining goods be sold in the lump sum at the best price obtainable, to which petition all of the heirs and persons interested in said estate have signified their assent in writing. It is therefore ordered that the administratrix put on said reduction sale over the counter, under a sales manager, and that she is authorized to pay the said sales manager 10 per cent. of the gross receipts and the necessary advertising, labor, and incidentals necessarily incurred in said sale; that when said sale has run its course in the opinion of the administratrix, then she is hereby authorized to sell whatever goods are remaining in the lump sum at private sale for the best price obtainable."

A sale was had under this order, and the net amount of $650.85 realized after the payment of expenses of sale, according to the findings made by the court. The report of the administratrix, however, shows $879.90 as net proceeds of sale after payment of expenses for conducting the sale in the sum of $650.85. The various creditors who had sold goods to the Ennis store during the latter part of its operation at Centralia presented to the administratrix for allowance their claims, totaling $3,824.82. On January 2, 1915, the administratrix filed a report, disavowing liability, and petitioned the court for the issuance of a citation against such claimants to show cause why their claims should not be disallowed. A show-cause order for that purpose was entered, directing the claimants to appear before the court on November 19, 1915, and after hearing thereon a judgment was entered, disallowing and rejecting the claims. From that judgment the creditors appeal to this court.

The respondents interpose a motion to dismiss the appeal on the ground of failure to serve notice on all the parties appearing before the court. On the petition of the administratrix some 28 claimants were cited to appear before the superior court of Grays Harbor county to show cause why their claims should not be disallowed. A hearing was had on November 19, 1915, and judgment subsequently rendered, disallowing and rejecting all the claims. These claims were in various amounts, ranging from $923.98 to $13.27, all except three of them being below the sum of $200. On July 5, 1916, the three claimants for sums in excess of $200 served and filed their notice of appeal. Service was made only on the prevailing parties to the judgment, who were the administratrix and a general creditor who had resisted the claims. No service was made on the coparties appearing in the cause whose claims were under $200 in amount. Motion is made by the prevailing parties to dismiss the appeal for failure to serve notice upon all the parties appearing in the action.

[1] The motion is resisted by the appellants on the ground that their coparties below had no appealable interest, because their respective claims were each below the amount of $200, and hence unappealable under Const. art. 4, § 4, which denies appellate jurisdiction to the Supreme Court in civil actions for the recovery of money or personal property when the original amount in controversy does not exceed $200. Rem. Code, § 1719, prescribes the service of written notice of appeal on the prevailing party. Section 1720, provides that all parties similarly affected by the judgment may join in the notice of appeal. Parties not joining have the right to serve an independent notice of appeal within ten days after the giving or service upon them of the original notice, or may join in the appeal already taken, and any "party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case." Under our holdings as to the necessity of service of notice of appeal upon all parties appearing in the action, the appeal herein is subject to dismissal, unless service of notice upon the omitted parties is unnecessary by reason of the fact that they had no right of appeal. It is plain that under our Constitution none of the claimants for sums under $200 could prosecute an independent appeal, and hence

they would have no right of appeal. Nor would they have such an appealable interest as would justify their joinder in the appeal by others with whom they were similarly affected. We have held on numerous occasions that service of notice is required on those only who, in addition to appearing in the action, had some right of appeal. Carstens & Earles v. Seattle, 84 Wash. 88, 146 Pac. 381, Ann. Cas. 1917A, 1070; Sipes v. Puget Sound Elec. R. Co., 50 Wash. 585, 97 Pac. 723; Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786; Soderberg v. McRae, 67 Wash. 104, 120 Pac. 878.

The situation here is aptly expressed in Robertson Mtg. Co. v. Thomas, 60 Wash. 514, 111 Pac. 795:

> "We can look no further than to determine (1) whether he was a party to the action appearing in the case; and (2) whether he is entitled to an appeal. If these two conditions concur, it must be presumed that he is affected by the judgment; whether wrongfully affected must be determined on the appeal."

The other grounds for dismissal are without merit. The motion to dismiss the appeal is denied.

[2] Passing to the merits of the appeal, it is settled law that an executor under powers conferred by will may carry on the business of a decedent if such testamentary power is conferred in distinct and positive terms. Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 South. 258; Willis v. Sharp, 113 N. Y. 588, 21 N. E. 705, 4 L. R. A. 493.

[3] In the present case A. C. Ennis died intestate, but prior to his death had expressed a wish that his son Donald be intrusted with the carrying on of his business, and that, on settlement of the estate, Donald should be paid $1,000 over and above his distributive share. Such a parol direction prior to death is not, however, recognized in law as a sufficient justification for a personal representative to continue the business for the benefit of the family or estate. Raynes v. Raynes, 54 N. H. 201; In re McCollum, 80 App. Div. 362, 80 N. Y. Supp. 755. The general rule is that a personal representative has no power to continue the business of a decedent unless expressly authorized by will, by statute, or by an order of the court. The only statute we have on the subject is Rem. Code, § 1497, which provides:

> "If it be made to appear to the satisfaction of the court that it will be for the interest of the estate to allow the executor or administrator to sell some or the whole of the personal estate at private sale, the court may so order."

[4] Under the sanction of this statute the superior court, pursuant to petition of the administratrix showing the consent of all the heirs, made an order authorizing and empowering her "to sell said stock of goods at private sale in such manner as may to her seem best, and of her actions make due report to this court." This order goes no further than to authorize the disposal of the stock of goods. It does not authorize the continuance of the business to the extent of replenishing the stock of goods. In fact, the petition upon which it was based recited that the store had been running during the administration of the estate, "but that owing to the continued depression in business, it has been impossible to realize anything in the way of profit from the business, and it is not thought by us advisable to continue said business." Notwithstanding this representation to the court on which its order of private sale was procured, the administratrix continued to operate the business under the management of her son Donald Ennis for nearly two years subsequent to the date of the order. During this period her son bought new goods to place in the stock, for which he incurred the indebtedness of $3,824.82, now before us for allowance or rejection.

[5, 6] The administratrix claims that these purchases were made without her knowledge or consent and neither the estate nor herself is liable. We hold, however, that Donald Ennis, as manager of the store, was merely the agent of the administratrix, and that she would be bound by his acts within the apparent scope of his authority. The evidence shows that the administratrix was employed in the store at the time the goods were coming in, and at least had an opportunity to know the condition of the business. Moreover, after admitted knowledge of these claims, she did not repudiate them, but promised through her attorney that they should be paid. Subsequently she obtained an order of court permitting a reduction sale of the goods over the counter, and on this sale disposed of the goods, payment for which she is now disputing. She is clearly estopped to assert that she is not bound by the acts of her agent, which she charges were in excess of his authority.

[7] In resisting the claims of appellants, counsel for the administratrix maintains that she had no authority to carry on the mercantile business even under the order of the court, inasmuch as no statute confers that power on the court. There are two lines of decision in this country upon that question; one upholding the jurisdiction of probate and chancery courts to authorize a personal representative or trustee to continue a decedent's business, the other denying such power. The general rule, under which a personal representative is denied the power of continuing a decedent's business, has some limitations, which are stated in 18 Cyc. 242, as follows:

> "Good discretion, however, may require some latitude in closing out the decedent's business, and this a probate court will duly consider when passing upon the representative's accounts. The personal representative may be justified in continuing the business of the decedent so far as is necessary for the purpose of winding up the same and converting the assets into money or carrying out existing contracts of decedent. * * * The rule is also subject to some limitations where the executor is also the residuary legatee or the business has been specifically bequeathed to him. And it has been held that the consent of all persons interested may authorize the personal representative to carry on the business of the decedent in good

faith so as fairly to be allowed for all assets so consumed."

In Gordon-Tiger Co. v. Loomer, 50 Colo. 409, 115 Pac. 717, a case where an administrator carried on a secondhand store for over four years, the court said:

> "Generally speaking, an administrator may not continue the business of the decedent, nor use the assets of the estate for business purposes. To this rule, however, there are exceptions; as where the decedent was engaged in the mercantile or manufacturing business, his representative may, under order of court, carry on the business for a sufficient time to close it up. The administrator, if properly authorized, could continue the business for the purpose of disposing of the stock to advantage, and might purchase necessary merchandise to make the property more salable. Such purchases would constitute a proper claim of the second class [expenses of administration] in the settlement of the estate. A person from whom he bought goods could present the claim to the court for allowance, and the statute of nonclaims, from the very nature of the transaction, would not apply."

Fleming v. Kelly, 18 Colo. App. 23, 69 Pac. 272, was a case in which an administratrix, under order of the court, carried on the business of carriage manufacture for three years after the decedent's death, purchasing goods to be used in the business, payment for which was resisted by a subsequent administrator. The court said:

> "From the necessities of the case, neither the Legislature nor the constitutional convention could anticipate every business contingency which might arise in the settlement of an estate, and provide by statute specifically the powers to be exercised by the court in every instance. Primarily, its duty is to see that the assets of the estate are collected and, if debts exist, converted into money as speedily as possible, consistent with the exercise of proper business discretion so as to prevent a sacrifice, in order that the claims of creditors may be satisfied, and the remainder, if any, be distributed among the heirs at law. It logically and reasonably follows that in furtherance of this general power, the court must have also such powers as may be incidental to it, and necessary to carry it out and effectuate the purpose. * * * Among such incidental powers must, of necessity, be included, in a proper case, the power to order the continuance of the business by the administrator, temporarily at least, so as to dispose of the stock on hand to the best advantage. The power may be especially necessary and required in case of a manufactory, where it has on hand a large amount of raw material and partly manufactured articles, a sale of which in their then condition would be impossible without a sacrifice. It follows also that in order to carry out the power in such case that it may be absolutely necessary to purchase some other material, and where such purchase is made under such circumstances, we cannot see how it can be other than an expense incurred in the settlement of the estate."

In line with the foregoing authorities, see, also: State v. Jones, 89 Mo. 470, 1 S. W. 355; Starling v. Wyatt (Miss.) 27 South. 526; In re Hodges, 1 Irish R. (1899) 480; In re Osburn, 36 Or. 8, 58 Pac. 521.

[8] We think the rule that accords to probate courts discretion to authorize the temporary continuance of a decedent's business by his personal representative is a salutary one, and that, under Rem. Code, § 1497, our courts have power to make an order of that nature which would authorize payment of costs of sale as a part of the expenses of administration. But, as held in some of the cases cited supra, an order of sale would not justify the purchase of additional merchandise to the extent of keeping the stock intact, or more than is necessary to enable the administrator to sell the remaining stock to the best advantage.

[9] With reference to the rights of the trade creditors, those who have furnished the business with merchandise in violation of the rule as above stated, while there is a disagreement among the authorities, we think the better rule is that they are restricted to that part of the estate assets which were embarked in the business to which such creditors contributed, unless their rights against the general assets may have been enlarged by some principle of estoppel depriving the heirs and general creditors of the right to assert their prior claims against the general assets. The rule is succinctly stated in Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501, as follows:

> "We understand the rule is that where an administrator or executor, instead of closing out a business, continues it, even when authorized by will to do so, the trade debts will reach only the trade assets; that is, the property that was employed in the business or that was the result of doing the business. Laible v. Ferry, 32 N. J. Eq. 791. See, also, Altheimer v. Hunter, 56 Ark. 159 [19 S. W. 496]; Lucht v. Behrens, 28 Ohio St. 231 [22 Am. Rep. 378]."

In Altheimer v. Hunter, 56 Ark. 159, 19 S. W. 496, it is said:

> "The order of the probate court directing the administrator to continue the mercantile business of the intestate created no greater power in the administrator than if it had been made upon directions to that effect to an executor by the terms of a will. But in the latter case the authorities are uniform to the effect that neither the executor nor his trade creditors can resort to the general assets of the estate for the purpose of reimbursement or payment, unless it is clear that the testator intended to make them liable for the debts contracted by the executor. In such a case advances are made by the administrator, and credit extended by those who give him credit, upon the faith of the assets embarked in the trade or business, and their remedies are confined to such assets. 2 Woerner, Administration, § 328, p. 689, note 5; Jones v. Walker, 103 U. S. 444 [26 L. Ed. 404]; Ex parte Garland, 10 Ves. Jr. 110; Laible v. Ferry, 32 N. J. Eq. 791."

[10] The authority to carry on business under order of the court is governed by the same principles which apply in case of conducting a business under testamentary powers. The rule in the latter case is thus stated in 18 Cyc. 244:

> "Where the representative is authorized to carry on the decedent's business after his death, only such assets of the estate as are invested in the business at the time of the decedent's death can be considered as trade assets; and, in the absence of some clear authority in the will, the other property of the estate cannot be subjected to the risks of trade, or be made liable for debts contracted by the representative in carrying on the business."

In further support of the foregoing rule, see: Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; In re Sharp, 5 Dem. (N. Y.) 516; Furst v. Armstrong, 202 Pa. 348, 51 Atl. 996, 90 Am. St. Rep. 653; Davis v. Christian, 15 Grat. (Va.) 11; Smith v. Ayer, 101 U. S. 320, 25 L. Ed. 955.

[11] The principle of estoppel is invoked in this case by the trade creditors for the purpose of subjecting the general assets of the estate, otherwise beyond their reach, to the lien of their claims. The weight of authority undoubtedly is that the consent of the adult heirs that the administrator may carry on the business conducted by the decedent will estop them from enforcing any personal liability against the administrator for losses incurred by him in such business. Swaine v. Hemphill, 165 Mich. 561, 131 N. W. 68, 40 L. R. A. (N. S.) 201.

[12] This rule is also extended to general creditors, who as beneficiaries of the estate expressly consent that the administrator may carry on such business. It will be seen, however, that this rule does not aid the trade creditors, who stand on a different footing from that of the heirs and the creditors of the decedent, in that they never had an interest in the general assets. It is otherwise, however, in regard to the assets embarked in trade. Where the heirs and general creditors consent that that portion of the estate may be carried on as a business venture, they are estopped to dispute the liability of the trade assets of the estate for debts incurred therein by the administrator. We think to this extent only are the trade creditors entitled to take advantage of the principle of estoppel.

The evidence shows that all the heirs and the widow of the intestate agreed among themselves that Donald Ennis should conduct the business carried on by A. C. Ennis in his lifetime, and this private arrangement was followed for a year before bringing it to the attention of the probate court. Finally resort was had to the court for authority to the administratrix to sell the stock of goods "in such manner as may seem to her for the best interests of the estate." The petition to the court was signed by the administratrix and all the heirs. Donald Ennis was continued in charge of the business under this order until his final sickness and death nearly two years later. During this time, while acting under the order of the court as granted to the administratrix, the indebtedness for new goods here in question was incurred. The administratrix and the heirs claim that they had not authorized the purchase of fresh stock and did not know it was done, but we think their participation in the affairs of the estate was sufficient to charge them with notice, whether they had actual notice or not.

[13] The general creditor Hayes & Hayes, Bankers, never expressly consented to the course of conduct here outlined; but, as the holder of a substantial claim, it must have been cognizant that this business was being conducted as a going business, and its failure to take any action to assert its rights estops it from now claiming as against the trade creditors.

[14] But while the fact that the business was carried on with the consent of the heirs and the administratrix was sufficient to estop them from disputing the prior rights of the appellants in the trade assets, it does not estop them from denying liability as to the general assets. Trade creditors have no right to be placed on an equality with those existing at the date of decedent's death, and who are entitled to share in the estate as it then existed.

[15] They contract with the personal representative, chargeable with notice as to any limitation on his powers to bind the estate. They are not in any sense creditors of the decedent. They deal with the administrator on his personal credit and on the credit of the business conducted by him. The primary idea of administration is to preserve the estate for the benefit of those interested in it at the time of the owner's death, and courts should be slow to adopt a rule involving a departure from that idea. The intent of the law originally, in permitting a personal representative to conduct a going business, was that he should wind it up without unnecessary sacrifices. But it has become quite common for administrators to continue a business as if it was to be maintained intact as a going concern. Such a course is unwarranted either by the statute or by general law.

The net proceeds arising from the business conducted by the administratrix were, as alleged in her petition, $879, and, as found by the court, $650.85. Whatever the amount may be, it was derived in part from the sale of goods bought from the appellants, and they are entitled to have such proceeds applied on their claims. Their claims are allowed to that extent.

The rule here announced must be understood as going no farther than the issue presented upon the allowance or rejection of the claims. Whatever rights the appellants may have against the administratrix, while raised in the briefs of counsel, are not properly before us for consideration, and hence will not be passed upon at this time.

The judgment of the superior court will be reversed, with directions to allow the claims of appellants as preferred claims against moneys in the hands of the administratrix derived from the sale of the stock of merchandise.

ELLIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

BAKER & LOCKWOOD MFG. CO. v. VOORHEES et al. (No. 8529.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ⚷568—CASE-MADE—NOTICE.

Where plaintiff in error has prepared and served a case-made, and has given the prescribed notice of the time and place that same will be presented to the trial judge for settlement and signature, and the trial judge is absent at such time and place, said notice becomes functus officio, and before such case-made can be legally settled and signed another notice of the time and place of settling and signing must be served upon the opposite party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529.]

Error from County Court, Okmulgee County; Mark L. Bozarth, Judge.

Action by the Baker & Lockwood Manufacturing Company against Lee A. Voorhees and others. Judgment for defendants, motion for new trial sustained as to defendant Greenwalt, and overruled as to defendant Voorhees, and plaintiff brings error. Appeal dismissed.

Swain & Griffith, of Okmulgee, and William W. Shelley, of Kansas City, Mo., for plaintiff in error. Cochran & Ellison, of Okmulgee, for defendants in error.

HARDY, J. Plaintiff in error commenced this action against defendants in error on an alleged contract of guaranty. The parties will be referred to as they appeared in the trial court.

Richards having died, and his death being suggested, the action as to him was dismissed, and was also dismissed as to the trustees of L. O. O. M. Trial resulted in judgment for defendants. Plaintiff filed motion for new trial, which was sustained as to defendant Greenwalt, and overruled as to the defendant Voorhees. Time was granted in which to prepare and serve case-made, which was duly prepared and served by plaintiff, and suggestion of amendments by defendant Voorhees was duly served upon plaintiff. Notice was thereafter served by plaintiff that the case-made would be presented to the trial judge on July 6, 1916, for settling and signing. On that day the trial judge was absent, and the case-made could not be presented to him, but on the succeeding day, July 7, 1916, in the absence of defendants in error or any one representing them, and without additional notice, the case-made was settled and signed by the judge, without incorporating therein the amendments suggested by defendants, which had been served upon plaintiff. Motion is made to dismiss the appeal, because same was signed and settled upon a day subsequent to that fixed in the notice, in the absence of defendants, without incorporating in the case-made the amendments suggested.

The motion must be sustained. It is now the established rule in this court that where the plaintiff in error has prepared and served a case-made, and has given the prescribed notice of the time and place that the trial judge will be asked to settle and sign the same, and the trial judge is absent at the time and place named in such notice, such notice becomes functus officio, and before such case-made can be legally settled and signed another notice of the time and place of settling and signing must be served upon the opposite parties. Southwestern Surety Ins. Co. v. Going, 150 Pac. 488; Sand Springs Ry. Co. v. Oliphant, 157 Pac. 284; Wood v. King, 151 Pac. 685.

The motion is sustained, and the case dismissed. All the Justices concur.

(47 Okl. 26)

ATCHISON, T. & S. F. RY. CO. v. STATE. (No. 2347.)

(Supreme Court of Oklahoma. Sept. 30, 1913.)

(Syllabus by the Court.)

1. CARRIERS ⚷18(1)—ORDER OF CORPORATION COMMISSION — VIOLATION OF ORDER — EVIDENCE.

Evidence examined, and *held* sufficient to sustain the finding of the Corporation Commission that one of its orders had been violated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24.]

2. CARRIERS ⚷18(1)—CORPORATION COMMISSION—VIOLATION OF ORDER—CONTEMPT.

Sections 1192 and 1193, Rev. Laws 1910, empowers the state Corporation Commission to punish as for contempt any railway company violating any of the rules or requirements of the Commission, but places a limitation upon such power and the discretion of the Commission as to the kind of punishment and amount of fine that may be imposed by the Commission, by specifying the maximum penalty the Commission may assess against a violator of any of its orders; and so long as the Commission does not exceed this limitation, specifically imposed by the statute, where there have been no errors in the proceeding prejudicial to defendant, this court is without power to disturb the judgment of the Commission fixing the amount of the penalty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24.]

Appeal from Order of Corporation Commission.

Proceeding by the State against the Atchison, Topeka & Santa Fé Railway Company, charging the violation of an order of the Corporation Commission. From an order of the Commission adjudging the road in contempt, it appeals. Judgment of Commission affirmed.

Cottingham & Bledsoe, of Oklahoma City, for appellant. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

HAYES, C. J. [1, 2] This appeal is prosecuted from an order of the Corporation Commission, adjudging appellant guilty of contempt for having violated what is known as Commission Order No. 4 of the state Corporation Commission. Said order, among other things, provides that it shall be the duty of every railway or railroad company to open its waiting rooms, ticket windows, and baggagerooms one hour before schedule time of arrival of trains. This proceeding was begun before the Commission by one G. R. Fields filing his complaint, wherein he charges that appellant, through its agent in the town of Avard, Okl., on the night of the 9th of March, 1910, violated said order of the Commission by failing to open its ticket windows at said station until 10 minutes prior to the time of arrival of its passenger train, which was due at that station at 12:20 a. m. By reason of which he alleges that he and other passengers were compelled to pay three cents a mile for transportation instead of two cents per mile, because at 12 o'clock on that night a new schedule of rates to that effect became effective upon appellant's line of road. No appeal seems to have been taken from the action of the Commission in promulgating said Commission's order No. 4, herein alleged to have been violated. The power of the Commission to make said order and its validity is not questioned in this proceeding. By section 1 of an act of the Legislature, approved May 29, 1908, entitled "An act providing for the punishment of any corporation, person or firm for contempt for the violation of any order or requirement of the Corporation Commission," etc., it is provided that any corporation, person, or firm may be fined by the Commission not exceeding $500, as the Commission may deem proper, for the violation of any of its rules or requirements, and each day's continuance of said violation is made to constitute a separate offense. Section 2 of the act provides that the Commission may punish such corporation, for violation of its order, as for contempt, and prescribes the procedure by which such prosecution may be made. Sess. Laws 1907-08, p. 228; sections 1192, 1193, Rev. Laws. A general demurrer of appellant's to the complaint was overruled. Whereupon, after answer was filed by appellant and demand for jury overruled, a trial before the Commission was had, resulting in findings and an order by the Commission, adjudging appellant guilty and assessing a fine against it in the sum of $500.

There is evidence to establish that the town of Avard is the junction point of appellant's line of railway and a line of the St. Louis & San Francisco Railway; that on the night of March 9, 1910, plaintiff arrived in said town on the St. Louis & San Francisco Railway and went at about the hour of 11 o'clock to appellant's depot for the purpose of embarking upon one of appellant's trains going southwest, which was due to arrive at Avard at 12:10. The evidence also establishes that there were a number of other passengers who went to appellant's station at about the same time for similar purposes. The ticket window of the station was not opened, according to the testimony of the prosecution, until five minutes before the schedule time for arrival of the train, and, according to the testimony of defendant, the window was not opened until 12 minutes before such time. Defendant, both by its answer and its evidence, admits the violation of the order, but seeks to purge itself of contempt or to justify or excuse its action by showing that the train was approximately one hour late, and that the agent of appellant at that point was engaged, during the hour immediately preceding the schedule arrival of the train, in performing other services which he was required to perform by the company, to wit, assorting mail packages that were to be placed upon said train, and that the window was opened for an hour immediately before the departure of the train, though not an hour before the schedule time for its arrival. The Commission took the view that the evidence of appellant was not sufficient to purge it of contempt for the violation of the order; and we have not been convinced by the presentation of the case, made by appellant, that the Commission committed reversible error in this conclusion. The purpose of the order violated is not only to afford the traveling public an opportunity to obtain at each station of a railway company information regarding its trains and the procuring of tickets and the checking of baggage before a train arrives upon which any such passenger intends to depart, but also that the patronizing public may know at what times during the day it can have access to the ticket office of any such company to transact such business. While it is shown that during a part of the time the window should have been opened appellant's agent was busy with other work, it is not shown that such work could not have been postponed until after the services required by the order had been rendered; nor does the record show that he was the only person to render such service. The most the record shows in this respect is that during the time the rule prescribed by the Commission required the ticket window to be opened for the accommodation of the traveling public, it was not open, and that the agent was doing something else.

It is asserted in the brief of counsel for appellant that, if the order of the Commission is to be construed, as it has been construed by the Commission, to require that the ticket window at every station shall be open continuously for the period of one hour before the schedule time for arrival of each train at all the stations, regardless of the amount of business that may be done at such station, the order is void, because unreasonable and unjust. It may be that the application of the order to some stations of appellant in the state, or to some stations of other railway companies in the state, may place an unreasonable and unjust burden upon the railway company, where the volume of business is exceedingly small, and where there are but few passengers who depart from such stations, and where the revenue received from the business of such station will not justify or require the employment of more than one person to transact the business of the railway company at such a station, and yet the other duties and work imposed upon him to transact the business of said company would not permit him to attend to the ticket window and the baggageroom for the period of one hour before arrival of any trains, as required by this order. But the evidence in this case does not show that such a state of facts exists as to the station here involved.

It is also contended that the amount of the fine assessed by the Commission is unreasonable and unjust, and that the order should be reversed upon this ground. This contention, we think, also is without merit. The statute empowers the Commission, when it finds in any proceeding brought before it for that purpose that any railway company has violated one of its orders, to assess a fine against such company for any sum not to exceed $500 for such offense. The statute has placed a limitation upon the power and discretion of the Commission as to the kind of punishment and amount of the fine that may be imposed by the Commission; and, so long as the Commission does not exceed this limitation, specifically imposed by the statute, where there have been no errors in the proceeding prejudicial to defendant, we think the court is without power to disturb the judgment of the Commission, assessing the penalty.

The judgment of the Commission is affirmed. All the Justices, except LOOFBOURROW and TURNER, JJ., not participating, concur.

STATE ex rel. MILLER v. DUDLEY, District Judge. (No. 8693.)

(Supreme Court of Oklahoma. April 24, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟹1202—MANDAMUS ⟹58—REMAND—GROUNDS—ENTRY OF JUDGMENT WITHOUT RETRIAL.

F. sued M. in the district court for cancellation of a deed executed by F. to M. on the ground of fraud and mental incapacity. Judgment was rendered in favor of F. canceling the deed. Upon appeal to the Supreme Court the cause was "reversed and remanded for a new trial." After the mandate had been issued and spread of record in the district court, M. filed his motion for judgment on the opinion and mandate. F., by leave of court, then filed his amended petition. M. filed his motion to strike the amended petition. The court overruled both the motion for judgment and the motion to strike. In an action by M. for writ of mandamus against the district judge to compel him to enter judgment on the mandate and opinion of the Supreme Court *held*, that it was the duty of the trial court to grant a new trial; that, the proceedings thus far taken in a retrial of the case being interlocutory and reviewable on a second appeal after a retrial, mandamus will not lie to compel the district judge to enter judgment without a retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4669; Mandamus, Cent. Dig. § 121.]

Original mandamus by the State, on relation of C. W. Miller, against C. E. Dudley, Judge of the District Court of Choctaw County. Writ denied.

I. L. Strange, of Hugo, for plaintiff. McPherren & Cochran, of Durant, for defendant.

TURNER, J. On October 20, 1916, the state of Oklahoma, on relation of C. W. Miller, filed its petition in this court praying for a writ of mandamus against C. E. Dudley, judge of the district court of Choctaw county. The facts out of which this proceeding grew are substantially as follows: On May 8, 1913, Grover C. Folsom sued C. W. Miller, relator herein, in the district court of Choctaw county, to set aside a warranty deed executed by Folsom to Miller on May 5, 1913, for his allotment of land, upon the ground of fraud in its procurement and mental incapacity to contract. Judgment was rendered in that court canceling and setting aside said deed, upon the ground of mental incapacity only of Folsom to execute the same. Upon appeal by Miller to this court (Miller v. Folsom, 149 Pac. 1185), after considering the errors assigned, and holding that the evidence did not tend to show mental incapacity on the part of the plaintiff sufficient to set aside the deed, the court, in summing up, said:

> "We are therefore of opinion that the court did wrong to set aside the deed complained of, and for that reason the cause is reversed and remanded for a new trial."

After the mandate had issued to the district court of said county, and the same had been spread of record, defendant in said action (relator here) filed his motion for judgment on the opinion and mandate of this court. Folsom, the plaintiff in said action, filed his amended petition, alleging practically the same grounds why the deed should be set aside as were considered by this court in said cause on appeal. Miller then filed his motion to strike the amended petition, upon the ground that he was entitled to judgment upon the mandate issued by this court. Upon a hearing of said motion for judgment, the court overruled the same and granted leave to plaintiff to file his amended petition. The court also overruled the motion of defendant to strike said amended petition from the files. Plaintiff prays that a writ of mandamus be allowed by this court, requiring said respondent as such district judge to render a judgment in said action on the opinion and mandate of this court, without a retrial of the case in said court.

The court did not err in refusing to enter judgment in favor of relator; this for the reason that it was the duty of the trial court to proceed with a new trial in accordance with the judgment of this court reversing and remanding the case. The district court was bound by the decree as the law of the case, and must carry it into execution according to the mandate of this court. Gilliland v. Bilby (Okl.) 156 Pac. 299. The district court was about to proceed to a new trial of the case pursuant to the directions of this court, by permitting plaintiff to amend his petition, and such amendment was permissible. Ball v. Rankin, 23 Okl. 801, 101 Pac. 1105. But, if the case should proceed to a new trial as directed by the judgment of this court, and the facts and questions of law presented are, in effect, the same as presented in the former appeal in said case, of course it would then be the duty of the court to render judgment in favor of defendant Miller, as before. St. L. & S. F. R. Co. v. Clark, 42 Okl. 638, 142 Pac. 396; Metropolitan Ry. Co. v. Fonville, 36 Okl. 76, 125 Pac. 1125. But the proceedings thus far taken in a retrial of the case are interlocutory, and, such proceedings being reviewable on appeal after a retrial, mandamus will not lie to review the action of the judge in proceeding to carry out the mandate and judgment of this court. 26 Cyc. 202, states the rule as follows:

> "The rule is almost universal that mandamus will not lie to correct or review interlocutory proceedings, even though no immediate appeal is given; such proceedings being reviewable on appeal or error from final judgment or decree. A very great portion of such proceedings involve judgment and discretion, and could not in any event be corrected by mandamus; and the delay, vexation, and expense attending interference with trial courts in interlocutory matters would be burdensome."

For the reasons stated, the petition for writ of mandamus will be denied. All the Justices concur.

WATTS et al. v. HOUSTON et al.

(No. 8007.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. INFANTS 🔑50 — "NECESSARIES" — ATTORNEY'S FEES—DISAFFIRMANCE.

Attorney's fees on account of services rendered in behalf of the estate of a minor are not "necessaries" under section 886, Rev. Laws 1910, and a claim therefor may be disaffirmed by the minor.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 114, 115, 117-126.

For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

2. INFANTS 🔑49—ATTORNEY'S FEES—RIGHT OF ACTION.

An action at law by an attorney to recover upon quantum meruit for the value of services rendered the estate of a minor, in the absence of a showing of express authorization by the county court prior to the rendition of the services, or a subsequent allowance therefor, cannot be maintained against the minor.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 112, 113.]

Commissioners' Opinion, Division No. 2. Error to County Court, McIntosh County; Jas. W. Robertson, Judge.

Action by Jess W. Watts, Charles G. Watts, and Charles A. Cook against Lucien Houston and others. There was judgment for the defendants, and plaintiffs bring error. Affirmed.

Jess W. Watts, of Wagoner, for plaintiffs in error. C. H. Tully, of Eufaula, for defendants in error.

GALBRAITH, C. This appeal presents one question only, namely: Can an action at law be maintained against a minor by an attorney to recover fees for services rendered the estate of the minor without specific authorization of the probate court prior to the rendition of such services? The trial court answered the question in the negative. The claimants appealed. The testimony taken at the trial is not brought up in the record. The trial court, however, made findings of fact and conclusions of law. The plaintiff moved for judgment upon these findings, and excepted to the denial of such motion. The facts found, briefly stated, are as follows: That the ancestor made a will by which his estate, consisting principally of real estate, was devised to a trustee for the purpose of establishing a charitable institution, and devising to certain of his heirs $1 only and to the defendants in error nothing. The heirs mentioned in the will were dissatisfied with the disposition of the estate, and employed plaintiffs in error, as attorneys at law, to contest the probate of it, agreeing to pay them as a fee for their services three-sevenths of whatever amount might be secured as a result of the contest. The defendants in error, although heirs, were not named in the contest proceeding, and had no part in employing the attorneys to resist the probate of the will. The will was presented for probate by the executor named therein, and the counsel employed by the heirs, in pursuance to the above contract, appeared and resisted the probate. At the hearing the court found that the will was not the last will and testament of the ancestor, and refused probate to the same. The estate was therefore cast to the heirs of the ancestor under the law. Those employing the plaintiffs in error as attorneys paid the agreed compensation out of their respective shares of the estate. The defendants appeared in the probate proceedings and asserted their claim to heirship and their right to participate in the distribution of the estate. Their claim was established, and they received from the estate their portion thereof, amounting to $678.26, but refused to pay the attorney's fee. This action was brought against them for three-sevenths of the amount received by them, which the attorneys claimed would be reasonable compensation for the services rendered by them;

that the minors accepted their part of the estate with the knowledge that it was through the services rendered by the plaintiffs in error that this amount was secured to them. The court found as a fact that the services rendered by the attorneys were not necessary, for the reason that the minors had another attorney employed by the year whose duty it was to attend to all legal matters pertaining to their estate.

The court found as conclusion of law from these facts that the claim for attorney's fees could not be classed as "necessaries" as defined by the statute, and therefore the minors were not bound, and rendered judgment for the defendants in error for costs.

It is not contended by the plaintiff in error that there was any contract with the minors or their guardian, approved by the county court, or that an allowance was made them by that court, but they insist "that they are entitled to recover, independent of any contract, whether express or implied, upon the ground that the law creates an obligation in behalf of reason and justice, but, for the sake of finding a remedy, classifies said obligation as a quasi contract," and "that it appears from the entire findings of the court, construed together, that the services of these plaintiffs were necessarily and essentially rendered for the benefit of said heirs at law, including these minors."

[1] Whatever may be the law in other jurisdictions in regard to the liability of minors in actions at law for attorney's fees on account of services rendered to the estates of minors, the law is settled in this jurisdiction that claims for such services cannot be classified as "necessaries" and may be avoided by the minors.

In Grissom et al. v. Beidleman et al., 35 Okl. 343, 129 Pac. 853, 44 L. R. A. (N. S.) 411, Ann. Cas. 1914D, 599, in an elaborate opinion, the court reviews the authorities on this question in other jurisdictions, and announces its conclusion as follows:

> "We believe that the rule in New Hampshire, followed in Massachusetts and other states, should prevail here; that is, where the services pertain to the defense of the liberty or person of the minor, or the prosecution of action for an injury thereto, that the same should be classed as a 'necessary,' and an action lie against the minor for a reasonable recovery for attorney's fees; but where the legal services are rendered in behalf of the minor in relation to his property, without the intervention of a legal guardian, no recovery for such services should be had in an action at law. As to whether a court of equity or probate court may allow for legal services at the instance of the minor in the administration of the estate or fund or property in such chancery or probate court, without the party having first obtained the approval of the court to render such service, that question is not involved in this case."

And again the court say:

> "When it comes to a question as to which line of authorities we will follow, that which permits the next friend, who is often an irresponsible person, to engage counsel for a minor to prosecute a suit at law in his behalf relative to his land, often occasioning an action at law against such minor, thereby affecting his estate, or that which requires first the approval of the probate court, we feel that we should incline to the old rule, as announced by the Supreme Court of New Hampshire, when it was composed of Chief Justice Parker and Justices Upham, Wilcox, Gilchrist, and Woods, and afterwards reaffirmed by the same court, when Chief Justice Sargent and Justice Doe were members of it."

[2] The proposition is not affected by the fact that the attorneys rendered valuable services to the estate of the minors, and actually increased the same in the amount of almost $700, and that the minors accepted this benefit with full knowledge that this sum had been secured by the efforts of the attorneys, and that in equity and good conscience they ought to pay the attorneys reasonable compensation for such services. The minors were denied capacity to make a contract for the payment for such services on account of their minority. No contract by implication, either express or implied, quasi or otherwise, was created for them by the law. Under the facts found the minors were not bound, and their estate could not be held for the payment for such services, in the absence of express authority given therefor by the county court, prior to the rendition of such services, or by an express allowance therefor after the same were rendered. Donnell v. Dansby, 159 Pac. 317; J. H. Cox Co. v. Fisher, 161 Pac. 171; Lee v. Tonsor, 161 Pac. 804; Marx v. Hefner, 46 Okl. 453, 149 Pac. 207.

Wherefore it appears that the action of the trial court was right, and the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. RY. CO. et al. v. RAY.
(No. 7010.)

(Supreme Court of Oklahoma. Dec. 19, 1916. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE ⟹38, 136(20)—CONDITION OF LAND—PUBLIC TRAVEL — QUESTION FOR JURY.

Where a cause of danger to public travel exists on private land adjoining a public highway, the liability of the owner of the land for the injury from it depends on its dangerous character with reference to public travel, rather than to its exact location. The question whether it endangers public travel is as a general rule one of fact and not of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 54, 321.]

2. APPEAL AND ERROR ⟹1001(1) — NEGLIGENCE ⟹38, 136(25) — OPEN, UNGUARDED PIT — QUESTION FOR JURY — PROXIMATE CAUSE—CONCLUSIVENESS OF FINDINGS.

Where a railroad company leases a part of its right of way that is open and unfenced, adjoining a public street in a city, for the purpose of a grain elevator, and the tenant in erecting the elevator excavates a pit, 15 by 30 feet

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and 6 to 12 feet in depth, and the elevator is destroyed by fire, and the pit is allowed to remain unguarded, and the railroad company makes use of the leased ground adjoining the pit for the purpose of loading and unloading freight from its cars, and the teams and wagons in moving the freight make a plain and distinct roadway leading from the public street over onto the right of way, and near the pit, and while the pit is open and unguarded the railroad company executes a second lease to the tenant for the same purpose as the first, and the plaintiff, a stranger in the city, passing along the public street upon a dark night, is misled by the roadway leading therefrom onto the right of way, and following the same, without fault on his part, falls into the pit and is injured, *held*, that both the railroad company and its tenant were negligent in allowing the pit to remain open and unguarded, and whether or not this negligence was the proximate cause of the injury complained of was a question of fact for the jury, and its finding, being supported by the evidence, is conclusive on this appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Negligence, Cent. Dig. §§ 54, 326-332; Railroads, Cent. Dig. § 1745.]

Commissioners' Opinion, Division No. 2. Error from District Court, Noble County; A. H. Huston, Judge.

Action by John W. Ray against the St. Louis & San Francisco Railway Company and E. J. Miller. Judgment for the plaintiff, and defendants bring error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiff in error Railway Co. P. W. Cress, of Perry, for plaintiff in error Miller. Henry S. Johnston, of Perry, and Horace Speed, of Tulsa, for defendant in error.

GALBRAITH, C. This action was for damages on account of personal injuries received by the defendant in error, John W. Ray, by falling into a pit on the land of the railway company, made by its tenant, Miller. There was a trial to the court and a jury, and a verdict returned for the plaintiff against both of the defendants, upon which judgment was rendered, and from which both the railway company and its tenant appeal.

It appears that: The St. Louis & San Francisco Railway Company built into the city of Perry, after the city was located and established, and that the company building the road acquired as a part of its right of way the property in block 14 of the city, and that at the intersection of Fifth and D streets, the property of the railroad company extended to Fifth street. There was no sidewalk or fence along the east side of Fifth street marking the line between the street and the company's property, and the right of way at that point remained open and unfenced. In 1904 the St. Louis & San Francisco Railroad Company leased a portion of its right of way in block 14 to E. J. Miller for the purpose of erecting a grain elevator thereon. In the construction of the elevator a deep pit was dug on the lots some 30 feet in length by 15 feet in width and varying in depth from 6 to 12 feet, walled with stone, and unevenly paved at the bottom with stone and cement. That in 1908 the elevator erected on this lot was entirely destroyed by fire, and from that time to November 22, 1911, the date of the accident, this pit remained exposed and unguarded. In 1909 Miller's lease expired, and the railroad company executed a new lease for the same purposes and for a term of five years. A switch had been constructed by the railroad company along the side of the elevator, and remained after the elevator was destroyed, and was used by the railroad company and its patrons for receiving and discharging freight. There was a board culvert over the gutter on the north side of D street, where it was intersected by Fifth street, and a plain wagon track passing from the culvert in a northerly direction from Fifth street over to the railroad property and near the switch, circling around to within 6 or 10 feet of this excavation and then led back to the culvert on Fifth and D streets.

John W. Ray, the defendant in error, was a citizen of Guthrie, Okl. One of his daughters resided at Perry on Fifth street, about a block and a half from the Santa Fé Railroad Company's passenger station. On the night of November 22, 1911, Ray, returning from Kansas, stopped at Perry to visit his daughter. He was an old man near 80 years of age. He had two hand grips, and undertook to walk from the station to his daughter's house. He passed up D street until he came to Fifth and turned up Fifth street, passed over the culvert, and, thinking he was proceeding up Fifth street, followed the track made by wagons hauling freight to and from the cars on the switch of the railroad company, and followed the track until it turned from the pit toward Fifth street. There he stopped and set down his grips, and, seeing a light across in a northerly direction, which he thought was an electric light in front of his daughter's house at the corner of Fifth and E streets, advanced toward it, taking three or four steps, fell into this pit, and was injured.

It was the theory of the plaintiff that both the railroad company and its tenant, Miller, were guilty of negligence in permitting this pit or excavation to remain open and unguarded, and that the path or roadway leading from the street to the property was an invitation or lure to the plaintiff, or any other traveler on the street, to pass upon this property, and in so doing they were liable to fall into the pit and be injured, and that such an accident was liable to happen, and ought to have been contemplated by the railroad company and Miller, and that it was negligence not to do so, and such negligence was the proximate cause of his injury. Both the railroad company and Miller denied liability, and maintained that this was private property, and that they had a right to dig the pit thereon and maintain it as they pleased, and that Ray was a trespasser on the property, and that they were in no way liable for his injury. The railroad company as well as Miller interposed a demurrer to the petition, and again demurred to the plaintiff's evidence. These were overruled by the court, and the ruling was assigned as error by each of them.

It seems that the petition stated the necessary elements of actionable negligence against each of the defendants. It charged that Miller made this pit or excavation on this lot, and left it unguarded and exposed, and that the railroad company, by inviting its patrons to use the lot for the purpose of receiving and loading freight into the cars upon its switch thereon, made the roadway from Fifth street over and across the lots, and by reason of this roadway, Ray, as a traveler on the street, mistook it for the street, and in so doing fell into the unguarded pit and was injured, setting out the extent of his injuries in detail. He charged the defendants owed him the duty to have put up a fence or a guard around this excavation, and that they each failed to discharge this duty, and that his injuries proximately resulted therefrom.

The evidence of Ray as to how he happened to be injured is corroborated by other witnesses and supports the allegations of the petition. After testifying that it was late at night and very dark when he left the Santa Fé train at the passenger station, he testified as follows:

> "Q. Now, how did you, how could you locate yourself then as to what you—how you were going? A. The only way was feeling my way in the road with my feet. Q. Feeling your way with your feet? A. With my feet; I was walking, and the only way—I couldn't see the ground. Q. How far did you continue up D street? A. Up to Fifth street. Q. Then what did you do? A. Crossed over on the bridge; I could feel when I crossed the culvert. Q. Could you feel the difference between the dirt— A. And the plank. Q. Wait a minute; could you feel with your feet the difference between the dirt road— A. I could feel the plank. (Objected to as leading. Overruled.) Q. Did you feel with your feet the difference between the dirt road and the bridge? A. Yes, sir. Q. Then after you crossed the bridge over D street and Fifth street, then where did you go? Then what did you do? A. I thought I was going right up Fifth street one block to where Mr. McCormick lived, I had got there within a block of it. Q. Now you started, as you thought, in that direction; what did you do from that time on? A. I went along in the road; went along in the road. Q. How did you know that you were in the road? A. From the way it felt under my feet and there was no weeds. Q. You can tell the jury how you knew that you were in the road. * * * A. I went that way I expect 75 feet or 80 feet perhaps, I thought I was on Fifth street; at that point I saw a light; there was a barn, it might have been before, a hay barn, right ahead of me, but when I came out the other side I could see a light in a house, a candle light or a lamp light or something of that kind, and there is an arc light on the corner of E and Fifth streets, but it didn't burn any; it wasn't alight at all that night. Q. There was no light that night? A. No, sir. Q. You say you saw a light in the house? A. A light in the house. By this time I was getting pretty tired with these grips, and set them down for about a minute, and picked them up again and started, on the left of that a little, because I knew that wasn't my son-in-law's light, and I made three or four or five steps, and I fell right into the pit. Q. You can tell the jury now as to what you did after taking up the grips as to the feeling of the ground with your feet. * * * A. It felt like I was in the road. I felt like I was traveling in the road. I thought I was in Fifth street then."

[1] The rule determining the liability of the landowner and its tenant is well stated by the Supreme Court of Connecticut in Crogan v. Schiele, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88:

> "Where a cause of danger to public travel exists on private land adjoining a public highway, the liability of the owner of the land for an injury from it depends on its dangerous character with reference to public travel, rather than its exact location. The question whether it endangers public travel is, as a general rule, one of fact and not of law."

Again in the course of the opinion the court said:

> "The rule laid down in City of Norwich v. Breed, 30 Conn. 535, was stated after an examination of the Massachusetts case and English cases cited above, was declared upon full consideration, and places the liability upon true grounds, and has been cited in other jurisdictions with approval. An extract * * * from that case will suffice. 'We think that in making the defendant's liability to depend upon the dangerous condition in which the excavation was left by the defendant rather than upon its distance from the street, the judge adopted the true criterion. It is the dangerous character rather than the exact location of the excavation that determines the duty and consequent liability of the defendant in this respect. * * * Whether the excavation could, with a due regard to the rights of passengers on the street, be left unguarded, or could not, depended upon the question whether, being unguarded, it endangered the travel or not; if it did not, no matter how near it was to the line of way; if it did, no matter how far it was removed.' It is plain that there was a duty upon the defendant in reference to the public use of that public way."

In Beck v. Carter, 6 Hun (N. Y.) 607, the rule is announced as follows:

> "To authorize an owner of land adjoining a highway to require travelers lawfully passing along it to keep within the limits of it, as laid out or dedicated, he must indicate, in some proper way, where the boundaries are, and when that is done he is relieved from liability for injuries sustained outside such limits. To hold a traveler, a stranger to the locality, bound to keep within the limits of a lane or alley in the night as well as in the day, and that the owner of adjoining land may dig pits in his land 5 or 6 or 7 feet from one of the margins of the street, and if the traveler falls into it, and is injured, he is without remedy against the owner of the land on which such pit is dug, is so monstrous, so unjust, and so unreasonable that it needs but to be stated to be repudiated."

[2] The facts in the above case disclose that the defendant for a long time had allowed a portion of his lot adjoining a street to be used by the public as a part of the highway; that he made an excavation on his lot about 10 feet from the line of the street, and the plaintiff, while passing over the lot, fell into the excavation and was thereby injured. In Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727, the Supreme Court of Indiana announced the rule as follows:

> "When the public have by permission traveled on foot for years over an open city lot, it is the

duty of the owner, upon making an excavation in the pathway, with a view to erecting a building, to put some guard or warning for public protection, and a failure to do so gives a right of action to one who, without fault, is injured thereby."

In Young v. Harvey, 16 Ind. 314, the defendant dug and left exposed a pit on his uninclosed lot near the street. The plaintiff's horse fell into the pit and was killed. In holding the owner of the lot liable, the court said:

> "If the probability" that such an accident might happen from thus leaving the pit exposed "was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard that community from the danger to which the pit exposed its members, in person and property, he is liable to an action for loss occurring through his neglect to perform that duty."

In Wharton on Negligence, § 349, it is said:

> "Nor am I justified in making excavations either in the path which I have permitted other persons to traverse, or so near a public road that travelers in the ordinary aberrations or casualties of travel may stray or be driven over the line and be injured by falling into the excavations."

From these authorities it is plain that the court did not err in overruling the demurrer to the petition, and for the same reason overruling the demurrer to the plaintiff's evidence was not error, and the denial of a peremptory instruction, also complained of in the assignments of error of the railroad company.

The fifth assignment of error is as to the admission of incompetent, irrelevant, and immaterial evidence on behalf of the plaintiff. It does not appear from the assignments what the evidence was, and we are therefore not able to determine whether the assignment is well taken or not. For the same reason the sixth assignment of error presents no question for review.

Complaint is made by the railroad company to instruction No. 5, which the court gave to the jury. That instruction is as follows:

> "If you find from a preponderance of the evidence that the pit or excavation was permitted to remain by the defendants upon the premises described in such relation to the public street and in such proximity to the excavation that the defendants could reasonably have foreseen that a person traveling on the public street in the exercise of due care himself would be injured, and that the plaintiff, while traveling along the public street in the exercise of due care, was allured by the condition of the premises from the public street and into the pit and sustained the injuries complained of, then your verdict should be for the plaintiff. But before you can so find you must first find that the situation regarding the pit and driveway was one from which it could reasonably have been foreseen by the defendants that the injury might occur to a person traveling carefully on the highway."

Under the authorities heretofore set out it seems that the instruction embraced a full and fair statement of the law applicable to the facts disclosed by the record.

It is also complained by the railroad company that there is no proof that it was the owner of this property. The evidence is that Miller formerly owned the lots, and that he sold them to C. G. Jones, who constructed the railroad into the city of Perry under the name of the Arkansas Valley & Western Railway Company, and that the title to the lots was made to that company. However, the evidence is undisputed that the Frisco Railroad Company leased the property to Miller in 1904, and again renewed the lease in 1909, and that it used the property as a place for loading and unloading freight from its cars, and in so doing made the roadway leading from the street to the property, and which was the lure that led Ray from the street to the pit. There is no dispute in the evidence that the Frisco Company exercised dominion over this property, and its ownership sufficiently appears to establish its responsibility for the condition of the property. The evidence is not disputed that Miller made this excavation on the property, and that it was there open and unprotected when the lease was renewed in 1909, and so remained until the time of the accident, November 22, 1911. Under the authorities both the landlord and tenant, under the circumstances above recited, were liable for the negligence. Taylor on Landlord & Tenant, § 195; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Bueschlng v. St. L. Gas Co., 73 Mo. 219, 39 Am. Rep. 503.

The contention is made on behalf of Miller that he was not a tenant, but a mere licensee; that his dominion over this property was for the special purpose of erecting and maintaining a grain elevator thereon. We fail to see that that makes any difference in his responsibility. In Hanson v. Spokane Valley Land & Water Co., 58 Wash. 6, 107 Pac. 863, the Supreme Court of Washington announces the rule in the seventh paragraph of the syllabus as follows:

> "Where one made a dangerous excavation in a public way over private land, where he knew the public were invited and accustomed to travel, he was liable for injuries to a person who fell into the excavation while using the way, although he was not the owner of the land."

The same court, in Collins v. Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798, in a case where a person obstructed a public highway and went on adjoining lands, which he did not own, and constructed a way around the obstruction and the person taking this way across the private land was injured, and sued the party who made the private way, said:

> "The way itself was, of course, an implied invitation to use it. The mere fact that the appellant was a trespasser as to the owner of the land or that persons traveling over the way were trespassers as to the true owner, did not make such persons trespassers as to the appellant. As between the appellant and persons lawfully upon the highway, the appellant, under the conditions shown, was clearly liable to his invitees as though it owned the land. This proposition is elementary."

We do not consider that it makes any difference in Miller's liability whether he was a tenant or a licensee, that his liability is in no way affected by this fact, and for that reason it was not error in the court to refuse to submit this issue to the jury in the special instruction requested by Miller.

Another assignment made by Miller is misconduct of counsel for the prevailing party in his argument to the jury. Complaint is first made of this in the motion for a new trial, where the alleged misconduct is set out, this motion being supported by affidavit. The record fails to show that objection was made at the time, and an exception saved to the action of the trial court in ruling thereon. In the absence of an affirmative showing in the record that objection was made to the conduct complained of at the time and exception saved to the ruling of the court thereon, no question is brought up for review by this assignment, and for that reason this assignment is not well taken.

A great many authorities from other jurisdictions are cited in the brief of the counsel for the plaintiffs in error, but none of these cases, so far as we have been able to discover, announce the controlling principle in the instant case.

It is contended on behalf of the railroad company that Faurot v. Oklahoma Wholesale Grocery Co., 21 Okl. 104, 95 Pac. 463, 17 L. R. A. (N. S.) 136, announces the controlling principle, and its application relieves the company from liability in this case. We do not so read that decision. The rule announced in that case does not apply to the facts in the instant case. It does, however, seem that the rule announced and applied in St. L. & S. F. R. Co. v. Bell, 159 Pac. 336, L. R. A. 1917A, 543, is applicable and controlling in this case, and establishes the liability of the railroad company as well as its tenant. In the Bell Case running water caused the pit upon the railroad company's right of way near the highway, and the railroad company negligently permitted weeds to grow up around it so as to obstruct the view of the traveler on the highway, and he thereby ran into the pit, while in the instant case Miller, the tenant, made the pit on the right of way, and neither he nor the company did anything to give warning of the danger it invited by reason of its proximity to the public street and the roadway leading therefrom near to it. The railroad company leased this land with the unguarded pit upon it, and continued to use the property in the discharge of its own business, and in so doing made the roadway from the highway, which roadway became the lure that caused the traveler to wander from the highway onto the private property, and to fall into the unguarded pit thereon.

In the instant case the questions were largely questions of fact. These were properly submitted to the jury by the court in its instructions, and the jury found that both the railroad company and Miller were responsible for the maintenance of this pit on this vacant property, and that they were negligent in not inclosing it by a fence or something that would warn travelers and prevent them from falling therein, and that this negligence was the proximate cause of the plaintiff's injuries, and should have been foreseen and guarded against, and for not doing so the liability of each of them was established.

There is evidence in the record to support these findings. We fail to find any prejudicial error in the proceedings, and therefore conclude that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

MILLER et al. v. GRAYSON et al.
(No. 6856.)

(Supreme Court of Oklahoma. May 23, 1916. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. CHAMPERTY AND MAINTENANCE ⟹7(4) — DEEDS—VALIDITY BETWEEN PARTIES.

A conveyance of land made in contravention of the provisions of section 2260, Rev. Laws 1910, by the rightful owner, is utterly void as against the person holding adversely, claiming to be the owner thereof under color of title, but as between the parties and all the rest of the world it is good, and passes the grantor's title.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 65.]

2. CHAMPERTY AND MAINTENANCE ⟹7(5)— CONVEYANCE—GRANTEE'S ACTION AGAINST ADVERSE POSSESSOR.

Where land in the adverse possession of another is conveyed, the grantee may maintain an action in the name of his grantor to recover from the adverse holder.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 57–64.]

3. CHAMPERTY AND MAINTENANCE ⟹7(5) — CONVEYANCE — TITLE — PURCHASE BY ADVERSE POSSESSOR.

Where the holder of the legal title to real estate who is out of possession conveys such title to a third person who is not in possession, in contemplation of law, as between the grantor, grantee, and the person in possession, holding adversely, claiming to be the owner thereof, the title remains in the grantor or original proprietor, and the person in possession has a right to purchase in such title during the pendency of an action commenced against him for possession by this grantor for the benefit of the champertous grantee.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 57–64.]

Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Suit by Daniel Miller and Charlico Emer against N. B. Grayson and J. M. Bound. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. Y. Dilley, of Waurika, for plaintiffs in error. Guy Green, of Waurika, for defendants in error.

KANE, C. J. This is a controversy between two sets of grantees of Daniel Miller and Charlico Emer, each set claiming to deraign their title to the interest of said Miller and Emer in said land through separate lines of conveyances. The first line of conveyances was executed by Miller and Emer to Grayson and Bound, the defendants in error herein. Immediately upon the execution of these conveyances, Grayson and Bound entered into possession of the land and were holding adverse possession thereof at the time the second line of conveyances was executed.

Counsel for plaintiff in error concede in their brief that, under the holdings of this court in a long line of cases construing our champerty statute (section 2260, Rev. Laws Okl. 1910), the second line of conveyances, through which his client claims, is void as against the defendants in adverse possession, and that his client could not, in his own name, commence this action to recover the said land, or to make any other recovery based upon the champertous deeds. For this reason, the present action was commenced by Miller and Emer, "for the use and benefit of F. A. Watkins" (the real party in interest), against the defendants, N. B. Grayson and J. M. Bound. On the other hand, it is conceded by counsel for the defendants in error that, where lands in the adverse possession of another are conveyed, the grantee may maintain an action in the name of his grantor to recover from the adverse holder; but, to avoid the force of the decisions holding to this effect, they call attention to the fact that, shortly after the commencement of this action, the nominal plaintiffs therein, viz. Miller and Emer, executed another conveyance to Grayson and Bound, which it is conceded would be good if not affected by the transactions hereinbefore set out. The court below decided the cause in favor of the defendants, and it is to reverse this action that this proceeding in error was commenced.

[1, 2] In Huston v. Scott, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721, and many other cases in this jurisdiction, it has been held that a conveyance of land made in contravention of the provisions of section 2260, Rev. Laws 1910, by the rightful owner, is utterly void as against the person holding adversely, claiming to be the owner thereof under color of title, but as between the parties and all the rest of the world it is good, and passes the grantor's title. And it also has been held by this court that, where land in the adverse possession of another is conveyed, the grantee may maintain an action in the name of his grantor to recover from the adverse holder. Gannon v. Johnson, 40 Okl. 695, 140 Pac. 430, Ann. Cas. 1915D, 522.

[3] The only unsettled question then, necessary to notice, is whether the last deed made by the original owners of the land, after the commencement of this action, to the parties in possession holding adversely, was effectual to perfect their title and bar the further prosecution of the suit. This question must be answered in the affirmative here, as it was in the court below. Chancellor Kent, in Jackson et al. v. Givens et al., 8 Johns. (N. Y.) 137, 5 Am. Dec. 328, in discussing the general rule, says:

> "The defendants have a right to protect themselves under their title, equally as if they had themselves purchased it in the first instance. Why not? The party in possession may always purchase in an outstanding title; and Atkinson and those under him had a right, by the purchase under Williams, to connect themselves with the patentee. The prohibition from purchasing pretended title was intended for the benefit of the party at the time in possession, and it ought not to be used as a weapon as against such party. This would be defeating the very object and policy of the rule. * * * There is no reason that the rule making the purchaser of a pretended title void should be applied to a purchase set up by the very party in possession at the time. The title so set up cannot be to the prejudice of any person. It is not within the mischief of maintenance."

Other cases to the same effect are Jackson v. Smith, 13 Johns. (N. Y.) 406; Dever v. Hagerty et al., 169 N. Y. 481, 62 N. E. 586; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Everenden v. Beaumont, 7 Mass. 76; Betsey v. Torrance, 34 Miss. 132. So, we take it to be an established rule of law that a party in possession may purchase in all outstanding titles in order to protect his possession. Therefore, unless the fact that the outstanding title, which, in contemplation of law, was in the nominal plaintiffs, as between the champertous grantee and the parties in possession, was purchased after the commencement of this action, forms an exception to the general rule, the authorities hereinbefore cited must govern. Livingston v. Proseus, 2 Hill (N. Y.) 526; Coogler v. Rogers, 25 Fla. 853, 7 South. 391.

Conceding the general rule to be sound, there is no statute, and we know of no principle of law, which would prohibit the party in possession from taking the conveyance of an outstanding title merely because he is defending his possession in a legal proceeding instituted against him for possession for the benefit of a champertous grantee. Adams v. Buford, 36 Ky. 406.

Having reached this conclusion, it is not necessary to note any other assignment of error presented by counsel for plaintiffs in error.

For the reason stated, the judgment of the court below must be affirmed. All the Justices concur.

CUSHING v. WHALEY et al. (No. 6578.)

(Supreme Court of Oklahoma. Jan. 9, 1917. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. INDIANS 🔑15(2) — DEED OF INHERITED LANDS—APPROVAL OF SECRETARY OF INTERIOR—VALIDITY.

Section 22 of the Act of Congress of April 26, 1906 (34 Stat. 137, c. 1876), giving to the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, authority to sell and convey the lands inherited from such decedent, but which also provides that "all conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe," renders void a deed to inherited lands, whether surplus or homestead, allotted during the lifetime of a deceased full-blood Chickasaw, who died prior to the date of the passage of the act, where the heirs, adult full-blood Chickasaws, attempted to convey by deeds dated, respectively, May 8 and June 7, 1907, without obtaining the approval of the Secretary of the Interior to such conveyances.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39.]

2. INDIANS 🔑2, 15(2)—GUARDIANSHIP—AUTHORITY OF CONGRESS—APPROVAL OF CONVEYANCES.

Congress, in the exercise of its constitutional authority, and in pursuance of a long-established governmental policy, has the right to determine for itself when the guardianship, which the government has maintained over full-blood Indians, shall cease. While such guardianship continues, it may by legislation constitutionally impose restrictions on full-blood Indian heirs, requiring that conveyances by them of inherited allotted lands be approved by the Secretary of the Interior: and this notwithstanding the fact that restrictions imposed by prior legislation have expired by limitation, or by the death of the allottee.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 3, 39.]

Hardy, J., dissenting.

Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by Francis J. Cushing against John H. Whaley, Mary E. Whaley, the American Trust Company, and J. A. Wooley, in which Jinsey Carney, Margrette Carney, and Billy Killcrease, Simon Killcrease, and Raymond Killcrease, by their legal guardian, John H. Cox, filed their plea of intervention, as did Johnson Carney, by a separate plea. From the judgment decreeing the title to the lands in controversy to be in the interveners, Jinsey Carney, Margrette Carney, and Billy Killcrease, Simon Killcrease, and Raymond Killcrease, the plaintiff brings error. Pending the appeal, the said Francis J. Cushing died, and said proceedings in error was on July 27, 1915, revived in the name of Ada T. Cushing, administratrix of the estate of Francis J. Cushing, deceased. Affirmed.

Tibbetts & Green, of Guthrie, for plaintiff in error. B. C. King, of Ada, for defendants in error.

SHARP, J. This case involves the title to the northwest quarter of section 27, township 4 north, range 7 east of the Indian Meridian, situate in Pontotoc county and allotted during life to Sampson Carney, a full-blood Chickasaw Indian, who died March 21, 1906. As we understand the record, Jinsey Carney was the surviving wife of Sampson Carney; Margrette Carney the surviving wife of Tom Carney, a son of Sampson; and Harriet Killcrease, née Carney, the daughter of said Sampson. Prior to the filing of the plea of intervention, Harriet Killcrease, née Carney, the daughter, died, leaving, as her sole and only heirs at law, her children, Billy, Simon, and Raymond Killcrease. After the death of Sampson, by deeds dated, respectively, May 8, 1907, and June 7, 1907, his heirs attempted to convey the title inherited by them to one W. C. Kandt. Thereafter conveyances were made by Kandt to the American Trust Company and by the trust company to John H. Whaley, who, joined by his wife, executed the mortgage sought to be foreclosed by the assignee thereof, July 5, 1907.

[1] Like himself, the heirs at law of Sampson Carney were each full-blood Chickasaw Indians. Their deeds to Kandt to the quarter section of land involved were not approved as provided by the act of Congress of April 26, 1906 (34 Stat. at L. 137, c. 1876). The sole question for our consideration is the right of the heirs, who are full-blood Indians, to sell and convey the lands inherited from their deceased ancestor, without having the conveyance approved by the Secretary of the Interior, as provided in section 22 of the Act of April 26, 1906. The exact question was involved, and after full consideration decided, in the case of Brader v. James, 154 Pac. 560, where it was held that section 22 of the Act of Congress of April 26, 1906, giving to the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged, authority to sell and convey the lands inherited from such decedent, but which further provides that "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe," rendered void a deed to inherited lands, whether surplus or homestead, allotted during the lifetime of a deceased full-blood Choctaw, who died prior to the date of the passage of the act, where the heir, an adult full-blood Choctaw, attempted to convey by deed, on August 17, 1907, without obtaining

the approval of the Secretary of the Interior to such conveyance. There, as here, the death of the full-blood allottee occurred prior to the passage of the act of Congress of April 26, 1906; but the conveyance was not made until after the date on which said act became a law. As recognized in the brief of counsel for plaintiff in error, the case is ruled by the decision in Brader v. James, if that opinion is adhered to.

In support of the views by us expressed in the opinion in Brader v. James may be added the following opinions of the Supreme Court of the United States, decided or published since the above opinion was handed down: Williams et al. v. Johnson, 239 U. S. 414, 36 Sup. Ct. 150, 60 L. Ed. 358; Levindale Lead & Zinc Mining Co. et al. v. Coleman, 241 U. S. 432, 36 Sup. Ct. 644, 60 L. Ed. 1080; United States v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192. In the opinion in Brader v. James, attention was called to the fact that the Supreme Court, in Choate et al. v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, expressly recognized a distinction between the right to exemption from taxation, based on a sufficient consideration, and the power of Congress to impose a limitation on alienation. This view of the law finds support in Williams et al. v. Johnson, supra, where, as here, the opinion in Choate v. Trapp was urged as an authority, authorizing a contrary conclusion. In that case it was said:

> "It has often been decided that the Indians are wards of the nation, and that Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation. Marchie Tiger v. Western Invest. Co., supra. Against this ruling, Choate v. Trapp does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an act of Congress containing a provision 'that the land should be nontaxable' for a limited time; and, excluding the application of the Marchie Tiger Case, it was said that exemption from taxation 'and nonalienability were two separate and distinct objects.' And further, 'one conveyed a right and the other imposed a limitation.' The power to do the latter was declared, and it was said: 'The right to remove the restriction (limitation upon alienation) was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant.'"

The opinion fully sustains our former construction of the decision in Choate v. Trapp, and, besides, removes any doubt as to the limitations that should be given that decision.

[2] Congress, in the exercise of its constitutional authority, and while the guardianship relation over full-blood Indians continues, may impose restrictions on full-blood heirs, requiring that conveyances by them of inherited allotted lands be approved by the Secretary of the Interior; and this notwithstanding the restrictions imposed by prior legislation have expired by limitation, or by the death of the allottee. Section 22 of the Act of April 26, 1906, as said in Levindale Lead & Zinc Mining Co. et al. v. Coleman, supra, "evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning." And as said in United States v. Nice, supra:

> "Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one sui juris, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection."

The latter opinion is noteworthy, in that it expressly overrules the former opinion of that court in Re Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, long considered a leading authority upon the power of Congress to deal with the individual Indian.

We think section 22 of the act of April 26, 1906, being for the protection and benefit of full-blood Indian heirs, in making conveyances of inherited allotted lands, should be taken literally, and without any implied exception in favor of those whose ancestors died subsequent to allotment, but prior to the passage of said act. Strained construction should not be given the language used, but, instead, the statute should be construed in the light of the policy it was obviously intended to execute; a policy relating to the welfare of Indians, wards of the general government.

The deeds not having been approved, Kandt took no title, and hence Whaley, through mesne conveyances, acquired no interest in the land, the subject of a mortgage.

The judgment of the trial court is affirmed. All the Justices concur, except HARDY, J., dissenting.

O K BUS & BAGGAGE CO. v. O K TRANSFER & STORAGE CO. (No. 7099.)

(Supreme Court of Oklahoma. Oct. 10, 1916. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. TRADE-MARKS AND TRADE-NAMES ⚿3(1)—PARTICULAR BUSINESS—EXCLUSIVE USE.

One who produces or deals in a particular thing or conducts a particular business may appropriate to his exclusive use as a trade mark or name some symbol or name which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation or part of a designation which relates only to the name, quality, or description of the thing or business, or the place where the thing is produced or the business carried on.

2. **Trade-Marks and Trade-Names** 🔑57 — **Unfair Competition—Confusing Identity of Business.**

All practices between business rivals which tend to engender unfair competition are odious to the law and will be restrained by the courts. No man will be permitted to make use of signs or tokens which serve to confuse the identity of his business with that of another so as to mislead the public and divert business from his competitor to himself.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65.]

3. **Trade-Marks and Trade-Names** 🔑84 — **Unfair Competition—Action to Enjoin—Defenses.**

The existence of business concerns doing business under names of which the letters "O K" constitute a part, which refer to lines of business other than that in which plaintiff is engaged, cannot be urged as a defense to unfair competition engaged in by defendant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 93, 97.]

4. **Trade-Marks and Trade-Names** 🔑92 — **Unfair Competition — Action — Counterclaim.**

In an action to restrain unfair competition, a counterclaim for damages by the defendant that plaintiff has wrongfully used the trade-name of defendant, and asking that plaintiff be restrained from the use thereof and required to pay damages for the infringement of defendant's rights, is proper, and, if the allegations thereof are sustained, defendant is entitled to the relief sought.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103.]

Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by the O K Transfer & Storage Company against the O K Bus & Baggage Company to enjoin alleged unfair competition. Judgment for plaintiff, and defendant brings error. Affirmed.

Blake, Boys & Shear, of Oklahoma City, for plaintiff in error. Warren K. Snyder, of Oklahoma City, for defendant in error.

HARDY, J. The "O K Transfer & Storage Company" instituted this action against the "O K Bus & Baggage Company" to enjoin it from certain alleged unfair competition with plaintiff in the transfer and storage business. The parties will be referred to as they appeared in the trial court. The petition alleges that during its corporate existence plaintiff had been engaged in Oklahoma City in the transfer and storage business, and conducting a business of warehouseman; that it was not engaged in any bus or baggage business; that the defendant, O K Bus & Baggage Company, was using for advertising purposes the name and style of "O K Bus & Baggage Company"; that recently it had engaged in the transfer and storage business in Oklahoma City, and that the advertisements used by them were very similar to the designation, style, and name of advertising plaintiff uses; that plaintiff was located at 336 West First street, and defendant's place of business was 300 West First street; that plaintiff had spent large sums of money in advertising, and its trade-name was extensively used and brought to the knowledge of the public, and plaintiff had acquired a valuable property interest in and to said trade-name, and its use and enjoyment by plaintiff was of great pecuniary value; that the defendant, well knowing the facts and the rights and privileges of plaintiff, secured by the use and adoption of its said trade-name, and with the intent upon the part of the defendant to appropriate to itself the profits, benefits, and advantages thereof, has engaged in a similar line of mercantile business in close proximity to the established place of business of the plaintiff, and is wrongfully and deceitfully and unlawfully using and applying its name and style of business to defendant's transfer and storage business, and by advertising the same concerning defendant's said business, consisting of signs, newspaper, telephone advertising, etc., or such approximations and simulations thereof as are calculated to deceive and do deceive patrons and customers of plaintiff, to a very large extent, and to plaintiff's great injury and damage. The defendant, "O K Bus & Baggage Company," answered admitting its incorporation, and its engagement in the bus and baggage business, and further alleged that the name "O K Bus & Baggage Company" is the name which relates to the description of the business conducted by defendant, and that plaintiff had never used said name for any designation of its origin or ownership, and has no rights in or to such name and no right to appropriate the same to its exclusive use, and no grounds upon which to claim infringement by defendant upon the name, designation, or advertising of plaintiff; and alleged that the name "O K Bus & Baggage Company" does not designate the origin or ownership of said defendant corporation.

After hearing the evidence, the court, being of the opinion that plaintiff had failed to sustain its allegation of money damages, withdrew the case from the jury, and, upon consideration, granted a perpetual injunction restraining defendant from the use of the letters "O K" in connection with its sign or signs, upon its warehouse, its place of business, and other places, and also upon the vehicles used by it in its business, and from its advertising; it being stated in the order that it was not intended to enjoin the defendant from advertising or conducting its business in a lawful manner, but only to enjoin the defendant from the use of the letters "O K" in connection with its business and advertising. Exceptions were duly saved, and defendant appealed.

In its judgment the court found:

> "That plaintiff had sustained by the evidence all the material allegations of its petition with relation to the equitable features and injunction prayed for."

Defendant relies upon section 6741, Revised Laws 1910, which is as follows:

> "One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form, symbol or name which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on."

And counsel contend that the letters "O K" have no relation either to the origin or ownership of the plaintiff's business, and therefore, under the section of the statute above quoted, plaintiff has no exclusive right to the use thereof; that said letters are applied to almost every class of business, and defendant has an equal right to the use thereof.

[1] The general doctrine of law as to trade-marks and symbols or signs which may be used in the prosecution of one's business, and the protection which the courts will afford to those who originally appropriate them, do not appear to be questioned. Every one is at liberty to affix to a product of his own manufacture any symbol or device not previously appropriated, which will distinguish the article from others of the same general nature, and thus to secure the benefits of increased sales which may accrue by reason of any particular excellence he may have given to the article so designated. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the person first appropriating the symbol; and the use thereof often becomes of great value in preventing the sale of a different or inferior article for the original product. It thus becomes his trade-mark, and he is entitled to protection in its exclusive use by the imposition of damages for its wrongful appropriation by another, or by restraining others from applying it to their goods, and requiring them to account for profits made by the sale of goods marked with it. Amoskeag Mfg. Co. v. David Trainer et al., 101 U. S. 51, 25 L. Ed. 993. However, under this rule, one cannot claim protection for the exclusive use of a trade-name which would give him a monopoly in the sale of any goods other than those of his own. Neither can a generic name or a name descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581; Amoskeag Mfg. Co. v. Trainer et al., supra.

The plaintiff's petition seeks protection for plaintiff in its business on the ground that the letters "O K" constitute a trade-name, and that the defendant has been guilty of an infringement thereof; and also upon the ground that defendant has been guilty of unfair competition.

It may be conceded that under the evidence plaintiff is not entitled to the exclusive use of the letters "O K" as a trade-mark within the law of that subject, and that it has no proprietary interest in the use thereof in connection with its business.

There would still remain the question as to whether defendant under the findings of the court should be restrained from continuing that kind of competition which is denominated as unfair and condemned by the courts.

Plaintiff's place of business was located at 336 West First street, while defendant's place of business was in the same block at 300 West First street. The plaintiff upon its building had painted its name in large letters, of which the letters "O K" formed a conspicuous part, and upon its vans and other vehicles had likewise displayed said letters, and had used the same in its advertising upon the curtains of theaters, in newspapers, telephone directories, bills, and stationery. The defendant had used the same letters in connection with its name displayed in similar manner upon its place of business, and in different advertising mediums, and its advertisements were calculated to deceive an ordinarily unsuspecting person. The court found that defendant had simulated and was using a form of advertising closely resembling that of plaintiff, for the purpose of deceiving plaintiff's customers, depriving it of its business and profits, and that said advertising had so deceived customers of plaintiff.

The leading English case (Lee v. Haley, 5 Chancery App. 155) held that the "Guinae Coal Company," which had carried on for some years at Pall Mall a large business and had acquired a considerable reputation, was entitled to enjoin the defendant, who had formerly been their manager and set up a rival business at another place under the name of the "Pall Mall Guinae Coal Company," and afterwards removed to Pall Mall, from the use of its name. In the opinion it is said:

> "I quite agree that they have no property in the name, but the principle upon which cases upon this subject proceed is not that there is any property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name that some other person should assume the same name, or the same name with a slight alteration, in such a use as to induce persons to deal with him under the belief that they are dealing with the person who has given a reputation to the name. * * * That it is a fraud on the part of a defendant to set up a business under such a name as is calculated to lead and does lead other people to suppose that his business is the business of another person."

In Wotherspoon v. Curry, 5 L. R. (5 H. L.) 508, defendant was enjoined from using the word "Glenfield" in connection with a starch manufactured by him; the House of Lords holding that putting the word "Glenfield" upon his labels fraudulently and with the intention of making out that his starch was the starch of plaintiff who had by use acquired the right to the use of the name "Glenfield" on his starch, was a fraud upon the plaintiff; and in Thompson v. Montgomery, L. R. 41 Ch. Div. 35, although it was held that plaintiff was not entitled to register the words "Stone Ale" as a trade-mark, under the act of Parliament in that behalf, yet they had acquired by user the right to the use of the words, and, the conduct of the defendant being in the opinion of the court calculated to deceive the public into supposing that his ales were brewed by plaintiff, he was enjoined from the use of said words.

The rule announced by the Supreme Court of the United States, which has generally been followed in this country, is stated in Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997, as follows:

> "Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief."

And again, in McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828, discussing what facts were necessary to constitute an infringement of a trade-mark, it was said:

> "Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights and to prevent their continued invasion."

In Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, it was said:

> "There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such a manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents; but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

In Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 94, the court enjoined the use of the word "Cellonite" by the defendant, because the similarity of that word to the word "Celluloid" used by plaintiff representing an article manufactured by both was sufficient under the circumstances to mislead the ordinarily unsuspecting purchaser. In the opinion it was said:

> "The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances."

Shaver v. Heller & Merz Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878, is a well-considered case on this subject, supporting the foregoing rule, and reviews the authorities at great length in an able opinion by Sanborn, Judge.

The unfair competition complained of in this case is similarity in its advertising, which, according to the findings of the court, so closely resembled that used by plaintiff as to deceive and mislead plaintiff's customers.

In Knott v. Morgan, 48 Eng. Rep. (Reprint) 610, the Rolls Court granted an injunction restraining the defendant from using upon its omnibus the words "Conveyance Company," or "London Conveyance Company," or any device used by plaintiffs for the purpose of distinguishing their property, and thereby depriving them of the profits of their business by attracting custom on a false representation that carriages really the defendant's belonged to and were under the management of the plaintiffs.

In the case of N. Y. Cab Co. v. Mooney, cited by Browne on Trade-Marks, at page 573, defendants were enjoined from using cabs painted and lettered to create the impression that they belonged to the plaintiff.

In American Brewing Co. v. St. Louis Brewing Co., 47 Mo. App. 14, it was held that:

> "Even where there may be no exclusive right to the use of a word, * * * as a trade-mark, a person who uses signs and devices, containing the word, for the purpose of advertising the sale of goods of his manufacture, will be entitled to protection against the fraudulent imitation of such signs and devices by others for the purpose of representing their goods as those of his manufacture."

In Johnson v. Hitchcock, 3 N. Y. Supp. 680, a real estate auctioneer, who for many years had sold suburban property on the installment plan and had always used in his business and for several years had printed in connection with his advertisements a representation of a flag with stars on the upper and lower borders, was awarded an injunction against the use of a like arrangement of stars upon the representation of a flag used in the advertisement of another real estate auctioneer who sold suburban property on the installment plan.

The case of Weinstock Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, further illustrates this principle. Plaintiffs had adopted the name "Mechanics Store," for their place of business, and in the management and conduct of their business fixed a price upon each and every article, marked the same in plain figures thereon, and sold such articles at the prices so marked, and never deviated therefrom. By extensive advertising throughout the entire Pacific Coast, their method of doing business became widely known, and plaintiffs acquired a wide and honorable reputation. Plaintiffs' place of business was located in a building of peculiar architecture. Defendant erected a building of similar architecture, adjoining that of plaintiffs, and, for the purpose of deceiving customers of such firm, adopted the name "Mechanical Store," and refrained from using any sign about the building to designate the proprietor. The court held that equity could not compel the defendant to designate who was the proprietor of his store, but required him to distinguish his place of business from the other in some way that would be a sufficient indication to the public that his store was a different place of business from that of the other.

Many other authorities could be cited announcing the same rule under similar circumstances, but the foregoing appears to be sufficient to indicate the state of the law on this subject.

[2] The rule may be summed up thus: That all practices between business rivals which tend to engender unfair competition are odious to the law and will be restrained by the courts, for no man will be permitted to make use of signs or tokens which serve to confuse the identity of his business with that of another so as to mislead the public and divert business from his competitor to himself. Where a person intentionally uses signs or advertising or other devices or symbols in imitation of those theretofore adopted by a business rival, for the purpose of deceiving the public and obtaining for himself the benefits properly belonging to his competitor, by reason of adoption of such sign, symbol, or advertising, the use of such imitation will be restrained. Paul on Trade-Marks, § 223; Browne on Trade-Marks, § 43; Lawrence v. Tennessee, supra.

[3] The defendant urges as an additional matter of defense that various other business enterprises were being conducted under names of which the letters "O K" formed a part, and that by reason thereof plaintiff has no right to complain of such use by the defendant. It is obvious, however, that such letters in connection with the other business enterprises were not used in such a way as to interfere with plaintiff's business or to create the impression in the mind of a person dealing with any of such concerns that they were dealing with plaintiff, because the line of business in which they were engaged is wholly unlike that of plaintiff.

Particular reference is made to the "Phillips O K Bus, Baggage & Carriage Company;" but it appears that this concern is not engaged in the transfer and storage business, as is the defendant, and that a working arrangement exists between plaintiff and said "Phillips O K Bus, Baggage & Carriage Company," whereby the transfer and storage business that may come to it will be delivered to plaintiff, and there is therefore no competition between the two.

A similar question was involved in Celluloid Mfg. Co. v. Cellonite Mfg. Co., supra, where Mr. Justice Bradley of the United States Supreme Court delivered the opinion, and said:

> "But it is obvious that such special names, indicating confinement to a particular branch of the trade, are wholly unlike complainant's general name of 'Celluloid Manufacturing Company.' Besides this, it is altogether probable, as we gather from one of the affidavits, that these branch companies are mostly licensees of the complainant, and very properly use the word 'Celluloid' in their names. We think that this defense cannot justly prevail."

The same rule applies in this case under the facts disclosed by the evidence, and defendant cannot urge these matters as a defense herein.

Neither can the question of laches enter into this case, for it appears from the allegations of the petition, and from the evidence, that only within a very recent time had defendant engaged in the transfer and storage business in competition with plaintiff, and that plaintiff promptly brought this action upon learning of the unfair methods of competition indulged in by defendant. Celluloid Mfg. Co. v. Cellonite Mfg. Co., supra.

[4] At the trial defendant offered to prove that plaintiff, through its agents and employés, had represented themselves as being in the service of defendant, and by such unfair means had succeeded in diverting their patronage to the plaintiff. This offer was excluded, and error is urged. Ordinarily, in an action of this kind, a counterclaim on the part of defendant alleging that he is himself the owner of the name, and that plaintiff has wrongfully used it, and asking that plaintiff be restrained from the use thereof and required to pay damages for the infringement of defendant's rights, is proper, and if the allegations thereof are sustained defendant is entitled to the relief sought. G. & H. Mfg. Co. v. Hall, 61 N. Y. 226, 19 Am. Rep. 278. It appears, however, that defendant only offered to prove a single instance of such conduct, and that the attempt of plaintiff's employé was discovered, and that defendant collected the charge for the services performed by the agent of plaintiff. Had the evidence been admitted, there would have been no proof of actual damages, and its exclusion, if error, was harmless.

The judgment is affirmed. All the Justices concur.

HAMILTON v. BLAKENEY. (No. 6517.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. Executors and Administrators 🔑227(1) —Claim Against Estate—Form—Statute.

The claim required to be presented to the administrator or executor of the estate of a decedent under Rev. Laws 1910, §§ 6338, 6339, need not be in any particular form. If it advises the administrator or executor of the nature of the claim, the amount demanded, and shows enough to bar another action for the same demand, it is sufficient.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 811, 812, 842.]

2. Executors and Administrators 🔑227(6) —Claim Against Estate — Action — Variance.

The claim presented to the executor in this case examined, and *held*, that there is no fatal variance between the causes of action sued upon in the petition herein and such claim.

3. Appeal and Error 🔑959(3)—Discretion of Trial Court—Trial Amendment.

The permitting of an amendment to a pleading at any stage of the trial to conform to the proof is within the sound discretion of the trial court, and, in the absence of a showing of an abuse of such discretion, the action of the court will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830.]

4. Appeal and Error 🔑757(3) — Review — Admission of Evidence.

When plaintiff in error complains of the introduction of evidence over his objection, but fails to set out in his brief the evidence admitted of which he complains, in compliance with rule 25 of this court (137 Pac. xi), the action of the court in admitting such evidence is not presented to this court for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092.]

5. Attorney and Client 🔑158—Services—Recovery upon Quantum Meruit.

Where service has been performed under an entire and indivisible contract and the benefits accepted by the employer, but such contract has not been completely performed, the employé may sue upon a quantum meruit, and recover the reasonable value of the services rendered, subject to set-off for damages for breach of the contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 361.]

6. Appeal and Error 🔑889(3)—Amendment to Conform to Evidence—Variance—Fact.

Where evidence not within the issues is introduced without objection, if it be a case where an amendment to the petition ought to be allowed to conform to the facts proved, the pleading may be treated as amended so as to conform to the proof, and the judgment will not be reversed on account of variance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3622.]

7. Trial 🔑141 — Directing Verdict — Evidence.

Evidence being introduced sufficient to prove the case of plaintiff, such evidence being uncontradicted and unimpeached and not inherently improbable, either in itself or taken in connection with the circumstances, the jury are not at liberty to disregard it, and, there being no evidence on behalf of defendant, in conflict therewith or presenting a defense, it is not error for the court to instruct a verdict for the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336.]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Pottawatomie County; Geo. C. Abernethy, Judge.

Action by B. B. Blakeney against B. F. Hamilton, as executor of the will of Samuel Bailey, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

F. H. Reily, of Oklahoma City, and W. S. Pendleton, of Shawnee, for plaintiff in error. J. H. Maxey, Jr., of Muskogee, and Edw. Howell, of Shawnee, for defendant in error.

RUMMONS, C. This action was commenced in the superior court of Pottawatomie county by the defendant in error against the plaintiff in error, to recover upon three causes of action. The parties will be designated in this opinion as they were in the court below. Plaintiff's first and second causes of action sought recovery for attorney's fees under written contracts with Samuel Bailey, now deceased, defendant's testator. The third cause of action set out in the petition of plaintiff sought to recover for attorney's fees, upon a quantum meruit, upon an implied contract between plaintiff and said Samuel Bailey. The first cause of action was dismissed at the trial by plaintiff, and needs no further consideration. The defendant answered each count of the petition, denying generally the allegations of each count and denying that plaintiff ever rendered any services to the said Samuel Bailey, deceased, or to the defendant, or that the defendant ever employed plaintiff, and denies that plaintiff ever tendered his services to the defendant. As to the second cause of action, the defendant says that for the best interests of the estate of said Samuel Bailey, deceased, he caused the lawsuits covered by the contract set up by plaintiff to be dismissed by his duly employed attorneys.

Upon the trial of the cause at the conclusion of the evidence of plaintiff the defendant demurred to the evidence, and moved the court to instruct the jury to return a verdict for defendant. This demurrer and the motion to instruct were overruled by the court, to which ruling the defendant excepted. The defendant rested, without introducing evidence, and the court then instructed the jury to return a verdict in favor of plaintiff for the full amount sued for in the second count of plaintiff's petition, and instructed the jury as to the third count to return a verdict for the plaintiff for such an amount as they found to be reasonable from all the evidence in the case, not exceeding $50. There was a verdict and judgment in favor of the plaintiff for the sum of $750 upon the second count and upon the third count for $25. The defendant, having excepted to the overruling of his motion for new trial, prosecutes this proceeding in error to reverse the judgment of the court below.

[1, 2] Defendant's first assignment of error complains that:

> "The court erred in not sustaining the motion of the defendant, at the close of plaintiff's testimony, to instruct the jury to return a verdict for the defendant, for the reason that the petition did not state facts sufficient to constitute a cause of action against defendant, and the further reason that there is such a material difference between the claim filed with the executor and the petition and causes of action in this case that the plaintiff could not recover."

Under this assignment of error the defendant argues that there is such a material variance between the claim filed by the plaintiff with the defendant, as executor, and the causes of action sued upon by the plaintiff that plaintiff cannot recover upon said causes of action. It was stipulated at the trial that the plaintiff had filed a verified statement as required by law, with the executor, which account was duly presented, filed, and rejected by the administrator, and that this action was commenced within 60 days after presenting said claim.

It will be necessary for the proper consideration of this assignment of error to set out the claim filed with executor by plaintiff, in full. It is as follows:

> "Muskogee, Okl., Oct. 13, 1912.
>
> "Dr. B. F. Hamilton, executor of the Estate of S. F. Bailey, deceased, indebted to B. B. Blakeney:

To attorney's fees in case of Exchange Bank of Wewoka v. Bailey, in Supreme Court	$ 250 00
Bailey v. Exchange Bank et al., district court, Seminole county	500 00
Bert Flesher, Receiver, v. Cutlip et al.	250 00
Bailey v. Tate	50 00
Total	$1050 00

> "State of Oklahoma, Muskogee County—ss.:
>
> "B. B. Blakeney, being first duly sworn, on oath deposes and says that the above and foregoing account is just, true, and correct, and that the items therein charged were furnished under agreement with the said S. F. Bailey and the amounts charged were the amounts agreed by the said Bailey to be paid; that the above and foregoing amount is now due and owing, over and above all offsets and counterclaims, and that no payments have been made thereon.
>
> "B. B. Blakeney.
>
> "Subscribed and sworn to before me this 18th day of December, 1912.
>
> "Hallie Whitaker, Notary Public."

It is claimed on behalf of defendant that this claim is a statement of an open account, and is a claim, upon a quantum meruit, for services rendered, and not upon an express contract, and that therefore, plaintiff having in the second count of his petition declared upon an express contract, such action is a departure from the claim presented to the executor, and cannot be maintained. It is also contended upon behalf of the defendant, inasmuch as plaintiff at the trial, to conform to the proof as to the third count of his petition, amended his petition so as to show that the contract sued upon in said count was entered into by the firm of Blakeney, Maxey & Miley with the said Samuel Bailey, deceased, and that the plaintiff was the assignee of said firm and entitled to recover the amount due on said contract, that the amendment and proof offered thereunder constituted such a departure from the claim presented to the executor that recovery could not be had thereon.

Counsel for defendant rely upon several cases determined by the Supreme Court of California upon this question. We think, however, that an examination of the cases, cited by counsel for defendant, and other authorities upon the same question, discloses that they do not bear out the contentions of defendant in support of his demurrer and motion for an instructed verdict. It is true that in an action against the estate of a decedent, it is necessary for the plaintiff to show that a claim has been properly presented to the administrator or executor of said estate and rejected, and that the recovery must be upon the same causes of action as were set up in the claim. In Ross, Probate Law and Practice, 555, it is said:

> "A creditor cannot come into court and allege and prove another or different contract or cause of action than the one stated in his claim. Of course, not every variance is fatal. The statement of facts in the complaint additional to those set forth in the claim is unobjectionable, when they are merely explanatory of the demand and do not change the cause of action."

In Lichtenberg v. McGlynn, 105 Cal. 45, 38 Pac. 541, the claim presented was as follows:

> "To services rendered by said Wm. Lichtenberg for said deceased, at his special instance, within two years next preceding his death, in and about effecting loans and sales for account of said deceased $15,000.00"

The court says:

> "In order to sustain his claim, it was necessary for the plaintiff to show that he had rendered services for the deceased within two years prior to his death; that these services had been rendered at the special instance of the deceased; that they were of the value of $15,000, or that they were rendered under an agreement, either express or implied, that he should be paid $15,000 for them." Wise v. Outtrim, 139 Iowa, 192, 117 N. W. 264, 130 Am. St. Rep. 301; Belleville Sav. Bank v. Bornman (Ill.) 10 N. E. 552; Hyatt v. Bonham, 19 Ind. App. 256, 49 N. E. 361.

In the Estate of Sulenberger, 72 Cal. 549, 14 Pac. 514, the claim filed was upon a promissory note, the statute of limitations was pleaded against the note, and recovery was sought to be had by the claimant upon another promise tolling the statute of limitations. It was held that the claim should have been upon the other obligation, and not upon the note, and that recovery could not be had, because the claim presented was barred by the statute of limitations. In McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466, the claim was upon a simple money demand. The claim was rejected, and action was brought, and in the complaint it was alleged that the moneys were held and received by deceased in trust for the use and benefit of the plaintiff. It was held that one cannot present a simple money demand, and then maintain an action as the beneficiary of an express trust. In Etchas v. Orena, 127 Cal. 588, 60 Pac. 45, the claim was for services rendered deceased at his request. Upon rejection of the claim recovery was sought to be had upon the ground that services were rendered deceased upon a promise to provide for claimant in decedent's will, which promise has not been performed. It was held that the action was not based upon the claim presented. Section 6339, R. L. 1910, provides:

> "Every claim which is due when presented to the administrator must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth, in the affidavit the reason why it is not made by claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate is insolvent, no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed by law on judgments obtained in the district court."

It is clear that the cases of Estate of Sulenberger, supra, McGrath v. Carroll, supra, and Etchas v. Orena, supra, are distinguishable from the instant case, as in those cases the actions were predicated upon entirely different causes from those shown in the claims presented. Here plaintiff filed his claim for attorney's fees in the several causes, giving their titles in the claim, and supported it by his affidavit reciting that the items therein charged were furnished under agreement with the said decedent and the amounts charged were agreed by said decedent to be paid the plaintiff. Under our statutes the executor might have required vouchers or proofs of the claim presented to be produced; not having done so, he cannot object to the sufficiency of the claim as a foundation for this action, because a copy of the written contract was not attached thereto.

The claim presented to the defendant showed that the plaintiff claimed that the estate of the decedent was liable to him for attorney's fees in the respective cases described in the claim. The claim against an estate required to be filed by our statutes need not be in any particular form. If it advises the administrator or executor of the nature of the claim and the amount demanded and shows enough to bar another action for the same demand, it is sufficient. Upon the rejection of this claim by the executor, without a demand for further information or of exhibits or vouchers or proof of the claim, the plaintiff was entitled to maintain an action for the amount of his claim upon a contract with the decedent, either express or implied. Nor does the third cause of action in plaintiff's petition constitute such a variance from the claim presented for the services upon which said third cause of action was based as to defeat plaintiff's right to recover thereon. The claim showed that it was for attorney's fees in the case of Bailey v. Tate, and plaintiff sought recovery as assignee of the firm, of which he was a member, which rendered the services. We do not think the claim presented differs so much from the cause of action sued on, in the absence of demand for more specific information upon the behalf of the executor, as to constitute a fatal variance. We, therefore, hold that defendant's first assignment of error is not well taken.

[3] Defendant's second assignment of error complains that the court erred in permitting plaintiff to amend the third count of his petition over the objection of the defendant. There is no merit in this assignment of error, for the reason that there is no showing that the cause of action of plaintiff was materially changed, or that defendant was so surprised by the amendment as to be unable to proceed to trial. It is well settled in this jurisdiction that the permitting of amendment at or after the trial to conform to the proof is within the sound discretion of the trial court, and that, in the absence of a showing of any abuse of such discretion, the court's action will not be disturbed. Alcorn v. Dennis, 25 Okl. 135, 105 Pac. 1012; Lewis v. Bandy, 45 Okl. 45, 144 Pac. 624.

[4] The defendant next urges that the court erred in permitting evidence to be introduced in said cause over the objection of the defendant. Defendant fails to comply with rule 25 [137 Pac. xi] of this court, in that he fails to set out in his brief the evidence admitted of which he complains, but it may be said that the record discloses that, omitting from consideration the evidence of plaintiff as to the transactions between plaintiff and decedent, there is sufficient competent evidence to establish the execution of the contracts upon which plaintiff seeks to recover, and therefore the defendant could not be prejudiced by any ruling upon plaintiff's evidence.

[5, 6] Defendant's fourth assignment of error complains of the action of the trial court in instructing the jury to return a verdict for plaintiff in the sum of $750 upon his second cause of action. It is contended in support of this assignment of error by the defendant that the plaintiff pleaded and proved an express contract with the decedent to represent the decedent in two cases described in said contract; that said contract was an entire contract for the trial of said two cases; and, it appearing from the evidence that plaintiff never tried either of the cases, but, on the contrary, that they were dismissed before trial on the order of defendant, that plaintiff was not entitled to recover upon the express contract and could only recover upon a quantum meruit, or for dam-

ages for being prevented performing the entire contract. This assignment urged by the defendant raised the question of what is the measure of damages for the breach of a contract with a lawyer for the trial of a cause where the lawyer is prevented performing the contract in its entirety by a settlement of the cause by his client or by a wrongful discharge by his client. If it were necessary for us to pass upon this question in the determination of this cause, we have no doubt that the weight of authority, as shown by the decided cases, is in favor of the rule that the measure of damages for a breach of a contract of employment of a lawyer is the fee agreed to be paid, and that contracts retaining a lawyer for the conduct of a litigated case are exceptions as to the measure of damages for the breach of entire contracts for the performance of services, because of the peculiar confidential relationship between client and attorney. On the other hand, there are respectable authorities which fix the measure of damages for the breach of such a contract at the reasonable value of the services actually rendered. Still other authorities fix such measure of damages at the fee agreed to be paid, less the value of such services as the attorney would have been required to render, and such expenses as he would have incurred in completing the contract.

However, upon a careful examination of the record, we do not believe that it is incumbent upon us, in order to determine this cause, to decide to which one of the rules as to the measure of damages for the breach of a contract for the employment of a lawyer to try a cause we should adhere. The record shows that witnesses for the plaintiff testified as to what services were performed by the plaintiff in carrying out his contract, without objection or exception, and that, without objection or exception by defendant, one witness was permitted to qualify himself and testify to the value of the services actually rendered by plaintiff, and that he fixed the value of the services so rendered prior to the dismissal of said attorney, in the two cases for which plaintiff seeks to recover upon his second cause of action, at the sum of $750.

If the contract in this case be construed to be entire and indivisible, and the rule of law that no recovery can be had thereon without proof of complete performance be applied, yet, if services have been performed under such contract and the benefits accepted by the client, the attorney will be entitled to sue upon a quantum meruit and recover the reasonable value of the services rendered. Davidson v. Gaskill, 32 Okl. 40, 121 Pac. 649, 38 L. R. A. (N. S.) 692. The evidence shows that the plaintiff performed services of which the decedent received the benefit, and shows the reasonable value of such services. The defendant having failed to object to the introduction of this evidence the petition may be treated as amended in this court to conform thereto. In the case of Carson v. Vance, 35 Okl. 584, 130 Pac. 946, this court says:

> "Where, in an action for his commission on a sale of land, plaintiff declared upon an express contract to pay him five per cent. therefor, and evidence is introduced without objection in effect that such commission is usual and customary, held, that the pleading is presumed to be amended so as to conform to the proof that an instruction, submitting to the jury the question of what is a reasonable commission, is proper, and that, the same having been found to be 5 per cent., will not be disturbed." Love v. Kirkbride Drilling Co., 37 Okl. 804, 129 Pac. 858; Roberts v. Markham et al., 26 Okl. 387, 109 Pac. 127.

[7] This evidence being uncontradicted, the witness not even having been cross-examined upon it, and not inherently improbable, either in itself, or when taken in connection with circumstances, the jury were not at liberty to disregard it, and the court did not err in instructing a verdict for plaintiff upon this unimpeached and uncontradicted evidence. It is held by this court in Meadors v. Johnson, 27 Okl. 544, 112 Pac. 1121:

> "Prima facie evidence of a fact is such evidence as in the judgment of the law is sufficient to establish the fact; and, if not rebutted, remains sufficient for that purpose."

The rule is stated in 14 Enc. Ev. 121, as follows:

> "While the fact that the jury are the sole judges of the credibility of the witness is universally recognized (and they are not bound by the mere swearing of witnesses), it is equally well established that they will not be allowed capriciously to disregard the unimpeached and uncontradicted testimony of witnesses." Newton v. Pope, 1 Cow. (N. Y.) 109; Engmann v. Estate of Immel, 59 Wis. 249, 18 N. W. 182; Lewis v. N. Y. Ry. Co., 50 Misc. Rep. 535, 99 N. Y. Supp. 462; Kelly v. Jackson, 6 Pet. 622, 8 L. Ed. 523.

It is true that the court submitted to the jury the determination of what was the reasonable value of the services sought to be recovered for in the third cause of action, and the jury by its verdict, in face of the uncontradicted evidence on behalf of plaintiff that the value of said services was $50, found such value to be $25, but of this the plaintiff does not, and the defendant cannot, complain. When plaintiff introduces sufficient evidence to prove his case and defendant's evidence does not conflict therewith, or when the evidence of defendant, together with all legitimate inferences in its favor fails to present a defense, the court should direct a verdict for the plaintiff. Homeland Realty Co. v. Robison, 39 Okl. 591, 136 Pac. 585; Cockrell v. Schmitt, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737; Moore v. Leigh-Head Co., 149 Pac. 1129.

The defendant having permitted without objection proof on behalf of the plaintiff that he had performed services under a contract with the decedent, and what the reasonable value of said services was, and the defendant not having offered any evidence to contradict the evidence of the plaintiff or to impeach the witnesses offered on behalf of the plaintiff, the plaintiff was entitled, under the undisputed evidence, to recover the amount found by the jury under the instructions of the court. No prejudicial error was therefore committed by the court in the instruction to the jury complained of in this assignment of error.

The fifth, sixth, and seventh assignments of error urged in the brief of defendant present again the same propositions that have already been discussed in this opinion, and need not be considered at length. It is sufficient to say that no error of the trial court is shown by said assignments.

Finding no prejudicial error in the record, the judgment of the court below should be affirmed.

PER CURIAM. Adopted in whole.

ANDERSON v. ANDERSON et al. (No. 6907.)

(Supreme Court of Oklahoma. May 16, 1916. On Rehearing, May 29, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD 🔑65—NEGLIGENCE—SURCHARGING ACCOUNT.

On a hearing of exceptions to a guardian's final account with each of his two wards, the facts bearing on the first exception were: That the wards were equal owners of a fund of $2,500 in the hands of the guardian which he had loaned to a live stock company. The order authorizing him to do so, among other things, as a condition precedent to his right to make the loan, required the guardian to take back from the borrower a note and mortgage on certain live stock to secure the loan and also a policy of insurance on the stock, containing a clause making the same payable to the guardian as his interest may appear, which he failed to do, and, on account of such failure, the loan was lost. *Held*, that the guardian was negligent, and his accounts were properly surchargeable with the amount of the loan; one-half thereof to each account.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 105.]

2. GUARDIAN AND WARD 🔑65—FINAL SETTLEMENT—LIABILITY—NEGLIGENCE.

A guardian is liable to his ward, on a final settlement, not only for such money and estate as actually came into his hands, but also for such additional money or property, lost by his negligence or failure of duty, as would have been received by him, had he exercised reasonable diligence and ordinary prudence in caring for his ward's estate.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 105.]

3. EXECUTORS AND ADMINISTRATORS 🔑225(1)—GUARDIAN AND WARD 🔑65—FINAL ACCOUNT—LIABILITY FOR NEGLIGENCE—STATUTE OF NONCLAIM.

On a hearing of exceptions to a guardian's final account with each of his two wards, the facts bearing on the second exception were: That S., as guardian of C., pursuant to an order of the probate court of C. county, made, executed, and delivered to M. an oil and gas lease, which was made and duly approved under the supposition that C. was the sole owner of the demised premises, and the cash consideration paid S. was charged to his account as guardian of C. Thereafter, in the probate court of C. county, in the distribution of the estate of which the demised premises was a part, it was determined that L. and N., minors, were entitled to share equally with C. in the estate. Thereupon, A., as guardian of L. and N., pursuant to an order of the probate court of T. county, joined with S. as guardian of C., in the execution of a new lease of the demised premises to M., without exacting from S. one-half the consideration received for the lease, and which S. thereafter, for more than two years, promised but refused to turn over to A., as guardian of L. and N. on demand. Thereafter, S. died, whereupon his successor in office, as guardian of C., was appointed, and M., his wife, appointed his executrix, who thereupon published notice to creditors to file their claims, which A., as guardian, failed to do for half the consideration due from S. to his wards. Further, evidence examined, and *held* that, owing to the mutations of business, one-half of said consideration became so intermingled with the property of S. and his ward as to lose its identity and reduce the right thereto as against the estate of S. to a mere claim, which was barred by statute of nonclaim of four months (Comp. Laws 1909, §§ 5274, 5275), and was lost through the negligence of A., as guardian of L. and N., and, being so lost, was properly surchargeable one-half to his final account with each of said wards.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 789; Guardian and Ward, Cent. Dig. § 105.]

Error to District Court, Tulsa County; L. M. Poe, Judge.

Exceptions by Lucy Anderson, née Brown, and others, to the final separate accounts of William Anderson, guardian of Lucy Brown and Nellie Brown, minors. Exceptions sustained, and the guardian surcharged with certain amounts, and he brings error. Affirmed.

Burke & Harrison, of Sapulpa, and W. T. Hutchings, of Muskogee, for plaintiff in error. N. J. Gubser, of Tulsa, and McDougal, Lytle & Allen, of Sapulpa, for defendants in error.

TURNER, J. [1] On June 24, 1912, in the county court of Tulsa county, William Anderson, plaintiff in error, tendered his resignation as the guardian of Lucy Brown and Nellie Brown, minors. On August 27, 1912, he filed separate final accounts, as the guardian of each ward, which were, on January 13, 1913, excepted to on the same grounds by his successors in office appointed and qualified on September 9, 1912; and the same, coming on to be heard, were consolidated, and on April 17, 1913, sustained. In the meantime, Lucy had married Walter Anderson and died, and the cause was revived in the name of Lee Clinton, her administrator. In sustaining the exceptions, the court surcharged each account with $1,250, or one-half of a fund of $2,500 belonging to both wards, which the guardian had loaned to the Limestone Live Stock Company, and which, the court held, the guardian had lost by negligently taking inadequate security. The court further surcharged each account with $4,043.75, which, the court held, was due and unpaid each ward, and which the guardian had negligently permitted to be lost to the estate by his failure to collect. He excepted to the action of the court in so surcharging his accounts, but, on appeal to the district court, the judgment was affirmed, and he brings the case here. He says the court erred in charging him with the loss of the $2,500 loan. The order authorizing the loan was made May 2, 1910, and, after reciting the necessary facts upon which to base it, reads:

> "The court, being fully advised in the premises, is pleased to authorize and order said William Anderson, guardian of Nellie and Lucy Brown, minors, to enter into a contract for the purpose of making a loan to said Limestone Live Stock Company, upon the following conditions, to wit: Provided that said guardian shall take from said company a note signed by said 12 members of said company or any ten of said company, for the sum of $2,500 to run for a period of one year bearing 8 per cent. interest per annum to be further secured by a mortgage properly describing the live stock and animals hereinbefore alluded to, made payable to said guardian, for the use and benefit of said wards.
>
> "It is further ordered and directed by the court that the owners of said animals shall cause said animals to be insured in some reliable insurance company in such sum as may be advisable to be carried by said insurance company, said insurance policy to contain a mortgage clause payable to said guardian as his interest may appear as additional security for payment of said note."

Construing which, the court held, in the light of the admitted fact that the stock was not insured as required thereby and hence the loan was lost, that the guardian was negligent in making it and should be charged with the full amount thereof. The court was right. By the order the guardian was authorized to make the loan only on certain conditions precedent to his right to make it pertaining to security therefor. One of those conditions required the guardian to take a mortgage on certain stock and that the owners of the stock cause it to be insured; the policy to contain a clause making the same payable to the guardian as his interest may appear "as additional security for the payment of said note," i. e., the note evidencing the loan and secured by the mortgage. Which means that the policy of insurance was required to be issued as ordered before the guardian had the right to part with the wards' money. It will not do to say that because, in prescribing the terms of the loan, the order reads, "it is further authorized and directed by the court" that this policy issue "as additional security," such was not a condition precedent to the right to make it, and hence, as no company would insure the stock, the guardian had a right to disregard this requirement and to make the loan without complying with it. This for the reason that, in so further ordering and directing, the court was dealing with conditions precedent to the right to make the loan, and as one of those conditions prescribed a policy of insurance as collateral to the loan; intending thereby that such collateral be executed and delivered before the guardian parted with the money of the ward. If it were true that no company would issue the policy required by the order, it was the duty of the guardian to so report to the court and secure a modification of the order or refuse to make the loan. Having made the loan in violation of the order, he did so at his peril and lost the loan as a result of his negligence, and therefore must respond to the action of the court in surcharging his accounts for the amount thereof. Guardianship of Cardwell, 55 Cal. 137; In re Estate of Mary Schandoney, 133 Cal. 387, 65 Pac. 877; In re Carver, 118 Cal. 73, 50 Pac. 22.

[2, 3] The next question is: Was the court right in surcharging each of his accounts with the further sum of $4,043.75 for his failure to collect twice that amount, or one-half the amount received by Dr. Soliss, as guardian of Lena Coser, as a bonus on her lease to the Mohawk Oil & Gas Company? There is no dispute as to the facts bearing on this exception. They are that, prior to 1907, Nuttetsa Coser died intestate in what is now Creek county, leaving him surviving a daughter, Lena Coser, at the time supposed to be his only heir at law, leaving also a tract of land in that county. Joseph Bruner qualified as administrator of his estate in the United States Court for the Indian Territory, Western District. In 1907, one Dr. Soliss, as guardian of Lena, pursuant to the order of said court, in which he also qualified, executed an oil and gas lease on the land to Mohawk Oil & Gas Company for a consideration of $16,175, which was duly approved by the Secretary of the Interior, also supposing Lena to be the only heir as stated, and, the presumption is, charged himself therewith as guardian of her estate. After that came on to be passed the order of final distribution of the estate of Nuttetsa when the county court of Creek county found that Lucy Brown and Nellie Brown were grandchildren and also heirs at law of said Nuttetsa, and as such were entitled to one-half of the estate; and it was so ordered. On October 8, 1909, the county court of Tulsa county, on petition of plaintiff in error as guardian of Lucy and Nellie, ordered him to join with Soliss in a new lease to the Mohawk Oil & Gas Company, which he did, and the same was approved, without exacting from either Soliss or the company a consideration therefor, or so much as requesting that he be permitted to share in the bonus theretofore received by Soliss as stated. While still the guardian of Lena, with this bonus of $16,175 in his hands as such, on April 12, 1912, Soliss died having promised but failed to turn over to plaintiff in error, as guardian of Lucy and Nellie, one-half of said bonus on demand, pursuant to the order of the county court of Tulsa county dated September 6, 1910. Shortly thereafter, the county court of Creek county appointed Mary, his wife, executrix of his estate, and Joseph

Bruner, his successor in office as guardian of Lena, and the executrix, after publishing notice to creditors, as required by law, proceeded to administer upon the estate; but at no time has plaintiff in error collected or attempted to collect from her one-half the bonus due his wards, as stated, or filed his claim therefor with her as executrix of the estate of her husband. In holding that the accounts of this guardian were surchargeable with the amount in question, the court, in effect, held that Lucy and Nellie were entitled to one-half of the bonus so collected by Soliss; that the guardian was not only negligent in failing to collect the same from Soliss at the time he joined in the lease, but that he was negligent in failing to collect that amount from Soliss for the two years and a half intervening between that time and the death of Soliss, and was also negligent in failing to present a claim therefor to his executrix, and that by reason of all of which the same was barred by the statute of nonclaim of four months (Comp. Laws 1909, §§ 5274, 5275).

Aside from holding that the claim was barred (of which we shall later speak), the court was right. The general rule is, as stated in Roush et al. v. Griffith et al., 65 W. Va. 752, 65 S. E. 168, that:

> "A guardian is liable to his ward, on a final settlement, not only for such money and estate as actually came into his hands, but also for such additional money or property, lost by his negligence or failure of duty, as would have been received by him, had he exercised reasonable diligence and ordinary prudence in caring for his ward's estate."

Or as stated in State ex rel. v. Brown et al., 73 N. C. 81:

> "A guardian is liable, not only for what he receives, but for all he ought to have received of his ward's estate; and, while infallible judgment is not expected of him in the management of his ward's estate, yet ordinary diligence and the highest degree of good faith is expected and required of him in the execution of his trust."

As the right of Lucy and Nellie to share alike in the bonus money is not questioned, it would seem to require no citation of authority to support the proposition that when they, as owners of one-half of the demised premises, joined with their guardian as parties lessor in the lease to the oil company, they were entitled to one-half the bonus paid Soliss, and that the guardian was negligent when he failed to bring suit to recover the same from Soliss, upon his refusal to turn it over to the guardian on demand, and permitted the same, less perhaps his commission, to be administered by Soliss as guardian into the estate of Lena Coser.

In re Kennedy, 120 Cal. 458, 52 Pac. 820, was an appeal by the executor from an order of court, surcharging his final account with a sum certain. The facts were that the executor had sold, by leave of court, an interest of his decedent in real estate belonging in common to the decedent and certain trustees and allowed the trustees to appropriate the money in payment of certain trust obligations, pursuant to certain stipulations and an order of court, in a suit to settle the trust estate in which he was not a party. On this state of facts, it was held that his account was properly surchargeable with the money he should have received from the sale.

Thus, it would seem, from its inception this was nothing more than a claim of one guardian against another, upon which this guardian might have recovered in a suit at law. But, assuming, as we are asked to do, that one-half of this bonus was a trust fund in the hands of Soliss for the benefit of Lucy and Nellie, and that this guardian had a right to come into a court of equity and have it so declared, we are of opinion that the negligence of this guardian, in failing to take the proper steps to reduce it to possession and the mutations of business whereby the fund became so intermingled with the property of Soliss and his ward as to destroy its identity, reduced it to a mere claim against the estate of Soliss which should have been presented by this guardian to the executrix of Soliss within the time prescribed by the statute. We say that, owing to the mutations of business, this fund lost its identity, and hence the right to one-half the bonus money was reduced to a mere claim against the estate of Soliss for the reason that the same has become absorbed in the property of Soliss and that of Lena Coser, as stated, and hence cannot be traced and identified as the property of Soliss in the hands of his executrix. When such is the case, and it is only shown generally, as here, that the estate of Soliss was solvent, without any attempt to show of what it consisted or what of it passed into the hands of his executrix, or that such as passed was a part of the trust fund sought to be traced, much less that any part of that fund entered into it, we repeat the right to payment is reduced to a mere claim against the estate, subject to the bar of the statute.

In Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141, the facts were that one Griffith was appointed guardian of Augusta Dean, a minor. Thereafter, the plaintiffs were also appointed her guardians. Before they were appointed, Griffith, as guardian, had come into possession of $2,500, derived from the lawful sale of certain real estate which he had previously, pursuant to the order of the probate court which appointed him, invested in the estate of his ward. He never thereafter invested said sum or any part of it for her benefit; nor did he keep the same separate and apart from his private funds, or any account thereof or of the income or expenses therefrom between himself and his ward, but mixed the same with his private funds and used it in his general business expenditures and investments, and never thereafter separated the same so it could be distinguished from his own private property.

Later he died, without rendering any account as guardian, but left a last will and testament in which he attempted to dispose of all his individual property, regardless of any supposed interest his ward might have therein. Thereafter his executor took possession of all the money and other property of which testator died possessed and was engaged in administering upon the estate of testator, regardless of any claim of the minor. Among the assets which came into his hands was the sum of $200. The estate of Griffith was insolvent, and so were the sureties upon his official bond as guardian, and unable to respond from the trust fund so received and held by him. Whether any of his real and personal property was acquired before he came into possession of the trust fund did not appear. Neither did it appear whether any of it was purchased by him with the trust fund or any part of it; and when defendant, his executor, refused to account to the plaintiffs as guardians of Augusta Dean, suit was brought for the purpose of subjecting the entire assets in the hands of defendant to the trust in question, and to pay over the full amount of the trust fund in the hands of his executor to satisfy the claim of the guardians. No claim was ever presented to defendant by plaintiffs as provided by the statute then in force, which is similar to our statute of nonclaim, supra. Plaintiffs prevailed. Whether or not they should have done so turned on the question here involved. In reversing the case and holding that the demand was a mere claim against the estate and was barred by the statute of nonclaim, the court said:

> "Where a trustee, in violation of his trust, invests the trust property or its proceeds in any other property, the cestui que trust may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him for the breach of the trust. The former he can do, however, only when he can follow and identify the property, either in its original or substituted form, as we have already seen. If this cannot be done, the right of the cestui que trust to elect is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee; and such seems to be the condition of the cestui que trust in the present case. When thus forced to rely upon the personal liability of the trustee, a cestui que trust occupies a position towards the estate of the trustee which is no better, but is identical with that of a simple contract creditor. He has no special lien upon the general estate of the trustee which is superior to that of any other creditor; for the specific property covered by the trust is gone, and nothing is left to the cestui que trust except a naked claim for damages generally, on account of the breach, to be obtained through an action at law, attended by all the incidents of a like action on behalf of one who is not the beneficiary of a trust. * *
>
> "Our conclusion is that the plaintiffs, upon the facts as disclosed by the record, had only a claim against the estate of Griffith, upon which they could have recovered had the same been presented to the defendant as required by the act concerning the settlement of the estates of deceased persons, but that they are not entitled to the relief which they obtained in the court below."

And on rehearing:

> "The defendant cannot be charged and held to account as a trustee, except upon the averment that he has come into the possession of the trust fund or its substitute. If, at the time of his death, the defendant's testator was in the possession of the trust fund, or other property into which he may have converted it, and such fund, or other property had come into the possession of the defendant, he would have held it upon the same terms as his testator held it, and the relation of trustee to the ward of the plaintiffs would have been added to that of executor by virtue of his successorship. Such fund or other property would have constituted no part of the testator's assets, and the defendant would not have held it in his capacity as executor, but in his capacity as succeeding trustee to the plaintiffs' ward, and might have been compelled to account as such. But such is not the case. Neither the trust fund, nor any substitute for it, which can be identified as such, has come into the hands of the defendant. On the contrary, the trust estate is gone, or, which amounts to the same thing, its identity is entirely lost; for it is not shown to be in the hands of the defendant in its primary condition, or that it was converted by the defendant's testator into the property or any part of it now in the defendant's possession as executor. Hence the defendant does not stand in the relation of trustee to the ward of the plaintiffs, beyond the obligations imposed by his office as executor, and she has no remedy against him, except such as belongs to a general creditor of the estate. Trecothick v. Austin, 4 Mason, 29, Fed. Cas. No. 14,164; Johnson v. Ames, 11 Pick. 181."

And in the syllabus it is said:

> "A trust assumed by a testator will not be enforced against his executor when the identity of the trust fund is entirely lost, and it is neither shown to be in the hands of the executor in its primary condition, nor that it was converted by his testator into the property or any part of it in the executor's possession."

In Roach v. Caraffa, 85 Cal. 436, 25 Pac. 22, in the syllabus it is said:

> "If a trust fund in the mutations of business has become so mingled with and absorbed into the property belonging to the trustee as to be no longer capable of being traced or identified, the only remedy of the cestui que trust upon the death of the trustee is that of a creditor, and, if he fails to present his claim as required by probate law, he must fail in his action; but if the trust property can still be earmarked, traced, and identified, the cestui que trust may maintain an action against the administrator to enforce the trust, without presenting any claim against the estate of the trustee, since the cestui que trust in such case seeks his own property only, and not to enforce a claim against the estate and property of the decedent."

In Byrne v. McGrath, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127, in the syllabus it is said:

> "Where a trust fund held by a deceased person is susceptible of identification, the trust may be enforced without the presentation of a claim against the estate; and it is only where the trust fund cannot be identified that the presentation of a claim against the estate, within the time limited by law, is essential."

We are therefore of opinion that the accounts of this guardian were properly surchargeable with one-half of this bonus of $16,175, that is, one-fourth thereof to the account of Lucy and a like amount to the account of Nellie; and that the judgment of the trial court should be affirmed, that is, if the court was right in holding that the bar of the statute of nonclaim fell at the expiration of four months from the date of the first publication by the executrix of Soliss of notice to creditors to file their claims. This sends us to the statute. Stripped to the point, Comp. Laws 1909 reads:

> "Sec. 5274. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, * * * a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them * * * to the executor or administrator, at the place of his residence or business, to be specified in the notice. * * *
>
> "Sec. 5275. The time expressed in the notice must be six months after its first publication, when the estate exceeds in value the sum of five thousand dollars, and four months when it does not."

These sections were sections 1309 and 1310 of the Statutes of 1893. The former was amended by act approved March 17, 1910 (Sess. Laws 1910, c. 65), and, as amended, was construed with section 1310, unrepealed by that act, in Soliss v. Gen. Elec. Co., 213 Fed. 204, 129 C. C. A. 548, and held to mean that:

> "The time for the presentation of claims against estates of a value in excess of $5,000 remained six months from the date of the notice."

From which we learn that the time for so doing is four months where the estate does not exceed that value. As there is no evidence of its value or claim that the estate of Soliss exceeded that amount and hence the six months' period applied, the court did right in holding as he did, and this, too, although claimants are infants, as the statute in question contains no exemption in favor of such. Morgan et al. v. Hamlet et al., 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043.

Some complaint is made of interest surcharged on certain items in these settlements; but, since counsel fail to make clear what alleged error of law they would have us decide, we decline to speculate.

Finding no merit in the remaining assignments of error, the judgment of the trial court is affirmed. All the Justices concur.

On Rehearing.

TURNER, J. It is urged that there is no evidence reasonably tending to prove that this fund was lost, and hence the court erred in holding that it was. While this does not appear in their assignments of error, counsel for plaintiff in error urge it as though it did, and in their briefs on rehearing again seek to go into that question. They contend that the modern rule is, not as stated in the opinion, but as stated in Lowe v. Jones, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551, that:

> "It is now held that, if the proceeds of trust property can be traced into a particular fund, the trust may be established and enforced as a charge upon the fund."

And that (quoting, they say, from Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141):

> "So long as the fund is greater than the amount of the trust fund, it will, in the absence of any showing to the contrary, be presumed to be held in trust."

And, taking this as the rule, they seek to show us that the one-half of the lease money collected by Soliss, belonging to Lucy and Nellie Brown, can be traced into the assets of his estate or into the fund in the hands of Joseph Bruner, as guardian of Lena Coser, and hence, they say, said fund is not lost; and hence, not being lost, plaintiff in error, as guardian for Lucy and Nellie, cannot be surchargeable therewith. Assuming the correctness of the rule contended for, and still assuming that fund to be a trust fund and that the point is properly before us, we repeat, the fund has been lost in the mutations of business, and that, from the record, it is impossible to tell whether it passed into the hands of the executrix of Soliss and into the assets of his estate, or into the hands of the guardian of Lena Coser as a part of the assets of her estate, or whether it has become absorbed in the estate of both. It cannot be successfully maintained that it can be traced into the estate of Soliss for the reason the record discloses the only evidence on this point to be that, while his estate was solvent, there is no evidence of its value and no claim that it exceeded $5,000. And, besides, no claim that the fund in controversy passed into the assets thereof was made in the trial court. Neither can it be successfully maintained that this fund can be traced into the hands of the guardian of Lena Coser as a part of her estate so as to make it a charge upon that fund. This for the reason the record discloses the only evidence upon that point to be that her estate at the death of Soliss was solvent with "several thousand dollars loaned out at interest," which, together with $4,500 cash on hand, was more than the amount of this fund. As the record fails to disclose, and there was no attempt to prove, that the fund in controversy was traceable into the assets of said estate, we adhere to the opinion that said fund cannot be made a charge upon it.

It follows that the modern doctrine contended for, in effect, that the confusion of trust property wrongfully converted does not destroy the equity entirely, but that, when the funds are traced into the assets of the unfaithful trustee, or one who has knowledge of the character of the funds, they become a charge upon the entire assets with which they are mingled, has no application to the facts in this case.

It is further contended that, on the undisputed facts, plaintiff in error was not a "creditor" with a "claim arising upon a contract" against the estate of Soliss within the contemplation of Rev. Laws 1910, § 6338, which provides:

> "If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever. * * *"

And section 6336, which provides:

> "Every executor or administrator must, immediately after his appointment, give notice to the creditors of the decedent, requiring all persons having claims against said estate to present the same. * * *"

And that the court erred in holding that he was and that the so-called claim was lost and barred because not presented within the four months required by said statute. Not so. When Soliss received the share of this lease money belonging to Lucy and Nellie, inasmuch as he, in equity and good conscience, had no right to retain it, a promise to pay it to plaintiff in error as guardian of Lucy and Nellie arose by implication sufficient to establish between them the relation of debtor and creditor; that is, Soliss was their debtor and they creditors of his estate, after his death, with a claim against it arising upon said implied contract. And, as this contract was sufficient to support an action in the nature of assumpsit for money had and received against him while living, the money thus due them constituted a claim arising upon contract against his estate after his death. Allsman et al. v. Oklahoma City, 21 Okl. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184, was such an action to recover the unearned portion of a license fee to sell intoxicating liquors which had been revoked on the erection of the state. It was urged that, as assumpsit at common law would not lie except upon a parol or simple contract, plaintiff was not entitled to recover, which we said was true; but, applying the modern rule which we declared to be that, whenever one had the money of another, which he, in equity and good conscience, had no right to retain, the law would imply a promise to pay it over to the person rightfully entitled to it, we held that plaintiff was entitled to recover. In that case we cited Lawson's Ex. v. Lawson, 16 Grat. (Va.) 230, 80 Am. Dec. 702, which was the same kind of an action; the money sought to be recovered being the property of plaintiff's testator in the hands of his wife which he had left with her for safe-keeping only, a short time before his death. In a suit by his executor against her to recover it, the court said that, if it be conceded that upon her refusal to deliver the money to plaintiff on demand trover might be maintained as for a tort, it by no means followed that assumpsit would not lie for the reason that the party aggrieved might waive the tort and sue in assumpsit, which would lie "whenever any one has the money of another which he has no right to retain, but which, ex æquo et bono, he should pay over to that other," and that "the law will imply a promise to pay the amount to the plaintiff" if necessary to support the action.

It follows that Lucy and Nellie were creditors of the Soliss estate with a claim against it, to the amount of said fund, arising upon contract which, not being presented within the time prescribed by law, was lost, owing to the negligence of plaintiff in error and the fall of the bar of the statute, and hence he was properly surchargeable with the amount thereof. All the Justices concur.

FROAGE et al. v. WEBB. (No. 8000.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS 🔑180(2) — DEMURRER—BAR OF LIMITATIONS.

The first paragraph of the syllabus in Fox v. Ziehme et al., 30 Okl. 673, 120 Pac. 285, adopted herein.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 671.]

2. LIMITATION OF ACTIONS 🔑180(4), 199(1, 3) — PLEADING — DEMURRER TO EVIDENCE — QUESTION FOR JURY.

In an action for damages for breach of an oral contract, where it appears from the face of the petition that the cause of action accrued more than three years prior to the day of commencing the action, and it is not alleged in the petition or established by the testimony that there was "an acknowledgment of an existing liability," in writing, "signed by the parties to be charged," within the three-year statutory period of limitation, *held* (1) that it was error to overrule the demurrer to the petition; (2) to overrule the demurrer to the evidence; and (3) that the question of whether the action was barred was a question of law for the court, and not a question of fact for the jury.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 673, 727, 729.]

Commissioners' Opinion, Division No. 2. Error from County Court, Ellis County; S. A. Miller, Judge.

Action by Harvey W. Webb against Harry Froage and Carl Meyers. There was judgment for the plaintiff, and the defendants bring error. Reversed.

C. B. Leedy, of Arnett, for plaintiffs in error. Frank B. Grant, of Gage, for defendant in error.

GALBRAITH, C. The controlling question presented upon this appeal is whether or not the cause of action sued upon was barred by the statute of limitations at the time of the commencement of the action. The question was raised, first, by demurrer to the petition, second, by answer, and, third, by demurrer to the evidence, and as often as raised was denied by the court, and finally submitted to the jury for decision. The action was based upon a claim for damages, charged to have arisen from the breach of an oral contract. It is charged in the petition that on May 1, 1909, Webb entered into an oral agreement with Froage and Meyers by which they undertook to "put down a good and sufficient well" upon his land, and also agreed "to furnish the casing and all other things necessary to make it a good and sufficient well," and that Webb agreed to pay them 80 cents per foot when the well was finally completed; that they entered upon the performance of this contract, and sunk a well 257 feet, and equipped it with casing and pump, and represented that it was completed according to contract. It is further charged:

> "That this plaintiff paid to these defendants the sum of $205.60 upon the completion of said purported well, and afterwards notified these defendants that they must complete said purported well, and make it a well, as they agreed to do, and these defendants agreed so to do, but utterly failed to fulfill the promises thus made, and after trying for a long time to induce these said defendants to furnish him a well, as they had agreed to do, this plaintiff was compelled to hire, in May, 1914, one Caufmann to complete said well, and to pay the further sum of $80 therefor."

It is further charged that, by failure of the defendants to perform their contract, Webb was forced to complete the well, and in so doing incurred an expense in the sum of $299.35, for which amount judgment was prayed. After the demurrer to the petition had been overruled, and in response to a motion to make more definite and certain, an amendment was filed, setting out that the well was completed on the 19th day of May, 1910, and was accepted and paid for by Webb on the 21st day of May, 1910. Webb testified that when he accepted the well on the 21st day of May, 1910, and paid for it, it was apparently satisfactory, and so continued for 30 days after that time, when it failed to furnish necessary water, and that he then notified the defendants of this fact, and requested that they complete the well and make it satisfactory, as they had agreed to do, and that they promised orally to do so, and repeatedly made such promises between that day and August, 1914, when he arranged with Caufmann to complete the well.

It thus appears from the face of the pleadings, as well as from the testimony, that his cause of action for breach of contract arose 30 days after the 21st day of May, 1910, when Webb discovered that the well had not been completed according to contract. This suit was not commenced until November 5, 1914, 4 years, 4 months, and 14 days after the time the cause of action accrued. Section 4657, Rev. L. 1910, reads in part as follows:

> "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: First. Within five years: An action upon any contract, agreement or promise in writing. Second. Within three years: An action upon a contract, express or implied, not in writing; an action upon a liability created by statute, other than a forfeiture or penalty."

It appears, both from the allegations of the petition and the testimony of the plaintiff, that the cause of action was barred at the time the suit was commenced, unless something was done by the defendants that would toll the running of the statute. Nothing is alleged in the petition that would have this effect, and the only thing, in the testimony, relied upon to have this effect, is the repeated oral promises to complete the well. At most, these oral promises would amount to an acknowledgment, by the defendants, of an existing liability under the contract. It is not alleged in the petition, nor is it claimed in the testimony, that these promises, or any one of them, were in writing and signed by the defendants, or either of them. Under section 4663, Rev. L. 1910, "an acknowledgment of an existing liability" on an obligation, in order to prevent the running of the statute of limitations, must be "in writing, signed by the party to be charged thereby."

[1] In Fox v. Ziehme et al., 30 Okl. 673, 120 Pac. 285, the rule is announced in the first paragraph of the syllabus as follows:

> "Where the petition shows on its face that the cause of action set out therein is barred by limitation, a demurrer urged specially on that ground should be sustained, and the overruling of which is error."

See, also, Skillern v. Pearcy, 36 Okl. 299, 128 Pac. 239.

[2] It thus appears that the cause of action arose more than three years prior to the date of the filing of suit, and that there was no acknowledgment in writing of "an existing liability" by the defendants, within three years, so as to toll the statute, and that the action was barred. It was therefore error in the court to overrule the demurrer to the petition, as well as that to the evidence, and it was likewise error to submit the question of whether or not the cause of action was barred by the statute of limitations to the jury, inasmuch as that was not a question of fact for the jury, but was one of law for the court.

On account of these errors, the exceptions should be sustained, and judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

(175 Cal. 813)

BANK OF CALIFORNIA, NATIONAL ASS'N, v. RICHARDSON, State Treasurer. (S. F. 8381.)

(Supreme Court of California. June 18, 1917.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Bank of California, National Association, against Friend William Richardson, as State Treasurer. From the judgment rendered, plaintiff appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. U. S. Webb and Raymond Benjamin, both of San Francisco, for respondent.

PER CURIAM. It is stipulated in this case that all of the questions involved in the appeal are identical with those involved and passed upon by this court in the case of Bank of California v. Roberts, as Treasurer, reported in 173 Cal., commencing at page 398, 160 Pac. 225. On the authority of that case the judgment must be affirmed.

The judgment is affirmed.

(34 Cal. App. 65)

JACKSON v. BROWN. (Civ. 1996.)

(District Court of Appeal, First District, California. June 7, 1917.)

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by B. M. Jackson against D. C. Brown. Judgment for defendant, and plaintiff appeals. Affirmed.

B. M. Jackson, of San Francisco, in pro. per. E. S. Bell, of Napa, J. J. Bullock, of Redwood City, and Michael Brown, of San Mateo, for respondent.

KERRIGAN, J. This is an action brought to recover a balance of an attorney's fee alleged to be due for services rendered by plaintiff to the defendant. The complaint contained several counts. At the trial it was contended by the defendant that, while he had paid part of the fee for which he was being sued, such payment was made as an accommodation to his attorney, who was not entitled to his fee, nor to any part of it, until the judgment in a certain action should be recovered and the amount thereof collected. After practically all the evidence was in, it was suggested that the further trial of the cause be postponed, in order to give the defendant an opportunity to introduce evidence to the effect that a written contract had been entered into by the parties, providing that the plaintiff's fee here sought to be recovered was to be contingent upon a certain event which had not yet happened, whereupon the plaintiff, in order to conclude the matter, proposed that the case be submitted on that portion of his complaint which alleged a cause of action upon an account stated, and that he waive the remaining counts of his complaint. This was agreed to and the cause submitted.

With the trial court we think that the evidence does not sustain the view that there was an account stated. Early in January, 1916, the plaintiff wrote to the defendant a letter, claiming that there was a certain balance due him on account of his fee in a suit conducted by him for the defendant, entitled Brown v. Lee et al. The defendant in a prompt reply neither expressly nor tacitly admitted the indebtedness and in fact turned the matter of the claim over to an attorney for attention and adjustment. This correspondence, and another letter written on behalf of the defendant, together with several conversations, telephonic and otherwise, between the parties, clearly show that the negotiation fell far short of constituting an account stated.

The judgment is affirmed.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

COX v. BRISBOIS. (No. 9171.)

(Supreme Court of Colorado. July 2, 1917.)

En Banc. Error to District Court, City and County of Denver; H. P. Burke, Judge.

Action between Victor M. Cox and Lizzie Brisbois. Judgment for Brisbois, and Cox brings error. Judgment affirmed, and application for supersedeas denied.

Bert Martin, of Denver, for plaintiff in error. John T. Bottom, of Denver, for defendant in error.

PER CURIAM. Upon a careful examination of the record and briefs of counsel, we are convinced that no prejudicial error was committed in this case, for which reason the application for supersedeas will be denied, and the judgment affirmed.

Supersedeas denied; judgment affirmed.

WHITE, C. J., and GARRIGUES, J., not participating.

DE LAN v. AMERICAN SECURITY & TRUST CO. (No. 8559.)

(Supreme Court of Colorado. Feb. 5, 1917. Rehearing Denied May 7, 1917.)

En Banc. Error to District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by S. J. De Lan against the American Security & Trust Company, executor of Thomas F. Walsh, deceased. Judgment for defendant, and plaintiff brings error. Affirmed.

John T. Bottom and Wm. H. Gabbert, both of Denver, for plaintiff in error. Thomas, Nye & Malburn, of Denver, for defendant in error.

ALLEN, J. This is an action for the recovery of a commission as a broker for the sale of mining property. The second amended complaint counts upon an express contract of employment and services rendered thereunder.

There was no evidence in the case tending to establish an express contract; there was not sufficient evidence to establish even an implied contract of employment. There was not sufficient evidence in the case upon which a verdict for the plaintiff could reasonably be based. We think the learned judge before whom the cause was tried in directing a verdict for the defendant was right.

The judgment is affirmed.

Affirmed.

LOPRESTO v. PEOPLE. (No. 9190.)

(Supreme Court of Colorado. June 4, 1917.)

Department 1. Error to District Court, Las Animas County; A. Watson McHendrie, Judge.

Antonio Lopresto was convicted of an offense, and he brings error. Supersedeas denied, and judgment affirmed.

Earl Cooley, of Trinidad, for plaintiff in error. Leslie E. Hubbard, Atty. Gen., and Clara Ruth Mozzer, Asst. Atty. Gen., for the People.

PER CURIAM. Finding no error in the record, the supersedeas is denied, and the judgment affirmed.

WALTERS et al. v. WEST et al.
(No. 9224.)

(Supreme Court of Colorado. July 2, 1917.)

En Banc. Error to District Court, Pueblo County; James L. Cooper, Judge.

Action by Lulu Walters and others against John T. West and others. Judgment for defendants, and plaintiffs bring error, and apply for supersedeas. Supersedeas denied; judgment affirmed.

Adams & Gast, of Pueblo, for plaintiffs in error. John A. Martin, City Atty., Charles M. Rose, Hartman & Ballreich, M. J. Galligan, and J. T. McCorkle, all of Pueblo, for defendants in error. John H. Voorhees, of Pueblo, amicus curiæ.

PER CURIAM. Upon a careful examination of the record and briefs of counsel, eliminating the reasons of the trial court therefor, which we shall not pass upon, we are convinced that no prejudicial error was committed in the rendition of the final judgment dissolving the temporary injunction and dismissing the action, for which reason the application for supersedeas will be denied, and the judgment affirmed.

Supersedeas denied; judgment affirmed.

WHITE, C. J., and SCOTT, J., not participating.

TRACY v. SPERRY. (No. 9111.)

(Supreme Court of Colorado. July 2, 1917.)

En Banc. Error to District Court, El Paso County; W. S. Morris, Judge.

Action between Cora Tracy and Fred A. Sperry. Judgment for the latter, and the former brings error. Judgment affirmed, and supersedeas denied.

W. N. Ruby and W. D. Lombard, both of Colorado Springs, for plaintiff in error. S. H. Kinsley, of Colorado Springs, for defendant in error.

PER CURIAM. Upon a careful examination of the record and briefs of counsel, we are convinced that no prejudicial error was committed in this case, for which reason the application for supersedeas will be denied, and the judgment affirmed.

Supersedeas denied, and judgment affirmed.

WHITE, C. J., and GARRIGUES, J., not participating.

PRICER et al. v. McDONALD. (No. 9143.)

(Supreme Court of Colorado. May 7, 1917.)

Department 1. Error to District Court, City and County of Denver; A. Watson McHendrie, Judge.

Suit between D. E. McDonald and R. T. Pricer and Bernis M. Pricer. To review the judgment, the Pricers bring error. Application for supersedeas denied, and judgment affirmed.

Walter I. Lyon and Bert Martin, both of Denver, for plaintiffs in error. Morris & Grant, of Denver, for defendant in error.

PER CURIAM. Upon examination of the record, we fail to discover any substantial error, and therefore deny the application for a supersedeas, and affirm the judgment.

(13 Okl. Cr. 736)

AKINS v. STATE. (No. A-2588.)

(Criminal Court of Appeals of Oklahoma. June 9, 1917.)

Appeal from County Court, Woodward County; Clyde H. Wyand, Judge.

George Akins was convicted of petty larceny, and appeals. Affirmed.

W. A. Briggs, of Woodward, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, George Akins, and T. F. Akins and Everett Brenneman, were jointly informed against and tried upon an information charging the larceny of 20 chickens, of the value of $10, the property of A. J. R. Smith. At the trial the court sustained a motion to advise the jury to acquit the defendants T. F. Akins and Everett Brenneman, and so instructed the jury. The jury by their verdict found the plaintiff in error guilty, and fixed his punishment at confinement in the county jail for a period of 10 days and a fine of $10. From the judgment rendered upon the verdict, an appeal by case-made was perfected.

From a careful consideration of the record we reach the conclusion that there was before the jury sufficient evidence to warrant the verdict rendered, and, finding no error, the judgment of the lower court is affirmed.

Ex parte GORDON and ten other cases. (Nos. A-2591—A-2601.)

(Criminal Court of Appeals of Oklahoma. July 11, 1917.)

Separate applications by C. E. Gordon, Morgan Offord, D. R. Gallagher, George Wagner, W. Wilson, George Burtch, Edward Hall, J. Reichensperger, John McDonald, W. C. McLean, and C. Yager for writs of habeas corpus. Writs granted and petitioners discharged.

J. J. Carney, of Oklahoma City, for petitioners. B. D. Shear, Municipal Counselor, and Charles Selby, Asst. Co. Atty., both of Oklahoma City, for respondent.

PER CURIAM. On behalf of the above-named petitioners, duly verified petitions for writs of habeas corpus, as filed in the office of the clerk of this court, were presented to the Presiding Judge on December 14, 1915, and writs were issued and made returnable before the court at 2 o'clock p. m. on said day. The petitions, duly verified by the petitioners, are the same; each petitioner alleging that he is illegally restrained of his liberty by the officers of the city of Oklahoma City and by M. C. Binion, sheriff of Oklahoma county, upon the judgment and sentence of the municipal court of said city, entered on the 3d day of December, 1915, and averring facts showing that his conviction and imprisonment was without due process of law, and praying that a writ of habeas corpus issue, that his said imprisonment may be inquired into, and that he may be restored to his liberty and discharged from further custody.

In response to the writs, the official to whom they were directed produced the petitioners in open court, and filed his answer and return under oath to each of the writs issued and served upon him as follows:

> "Return and Answer to the Writ.
>
> "Comes now M. C. Binion, sheriff of Oklahoma county, Oklahoma, and in answer to the writ issued by Hon. Thomas H. Doyle, Presiding Judge of the Criminal Court of Appeals of the state of Oklahoma, commanding him, as sheriff of Oklahoma county, to produce the body of ——— before this court at the hour of 2 o'clock p. m. on this 14th day of December, 1915, and to then and there show cause, if any, for his detention of the said named ———, now in his custody, shows to this honorable court that said ——— was heretofore, in the municipal court of Oklahoma City, Oklahoma, duly informed against and charged therein with being a vagrant under the ordinances of the city of Oklahoma City, and was, in said court and cause, heretofore duly tried and convicted and found guilty of being a vagrant under the said ordinances of said Oklahoma City, and was, by the judge of said court, in said cause, fined in the sum of $99 and adjudged to serve 90 days in the city jail of Oklahoma City therefor; that thereafter, and on, to wit, the ——— day of December, 1915, by agreement with the commissioners of said Oklahoma City and the board of county commissioners of Oklahoma county, Oklahoma, under the provisions of law authorizing the two said boards to so agree, was delivered by the said city authorities to the county commissioners of Oklahoma county, and to the undersigned sheriff of said county, for the purpose of working upon the roads of said Oklahoma county, Oklahoma, and said named ——— is now held by the undersigned sheriff of Oklahoma county, Oklahoma, in pursuance of and by virtue of said agreement between said city commissioners and the board of county commissioners of Oklahoma county, Oklahoma, for the purpose of public road work upon the public highways of Oklahoma county, in execution and satisfaction of said fine and jail sentence, so imposed by the said municipal court of Oklahoma City; and that said period of jail sentence and fine are yet in force and existence, and the same unsatisfied, and said named party is held for the purpose of paying the same by service upon the public highways of said Oklahoma county.
>
> "Wherefore the undersigned prays that the said prayer of the said petitioner for a writ of habeas corpus may in all things and respects be denied, and for such other relief as may be proper under the facts and the law."

The testimony of the petitioners as witnesses in their own behalf established or tended to establish the following facts: That on the 3d day of December, 1915, they, with others, were arrested without warrants by police officers of Oklahoma City, and were that day taken before the police judge of said city without any written charge, complaint, or information; that their only knowledge of what they were accused of was the statement made by the police judge to the effect that they were each separately charged with being guilty of vagrancy; that each entered a plea of not guilty to said charge; that they were each without counsel, and the said police judge did not inform them, or any of them, of their right to have counsel before being arraigned, nor did he ask them if they desired the aid of counsel; that, when they asked to be heard in their own behalf, he told them to hold up their right hands and be sworn; that after they were sworn he asked their names, and why and for what purposes they were in Oklahoma City; that, without permitting them to be heard further than to answer questions asked by said judge, he pronounced each and all of the petitioners and 11 other prisoners present and separately charged with vagrancy as being guilty as charged, and sentenced each person so charged to be confined at hard labor on the roads of Oklahoma county for the term of 90 days and to pay a fine of $99, and in default of the payment of said fine to be further so confined at hard labor until said fine was satisfied according to law.

It further appears as an undisputed fact that the police officers that testified in the 20 or more separate cases that were heard at that time, including the cases against the petitioner, were only sworn as witnesses when the first case was called, and the fact that the petitioners had arrived at Oklahoma City that day on their way to the oil fields was not disputed. Upon the conclusion of the arguments the decision of the court was announced by the Presiding Judge, who delivered an oral opinion finding that the petitioners were unlawfully restrained of their liberty by the respondent, and that they were entitled to a discharge from the imprisonment of which they complained.

Thereupon writs were allowed, and the petitioners discharged.

(13 Okl. Cr. 736)

AUSTIN et al. v. CITY OF ENID.
(No. A-2760.)

(Criminal Court of Appeals of Oklahoma.
July 2, 1917.)

Appeal from County Court, Garfield County; E. L. Swigert, Judge.

Action between W. F. Austin and another and the City of Enid. Judgment for the latter, and the former bring error. Appeal dismissed.

H. J. Sturgis, of Enid, for plaintiffs in error.

PER CURIAM. The plaintiffs in error filed in this court on June 13, 1916, a petition in error with case-made, whereby they appeal from the judgment of the county court of Garfield county, dismissing their appeals from the police court of the city of Enid to said county court. When the case was called for final submission, the plaintiffs in error, by their counsel, moved that said appeal be dismissed.

It is so ordered.

(14 Okl. Cr. 677)

WILLIAMS v. STATE. (No. A-2617.)

(Criminal Court of Appeals of Oklahoma.
Aug. 27, 1917.)

Appeal from County Court, Seminole County; A. S. Norvell, Judge.

Willie Williams was convicted on a charge of carrying concealed weapons, and appeals. Affirmed.

G. A. Outcelt and Robert Rowlans, both of Tecumseh, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for defendant in error.

PER CURIAM. The plaintiff in error, Willie Williams, was convicted in the county court of Seminole county on a charge of carrying concealed weapons, and his punishment fixed at a fine of $25. A careful examination of the record discloses no prejudicial error.

The judgment of the trial court is therefore affirmed.

(13 Okl. Cr. 735)

YOWELL v. STATE. (No. A-2354.)

(Criminal Court of Appeals of Oklahoma.
June 2, 1917.)

Appeal from Superior Court, Oklahoma County; E. D. Oldfield, Judge.

James Yowell was convicted of assault and battery, and appeals. Affirmed.

C. H. Garnett, of Oklahoma City, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, James Yowell, was tried in the superior court of Oklahoma county on a charge of assault with intent to kill, and convicted of assault and battery, and his punishment fixed at a fine of $100 and costs.

A careful examination of the record and briefs discloses the fact that the plaintiff in error had a fair and impartial trial, and escaped with exceedingly light punishment. No prejudicial error is found.

The judgment is affirmed. Mandate ordered forthwith.

STEVENSON v. STATE. (No. A-2652.)

(Criminal Court of Appeals of Oklahoma. Sept. 23, 1916.)

Appeal from County Court, Garvin County; W. R. Wallace, Judge.

J. S. Stevenson was convicted of a violation of the prohibitory law, and he appeals. Affirmed.

H. M. Carr, of Pauls Valley, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. On information charging that he did have in his possession intoxicating liquors with intent to sell the same, the plaintiff in error J. S. Stevenson was tried and convicted in the county court of Garvin county, and his punishment assessed at confinement in the county jail for 30 days and a fine of $100. From the judgment rendered on the verdict, he appealed, by filing in this court on February 19, 1916, a petition in error with case-made.

No brief has been filed. When the case was called on the assignment for final submission, no appearance was made on behalf of the plaintiff in error, whereupon the Attorney General moved that the judgment be affirmed for failure to prosecute the appeal. A careful examination of the record discloses that the assignments of error are without merit.

The judgment herein is therefore affirmed.

(14 Okl. Cr. 677)

STATE v. RUSSELL. (No. A-2753.)

(Criminal Court of Appeals of Oklahoma. Aug. 4, 1917.)

Appeal from County Court, Craig County; E. M. Probasco, Judge.

Fred Russell was charged with crime, and from adverse judgment the State appeals. Appeal dismissed.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The Attorney General has filed a motion to dismiss this case, upon the ground that the state has not sufficient evidence upon which to base the charge, or sustain a conviction, should the case be further prosecuted. The county attorney of Craig county, from which this appeal was taken, joins the Attorney General in asking that this case be dismissed.

This prosecution having been abandoned, it is therefore ordered by the court that the same be dismissed.

CHICAGO, R. I. & P. RY. CO. v. GRAY et al.

(No. 7826.)

(Supreme Court of Oklahoma. Oct. 17, 1916. Rehearing Denied May 22, 1917.)

(Syllabus by the Court.)

1. CARRIERS 🔑218(10)—LIVE STOCK—NOTICE OF LOSS—VALIDITY OF PROVISION.

Where an action is brought to recover damages upon an interstate shipment of live stock under a written contract containing the provision that, as a condition precedent to recovery of damages for any loss or injury to or detention of live stock or delay in transportation thereof, a written notice must be given of such damage to a designated representative of the carrier within a day after delivery of the stock at its destination, such provision being reasonable and valid, the failure to give such notice is a complete bar to such action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674–696, 947.]

2. CARRIERS 🔑218(10,11)—CARRIAGE OF LIVE STOCK—NOTICE OF LOSS—COMPLIANCE WITH PROVISION—WAIVER.

The provision of said contract requiring notice is a condition precedent to the maintenance of an action, and must be substantially complied with by the shipper before he can maintain a cause of action against the carrier, and the carrier cannot waive the terms of the contract nor ignore those terms applicable to the conduct of the shipper, nor can the shipper hold the carrier to a different responsibility from that fixed by the contract; for a different view would antagonize the policy of the act and open the door to the very abuses which the act was aimed to prevent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674–696, 947, 948.]

Commissioners' Opinion, Division, No. 3. Error from County Court, Kingfisher County; R. F. Shutler, Judge.

Action by L. M. Gray and another against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

K. W. Shartel, of Oklahoma City, C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, and F. L. Boynton, of Kingfisher, for plaintiff in error. W. L. Moore, of Enid, for defendants in error.

HOOKER, C. The defendants in error commenced this action on the 13th day of January, 1914, against the plaintiff in error to recover the sum of $195 damages alleged to have been suffered by them on account of the delay in the shipment of some mules from Dover, Okl., to North Ft. Worth, Tex.; and it is alleged in the bill of particulars filed in this action that on the 10th day of January, 1913, for a reasonable compensation paid to the plaintiff in error, the plaintiff in error agreed to transport from Dover, Okl., to North Ft. Worth, Tex., and there deliver to the defendants in error within a reasonable time after the receipt thereof 26 head of mules, and that 36 hours was then and is now the usual and ordinary time required for the transportation of mules as contemplated by this contract; that the plaintiff in error failed to transport said mules within that time, but, upon the contrary, unreasonably and negligently delayed the delivery of said mules until the 14th day of January, 1913, more than 72 hours after the time when said mules should have been delivered at said destination in the usual and customary course of transportation as aforesaid, and on account thereof defendants in error were damaged as alleged in the petition. It is asserted by the plaintiff in error that the defendants in error are not entitled to recover here, because the shipment in question was made in accordance with a live stock contract entered into between the company and them on the day of shipment, by the terms of which it was provided as follows:

> "That as a condition precedent to claiming or recovering damages for any loss or injury to or detention of live stock, or delay in transportation thereof, covered by this contract, the second party, as soon as he discovers such loss or injury, shall promptly give notice thereof in writing to some general officer, claim agent, or station agent of the first party, or to the agent at destination or to some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, as the case may be, and before such stock is mingled with other stock; and such written notice shall in any event be served within one day after delivery of the stock at its destination, in order that such claim may be fully and fairly investigated. It is agreed that a failure to strictly comply with all the foregoing provisions shall be a bar to the recovery of any and all such claims."

And it is further asserted that under section 15 of said contract:

> "That no suit or action against the first party for the recovery of any claim by virtue of this contract shall be sustainable in this court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall occur; and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

[1] It is admitted by the defendants in error that the only notice given by them to the plaintiff in error was mailed to the general claim agent of the company about the 24th day of January, 1913. The shipment arrived at North Ft. Worth, Tex., on January 14, 1913. This was an interstate shipment, and the rights of the parties under the contract must be construed with reference to the laws applicable thereto. It is the contention of the plaintiff in error that on account of the failure of the defendants in error to give the notice provided by this contract this suit cannot be maintained, while the defendants in error assert that on account of the company refusing to pay this claim when presented upon grounds other than the failure of the defendants in error to file the same within the time given by the contract this constitutes a waiver of the pro-

visions of the contract, and that the company was not now entitled to rely thereon, so as to avoid liability accruing to the defendants in error by virtue of the acts complained of. This contract involved here was made under and pursuant to the Carmack Amendment to the Hepburn Act (Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [Comp. St. 1916, §§ 8604a, 8604aa]), and this contract has been held by this court, and by the United States Supreme Court, to be supported by a valuable consideration, and the provisions thereof reasonable and binding upon the parties.

This court, in St. L. & S. F. R. R. Co. v. Wynn, 153 Pac. 1156, said:

> "This action being based upon a contract of interstate shipment, section 9, art. 23, of the Constitution, which provides, 'Any provision of any contract or agreement express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void.' is without force, being abrogated under the Carmack Amendment of June 29, 1906 (34 Stat. 593, c. 3591, § 7, pars. 11 and 12 [U. S. Comp. Stat. 1913, § 8592]).
>
> "In St. Louis & S. F. R. Co. v. Zickafoose, 39 Okl. 302, 135 Pac. 406, it is held: 'Under the federal law, which is controlling upon the court in determining questions of liability properly arising out of interstate shipments, a provision in a live stock contract or bill of lading to the effect that, as a condition precedent to a recovery for any damages for delay, loss, or injury to live stock covered by the contract, the shipper will give notice in writing of the claim therefor to some general officer, or the nearest station agent, or to the agent at destination, or some general officer of the delivering line, before said stock is removed from the point of shipment or the place of destination, and before such stock is mingled with other stock, such notice to be served within one day after the delivery of such stock at destination, was valid. St. Louis & S. F. R. Co. v. Ladd, 33 Okl. 160, 124 Pac. 461.'"

Likewise this court, in C., R. I. & P. R. Co. v. Craig, 157 Pac. 87, said:

> "(1) Where an action is brought to recover damages upon an interstate shipment of live stock, under a written contract containing the provision that as a condition precedent to recovery of damages for any loss or injury to, or detention of live stock or delay in transportation thereof, a written notice must be given of such damage to a designated representative of the carrier, within one day after the delivery of the stock at its destination, such provision being reasonable and valid, the failure to give such notice is a complete bar to such action."

And in the body of the opinion in this case it is held:

> "That the notice required by section 7 of the contract, hereinafter quoted, is a condition precedent to the maintenance of this action is not an open question, having been repeatedly decided by this court and the Supreme Court of the United States, that the same is reasonable and valid when applied to interstate shipments."

See authorities cited at page 88 of this opinion. For further authorities see M., K. & T. Ry. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; K. C. S. Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

All the aforementioned authorities uniformly hold that the Carmack Amendment supersedes all state laws, and that interstate shipments be construed and controlled by the federal statutes and the construction placed upon those statutes by the federal courts, and that state statutes and provisions of the Constitution of the states are not applicable to interstate shipments or to contracts governing them.

[2] It is admitted here by the defendants in error that this provision of this contract is valid and enforceable, but it is asserted that the company may waive its provision, and by reason of its own act place itself in a position so that it cannot rely upon the provision of the contract as a bar to a right of recovery on behalf of the defendants in error against it. And it is claimed that the company here has waived the provision of this contract with reference to the filing of its claim for damages by receiving the claim, investigating its merits, and refusing to allow the same for other reasons than that of the claim not being filed within the time specified in the contract.

We are aware that this court has held in several cases that the provisions of this contract may be waived, but yet, since the rendition of the decisions of this court holding that the same may be waived, the Supreme Court of the United States has held adversely thereto, and, this being a construction of a contract for an interstate shipment, we must construe the same with reference to the federal statute and the constructions placed thereon by the federal court.

The Supreme Court of the United States, through Mr. Justice Hughes, in the case of G., F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, said:

> "There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility, * * * and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation, which, as defined in the federal act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable: and when it inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery,' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier, and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms; * * * and if the clause must be deemed to

cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier, which, in the contemplation of the parties, was to make the delivery. The clause gave abundant opportunity for presenting claims, and we regard it as both applicable and valid.

"In this view it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but, as the state court said: 'If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' * * * It is urged, however, that the carrier, in making the misdelivery, converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. * * *"

Likewise in the Supreme Court of the United States, in the case of Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, it is said:

"It is argued, however, that under the Conformity Act [Rev. St. U. S. § 914 (U. S. Comp. St. 1916, § 1537)] the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, and not after. Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232 [8 Sup. Ct. 82, 31 L. Ed. 128]), whether complaint is filed with the commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which in this as in so many other instances must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the commission and the varying periods of limitation of the different states where a suit was brought in a court of competent jurisdiction, or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier."

We are therefore of the opinion that it was not within the power or authority of the railroad company to waive the provisions of the contract which required notice of this claim to be presented to it within the time specified therein, and in view of the fact that the contract itself provides that a failure of the defendants in error to comply therewith shall be a bar to their right of recovery herein.

This action was not instituted until the expiration of one year from the date of the delivery of the mules in question at North Ft. Worth, Tex., and therefore the provision of section 15 of the contract which provides the time within which actions of this character might be instituted was not complied with.

We are therefore of the opinion that the defendants in error were not entitled to maintain this cause of action by reason of the failure to give notice as provided in section 7 of the contract, and that the contractual limitation relied upon by the plaintiff in error here as set forth in section 15 of the contract is a complete bar to the right of recovery in this case.

The judgment of the lower court is therefore reversed.

PER CURIAM. Adopted in whole.

CLEVELAND et al. v. LAMPKIN et al.

(No. 7446.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ⚿754(3)—ASSIGNMENTS OF ERROR—OVERRULING OF MOTION FOR NEW TRIAL—REVIEW.

Where the plaintiff in error fails to assign as error the overruling of his motion for a new trial, the Supreme Court has no power to review errors alleged to have occurred during the progress of the trial.

Commissioners' Opinion, Division No. 3. Error from District Court, Kiowa County; James R. Tolbert, Judge.

Action between A. S. Cleveland and Wm. D. Cleveland, Jr., copartners doing business under the firm name and style of Wm. D. Cleveland & Sons, against W. E. Lampkin and the Home State Bank. Judgment for the latter, and the former bring error. Cause dismissed.

Morse, Standeven & Willingham, of Oklahoma City, for plaintiffs in error. Zink & Cline, of Hobart, for defendants in error.

BLEAKMORE, C. Motion is presented to dismiss this proceeding on the ground that plaintiffs in error have failed to assign as error the overruling of their motion for new trial. The only errors assigned here are those alleged to have occurred during the progress of the trial relative to the giving of instructions and the exclusion of certain evidence. The established rule in this jurisdiction is that:

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"Where the plaintiff in error fails to assign as error the overruling of his motion for a new trial, the Supreme Court has no power to review errors alleged to have occurred during the progress of the trial." O'Neil et al. v. James, 40 Okl. 661, 140 Pac. 141.

The motion is sustained, and the cause dismissed.

PER CURIAM. Adopted in whole.

McBRIDE v. FOOTE. (No. 6757.)

(Supreme Court of Oklahoma. May 8, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑185(3)—AUTHORITY OF TRIAL COURT—OBJECTION FIRST RAISED ON APPEAL.

Where an action is tried before a special judge, both parties announcing ready for trial, and no question is raised in the trial court as to his authority to hear and determine the case, or as to the regularity of his selection, such questions cannot be raised for the first time in this court on appeal.

Appeal from County Court, Harper County; R. H. Nichols, Special Judge.

Action by A. S. McBride against A. E. Foote. Judgment for defendant, and plaintiff appeals. Affirmed.

Dickson & Dickson, of Beaver, and Gray & McVay, of Oklahoma City, for plaintiff in error. Dick & McKenzie, of Buffalo, for defendant in error.

OWEN, J. This was an action by plaintiff in error against defendant in error. Verdict for defendant, and plaintiff appeals. The cause appears to have been tried before R. H. Nichols, special judge. The petition in error contains 19 assignments. In the brief filed by counsel for plaintiff in error only one question is presented for the consideration of this court. Following an abstract of the record counsel say:

"From the foregoing abstract it would appear that but one question is here presented for consideration, and that is for this court to take judicial notice of who was the lawful county judge of Harper county at the time this cause was tried, and, it not appearing that Hon. R. H. Nichols, before whom same purports to have been tried, was other than a private person, or that he was selected to act as judge, or that he possessed any of the qualifications to act as such prescribed by law, the judgment should be reversed, and the cause remanded for new trial."

This objection is made for the first time in this court. No such objection was made in the lower court. On the contrary, the record (C. M. P. 22) recites:

"The plaintiff appeared in person and by attorneys, and the defendant appeared in person and by attorneys; both parties announced ready for trial, and the jury is drawn and impaneled," etc.

Objection to the authority of a special or substituted judge may be waived by the act or omission of a party. The objection should be made at or before the trial, and cannot be made for the first time in this court. Such objections, not having been made at the trial, are deemed to have been waived. The Constitution of this state (article 7, §§ 12, 197, William's Ann.) provides for a special judge. The statute (section 5813, Rev. Laws 1910) provides the parties to an action may agree on a special judge to try the case. In the 19 assignments of error no mention is made of any lack of qualification of the special judge or irregularity in his selection. Under the great weight of authority, when Constitution and laws recognize a judge pro tempore, and no objections are made at the time of the trial to the authority of such special judge, the objections cannot be made for the first time upon appeal. Kelly v. Roetzel, 165 Pac. 1150, not yet officially reported; 23 Cyc. 616; 15 R. C. L. 516, § 6; Tillman v. State, 58 Fla. 113, 50 South. 675, 138 Am. St. Rep. 100, 19 Ann. Cas. 91; Higby v. Ayres, 14 Kan. 331; Mo. Pac. Ry. Co. v. Preston, 63 Kan. 819, 66 Pac. 1050; 11 Enc. Pl. & Pr. 793.

In the case of Kelly v. Roetzel, 165 Pac. 1150, not yet officially reported, this court, in an opinion by Mr. Justice Hardy, passed on a similar question, expressly overruling the case of Apple v. Ellis, 150 Pac. 1057, and later decisions following that case, relied upon by plaintiff in error. In that case Justice Hardy said:

"Litigants should not be permitted to try a case without objection before a special judge, taking chances upon the outcome of the trial with the intention of availing themselves of the benefits incident to a favorable result and at the same time be accorded the right to question the validity of such proceedings should an adverse verdict be rendered."

Adhering to the rule as announced in Kelly v. Roetzel, the judgment of the trial court is affirmed. All the Justices concur.

WHITAKER v. CHESTNUT. (No. 7640.)

(Supreme Court of Oklahoma. May 8, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑529(2)—PETITION IN ERROR—ORDER OF COURT REVIEW.

"Order of the court on a motion to vacate a judgment is not a part of the record proper and cannot be reviewed by this court on petition in error and transcript."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2392, 2393.]

Commissioners' Opinion, Division No. 1. Error from District Court, Mayes County; Preston S. Davis, Judge.

Action by W. J. Whitaker against H. M. Chestnut. Judgment by default, defendant's motion on his special appearance to vacate and set aside the judgment sustained, and plaintiff files petition in error and transcript. Appeal dismissed.

J. Howard Langley, of Pryor, for plaintiff in error. T. C. Wilson and Irwin Donovan, both of Muskogee, for defendant in error.

STEWART, C. The plaintiff, W. J. Whitaker, obtained a judgment against the defendant, H. M. Chestnut, in the district court of Mayes county by default. Afterwards, by special appearance, the defendant moved the court to vacate and set aside the judgment, which motion was by the court sustained. The plaintiff attempts to appeal to this court by petition in error and transcript.

In Orr v. Fulton, 153 Pac. 149, it is said:

> "A motion to vacate a judgment copied into a transcript constitutes no part of the record, and presents no question for review by the Supreme Court on appeal."

In Menten v. Shuttee, 11 Okl. 381, 67 Pac. 478, the Supreme Court of the territory of Oklahoma says:

> "Motions presented to the trial court, the rulings thereon, and exceptions, are not properly part of the record, and can only be preserved and presented for review on appeal by incorporating the same into a bill of exceptions or case-made."

Such is the uniform holding of this court, as shown by the following authorities: Tribal Developing Company v. White Bros., 28 Okl. 525, 114 Pac. 736; McCoy v. McCoy, 27 Okl. 372, 112 Pac. 1040; Veverka v. Frank et al., 41 Okl. 142, 137 Pac. 682; Grady County v. Schrock et al., 155 Pac. 882.

We have no discretion.

Following the authorities cited, the appeal is dismissed.

PER CURIAM. Adopted in whole.

(74 Okl. 27)

NATIONAL SURETY CO. v. OKLAHOMA NAT. LIFE INS. CO. (No. 7304.)

(Supreme Court of Oklahoma. Jan. 30, 1917. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. EVIDENCE ⇨181—COPY OF LETTER—PREDICATE.

In order that a copy of a letter may be properly introduced in evidence, it is a condition precedent that a proper predicate be shown for the admission of such secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 600.]

2. EVIDENCE ⇨378(1)—ADMISSION OF LETTER—IDENTIFICATION.

A letter cannot be properly admitted in evidence without being properly identified.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648, 1655.]

3. WITNESSES ⇨321 — IMPEACHING OWN WITNESS.

A party introducing a witness in his behalf cannot impeach the character of such witness for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100.]

4. WITNESSES ⇨344(2)—DISCREDITING OWN WITNESS—EVIDENCE.

Evidence of the particulars of the arrest of a witness for immoral acts with a woman in a rooming house cannot be properly introduced in evidence by the party offering such witness, for the purpose of discrediting such witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1125.]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by the Oklahoma National Life Insurance Company against the National Surety Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Bennett & Pope, of Oklahoma City, for plaintiff in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendant in error.

COLLIER, C. This is an action brought by the Oklahoma National Life Insurance Company, a corporation, hereinafter styled plaintiff, against the National Surety Company, a corporation, hereinafter styled defendant, to recover for a breach of a bond executed by the defendant to the plaintiff to protect the plaintiff against loss on account of larceny or embezzlement by a soliciting agent of the plaintiff, one White.

[1, 2] The evidence is in conflict as to the premiums collected by White as such agent and not properly accounted for to the plaintiff, but the view we take of the case renders it unnecessary to set out such evidence in extenso. Against the objection and exception of the defendant the court permitted to be introduced in evidence what purported to be a copy of a letter written by an officer of the plaintiff to the said White, but no predicate whatever was laid for the introduction of said copy. Said letter reads as follows:

> "May 10, 1911.
>
> "Mr. D. E. White, c/o Regal Hotel, Shawnee, Oklahoma—Dear Sir: I wish to advise that, on account of a quorum of the board of directors not being present, the meeting had been deferred until May 3d, and I shall be compelled to insist upon your cutting down your account by that date, as you promised me on April 30th that by this time you would have cut down your account $300, naming the collection you would get, as the Gregg and Tunston. Now, White, will you not disappoint me, for the simple fact that I may depend upon you to do something as per your promise. Thanking you for your prompt attention, I wish to remain
>
> "Yours very truly, Secretary."

The evidence discloses that no effort was made to locate the original of this letter, no notice is claimed to have been served on the defendant or his attorney, or on White, for the production of the original of this letter, or the loss of said letter in any way accounted for.

There was also introduced in evidence, against the objection and exception of the defendant, without a proper predicate therefor, a copy of a letter written by the Secretary of the plaintiff to Mr. J. A. Galbreath, an officer of the defendant, which reads as follows:

> "July 20, 1911.
>
> "Mr. J. A. Galbreath, 1307–8 Commerce Bldg., Kansas City, Mo.—Dear Sir: Referring to our conversation recently regarding Mr. D. E. White, who is bonded under your schedule bond with us, wish to say that I had a long talk with Mr. White yesterday regarding his account, and will say that his shortage is not as much as I expected, and he has promised to adjust this as early as possible. However, I presume it is necessary that you be notified that he is somewhat behind. In the Reed case I have written all of the parties, but have heard from only one, Ellis Shaffer, and I am herewith inclosing his letter.
>
> "Yours very truly, Secretary."

There was also admitted in evidence, against the objection and exception of defendant, and without proper identification, a letter purported to be in reply to the letter of the secretary of the plaintiff, by an officer of the defendant, which reads as follows:

> "National Surety Company, New York.
>
> "Claim Department. Ausburn M. Birdsall, Assistant General Solicitor, New York. 1307 Bank of Commerce Bldg., Kansas City, Mo., July 24, 1911. Address reply to J. A. Galbreath, Superintendent. Mr. F. E. Beaty, Sec., The Oklahoma National Life Ins. Co., Oklahoma City, Oklahoma.—Dear Sir: I have before me your letter of the 20th, and am glad to note that there is only a small shortage in Mr. White's accounts, which he has promised to adjust as soon as possible. If you see that the discrepancies come within the terms of our bond and settlement is not made at once, please furnish me detailed statement, with all the facts in connection therewith. Kindly notify me what settlement is made.
>
> "Yours very truly, J. A. Galbreath,
> Superintendent."

In the admission of said copies and said letter, the fundamental rule of the best evidence being required, and the necessary condition precedent to the admission of secondary evidence, is violated to an extreme degree, and we are at a loss to understand upon what rule of evidence the court permitted said copies and said letter to be introduced, against the objection and exception of the defendant. Certainly it was not the best evidence, nor was a proper predicate laid for the introduction of secondary evidence; and we are of the opinion, and so hold, that the admission of said copies and said letter wrongfully bolstered up the evidence of the plaintiff, were self-serving declarations, and from any standpoint inadmissible, and that the result of the admission of such evidence was highly prejudicial to the defendant, and reversible error.

The error of the court in admission of the copies of said letters, and the letter purported to have been received in reply to the copy of said letter, without being properly identified, are such fundamental errors, that we do not deem it necessary to cite authorities in support of our holding.

[3, 4] As the case must again be tried, we deem it necessary to say that we are unable to understand under what rule of evidence the particulars of the escapade of White, the witness, in connection with a woman in Shawnee, could be regarded as proper evidence in this case.

> "A party cannot impeach his own witness, and this doctrine is an ancient rule of the common law." Jones on Evidence, vol. 5, § 853.

Again, the character of a witness for truth and veracity cannot be impeached by evidence of the particulars of his arrest for wrongfully associating with a female in a rooming house.

> "Inquiry cannot be made of the impeaching witness as to particular facts which tend to discredit the reputation of the person sought to be impeached. The inquiry should be limited to whether the impeaching witness knows the general reputation for truth and veracity of the person in question, among his neighbors—how he stands in general estimation." Jones on Evidence, vol. 5, § 860.

See Sharon v. Sharon, 79 Cal. 663, 22 Pac. 26, 131; Johnson v. State, 61 Ga. 305; Frye v. Bank of Illinois, 11 Ill. 367; Hansell v. Erickson, 28 Ill. 257; Dimick v. Downs, 82 Ill. 570; Fletcher v. State, 49 Ind. 124, 19 Am. Rep. 673; Farley v. State, 57 Ind. 331; Thruman v. Virgin, 18 B. Mon. (Ky.) 785; State v. Jackson, 44 La. Ann. 160, 10 South. 600; Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760; Deck v. Baltimore, etc., Ry. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; Holbrook v. Dow, 12 Gray (Mass.) 357; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; State v. Barrett, 40 Minn. 65, 41 N. W. 459; Rudsdill v. Slingerland, 18 Minn. 380 (Gil. 342); Moreland v. Lawrence, 23 Minn. 84; Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821; Shaefer v. Railway Co., 98 Mo. App. 455, 72 S. W. 154; State v. Slattery, 74 N. J. Law, 241, 65 Atl. 866; Conley v. Meeker, 85 N. Y. 618; Barton v. Morphes, 13 N. C. 520; Bucklin v. State, 20 Ohio, 18; Wike v. Lightner, 11 Serg. & R. (Pa.) 198; Missouri, K. & T. R. Co. v. Houlihan (Tex. Civ. App.) 93 S. W. 495; Crane v. Thayer, 18 Vt. 162, 46 Am. Dec. 142; United States v. Vansickle, 2 McLean, 219, Fed. Cas. No. 16,609; Richards v. State, 154 Pac. 72.

Had objection and exception been made and taken to the admission in evidence of the particulars of the escapade of White, the same would be reversible error, as the only effect of such evidence would be to improperly prejudice the jury against the witness White.

As the prejudicial errors pointed out must work a reversal of this case, we deem it unnecessary to consider any of the other errors assigned.

This cause is reversed and remanded.

PER CURIAM. Adopted in whole.

FISHER et al. v. PETTY et al. (No. 7251.)

(Supreme Court of Oklahoma. May 8, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑773(5)—FAILURE OF DEFENDANT IN ERROR TO FILE BRIEF—REVERSAL.

When plaintiff in error, in conformity with the rules of the Supreme Court, has prepared, served, and filed a brief, and no brief is filed, and no reason is given for its absence, on behalf of defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of the plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110.]

Commissioners' Opinion, Division No. 1. Error from District Court, Roger Mills County; T. P. Clay, Judge.

Action by Mary E. Petty and others against George F. Fisher and others. Judgment for plaintiffs and defendant George F. Fisher brings error. Reversed and remanded.

T. L. Turner, of Cheyenne, for plaintiff in error.

RUMMONS, C. Plaintiff in error duly completed, served, and filed his case-made, with petition in error attached, and in due time, and in conformity with the rules of this court, prepared, served, and filed his brief; but the defendant in error has failed to file his brief, or give an excuse for such failure. The brief of plaintiff in error reasonably sustains the assignments of error made by him. This court, not being required to search the records, in the absence of a brief on behalf of defendant in error, for reasons to sustain the judgment of the trial court, may reverse the case upon the brief of the plaintiff in error.

The judgment of the court below should therefore be reversed, and this cause remanded, with directions to the trial court to grant plaintiff in error a new trial.

PER CURIAM. Adopted in whole.

COTTON et al. v. WOODS. (No. 6874.)

(Supreme Court of Oklahoma. May 8, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑796—MOTION TO DISMISS—CONSIDERATION.

A motion to dismiss a case predicated upon a motion of a defendant in error, who recovered in the trial court, and who was an incompetent under guardianship at the time of filing such motion to dismiss, cannot be legally entertained, and such motion will be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3146-3148.]

Commissioners' Opinion, Division No. 1. Error from District Court, Haskell County; W. H. Brown, Judge.

Action by Henrietta Woods, an incompetent, by J. K. McKinney, her guardian, against Fred Cotton and others. Judgment for plaintiff, motion for new trial overruled, and defendants bring error. Motion to dismiss cause denied.

A. L. Beckett, of Stigler, and Rosser & Cochran, of Muskogee, for plaintiffs in error. Clark & Foster, of Stigler, for defendants in error.

COLLIER, C. This action was instituted by the defendants in error against the plaintiffs in error to remove clouds from the title of land described in the petition filed in said cause, and resulted in a judgment in favor of Henrietta Woods, canceling all deeds executed to the defendants, or either of them, by the defendants in error, and enjoining the plaintiffs in error, and all those claiming under them, from commencing any suit or action disturbing plaintiff in the possession and title of said lands in controversy, and from setting up any claim or interest adverse to the interests of said plaintiff, and from disturbing the plaintiff in her peaceable and quiet enjoyment of said lands. Within the time provided by law the defendants moved for a new trial, which was overruled, excepted to, and error brought to this court.

This cause is now submitted upon motion to dismiss the case, said motion being filed by Rosser & Cochran, as attorneys for Fred Cotton, one of the defendants in said cause, based upon a motion made by said Henrietta Woods, upon the grounds:

> "That the lands in controversy had been legally sold; that she was persuaded to bring this suit, but that she did not bring it of her own free will; that since it was brought she has executed a deed to the said Fred Cotton, and received from said Fred Cotton at the time of making the deed the sum of $50 in addition to the amount paid her guardian; and that she does not think it right and just to prosecute this matter further, and therefore moves the court to dismiss this case."

This motion to dismiss the case is resisted by the guardian of Henrietta Woods, an incompetent, and in support of said resistance there is attached thereto a duly certified transcript of the proceedings of the county court of Haskell county, showing that on the 2d day of March, A. D. 1914, said Henrietta Woods was declared to be an incompetent, that J. L. McKinney was duly appointed her guardian, and that said guardianship is still in force.

The motion under consideration was filed July 10, 1916, at which time Henrietta Woods was an incompetent, and therefore the motion to dismiss the case is without legal force and without the slightest merit; and the said motion to dismiss the case is hereby denied.

It is hereby ordered that the plaintiff in error be given 20 days in which to file a brief on the merits of the appeal, and that the defendants in error be given 20 days thereafter in which to file answer brief.

PER CURIAM. Adopted in whole.

OKLAHOMA CITY et al. v. PAGE.

(No. 3735.)

(Supreme Court of Oklahoma. May 8, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑773(2) — FAILURE TO FILE BRIEF—DISMISSAL.

"Where the plaintiff in error fails to file a brief, as required by the rules of the Supreme Court, and offers no excuse for such failure, the appeal will be dismissed."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108.]

Commissioners' Opinion, Division No. 1. Appeal from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Albert Page against the City of Oklahoma City and others. Temporary injunction granted, and defendants appeal. Dismissed.

J. W. Johnson, Geo. A. Matlack, and Warren K. Snyder, all of Oklahoma City, for plaintiffs in error.

COLLIER, C. This is an action by the dedendant in error against the plaintiff in error for a temporary injunction, which was granted, and from the granting of which this appeal is prosecuted.

This appeal was filed in this court on March 27, 1912, and submitted for decision September 27, 1915. The plaintiff in error has failed to file a brief, and has not offered an excuse for such failure, and therefore, under the unbroken line of decisions of this court, this appeal is dismissed. Board of County Commissioners of Garvin County v. Pyeatt, 154 Pac. 549; Wilcox v. Wooton, 159 Pac. 1118.

PER CURIAM. Adopted in whole.

LOWERY et al. v. PARTON et al. (No. 6991.)

(Supreme Court of Oklahoma. Jan. 30, 1917. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD 🔑17—APPOINTMENT —JURISDICTION OF PROBATE COURT—COLLATERAL ATTACK—STATUTE.

Rev. Laws 1910, § 6190, provides with reference to the jurisdiction of probate courts: "The proceedings of this court are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, * * * there are accorded like force, effect and legal presumption as to the records, * * * of district courts." An order appointing a guardian, which recites that application has been made to the county court for the appointment of a guardian, is sufficient evidence, within itself, that the proper petition had been filed in said court invoking the jurisdiction of the court, and is valid as against a collateral attack.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 66-70.]

2. GUARDIAN AND WARD 🔑17 — APPOINTMENT—ORDER OF PROBATE COURT—RECITAL OF MINORITY—COLLATERAL ATTACK.

Where an order of the probate court in appointing a guardian recites in the order of appointment that the party for whom the application for appointment of guardian was made was a minor 20 years of age, same is conclusive on collateral attack.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 66-70.]

3. JUDGMENT 🔑504(3)—COLLATERAL ATTACK —ORDERS OF PROBATE COURT.

Orders issued by a probate court, though irregular and not in the ordinary form, are valid as against a collateral attack, where the language is sufficient to clearly indicate the purpose and denote the character of such orders.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 946.]

Commissioners' Opinion, Division No. 5. Error from District Court, Carter County; A. Eddleman, Judge.

Suit by George A. Parton and others against Choctaw Lowery and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

I. R. Mason, of Ardmore, for plaintiffs in error. Thos. Norman, of Ardmore, for defendants in error.

JONES, C. On February 20, 1914, in the district court of Carter county, Okl., defendants in error, plaintiffs in the original suit, filed their petition against the plaintiffs in error, in which they allege that they are the owners of a certain oil and gas lease upon the lands belonging to the defendant Choctaw Lowery, such lease having been executed and delivered to one W. C. Daniels, guardian of said Choctaw Lowery; that said lease has been duly approved by the judge of the county and probate court, and they became the owners of such lease by reason of an assignment by J. H. Mathers, made February 13, 1914; that on the 14th day of February, 1914, Choctaw Lowery executed an oil and gas lease upon said lands to one E. M. Kinkade, and that said lease had been placed of record; that the said Choctaw Lowery is not yet 21 years of age; that the lands are valuable for oil and gas, and that the Kinkade lease is a cloud upon their title and interests; and they pray for a cancellation of said lease and for an injunction against the defendants, plaintiffs in error, herein. Pursuant thereto the district court of Carter county issued its order of injunction, and on March 16, 1914, plaintiffs in error filed their motion to dismiss the injunction, which was overruled April 9, 1914. Upon April 13, 1914, plaintiffs in error filed their answer to the petition, in which they deny each and every material allegation, they deny that Daniels was ever the legal guardian of Choctaw Lowery, and pray for a cancellation of the lease held by defendants in error, plaintiffs below. On May 27, 1914, the case proceeded to trial, and at the conclusion thereof the jury, under the direction of the court, rendered a verdict in favor of the plaintiffs, from which judgment of the court the defendants, plaintiffs in error, prayed an appeal to the Supreme Court of the state of Oklahoma.

[1-3] Plaintiffs in error in their petition in error call attention to ten different assignments of error; but we take it, from the facts as disclosed by the record and the argument made in the brief of plaintiffs in error, that the only material question in this case is whether or not the proceedings in the county court, wherein W. C. Daniels, the guardian of Choctaw Lowery, was appointed, are valid on account of irregularities occurring in such proceedings, and while there may be some irregularity in the probate proceedings the present attack of plaintiffs in error is directed against the order appointing a guardian in said cause, which is as follows, to wit:

"State of Oklahoma, Carter County—ss.: The State of Oklahoma, to All Whom It may Concern, and Especially to W. C. Daniels—Greeting: Know ye, that whereas, application has been made to the county court of said county for the appointment of a guardian to Choctaw Lowery, aged 20 years, minor, and it appearing to the court that it is necessary to appoint a guardian to said Choctaw Lowery, and the said W. C. Daniels having been approved for said trust by the court, and having given bond as required by law, which has been approved, filed, and recorded in said court: Now, therefore, trusting in your care and fidelity, we have appointed and do by these presents appoint you, the said W. C. Daniels, as such guardian, hereby authorizing and empowering you to take and to have the custody of said minor and the care of his education, until he arrive at the age of 21 years, or until you shall be discharged according to law, and requiring you to make a true inventory of all the estate, real and personal, of the said ward that shall come to your possession or knowledge, and to return the same into the county court within three months from the date of these letters, or at any other time the court shall direct, to dispose of and manage all such estate according to law, and for the best interest of the ward, and faithfully to discharge your trust in relation thereto, and also when required in relation to the care, custody, and education of the ward to render an account on oath of the property, real and personal, of said ward in your hands, and all proceeds and interests derived therefrom, and of the management and disposition of the same within one year after your appointment, and annually thereafter, and at such other times as the court shall direct, and at the expiration of your trust to settle your account with the county court, or with the ward if he shall be of full age, or his legal representatives, and to pay over and deliver all the property, real and personal, remaining in your hands or due from you on such settlement to the person lawfully entitled thereto.

"In testimony whereof, we have caused the seal of said county court to be hereunto affixed. Witness, W. F. Freeman, judge of said court, at Ardmore, in said county, this 15th day of March, A. D. 1913.

[Signed] W. F. Freeman,
County Judge. [Seal.]

It will be seen from the foregoing that the first part of the order makes the appointment of the guardian. It recites:

"Know ye that whereas, application has been made to the county court for the appointment of a guardian to Choctaw Lowery, aged 20 years, minor, and it appearing to the court that it is necessary to appoint a guardian to said Choctaw Lowery, and the said W. C. Daniels having been approved for said trust by the court, and having given bond as required by law, which has been approved, filed, and recorded in said court: Now, therefore, trusting in your care and fidelity, We have appointed and do by these presents appoint you, the said W. C. Daniels, as such guardian," etc.

Giving to this full force and credit, and construing it sensibly and legally, it makes the appointment of the guardian, and while it may be to some extent defective in form, we think it is sufficient in substance, and the order having recited the fact that Choctaw Lowery was a minor, that the necessity existed for the appointment of a guardian, and that W. C. Daniels possessed the qualifications necessary for a guardian, and that an application had been filed asking for such appointment, we think renders the order good as against collateral attack.

The validity of the lease in question, executed by W. C. Daniels, as guardian of Choctaw Lowery, and now held by the defendants in error, being based upon the validity of the appointment of the guardian, we deem that it is unnecessary to discuss the validity or the invalidity of the lease, having held that the appointment of the guardian was valid, necessarily the lease, which seems to have been regular in form and duly approved by the county court, would likewise be valid.

We therefore find no error committed by the trial court in rendering judgment in favor of the plaintiffs, defendants in error. This being an equity case, the verdict of the jury would have only been advisory, and the court would not have been bound by the jury's verdict, and no error was committed in directing the verdict.

The case is therefore affirmed.

PER CURIAM. Adopted in whole.

LUCAS v. KING. (No. 6944.)

(Supreme Court of Oklahoma. Feb. 13, 1917.
Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

REPLEVIN ⇨72—JUDGMENT—SUFFICIENCY OF EVIDENCE.

Record examined, and *held* that the court is unable to find sufficient satisfactory evidence to support the verdict of the jury.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 292–295.]

Error from District Court, Grady County; Frank M. Bailey, Judge.

Replevin by J. E. Lucas against W. C. King. Judgment for defendant, motion for new trial overruled, and plaintiff brings error. Reversed and remanded, with directions to grant a new trial.

Riddle & Hammerly, of Chickasha, and Warren K. Snyder, of Oklahoma City, for plaintiff in error. Bond, Melton & Melton, of Chickasha, for defendant in error.

KANE, J. This was an action in replevin, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, for the recovery of certain specific personal property of the aggregate value of $2,234 and for damages for the wrongful detention thereof in the sum of $2,500. The petition, bond, and affidavit in replevin were in the usual form, the plaintiff alleging that he was the owner of and entitled to the immediate possession of the property involved, which consisted of about 14 head of live stock, 3 sets of harness, 1 wagon, and 7 collars. After the petition, affidavit, and bond in replevin were filed by the plaintiff, the defendant gave a redelivery bond, and in due time filed his answer, which alleged, in effect, that the plaintiff at one time held a mortgage on said personal property to secure a certain indebtedness aggregating $2,100, but that this indebtedness had long since been paid in the following manner. Then follows what purports to be a statement of mutual accounts existing between the plaintiff and defendant, which showed the plaintiff to be indebted to the defendant in the sum of $1,000, for which sum the defendant prayed judgment, together with his costs. To this answer the plaintiff replied, denying generally and specially the allegations thereof, and alleging that the defendant was indebted to the plaintiff in a large sum; that the chattel mortgage mentioned by the defendant in his answer had been foreclosed in the manner provided by law, and the property therein described sold at mortgage sale for a sum much less than the amount due said plaintiff from said defendant, and the proceeds applied pursuant to its terms; that at said sale the plaintiff became the purchaser in good faith of the personal property described in said chattel mortgage, and thereby became the owner thereof. Upon trial to jury there was a verdict in favor of the defendant, which, omitting the caption, reads as follows:

> "We, the jury, impaneled and sworn to try the issues involved in the above-entitled cause, do upon our oaths find for the defendant and fix the amount of his recovery at the sum of $500.00, and for the retention of all property sued for in this cause."

After overruling the motion for new trial filed by the plaintiff, the court entered judgment upon the verdict, to reverse which this proceeding in error was commenced.

Counsel for the defendant state their grounds for reversal in their brief as follows: (1) That the verdict of the jury and judgment of the court are contrary to law; and (2) that the verdict of the jury and judgment of the court are wholly unsupported by and contrary to the uncontradicted evidence.

As we view the record, it presents no question of law whatever for review. The record shows that the pleadings were not challenged by demurrer or otherwise, and that after all the evidence was in and the case closed, the court instructed the jury as to the law of the case upon the issues joined by the pleadings and the evidence without objection or exception by either party. It is true that the action of replevin has for its primary object the recovery of specific personal property, and an ordinary judgment for a sum of money is not responsive to the issues raised (Cobbey on Replevin, § 1147); but the parties to this proceeding, as we have seen, treated it more in the nature of a suit for the adjustment of mutual accounts than an ordinary action in replevin, and so we shall treat it in examining the remaining assignment of error.

To meet the contention that the verdict of the jury is not sustained by the evidence, counsel for defendant in their brief present a statement showing certain credits as being established by the evidence in favor of their client, and say that the allowance of these claims more than justify the verdict of the jury. As there was no attempt to state an account between the parties, of course, we are unable to say just what credits were allowed by the jury, or what claims they rejected. But, looking upon the case from the standpoint of the defendant, we are unable to find satisfactory support in the evidence for many of the items of credit which counsel contend are established. In view of the fact that it will be necessary to reverse the cause for a new trial, and that upon a retrial the pleadings and issues may be so revised as to present merely an ordinary action in replevin for consideration, which, of course, would greatly simplify the case, we deem it necessary to note but three of the larger credits which, in our judgment, are not supported by the evidence.

One of the credits which counsel claim is established by the evidence is designated in their brief as follows:

> "Total value of property sold and converted by Lucas for which King is entitled to credit, $5,563.50."

A large part of the property included in this item consisted of the personal property covered by the chattel mortgage hereinbefore mentioned, and came into the possession of the plaintiff in substantially the following manner: One Arnote held a chattel mortgage against this property which he was about to foreclose. To save foreclosure the plaintiff purchased the Arnote note and mortgage under the following agreement with the defendant, as related by the latter: Mr. Lucas was to take possession of all the live stock and sell the jack and stock horses and apply the proceeds in payment of the Arnote note, retaining the work animals to do certain contract work, leaving the defendant enough teams on the farm to do farm work with, which teams he was also to use on contract work with his brother, when he had no work on the farm for them to do. In pursuance of this agreement Mr. Lucas took possession of the live stock. Upon the defendant taking the necessary work animals back to his farm, to be used in pursuance of his agreement with Lucas, they were seized by a Mrs. Holder, who held a second chattel mortgage upon the property covered by the Arnote mortgage. At this point Mr. Lucas said to the defendant, according to the testimony of the latter:

> "'We have got to sell all this stuff and stop this litigation,' and I said, 'All right, John; anything goes with me.'"

In pursuance of this conversation the personal property covered by the Arnote mortgage was all sold pursuant to the terms of the mortgage, at which sale the plaintiff became the purchaser for the sum of $800, which sum was credited upon the Arnote note, leaving a balance of several hundred dollars still unpaid. Right here there occurred the first serious disagreement between the parties. The plaintiff contends that the sale pursuant to the Arnote note and mortgage was a bona fide sale, and that he credited the Arnote note with the $800, and that that was the end of that transaction in so far as the ownership of the live stock and other property covered by the mortgage is concerned. We find nothing in the record which directly negatives this contention; whilst, on the other hand, the evidence of the plaintiff tends to confirm it. From the part of the defendant's testimony above set out it might fairly be inferred that upon finding the first agreement to be impracticable on account of the second chattel mortgage of Mrs. Holder, Lucas and King entered into a new agreement whereby the property was to be sold under the first, or Arnote, chattel mortgage. "Lucas says," testified the defendant, "'We have got to sell all this stuff and stop this litigation,' and I said, 'All right, John; anything goes with me.'" But even if we assume that the jury might have inferred from the foregoing testimony of the defendant that the sale pursuant to the Arnote note and mortgage was a mere subterfuge to shut off the second mortgagee, who had seized the property, and that the original agreement was to stand, notwithstanding the foreclosure of the Arnote mortgage, yet Lucas ought not to be charged with the value of the property as in conversion. In other words, instead of allowing the defendant the reasonable market value of the property covered by the Arnote mortgage, as counsel assumes the court and jury did, the defendant would be entitled only to have credit for the amount Lucas received for the property upon a sale thereof in good faith; for, testifies the defendant, "Mr. Lucas was to sell the jack and stock horses and apply the proceeds to my note." In either of the foregoing circumstances it would be manifestly unfair to the plaintiff to charge him with the conversion of this property. We also are unable to find in the record any satisfactory evidence which entitled the defendant to receive a credit of $2,284.85 on account of the transaction which, for identification, will be called the "Butler work," the "Strong City work," the "Rock Island work," "county road work," "Herring and Young work," and the "work at Oklahoma City." And the same may be said of the credit which counsel refer to in their brief as follows:

> "He further testified that he paid the balance due on a note and mortgage to one J. E. Brown amounting to about $600," etc.

On the whole case, we are constrained to say that the trial of a replevin case before a jury is a most unsatisfactory method of stating and settling intricate mutual accounts covering a long period of time. If the parties continue to treat this cause as a suit for an accounting, it should be tried as such and complete findings made which would enable this court on review to ascertain with some degree of certainty the specific items of account found to be established by the evidence.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial. All the Justices concur.

LEHR et al. v. GRENNELL FARM LOAN CO. et al. (No. 7315.)

(Supreme Court of Oklahoma. Jan. 30, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑1012(1)—WEIGHT OF EVIDENCE—REVERSAL.

Where plaintiff in error appeals from a decree in equity on the question of the weight of the evidence, this court will not weigh the evidence and reverse the judgment appealed from, unless it is clearly shown that the trial court failed to consider uncontroverted evidence, or that the finding and decree are clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992.]

Commissioners' Opinion, Division No. 4. Error from District Court, Major County; James B. Cullison, Judge.

Action by Katherine Lehr and Henry Lehr against the Grennell Farm Loan Company and T. H. Grennell. Judgment for defendants, and plaintiffs bring error. Affirmed.

Tom E. Willis, of Fairview, S. F. Brady, of Oswego, Kan., and C. B. Wood, of Fairview, for plaintiffs in error. Wm. O. Woolman, of Watonga, and S. J. Bardsley, of Fairview, for defendants in error.

JOHNSON, C. This case is on rehearing, and is an action by plaintiffs to have canceled a certain judgment rendered in the district court of Major county in favor of the defendants and against plaintiffs, on the ground of fraud alleged to have been practiced by the defendants in inducing these plaintiffs not to make defense to said cause, and to have canceled a judicial sale and sheriff's deed resulting from said judgment; plaintiffs contending further that the full amount of said judgment has been paid, but that they were induced not to oppose the said sale by fraudulent representations of defendants.

The action is an equitable one, was tried to the lower court without a jury, a decree was entered in favor of defendants, and plaintiffs have appealed.

Upon oral argument, had at a rehearing of this cause, it was stipulated that the only issue for determination by this court is the weight of the evidence; and in prosecution of this issue plaintiffs in error insist that the judgment and decree of the lower court is against the weight of the evidence, and that this court should consider the evidence and render or direct the rendition of judgment in favor of plaintiffs in error, or reverse the judgment of the lower court and remand the cause for a new trial.

The rule of law by which we are guided was stated by this court in the case of Checote v. Berryhill et al., 150 Pac. 679, not yet officially reported, as follows, to wit:

> "Where the plaintiff in error appeals from a decree in equity on the question of the weight of the evidence, this court will not weigh the evidence and remand the case, unless it is clearly shown that the trial court failed to consider uncontroverted evidence, or that the finding and decree are clearly against the weight of the evidence."

As more particularly applicable to this case, the rule has been otherwise stated as follows:

> "Where fraud is relied upon as the basis for equitable relief, and the trial court, after hearing the evidence, finds that fraud has not been established, the appellate court will not disturb such finding, unless it is clearly against the weight of evidence." Overstreet et al. v. Citizens' Bank, 12 Okl. 383, 72 Pac. 379; Schock v. Fish, 45 Okl. 12, 144 Pac. 584; Ashton v. Board of Commissioners of Murray County, 158 Pac. 901, not yet officially reported.

We have carefully read and considered the entire record in the case, and are unable to say that the judgment and decree of the lower court is against the weight of the evidence, or that the court has not considered uncontroverted evidence.

The suit, judgment in which is attacked, was a creditors' suit by the Bank of Ames against these parties and the Citizens' State Bank of Okeene to declare invalid certain mortgages upon the property of these plaintiffs. On cross-petition in that action judgment was rendered for the foreclosure of the mortgages, and the mortgaged property was sold. It is that judgment and sale cancellation of which is sought in this action.

In support of the allegations of plaintiffs below upon the question of fraudulent inducement of the plaintiffs by the defendants not to prosecute their defense of the action in which there was rendered the judgment sought to be canceled, plaintiffs rely largely upon the testimony of the plaintiff Henry Lehr to the effect that T. H. Grennell, one of the defendants, and the principal officer of the Grennell Farm Loan Company and the Citizens' State Bank of Okeene, had stated to the said Lehr that the interests of the said bank and loan company and plaintiffs, in the case in which such judgment was rendered, were the same, and that the said bank and loan company would take care of the interests of plaintiffs in that cause; that the said Grennell took Lehr to the attorney for the bank and loan company in the former cause, and, by reason of confidential relations existing between Lehr and Grennell, and by false representations as to the identity of interests, induced the said Lehr to leave the defense of the Lehrs in the former action to the attorney for the bank and loan company; that, having so left their interests in the hands of the attorney for the bank and loan company, the Lehrs made no defense to the former action, and that the bank and loan company, upon an answer fraudulently obtained by such attorney from Mrs. Lehr, and which she signed unwittingly and without the benefit of fair counsel, in the absence of other defense by the Lehrs, procured the judgment sought to be canceled. This testimony was refuted by the testimony of Grennell, the attorney in question, and the persons who witnessed the execution of the pleading by Mrs. Grennell, at least one of whom was disinterested, and the general circumstances adduced by the testimony tended to support the evidence of defendants upon this point. These witnesses were before the lower court, who had the opportunity to observe them, and who probably knew the persons testifying, and the finding of the lower court was in favor of the testimony of the defendants in error upon this point. The weight of the evidence, aside from the credibility of the witnesses, is undoubtedly with defendants in error upon this question, and, as to the credibility of the witnesses, the lower court was in better position to act than this court is.

Plaintiffs alleged that they did not learn of the judgment against them in the Bank of Ames case until some time after it was rendered; that they learned that an order of sale had been issued for the sale of their property under the decree of foreclosure; that plaintiff Henry Lehr went to see the said T. H. Grennell to find out why judgment had been taken against them, and what was meant by the order of sale; that Grennell told him (Lehr) that it was necessary to take the judgment and to sell the property under the foreclosure, and for the bank or himself to buy the property in, in order to defeat the judgment lien of the Bank of Ames upon the real property involved; that after the property should be sold under the judgment and bought in by the bank or himself, it would be deeded back to Mrs. Lehr, clear of the judgment lien of the Bank of Ames. Plaintiffs further claim that at the time of this understanding with Grennell, and at the time of the foreclosure sale, the judgment against plaintiffs, under which the foreclosure sale was being had, had been fully paid and satisfied; that plaintiffs waived their objections to the judgment and to the foreclosure, regardless of the fact that the judgment had been paid, as an acquiescence in the proposal of Grennell to conclude the foreclosure proceeding for the purpose of getting the land back into the name of Mrs. Lehr, free of the judgment lien of the Bank of Ames. The evidence that the judgment had been satisfied was controverted; but, if this contention of plaintiffs is conceded to be true, then this court would not be justified in interfering with the judgment of the lower court in this case, for the reason that plaintiffs did not come into court in this cause with clean hands. The procuring of the sale, confirmation thereof, and sheriff's deed, for the purpose of satisfying a judgment which had already been satisfied, would have been a fraud upon the court and upon the Bank of Ames; and, if the Lehrs agreed to, or acquiesced in, any such plan, and the execution of this plan resulted in the loss of their property by reason of the failure of the other party to stand by his fraudulent agreement, they should not be heard to complain in equity. Under the testimony of Lehr himself, he learned of the judgment in the Bank of Ames case prior to the foreclosure sale, and acquiesced therein, and agreed to the foreclosure sale, for the purpose of the accomplishment of fraud upon another; and equity will not now hear him say that the judgment had been satisfied.

Plaintiffs contended that they were entitled to much larger credits upon the mortgage indebtedness, which was the subject-matter of the judgment in the Bank of Ames case, than they were allowed by the judgment in that case, setting up this contention in support of their allegations of fraud in the obtaining of that judgment. The principal testimony upon this point and upon the supporting allegation that the judgment was paid before the foreclosure sale was given by the plaintiff Henry Lehr and by his son, Henry Lehr, Jr. Their testimony covered transactions with the Citizens' State Bank and Grennell running through the course of a long term of years. They kept no books, but attempted to give from memory a list of numerous sums of money obtained from the bank through the course of a number of years, and of a great number of sums of money paid by them to the bank during such time. This class of testimony was necessarily vague and uncertain, and upon cross-examination the Lehrs were brought to admit various inaccuracies in their statements from memory. For instance, there was testimony by them of one payment of $800 to the bank during the year 1909, in which testimony it was conclusively shown by other evidence that they were either mistaken or misrepresented the facts. As against this class of evidence, the books of original entry of the bank and loan company were in evidence, and the testimony on the part of the defendants, supported by these books, was definite and certain and of such character that some definite conclusion might be drawn from it.

As hereinabove stated, after a careful reading and consideration of the evidence, we arrive at the conclusion that the judgment and decree of the lower court is fully sustained by the weight of the evidence.

The judgment of the lower court should be affirmed.

PER CURIAM. Adopted in whole.

BURTON v. DOYLE et al. (No. 7887.)

(Supreme Court of Oklahoma. May 8, 1917.)

(Syllabus by the Court.)

1. Replevin 🔑49 — Sheriffs and Constables 🔑157(4)—Redelivery Bond—Liability on Official Bond.

The redelivery bond in an action of replevin before a justice of the peace, provided for in section 5403, Rev. Laws 1910, must be taken by the officer levying the writ of replevin, and a redelivery bond taken and approved by a constable, who did not levy the writ of replevin, and who has not, as an officer, succeeded to the possession of the property under said writ, is not taken by said constable in the performance of his official duties. His approval thereof is of no effect, and imposes no liability upon his official bond.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 180–185; Sheriffs and Constables, Cent. Dig. §§ 359–364, 370, 371.]

2. Trial 🔑142—Demurrer to Evidence.

Where the evidence of plaintiff, together with such inferences and conclusions as may reasonably be drawn therefrom, does not warrant a recovery against the defendant, a demurrer to the evidence is properly sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337.]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action of replevin by Chistel Burton against John Doyle and another. Judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 150 Pac. 711.

Brook & Brook, of Muskogee, for plaintiff in error. W. W. Momyer, of Muskogee, for defendants in error.

RUMMONS, C. This is an action by the plaintiff in error against the defendant in error, John Doyle, a constable, and the surety upon his official bond, to recover damages sustained by plaintiff in error because of a breach of the conditions of said official bond. The parties will be hereinafter designated as they appear in the court below. Plaintiff's petition alleges that a writ of replevin was issued to the defendant Doyle in an action, pending in a justice of the peace court of Muskogee county, commanding him to take from the defendant in said action one cow, of the value of $40; that the defendant Doyle, in obedience to said writ, seized and took into his custody said cow, but failed and refused to deliver said cow to plaintiff; that defendant recovered in the action in the justice of the peace court, and that said judgment became final; that plaintiff demanded of the defendant Doyle the delivery of said cow, or her value, but that the said Doyle refused to deliver said cow to plaintiff, or to pay the value thereof to plaintiff; that execution was issued upon the judgment rendered in the justice of the peace court, and returned "No property found"; and that plaintiff has recovered nothing by reason of said suit. The petition alleges that by reason of said facts the conditions of the official bond were broken and plaintiff was damaged. The defendant answered, denying generally the allegations of the petition, but admitting the execution of the bond, the pendency of the suit in the justice of the peace court, and the recovery of judgment therein by plaintiff, and denying specifically all liability to plaintiff. At the conclusion of the evidence on behalf of plaintiff, the defendants demurred thereto, which demurrer was sustained by the trial court, and the plaintiff saved exceptions to the ruling of the trial court upon said demurrer. Motion for a new trial having been duly filed and overruled by the court, and exception to such ruling by plaintiff duly saved, plaintiff brings this proceeding in error to reverse the action of the court below.

Under several assignments of error the plaintiff presents for review the action of the trial court in sustaining the demurrer to the evidence of plaintiff. To sustain the issues on the part of plaintiff, the guardian of plaintiff was offered as a witness, who testified to making demand upon the defendant Doyle for the return of the cow, or her value, which was admitted to be the sum of $40, and that neither the cow, nor her value, nor any part thereof, was ever recovered by the plaintiff. Plaintiff also introduced the docket of the justice of the peace, before whom the replevin action was tried, the writ of replevin, and the return thereof, and a redelivery bond, executed by the defendant in the replevin action. The docket shows that the writ of replevin was issued to Will Doyle, constable. The return upon the writ of replevin shows that it was served by Will Doyle, constable, by taking into his possession the cow described therein, and that, upon the execution of a redelivery bond by the defendant in replevin, said animal was redelivered to said defendant. The redelivery bond shows that it was taken and approved by the defendant Doyle. The defendant Doyle was a witness for plaintiff, and testified that he was a constable and executed the official bond sued on; that, at the time the writ of replevin was issued and served, he thought no one was working under him as deputy constable; and that Will Doyle was acting as deputy under another constable of Muskogee county. This was all the evidence in the case.

[1] We think there is no merit in this appeal, for the reason that the evidence of plaintiff does not show that the defendant Doyle received or served the writ of replevin, or that he ever had in his possession the animal sought to be recovered In fact, it appears that the writ of replevin was delivered to and served by Will Doyle, who was then acting as the deputy of another constable; so that the evidence offered by plaintiff does not tend to sustain the cause of action set out in the petition It is alleged in the petition that the defendant Doyle received the writ of replevin, and in obedience thereto seized and took into his possession the said cow, but failed and refused to deliver her to the plaintiff No connection is shown by the evidence between Will Doyle, who is shown to have taken the cow, and the defendant Doyle. The redelivery bond taken by defendant Doyle was taken without authority, since he was not the officer who served the writ. Section 5403, R. L. 1910, provides:

> "If, within twenty-four hours after service of the copy of the summons, there is executed, by one or more sufficient sureties of the defendant, to be approved by the constable, an undertaking to the plaintiff, in not less than double the amount of the value of the property, as stated in the affidavit of the plaintiff, to the effect that the defendant will deliver the property to the plaintiff if such delivery be adjudged, and will pay all costs and damages that may be awarded against him, the constable shall return the property to the defendant. If such undertaking be not given within twenty-four hours after the service of the order, the constable shall deliver the property to the plaintiff."

From this section it is apparent that in an action of replevin before a justice of the peace the redelivery bond must be taken by the officer levying the writ, or by an officer who has succeeded to the possession of the property under said writ, since he is the only one who can return the property to the defendant if the redelivery bond be executed, or deliver it to plaintiff upon a failure to execute such bond. The redelivery bond, therefore, in this case was not taken by the defendant Doyle in the performance of his official duties, and his approval thereof was of no effect, and he is not liable upon his official bond therefor. Taylor v. Morgan, 43 Okl. 142, 141 Pac. 679, and cases there cited.

[2] Nor does the plaintiff in this action seek to recover upon any failure or neglect of duty by the defendant Doyle in the taking of said redelivery bond. While it is argued in the brief of plaintiff that said redelivery bond was worthless, yet it is not so alleged in the petition, nor is there any evidence to that effect in the record. Nor does it appear that the plaintiff excepted to the sufficiency of the sureties upon said redelivery bond, as provided by section 5404, Rev. Laws 1910, and therefore all objection to the sufficiency of said sureties was waived by him.

The plaintiff having failed to produce any evidence at the trial warranting a recovery against the defendant Doyle and the surety on his official bond, the demurrer of the defendants to the evidence of plaintiff was properly sustained, and the judgment of the court below should be affirmed.

PER CURIAM. Adopted in whole.

CLEVELAND COUNTY v. OKLAHOMA SANITARIUM CO. (No. 7535.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑407(1)—SUMMONS IN ERROR—FORM.

A summons in error is required to be served as in the commencement of an action; and where the statute points out a particular method of serving process upon a domestic corporation, such method is exclusive and must be followed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2120, 2128, 2129, 2131, 2132.]

Commissioners' Opinion, Division No. 3. Appeal from County Court, Cleveland County; B. F. Wolf, Judge.

Proceeding by Cleveland County, by and through its County Commissioners for and on behalf of the County and the State of Oklahoma and J. P. Whittinghill, Tax Inquisitor in and for said County, against the Oklahoma Sanitarium Company (now Oklahoma State Hospital). From a judgment of the county court on appeal from a dismissal by the county treasurer dismissing the proceeding, the plaintiffs bring error. Motion to quash the summons in error sustained.

W. L. Eagleton, of Norman, and J. P. Whittinghill, of Oklahoma City, for plaintiff in error. Burford, Robertson, Hoffman & Burford, of Oklahoma City, for defendant in error.

BLEAKMORE, C. On October 1, 1914, the Oklahoma Sanitarium Company was notified by registered letter by the county treasurer of Cleveland county that information had been filed in his office by the tax ferret that certain of its property subject to taxation had not been assessed, and that after ten days from the receipt of such notice any written protests submitted by it, together with the recommendations of the tax ferret, would be considered, etc. The registry return receipt for such letter, dated October 7, 1914, was by "D. W. Griffin, Supt." Upon hearing before the county treasurer on April 8, 1915, the proceeding was dismissed; whereupon an appeal was had to the county court of Cleveland county, wherein, on May 21, 1915, by judgment of that court, the proceedings were again dismissed, to review which the cause has been lodged in this court by petition in error with case-made attached.

There was no waiver of summons in error; but such summons was issued out of this court commanding the sheriff of Cleveland county to notify the Oklahoma Sanitarium Company (its name being now changed to "Oklahoma State Hospital") of the filing of the petition in error, etc., returnable on or before July 31, 1915. Upon this summons the following return was made by the sheriff:

> "I received the within summons in error July 20, 1915, and served the same by delivering a true copy of the original now in my possession to Dr. D. W. Griffin at the Oklahoma State Hospital at Norman, Okl. I cannot find P. J. Whittinghill in my county this July 26, 1915.
> "Claud Pickard, Sheriff,
> "By L. P. Barker, Deputy."

Defendant in error, appearing specially and only for the purpose, has moved to quash the service of summons on the following grounds:

> "First. Said summons was not served upon any person service upon whom would bind the defendant or bring it into court.
>
> "Second. The return of the sheriff upon such summons in error does not show upon its face that service was made upon any person service upon whom would bind this defendant or bring it into court."

The motion is supported by the affidavit of D. W. Griffin, wherein he states:

> "That the Oklahoma Sanitarium Company was a corporation organized under and by virtue of the laws of the state of Oklahoma, and for a period of several years said corporation owned, maintained, and operated a sanitarium and hospital at Norman Okl., for the care and treatment of insane persons, and for several years affiant was in the employ of said cor-

> poration as its superintendent and principal physician in charge of said hospital.
>
> "That the charter or articles of incorporation of said Oklahoma Sanitarium Company expired by limitation on the 24th day of November, 1914, since which time it has never attempted to do or transact any business; that the last meeting of the stockholders and directors of said corporation was held on the 20th day of November, 1914, at the office of the company in the city of Norman, in Cleveland county, Okl., at which time and meeting all of the assets and property of said corporation was sold, transferred, and delivered to the Oklahoma State Hospital, a corporation, duly organized and doing business under and by virtue of the laws of the state of Oklahoma; that all of the assets and moneys of said corporation were distributed to its stockholders, and there has never been any meeting of the former stockholders or directors of said corporation since said dates, and said corporation became and was then and there dissolved; that said Oklahoma Sanitarium Company never at any time changed or attempted to change its name, but carried on and transacted business under and in its chartered name, until said charter expired at the end of the 20 years for which it was originally incorporated; that the Oklahoma State Hospital, a corporation, thereafter sold, conveyed, transferred, and delivered all of its property, real and personal, the same being largely the property formerly acquired and owned by the Oklahoma Sanitarium Company, to the state of Oklahoma, and the state now maintains, supports, and operates said hospital as a state hospital for the insane at public expense.
>
> "That affiant is now, and was at the time said summons was attempted to be served upon him, employed by the state of Oklahoma as superintendent and physician in charge of said state hospital; that he was not at the time said summons or copy was left with him and service thereof attempted to be made upon him an employé, officer, or agent of the defunct dissolved Oklahoma Sanitarium Company, nor the agent of or in the employ of the Oklahoma State Hospital, a corporation; that he has no right or authority to appear for or represent either of said corporations. * * *"

By R. L. 1910, it is provided:

> "4715. A summons against a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees, or other chief officer, or upon an agent duly appointed to receive service of process; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof."
>
> "5238. The proceedings to obtain such reversal, vacation or modification, shall be by petition in error, filed in the supreme court, setting forth the errors complained of; and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record, in the original case, shall be sufficient."

It appears from the foregoing affidavit and return of summons that defendant in error is a domestic corporation; that service of such summons was not had upon its president, chairman of the board of directors, or trustees, or other chief officer, or upon an agent appointed to receive service of process, and it does not appear that its chief officer was not found in the county, or that service was had upon its cashier, treasurer, secretary, clerk, or managing agent, or that none of such officers could be found, and that copy of such summons was left at the office or usual place of business of such corporation with the person having charge thereof. It is obvious that the method of serving process upon a corporation as in the commencement of an action specifically prescribed by the statute was not followed in this case.

In Oklahoma Fire Insurance Co. v. Barber Asphalt Paving Co., 34 Okl. 149, 125 Pac. 734, in which the provisions of section 5604, Comp. Laws 1909, being the same as section 4715, R. L. 1910, supra, were examined and construed, it was held:

> "Where the statute points out a particular method of serving process upon a domestic corporation, such method is exclusive and must be followed."

It is an elementary principle that a court acquires jurisdiction of a party, where there is no appearance, only by service of process in the manner prescribed by law.

The motion to quash the summons in error is sustained.

PER CURIAM. Adopted in whole.

FARMERS' STATE BANK OF TEMPLE v. ANDRUSS. (No. 4837.)

(Supreme Court of Oklahoma. June 13, 1916. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

JUDGMENT 🔑622(1)—RES JUDICATA—ITEM OF BANK DEPOSIT.

A bank brought suit upon a bill of exchange, alleging a certain balance due thereon after allowing certain credits, and the defendant answered by general and special denial and set up other matters by way of counterclaim; judgment was rendered for defendant. Thereafter the defendant brought suit to recover on an item which had been admitted by the plaintiff as a credit in the former suit. *Held*, that the former judgment was a bar to an action upon said item.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136.]

Error from County Court, Comanche County; W. J. Ray, Judge.

Suit by E. H. Andruss against the Farmers' State Bank of Temple, Okl. Judgment for plaintiff, and defendant brings error. Reversed.

Hamon & Ellis, of Lawton, for plaintiff in error. W. C. Henderson, of Lawton, for defendant in error.

HARDY, J. E. H. Andruss brought suit against the Farmers' State Bank upon a deposit made by him in the Farmers' National Bank of Temple, which had been reorganized as the Farmers' State Bank. The bank answered, and alleged that in litigation theretofore had between the parties the matters involved were adjudicated and determined, and pleaded the judgment therein as a bar to plaintiff's action. Only the pleadings in the former case were introduced in evidence, from which it appears that the Farmers' National Bank sued Andruss upon a bill of exchange in the sum of $8,690.15, less certain credits including the following: "8-7. Dep. Balance, $436.39"—which is the item in controversy. The bill of exchange was attached to the petition, and plaintiff expressly admitted said item as a credit upon the amount claimed to be due. Andruss filed answer in that litigation, containing a general and specific denial and specifically denying the execution of the bill of exchange as sued on, but alleging and admitting the execution of a bill of exchange upon the same date for the same amount in favor of the bank, and pleading that said bill of exchange had been altered, in that it was made to provide therein for interest after date when the original instrument contained no such provision, and as a further defense alleged that he had become indebted to the bank for money advanced to enable him to buy cotton, the tickets for which were delivered to the bank and the cotton shipped to certain cotton brokers at Houston, Tex.; that between the date of said draft and the 6th day of July, 1908, he had received certain credits thereon, and on said day the true amount owing to the bank was $2,096.45, and that by the sale of said cotton he became entitled to an additional credit of $2,446.52, which would extinguish the balance due upon said bill of exchange and leave the bank indebted to him in the sum of $350.07, for which judgment was prayed. Trial in that case resulted in a verdict and judgment for defendant, Andruss, in the sum of $194.07, which amount was satisfied and paid by the Farmers' State Bank.

The sole question presented is whether the item of $436.39 was in issue and was adjudicated in the former suit. To determine this question we are confined to an examination of the pleadings and verdict, for that is all of the record in the former case before us. The petition of the bank in that case set out the bill of exchange with certain credits, including the item in controversy, and prayed judgment for the balance after allowing said credit. Counsel say that the answer of defendant, Andruss, contained a general denial, and set up a state of facts which showed that, on August 7, 1908, the date the deposit was applied by the bank as a credit upon said bill of exchange, Andruss was not indebted to the bank in any sum, but instead the bank was indebted to him, and because in his answer he enumerates certain credits properly applied upon this indebtedness by the bank, and said deposit was not included in the list, when the jury rendered a verdict in his favor this was a finding that said sum had been wrongfully charged off by the bank. The mere fact that his answer contained a general and specific denial was not a disclaimer of the credit allowed by the bank. Ebert v. Long, 43 Minn. 235, 45 N. W. 226; Abbott v. Stevens, 117 Mass. 340. If in fact Andruss was indebted to the bank and had on deposit in the bank a sum of money to his credit, the bank had the right to appropriate the sum on deposit to his credit and apply the same to the satisfaction and discharge of any indebtedness owing by him to the bank. Walters National Bank v. Bantock, 41 Okl. 153, 137 Pac. 717, L. R. A. 1915C, 531. The pleadings clearly apprised the defendant that the sum in controversy had been applied as a credit upon the amount alleged to be due, and that the amount claimed by the bank had been reduced to that extent. Such credit having been applied by the bank upon the amount claimed to be due would naturally be treated by the jury as a credit thereon, and would be considered by them as an extinguishment of the bank's demand to the amount of such deposit in the adjustment of the respective claims of the litigants, and for defendant under those circumstances to permit the trial to proceed in the face of such allegations, without expressly disclaiming said credit and seeking recovery against the bank for the amount thereof, would warrant the jury in considering said sum as a credit upon plaintiff's original demand, and would authorize the court and jury to assume that defendant had acquiesced in such application and consented to the allowance of such credit in his favor. Ebert v. Long, supra. The jury did not adopt entirely the theory of either party, but the verdict evidences the fact that there was an adjustment of the respective claims of each. This item, having been allowed as a credit upon the plaintiff's demand, was clearly within the issues made by the pleadings, and the judgment was a determination of all of the issues within the pleadings as framed, and constitutes a bar to an action by either party thereon.

It is said, however, that Andruss made no claim in his cross-petition against the bank for said sum, and therefore said item was not involved and was not determined. If he intended to disavow said credit as allowed by plaintiff and to claim said amount over against the bank, it was his duty in that case, after the bank had appropriated the same to the payment of its alleged claim, to present in that litigation any right or claim which he might have had and which he now urges for a recovery of that item. Ebert v. Long, supra; Abbott v. Stevens, supra.

For the reasons stated, the plea of res judicata was well taken, and the judgment is reversed. All the Justices concur, except THACKER, J., absent.

FT. SMITH & W. R. CO. v. BLACK et al.

(No. 5608.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. STATUTES 🔑64(3)—PARTIAL INVALIDITY—EFFECT.

Because a law which was intended to embrace two classes of persons or officials is void as to one class, because the Legislature had no authority to legislate with reference to that class, it does not follow that it is void as to the other class with reference to whom the Legislature did have authority to legislate. Hence it is *held* that, although the act of the territorial Legislature of 1897 (chapter 15, § 11), which prescribed the fees to be charged by the territorial district clerks, was void as to them because they were federal officers, it was not void as to probate judges, who by the same act were directed to charge the fees prescribed for district clerks for like services.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 60, 195.]

2. OFFICERS 🔑94—FEES—STATUTE.

Where a portion of the fees in a case were earned under a statute that was in force at the time the case was filed, but, before the case was disposed of, a new statute became effective, the official must charge the fees under the statute that was in force at the time each particular item of service was performed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 132, 133, 136–138, 140, 141.]

Error from County Court, Logan County; J. C. Strang, Judge.

Action by the Fort Smith & Western Railroad Company against W. J. Black and others. Actions dismissed with costs, motion to retax costs overruled, and plaintiff brings error. Reversed and remanded, with directions.

C. E. Warner and H. P. Warner, both of Ft. Smith, Ark., for plaintiff in error. John Adams, of Guthrie, for defendants in error.

BRETT, J. This case comes up on an appeal from an order of the county court of Logan county, overruling a motion filed by plaintiff in error to retax costs. The plaintiff in error on and about November 13, 1907, filed in the county court of Logan county something over 300 cases against different parties seeking to recover on certain "bonus notes." The cases seem to have remained on the docket until 1912, when they were all dismissed. The county judge in these cases taxed the costs in accordance with the schedule of fees allowed district clerks by the federal statutes. The plaintiff in error objected to the cost being taxed under this schedule, and filed motion to retax same. This motion was overruled, an appeal has been perfected, and a stipulation entered into that the costs in all of the other cases shall abide the decision in this case.

[1] The territorial Legislature of 1897 (chapter 15, § 2, 1897 Session Laws; Wilson's Rev. Laws, § 2993; Snyder's Com. Laws, § 3367) passed a fee bill prescribing the fees to be charged by district clerks of the territory, and in the same act provided the fees to be charged by probate judges, in probate matters; and in section 11 of this same act provided:

> "That whenever the probate judge of any county shall be compelled to perform any services for which no fees are fixed by law, he shall be entitled to receive therefor the same fees as may be by law allowed to district clerks for like services."

There was also a provision allowing probate judges, for any services performed in matters within the jurisdiction of justices of the peace, the same fees as were allowed justices of the peace for like services. Section 1884, Wilson's Rev. & Ann. Statutes 1903. Thus it is clear that by section 11, c. 15, 1897 Session Laws, the intention of the Legislature was to allow probate judges, for like services, the identical fees provided by that chapter for district clerks. But the territorial Supreme Court, in Pitts v. Logan County, 3 Okl. 719, 41 Pac. 584, held that the district clerks of the territory were federal officers, and therefore their compensation and fees were fixed by Congress, and that the territorial Legislature transcended its authority in attempting to regulate their fees; that therefore the act was void, and the clerks of the district court were entitled to the fees prescribed by the federal statutes. And the county judge in the case at bar insists that, since the court held that district clerks are entitled to the fees prescribed by the federal statutes, under section 11, c. 15, of the 1897 Session Laws, above quoted, he was also entitled to charge the same fees, and did so in each of the cases involved in this controversy.

But we think this contention cannot be maintained. The territorial Legislature had no authority to regulate or prescribe the fees or compensation of the territorial district clerks, because they were federal officers; but it did have authority to prescribe the compensation and fees of the probate judges, since they were territorial officers. And in providing a schedule of fees, which they intended should govern the charges of the district clerks, and then by providing in the same act that the compensation of the probate judges for like services should be the same as prescribed for district clerks, did they not fix the fees to be charged by probate judges for that particular class of work?

We are not unmindful of the broad language of section 11, supra, which provides:

> "That whenever the probate judge of any county shall be compelled to perform any services for which no fees are fixed by law, he shall be entitled to receive therefor the same fees as may be by law allowed to district clerks for like services."

But, we think, this provision contemplated only the existing act, and such changes as might in the future be made by the Legislature itself in the schedule of fees of the district clerks. And while it says they "shall be entitled to receive the same fees as may be by law allowed district clerks for like services," they had in mind only such laws as the Legislature itself might enact. And as stated in Lewis' Sutherland, Statutory Construction (2d Ed.) vol. 2, § 363:

> "If a statute is valid it is to have effect according to the purpose and intent of the lawmaker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. 'The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act.' "

And the very purpose of this act, under consideration, was to fix another and different schedule of fees for district clerks than that which was prescribed by the federal statutes, and at the same time to make the fees for probate judges for like services the same as the Legislature had or might fix for district clerks. Black on Interpretation of Laws (2d Ed.) c. 3, § 24, says:

> "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced."

36 Cyc. 1106–1110, states that:

> "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature, * * * and in pursuance of the general object of enforcing the intention of the Legislature is the rule that the spirit or reason of the law will prevail over its letter. * * * Every statute must be construed with reference to the object intended to be accomplished by it."

Then, was it the intention of the Legislature that the fees of probate judges should be governed by federal statute, or by the schedule prescribed by the Legislature itself? And because a law which was intended to embrace two classes of persons or officers is void as to one class, because the Legislature had no authority to legislate with reference to that class, does it follow that it is also void as to the other class, concerning which the Legislature did have authority to legislate? We think not. And we think the Legislature by this act has as effectively prescribed the fees to be charged by probate judges for the class of services rendered by district clerks, as if that schedule had been specifically prescribed for probate judges alone, for that class of work.

It is true the territorial Supreme Court declared the act void; but this was solely on the ground that the territorial district clerks were federal officers, and that for that reason the Legislature had no authority to prescribe their compensation. The act was construed by the court from no other angle, or as affecting any one else except district clerks.

We think, beyond a doubt, that the intention of the Legislature was to make the schedule of fees prescribed by itself or succeeding Legislatures the schedule which should govern the charges of both district clerks and probate judges, in cases where their services were similar; and that that intention should control as to probate judges, since the Legislature had the right to fix and regulate their compensation.

[2] Besides, these cases were filed after the incoming of statehood, and in Board of Commissioners of Grant County v. Ernest, 45 Okl. 725, 147 Pac. 322, this court held that after statehood the federal statutes were inoperative even as to district clerks; that article 25 (Schedule), § 2, of the Constitution, which provided for extending all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which were not repugnant to the Constitution, and which were not locally inapplicable, did not contemplate the taking over of this federal statute, prescribing the fees of district clerks; but that, as held in Bohart et al. v. Anderson, 24 Okl. 82, 103 Pac. 742, 20 Ann. Cas. 142, this statute "was inconsistent with and repugnant to the schedule to the Constitution as well as locally inapplicable, hence did not become the law of the state."

But the provisions of the territorial Legislature of 1897, which were carried forward in Wilson's Revised & Annotated Statutes of 1903 and Snyder's Compiled Laws of 1909, with reference to the fees of probate judges, were not repugnant to the Constitution or locally inapplicable, and, since these provisions made clear the legislative intent as to what the fees of probate judges should be, we think, they were extended to and remained in force in the state as to county judges after statehood until altered or repealed by law; and this was not done until the special session of 1910.

We therefore conclude that the fees earned in the case at bar prior to the 1910 act should be taxed according to the 1897 schedule, and that those earned subsequent to 1910 should be taxed according to the provisions of the 1910 act, which prescribes the fees to be charged by county courts.

The judgment is reversed, and the cause remanded, with directions to retax the costs in accordance with the views herein expressed. All the Justices concur, except MILEY, J., who concurs in the conclusion.

BARNES v. UNIVERSAL TIRE PROTECTOR CO. (No. 6355.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. JUDGMENT 🔑199(2)—JUDGMENT NOTWITHSTANDING THE VERDICT.

In the absence of special findings, a trial court is without authority to render judgment notwithstanding the verdict, unless the same is warranted by the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 368.]

2. PLEADING 🔑343 — JUDGMENT ON THE PLEADINGS—ACCOUNT.

Where the bill of particulars contains no allegations of the correctness of the account sued on, and is unverified, plaintiff is not entitled to judgment on the pleadings, even though a verified statement of account be attached to the bill of particulars.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048–1051.]

3. JUDGMENT 🔑199(3) — MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO—SUFFICIENCY OF EVIDENCE.

A motion for judgment non obstante veredicto does not present for consideration errors in the admission of evidence or the sufficiency of the evidence to sustain the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 367.]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Suit by the Universal Tire Protector Company against George W. Barnes. Judgment for plaintiff notwithstanding a verdict, and defendant brings error. Reversed and remanded.

Franklin P. Schaffer, of Muskogee, for plaintiff in error. Mosier, Greenslade & Reynolds, of Muskogee, for defendant in error.

HARDY, J. [1] The Universal Tire Protector Company sued George W. Barnes in the justice of the peace court in Muskogee county for an amount alleged to be due upon an account. Parties will be referred to as they appeared in the trial court. Upon appeal the case was transferred to the superior court, where a trial was had to a jury, resulting in a verdict for defendant. Upon motion therefor the court rendered judgment in favor of plaintiff notwithstanding the verdict, and defendant prosecutes error. Section 5140, Rev. Laws 1910, is as follows:

> "Where upon the statement in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party."

Construing this statute, this court has held that a trial court is without jurisdiction, in the absence of special findings, to enter judgment non obstante veredicto, unless the same is warranted by the pleadings. Choctaw, O. & W. R. Co. v. Castanien et al., 23 Okl. 735, 102 Pac. 88; Whitaker & Crowder State Bank, 26 Okl. 786, 110 Pac. 776; Foster v. Leftwich, 152 Pac. 583.

It is contended, however, that the court may render such a judgment where there is an entire failure of evidence to justify the verdict in favor of the prevailing party or if the evidence shows as a matter of law that the court should have directed a verdict in favor of the losing party, and where it is not probable that a different result would be reached upon another trial. Such, however, is not the law in this state.

In Curtis & Gartside et al. v. Pigg, 39 Okl. 31, 134 Pac. 1125, Pigg sued Curtis & Gartside Company for damages alleged to have been sustained from personal injuries received as a result of negligence of the company. The company filed motion for judgment on the pleadings after verdict had been returned in plaintiff's favor, basing its motion upon section 5933, Comp. Laws 1909, which is identical with section 5140, Rev. Laws 1910. The pleadings were examined, and it was held that the court did not err in overruling such motion, the court saying:

> "This statute and the decisions cited very clearly support the contention that in certain cases a judgment may be rendered on the pleadings, although a verdict has already been rendered against the moving party. In such cases, however, it must clearly appear upon the face of the pleadings that the movant is entitled to the judgment asked for."

The question was again presented in Foster et al. v. Leftwich, 152 Pac. 583, where, after setting out the statute, it was said:

> "It therefore follows that this court is without jurisdiction, in the absence of special findings, to enter judgment non obstante veredicto, unless the same is warranted by the pleadings."

See, also, 11 Enc. Pl. & Pr. 917, and note 4.

[2] Within this rule, it becomes necessary to examine the pleadings in the case and determine whether, upon the face thereof, plaintiff was entitled to a judgment in its favor. The bill of particulars was unverified, and contains no allegation as to the correctness of the account sued upon, but attached thereto was a verified statement or invoice of the account which formed the basis of the suit. The answer contained a general denial and was verified. Upon this state of the pleadings, an issue of fact as to the existence of the account and the correctness thereof was raised which could not be determined in plaintiff's favor without evidence in support of the allegations in his bill of particulars. Myers v. First Presbyterian Church, 11 Okl. 544, 69 Pac. 874; Buchannan v. Statler & Herndon, 32 Okl. 206, 120 Pac. 658; Miners' Supply Co. v. Chestnutt Gibbons Gro. Co., 150 Pac. 686; El Reno Vitrified Brick & Tile Co. v. Raymond Co., 46 Okl. 388, 148 Pac. 1000; M., K. & T. Ry. Co. v. Lawson, 37 Okl. 322, 132 Pac. 321.

At the trial, in support of the allegations in its bill of particulars, plaintiff offered in evidence what purported to be a written order for two tire protectors sold to defendant, and defendant offered in support of his defense testimony tending to show that at the time the tire protectors were purchased he entered into an agreement with the agent of plaintiff whereby same were to be delivered to him upon trial for 30 days upon a guaranty that they would lessen blow-outs and punctures and prevent skidding and heating of tires, and, in general, save automobile tire expense and annoyance, and that, pursuant to this agreement, he received said tire protectors upon trial, and they were found not to be as represented, and by reason thereof caused him certain damage for which he claimed judgment. The court instructed the jury, however, that he was not entitled to recover upon his counterclaim, and submitted the case to the jury upon the other issues.

[3] Assuming that it was error for the court to permit parol evidence to vary or contradict the terms of the written order, that question was not raised by the motion for judgment notwithstanding the verdict, but could only be presented by motion for a new trial.

In the absence of a demurrer to the evidence or motion for a directed verdict, the sufficiency of the evidence or motion for a directed verdict is not presented to the Supreme Court on appeal (Muskogee Elev. Trac. Co. v. Reed, 35 Okl. 334, 130 Pac. 157; Bank of Cherokee v. Sneary, 46 Okl. 186, 148 Pac. 157; Reed v. Scott, 151 Pac. 484; Oaks v. Samples, 157 Pac. 739); and plaintiff, not having properly raised that question, and not having filed motion to set aside the verdict and grant a new trial, and having prosecuted no appeal to this court, is not in position to urge any errors occurring at the trial, unless the same be presented by the motion for judgment notwithstanding the verdict. In reference to this proposition, the rule is that the court has no authority to entertain a motion for judgment notwithstanding the verdict on the ground that there was a failure of proof as to some essential element of the cause of action or that the verdict had been returned upon insufficient evidence to sustain it, but such a motion for the purposes thereof admits the facts found by the jury to be true, and asserts that, taking the verdict at its face, the judgment should go the other way, and cannot be treated as a motion to set aside the verdict because contrary to the evidence. Foster v. Leftwich, supra; Kirk v. Salt Lake City, 32 Utah, 143, 89 Pac. 458, 12 L. R. A. (N. S.) 1021; Maxon v. Gates, 136 Wis. 270, 116 N. W. 758; 11 Ency. Pl. & Pr. 917, and cases cited.

The court erred in sustaining the motion for judgment notwithstanding the verdict and rendering judgment in favor of plaintiff, and the judgment is reversed, and the cause remanded, with directions to render judgment upon the verdict in favor of the defendant. All the Justices concur.

ELLIS v. MID-CONTINENT OIL & GAS CO. et al. (No. 4510.)*

(Supreme Court of Oklahoma. May 8, 1917.)

(Syllabus by the Court.)

1. NEW TRIAL 🔑99—GROUNDS IN GENERAL.

To warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that such evidence fulfills the following requirements: (1) It must be such that it will probably change the result, if a new trial be granted. (2) It must have been discovered since the trial. (3) It must be such as could not have been discovered before the trial by the exercise of due diligence. (4) It must be material to the issue. (5) It must not be merely cumulative to the former evidence. (6) It must not be to merely impeach or contradict the former evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207.]

2. NEW TRIAL 🔑101—NEWLY DISCOVERED EVIDENCE—DISCOVERY SINCE TRIAL—MOTION AFTER DECISION.

When the record discloses that before the conclusion of the trial newly discovered evidence and the names of some of the witnesses and the places of residence of the other witnesses who would produce such evidence came to the knowledge of appellant, and that appellant before the conclusion of the trial moved the court to reopen the case and permit appellant to produce such witnesses and offer such newly discovered evidence, which motion was by the court overruled, and when the record further discloses that appellant failed to file motion for a new trial within the statutory time, such evidence is not newly discovered since the trial and will not warrant the granting of a new trial upon that ground.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 205, 206.]

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by Jeff D. Ellis against the Mid-Continent Oil & Gas Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Malcolm E. Rosser, of Muskogee, and William S. Cochran, of Tulsa, for plaintiff in error. Geo. S. Ramsey, of Muskogee, Edgar A. De Meules, of Tulsa, and Sol H. Kauffman, of Muskogee, for defendants in error.

RUMMONS, C. This action was commenced in the district court of Muskogee county by the plaintiff in error, hereinafter styled the plaintiff, against the Mid-Continent Oil & Gas Company, defendant in error, hereinafter styled the defendant, and others, to cancel an oil and gas lease upon a tract of land in Muskogee county. The cause was tried to the court without the intervention of a jury, and, after the evidence had been submitted and the cause argued to the court, was taken under advisement by the trial court. Thereafter, and before the trial court had made its findings of fact or rendered judgment in the cause, the plaintiff filed a motion praying the court to reopen the cause and permit him to offer newly discovered

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*Rehearing denied July 24, 1917.

material testimony, supporting the motion by affidavits. Upon the hearing of this motion, the court, upon the proffer by defendant that the court might consider the affidavits filed on the motion to reopen the cause, in connection with the evidence, overruled said motion to which plaintiff excepted. Thereafter, on June 4, 1912, the court made its findings of fact, finding against the plaintiff and in favor of the defendant, and ordering that judgment go against the plaintiff for costs, to which plaintiff excepted. On June 20, 1912, formal journal entry of judgment of the court was entered. Thereafter, on June 22d, plaintiff filed his motion for a new trial, supported by affidavits as to newly discovered evidence. This motion was overruled by the court, to which plaintiff excepted and prosecutes this proceeding in error to reverse the action of the trial court.

The sole assignment of error argued in the brief of counsel for plaintiff is that the court erred in denying the motion of plaintiff for a new trial on the ground of newly discovered evidence.

Plaintiff founded his cause of action for the cancellation of the oil and gas lease of defendant upon the ground that George Washington, a full-blood Creek Indian to whom the land in controversy was allotted, was, at the time of the execution of the oil and gas lease under which defendant claims, a minor, and therefore said oil and gas lease was null and void. The only question of fact at issue between plaintiff and defendant was the date of the birth of said George Washington. The evidence of plaintiff tended to show that the allottee was born in the year 1887 or 1888, while the evidence of the defendant tended to show that he was born in 1885. The oil and gas lease was executed in January, 1907. The father of the allottee, a witness for defendant, fixed the date of the birth of the allottee as the year following his return to the Creek Nation from the Cherokee Nation, which return he said occurred the year following the Esparhecher, or Green Peach War in the Creek Nation, to avoid which, as a good pacifist, he had fled to the Cherokee Nation. The evidence of defendant fixed the date of the war as the year 1883.

The newly discovered evidence upon which plaintiff relies for a new trial is the evidence of the father of the allottee and four other witnesses, one of whom was a witness for plaintiff at the trial, to the effect that the father of the allottee did not return to the Creek Nation from the Cherokee Nation until after the grading for the Iron Mountain Railway was in progress, and that the allottee had not been born at the time of his return. It was agreed that the grading of the Iron Mountain Railway was done in the years 1886 and 1887.

It is argued by counsel for defendant that the action of the trial court in overruling plaintiff's motion for a new trial was right, for the reason that the evidence said to have been newly discovered was cumulative and would not probably result in changing the decision of the court; that the showing of diligence by the plaintiff was insufficient; and that the evidence had not been discovered since the trial concluded.

In the view we take of this case, we deem it unnecessary to determine whether or not the evidence is merely cumulative, or would probably change the decision of the trial court, or whether the showing of plaintiff's diligence was sufficient. It is apparent, from the showing made by plaintiff in support of his motion to reopen the case and offer newly discovered evidence, that plaintiff knew of this evidence before the trial had been concluded by a decision upon the facts by the trial court.

Plaintiff filed his motion to reopen the hearing and permit him to introduce newly discovered evidence on March 28, 1912. This motion was supported by affidavits, in which plaintiff says that:

> "He is reliably informed, and believes that he will be able to prove by Indians whose whereabouts he has ascertained, but whose names he is unable to give, that at the time Peter Washington came to the Creek Nation from the Cherokee Nation, the Kansas & Arkansas Valley Railway, now known as the Iron Mountain, was in progress of construction, which construction was not authorized by act of Congress or commenced until after June 1, 1886, and that Peter Washington and those Indians that came about the same time crossed the line of said railway near the present site of Braggs, Okl., while the roadbed of said railway was being graded and constructed."

Plaintiff's affidavit further showed that Peter Washington would testify to the same state of facts. Plaintiff in his affidavit in support of his motion for a new trial gives the names of Indian witnesses who would testify to the state of facts above set forth, and their affidavits were filed in support of the motion for a new trial. Plaintiff in his affidavit says that "he did not learn reliably of the testimony of said witnesses until June 21, 1912."

[1] It is a well-settled rule of law that motions for a new trial on the ground of newly discovered evidence are not viewed with favor. It has been held by this court, in the case of Vickers v. Phillip Carey Co., 151 Pac. 1023, L. R. A. 1916C, 1155, that, in order to warrant the granting of a new trial on the ground of newly discovered evidence, the evidence must fulfill the following requirements: First. It must be such as will probably change the result if a new trial be granted. Second. It must be discovered since the trial. Third. It must be such as could not have been discovered before the trial by the exercise of due diligence. Fourth. It must be material to the issue. Fifth. It must not be merely cumulative to the former evidence. Sixth. It must not be to merely impeach or contradict the former evidence.

First National Bank of Taloga v. Farmers' State Guaranty Bank, 161 Pac. 1063.

[2] If it be admitted that the evidence upon which plaintiff relies is not merely cumulative or impeaching, and that plaintiff could not with due diligence have discovered it before the trial, and that it would probably change the result, yet the showing made by plaintiff fails to comply with the second requisite for the granting of a new trial on the ground of newly discovered evidence, in that it does not appear that the evidence claimed to have been newly discovered had been discovered since the trial. In fact, the records show that it had been discovered before the trial had finally ended in a decision by the trial court.

It is said by the Supreme Court of the territory, in Watkins v. United States, 5 Okl. 729, 50 Pac. 88:

> "To be grounds for a new trial, the knowledge of what the witness would be expected to testify must have come to the defendant after it was too late to be procured and used upon the trial."

In McCants v. Thompson, 27 Okl. 706, 115 Pac. 600, this court says:

> "The facts set out in the affidavits in support of the motion for a new trial appear to have been known to the defendant at the time of the trial. If he was surprised, he should have asked for a continuance or delay of the case, in order to properly make his defense. We cannot say that the trial court erred in refusing to grant a new trial on account of surprise or newly discovered evidence."

In First National Bank of Taloga v. Farmers' State Guaranty Bank, supra, this court says:

> "As we view it, the existence of the evidence itself, as distinguished from the whereabouts of the witness, must have been discovered since the trial in order to authorize a new trial."

Plaintiff very properly, upon the discovery of the facts set out in his affidavit, moved the court to permit him to offer additional evidence to establish such facts. This motion was overruled by the court, but no complaint as to such ruling is made in the brief of counsel for plaintiff, nor could any complaint of such ruling be considered by us, because as stated in the brief of counsel for plaintiff, and as appears from the record, the counsel for plaintiff, who tried the cause below, failed to file a motion for a new trial within three days after the trial court had made his findings of fact and rendered his decision in the cause.

The plaintiff had his day in court, and, having waived any error that may have been committed by the court in refusing his application to offer additional evidence by failing to move for a new trial within the statutory time, he cannot now set up the same evidence which he offered to submit to the court in his motion to reopen the case as newly discovered evidence warranting the granting of a new trial, because such evidence had been discovered by him and he had full knowledge of it long before the trial was finally concluded.

The judgment of the trial court should therefore be affirmed.

PER CURIAM. Adopted in whole.

ÆTNA LIFE INS. CO. v. KRAMER et al.

(No. 5782.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟹110—JURISDICTION OF SUPREME COURT — ORDER OVERRULING MOTION FOR NEW TRIAL—STATUTE.

Under the second subdivision of section 5236, Rev. Laws 1910, this court has jurisdiction to reverse, vacate, or modify an order overruling motion for new trial, notwithstanding the judgment has not been entered on the verdict, where there is a verdict in a case tried to a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740–748.]

2. INSURANCE ⟹73 — STATUTES — CONSTRUCTION.

Sections 3420–3434, inclusive, Rev. Laws of Oklahoma 1910, do not fix the contractual relations between insurance companies doing business in the state and their agents, but this is regulated by contract. The statutes above were not enacted to regulate the relations between insurance companies and their agents, but for the protection of the insuring public.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 100.]

3. TRIAL ⟹29(3)—POWER OF TRIAL COURT—REPRIMAND OF WITNESS.

Trial courts in the exercise of their judicial prerogative have a right to reprimand a witness who, contrary to the admonition of the court, persists in making voluntary statements not elicited by his examination. The admonition, however, must not be done by word, sign, token, or gesture that would indicate the opinion of the trial court as to the merits of the case, or the truth or falsity of the testimony of the witness reprimanded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 82.]

Commissioners' Opinion, Division No. 2. Error from County Court, Tulsa County; Conn Linn, Judge.

Action by the Ætna Life Insurance Company, a corporation, against Phil Kramer, John T. Kramer, and Otto Kramer, doing business under the firm name and style of Kramer Bros. Judgment for defendants, and plaintiff brings error. Affirmed.

Martin & Moss, of Tulsa, for plaintiff in error. Rice & Lyons, of Tulsa, for defendants in error.

WEST, C. Plaintiff in error attached to their brief a motion to dismiss appeal in this cause, because the case-made fails to contain any final judgment of the court rendering judgment for defendants. The record shows verdict, motion for new trial, and judgment overruling motion for new trial, and provides for an appeal, giving the time to make and serve case-made and providing for a supersedeas. Under the law announced in case of Roof v. Franks, 26 Okl. 392, 110 Pac. 1098, and Neoma P. Phillips v. W. D. Oliver, 155 Pac. 586, this court has jurisdiction to review, vacate, or modify an order overruling motion for new trial, where there is a verdict in a case tried to a jury, notwithstanding a judgment has not been entered on the verdict, and motion to dismiss will be overruled.

[1] This is a suit instituted by the Ætna Life Insurance Company, plaintiff in error, who will hereinafter be designated plaintiff, to recover from Kramer Bros., defendants in error, who will hereinafter be designated as defendants, money alleged by plaintiff to be due it on account of premiums collected by the defendants. The plaintiff alleged that the defendants were acting as its agents under a verbal appointment made by C. H. Verschoyle, a general agent of the plaintiff. Defendants denied that they were the agents of plaintiff, and alleged that they were acting as agents or brokers for Verschoyle & Co., general agents of plaintiff, in the matter of soliciting and collecting the insurance in controversy, and that they had settled in full with Verschoyle & Co.

[2] There are only two issues presented by the pleadings and argued in the brief by plaintiff: First. As to whether or not defendants were, as a matter of law, agents of the plaintiff at the time complained of. Second. As to the misconduct of the trial judge in directing certain remarks to witness of plaintiff while on the stand. We will now consider the first question presented by the pleadings and evidence. Plaintiff contends that as a matter of law, the defendants Kramer Bros., were the agents of the plaintiff under and by virtue of the statutes of the state regulating insurance companies, and particularly section 3431, Revised Laws of the State of Oklahoma of 1910, which is as follows:

> "Sec. 3431. *Who Deemed an Agent.* Any person who for compensation solicits insurance on behalf of any insurance company, or transmits for a person other than himself an application for a policy of insurance to or from such company, or offers or assumes to act in the negotiating of such insurance, shall be an insurance agent within the intent of this article, and shall thereby become liable to all the duties, requirements, liabilities and penalties to which an agent of such company is subject."

In order to properly ascertain the force of this section and the intent of the Legislature in passing the same, it is necessary to consider in connection therewith at least a portion of the article of which this section is a part, and particularly section 3434, which is as follows:

> "Sec. 3434. *Resident Agents for Foreign Companies—Exceptions.* Foreign companies admitted to do business in this state shall make contracts of insurance upon lives, property, or interests herein, only through lawfully constituted and licensed resident agents: Provided, that this section shall not apply to direct insurance covering the rolling stock of railroad corporations, or property received for shipment from one state to another while in the possession or custody of railroad corporations or other common carriers."

It will be noted that by the provisions of the above sections there is a concurring obligation on the part of an insurance company doing business in the state and agents soliciting risks for it: First, upon the company to procure and pay for a license for its agents, which license is a written authority of such agents soliciting and procuring risks, and prohibiting companies from making contracts of insurance upon lives, property, or interest only through lawfully constituted and licensed resident agents, and upon agents to have this license before soliciting risk for insurance companies, and fixing personal liability upon an agent if he assumes to act without such license.

It is our view that the statutes relied upon by the plaintiff do not support its contention, and were enacted by the state, not for the protection and regulation of the intercourse of insurance companies and their agents, or to fix their contractual relations, but for the protection of the insuring public. An insurance company doing business in the state certainly could not violate the statute by failing to procure and pay for a license for its agents, and accept risks from unlicensed agents, and then invoke the provisions of the same law to establish the fact of the agency, and to fix the contractual relations of its agents to itself. As between the insured and the company, the defendants were under the statute quoted, as a matter of law, the agents of the company; but as to the relations of the insurance company and its agents the state is not or was not concerned, and their relations would depend upon contract. We therefore cannot say, as a matter of law, the status of the insurance company and their agents as between themselves is fixed by statute, but, on the contrary, we think it is regulated by contract. Welch, Insurance Commissioner, v. Maryland Casualty Company et al., 147 Pac. 1046. The issue as to who defendants were representing, whether plaintiff or Verschoyle & Co., at the time the insurance was solicited and collected for by defendants, was sharply drawn and fairly submitted by the trial court, and the jury by their verdict found that the defendants were the agents of Verschoyle & Co., and we are therefore bound by such finding.

[3] The last assignment of error complained of being the misconduct of the trial judge in directing certain remarks to the witness of plaintiff while upon the stand, and in the presence of the jury is in our opinion the most serious urged. It is difficult to state in this opinion the language of the court complained of, which should be considered in the light of its context, the principal part of

which may be found in Case-Made, pages 51–53, inclusive, and is as follows:

> "The Court: Just answer the questions; we are running this business; and confine yourself to the points in controversy.
>
> "Mr. Moss: I don't think that is proper, if the court pleases.
>
> "The Court: I think that is true; but where you have a witness that knows more than the attorneys on both sides of the case—
>
> "Mr. Moss: We except to the remarks of the court.
>
> "Mr. Lyons: Mark that Exhibit A. (The same is so marked for purposes of identification.)
>
> "Q. Is that the signature of Verschoyle & Kahle? A. That is the signature of Verschoyle & Kahle. That was on Verschoyle & Co.
>
> "The Court: Wait there a minute. Put all the remarks down there; put all the remarks of the court down there; the court is going to remark a good deal directly; put it all in there for the attorneys on both sides, and put in there as they say, and that the witness was a very talkative witness, and would not confine himself to the questions of the attorneys. Put it in there so you can get it reversed good and proper.
>
> "Mr. Moss: I do not mean any disrespect at all to your honor, but in order to protect the right of my clients we except to the remarks, to all the remarks, of the court.
>
> "The Court: You have a right to your exception; and I have asked this witness half a dozen times to answer the questions and confine himself to the questions, but he does not do so.
>
> "The Witness: If your honor please, may I state something now?
>
> "The Court: That is it; you have stated too much now; put it all down there, and I will write more and put it in there.
>
> "Mr. Bush: To every remark of the court the plaintiff excepts.
>
> "The Court: I want to try the case fairly on both sides, and give every one a chance; but it does not embarrass me a bit to get reversed every time you want to reverse me."

Our court, speaking through Judge Gillette, in City of Newkirk v. Dimmers, 17 Okl. 525, 87 Pac. 603, said:

> "In the trial of a cause before a jury, it is the province of the jury alone to weigh the testimony of witnesses, and give to it such credence as in their judgment they believe it entitled to, uninfluenced by the judge before whom the cause is being tried. That a trial judge may exert an influence over a jury without speaking to them, and perhaps unconsciously, by mere demeanor or conduct touching the subject under investigation, is undoubtedly true, and where such influence has been exerted appellate courts have invariably held the trial to have been erroneous."

And in case supra the trial judge indicated that the testimony of the witness was untrue and unworthy of consideration. In fact, Judge Gillette, before laying down the rule quoted above, said:

> "It is impossible to read the testimony here quoted without reaching a conclusion that the testimony of Minnie Eads was by such examination criticized as being untrue, and as having been 'procured'—in fact, false."

Not so in the instant case. The trial judge was criticizing the manner of the witness in testifying and his efforts to inject in his testimony statements not responsive to the questions asked. The court at no time indicated that the witness was unworthy of belief, or was testifying falsely, but only too voluble. The courts have and should have authority to conduct trials in an orderly manner in accordance with the rules of evidence, and when a witness insists on voluntary statements not elicited by his examination, and contrary to the admonition of the court, then it is the duty of the court to use his judicial prerogative to maintain the dignity and decorum of his court. He should not, however, do this in any way, either by word, sign, token, or gesture that would indicate his opinion as to the merits of the case, or the truth or falsity of the testimony of the witness reprimanded, and if he does the aggrieved party should be entitled to a new trial. However, in this case we don't believe the action of the trial judge transcended his inherent power to conduct the trial in an orderly manner along the rules of established practice and usage. The court merely admonished the witness to answer the questions asked without incumbering the record with his voluntary statements. It is true the language of the trial court might have been couched in more appropriate and sedate diction; but in the midst of the trial on occasions of this sort it is hard for a trial judge to choose the language of a diplomat, and where he does not invade the province of the jury by indicating his opinion as to the merits of the case or the weight and credence to be given to the witness' testimony, we do not think it should require a reversal of the case, especially where it is not apparent that the aggrieved party has suffered injury or defeat on account of the conduct complained of. Love v. Reynolds, 36 Okl. 297, 128 Pac. 242.

Finding no reversible error, the judgment of the lower court should be and is affirmed.

PER CURIAM. Adopted in whole.

PASSUMPSIC SAVINGS BANK v. JOHNSON et al. (No. 7156.)

(Supreme Court of Oklahoma. March 6, 1917. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. MORTGAGES 🔑303, 489—CONSTRUCTION OF CONTRACT—TIME AS ESSENCE—SUFFICIENCY OF EVIDENCE.

The P. Bank sued J. and wife on a promissory note for $1,500, a past-due interest coupon for $45, and to recover $200 attorney's fee, as provided for in the mortgage, and prayed that the same be foreclosed. The petition alleged that W., D., M., McM., P., and the A. Bank claimed some interest in the land adverse and inferior to that of plaintiff, and also prayed that they be made parties defendant and required to set it up. W. answered that he had purchased the land subject to the mortgage, and pleaded and proved a contract in which (after reciting that there was $269.55 delinquent interest due on the indebtedness, that said interest coupon would be due on the $1,500 note July 1, 1913, and that W. was interested in the payment of said indebtedness) it was agreed by and between W. and plaintiff, in consideration of a present settlement of all controversies in connection with the loan, that W. would pay plaintiff cash in hand said sum of $269.50 (which he did), and also "on or before June 25, 1913, as full principal and interest then accrued on the loan, $1,447.50, time being of the essence of this contract"; that, if said sum was not paid plaintiff on or before said date, then plaintiff should be entitled to judgment in foreclosure of the mortgage for $1,545, with interest from July 1, 1913, and that W. would interpose no defense to the action; that plaintiff would surrender to W. said evidences of indebtedness duly canceled, and receive the $1,447.50 on or before said date; and that, in case of default in the payment at the time specified, plaintiff would be entitled to judgment for the full amount of said note and coupon and foreclose the mortgage according to its terms. W. defaulted in the payment, but on July 12, 1913, and again on July 30 1913, and again on August 2, 1913, tendered plaintiff $1,447.50, each time with interest from June 25, 1913. There was judgment for plaintiff for $1,446.78, the sum last tendered. *Held*, that time was the essence of the contract; that plaintiff was entitled to recover $1,500 on the note sued, also $45 on the past-due interest coupon thereto attached, together with interest thereon at 10 per cent. per annum from July 1, 1913, also $200 as an attorney's fee, as provided in the mortgage, with interest thereon at 6 per cent. per annum from the date of the suit, and that the judgment was contrary to the evidence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1756, 2279.]

2. APPEAL AND ERROR 🔑327(7)—PROCEEDING IN ERROR—PETITION—DISMISSAL.

By way of cross-petition W. further alleged that the mortgaged lands were theretofore allotted to one S. B., a duly enrolled citizen of the Choctaw Nation by blood, who died November 10, 1904, after selecting his allotment, leaving him surviving as his only heirs at law his widow, K., and J. and S., his minor children, who sold and conveyed the land to Mrs. Pitt, and she to the defendant J., and he to W.; that the sale was good, and passed the title, but that the B.'s were asserting title thereto on the ground that the county court was without jurisdiction to appoint a guardian to make the sale for said minors; and that the three B.'s were necessary parties to the suit and asked that they be brought in. And such was done, whereupon they answered and set up title to the land, and by way of cross-petition asked that their title thereto be cleared of all conveyances including the mortgage sought to be foreclosed. No issue was joined between plaintiff and the three B.'s. There was judgment for W. against them as prayed, and that they take nothing on their cross-petition. *Held*, that they were not necessary parties to the proceeding in error to reverse the judgment foreclosing the mortgage, and that a failure to make them parties thereto was not a ground for a dismissal of said proceeding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1818, 1824–1826, 1828–1830, 1832, 1833, 1835; Mortgages, Cent. Dig. § 1650.]

3. APPEAL AND ERROR 🔑327(7)—PROCEEDING IN ERROR—PARTIES.

Further, by way of cross-petition, W. also alleged that subsequent to the date of the mortgage sought to be foreclosed he and the defendant D. were sureties for one Williams, who then owned the land, on a promissory note for $1,700, payable to the defendant A. bank, secured by a mortgage thereon; that later they became his sureties on another note to said bank for $2,290, which was secured by another mortgage to the bank executed by W.'s wife, who then owned the land; that both mortgages were junior to another mortgage on the land Williams owed Bowman for $210; that thereafter Williams caused the land to be conveyed to him and D. in consideration that they pay off all of said indebtedness, which they did, to the bank only, by executing their note for $4,000 and paying the balance in cash and delivering the notes to Williams; that thereafter Bowman foreclosed his mortgage and sold the land to the defendant M., who quitclaimed the same to W. for value, who offered to convey one-half thereof to D., in consideration that he pay one-half the purchase money paid M., which he refused to do. The A. bank answered, and D. defaulted, whereupon there was judgment against him and in favor of the bank for $2,261.58 together with attorney's fees and costs, and he was perpetually enjoined from asserting any claim to the land. *Held*, that neither the bank nor D. were necessary parties to the proceeding in error to review the judgment in favor of plaintiff, the P. bank, against W., foreclosing its mortgage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1818, 1824–1826, 1828–1830, 1832, 1833, 1835; Mortgages, Cent. Dig. § 1650.]

4. APPEAL AND ERROR 🔑327(7)—PROCEEDING IN ERROR — PARTIES — MORTGAGE FORECLOSURE.

After the decree in foreclosure was rendered and entered, on the overruling of the motion for a new trial, the same was modified, pursuant to which the defendant W. paid plaintiff $1,462.78 and executed a bond to respond in lieu of the land for any additional sum plaintiff might recover against him on the mortgage indebtedness. *Held*, that as no deficiency judgment was asked, and could not be recovered against the mortgagors J. and wife, they were not necessary parties to the proceeding in error to review said decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1818, 1824–1826, 1828–1830, 1832, 1833, 1835; Mortgages, Cent. Dig. § 1650.]

5. APPEAL AND ERROR 🔑327(7)—PROCEEDING IN ERROR—PARTIES.

Where, in a suit to foreclose a mortgage, M., McM., and P. were alleged to claim some interest in the land adverse, but inferior, to that of plaintiff, M. appeared and disclaimed, and the other two were not summoned, nor did they appear, and no judgment was taken for or against them, all, seemingly, having passed out of the case, *held*, that a failure to make them parties to the proceeding in error is not a ground for dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1818, 1824–1826, 1828–1830, 1832, 1833, 1835; Mortgages, Cent. Dig. § 1650.]

Error from District Court, Atoka County; Robert M. Rainey, Judge.

Suit by the Passumpsic Savings Bank against G. C. Johnson and Jazie Johnson on a note and to foreclose a realty mortgage, in which James E. Whitehead, J. Kirby Dobbs, T. F. Memminger, Pete McMillan, R. T. Pennington, and the American National Bank of McAlester were made parties defendant, and in which Memminger disclaimed, and Whitehead answered and filed a cross-petition to quiet title, asking that Dobbs, Memminger, and Katie Benjamin, and James and Sampson Benjamin, minors by their guardian, be brought in, and in which they filed answer and cross-petition, upon which Whitehead joined issue. Judgment by default against Pennington and McMillan, and default judgment for the American National Bank against Dobbs, and judgment against the Benjamins, enjoining those parties, with default judgment for plaintiff bank against the Johnsons, with an order of sale. The bank's motion for a new trial was denied, and it brings error. Reversed and remanded.

Charles B. Mitchell, of Oswego, Kan., and H. A. Kroeger, of Oklahoma City, for plaintiff in error. James E. Whitehead, of Oklahoma City, for defendants in error.

TURNER, J. On August 6, 1913, Passumpsic Savings Bank, plaintiff in error, in the district court of Atoka county, sued G. C. Johnson and Jazie Johnson on a past-due promissory note, dated January 14, 1909, for $1,500, payable to the Deming Investment Company, and by said company indorsed to plaintiff for value and before maturity, also on a past-due interest coupon thereto attached for $45, and to foreclose a real estate mortgage on certain lands described to secure the payment thereof. As the mortgage provides for an attorney's fee of $200 in case of foreclosure, plaintiff prayed, not only judgment for $1,545, the amount of the note and coupon, together with interest thereon at 10 per cent. per annum from July 1, 1913, but judgment for $200 as an attorney's fee and interest thereon at 6 per cent. per annum from the date of suit and for costs.

James E. Whitehead, J. Kirby Dobbs, T. F. Memminger, Pete McMillan, R. T. Pennington, and the American National Bank of McAlester were alleged in the petition to claim some interest in the land adverse, but inferior, to that of plaintiff, the nature and extent of which was alleged to be unknown, and for that reason were made parties defendant and asked to set it up. For answer, Memminger disclaimed and passed out of the case. After demurrer filed and overruled, Whitehead answered, making a general denial. After that, for separate amended answer and cross-petition, he in effect alleged himself to be the owner of the land subject to the mortgage; that, as such, on April 9, 1913, he entered into a contract in writing with Deming Investment Company, agent for plaintiff, which, after reciting the fact of the mortgage in question and that there was $269.55 delinquent interest due thereon, reads:

> "Whereas, an interest coupon of forty-five dollars ($45) on said principal note of fifteen hundred dollars ($1,500) will fall due July 1, 1913, no part of which is included in the said sum of two hundred sixty-nine and 55/100 dollars; and whereas, said party of the first part is interested in the title to said land and the payment of said mortgage indebtedness:
>
> "Now, in consideration of a present settlement of all controversy in connection with said loan, and by way of compromise to obtain such present settlement, said first party hereby agrees to pay to said second party, on signing of this agreement, said delinquent interest in the sum of two hundred sixty-nine and 55/100 dollars ($269.55), and to pay to said second party, on or before June 25, 1913, as full payment of the principal and interest then accrued on said loan, the sum of fourteen hundred forty-seven and 50/100 dollars ($1,447.50) time being of the essence of this contract, and if said sum of fourteen hundred forty-seven and 50/100 ($1,447.50) shall not be paid to the Deming Investment Company, agent as aforesaid, on or before June 25, 1913, then said first party hereby agrees that said Passumpsic Savings Bank shall be entitled to judgment in foreclosure action for the full sum of fifteen hundred and forty-five dollars ($1,545), with interest at ten per cent. per annum from July 1, 1913, together with all unpaid taxes, and said first party agrees that he will not interpose any defense of any nature whatsoever, in such foreclosure action. And for said consideration, said second party agrees to deliver to first party the interest coupons duly canceled, and to surrender the tax sale certificate aforesaid to the county treasurer to be canceled, and by way of compromise to receive said sum of fourteen hundred forty-seven and 50/100 dollars ($1,447.50) on or before June 25, 1913, and to deliver to said first party the canceled principal note of fifteen hundred dollars ($1,500), and canceled coupon of forty-five dollars ($45), due July 1, 1913, and duly acknowledged release of said mortgage, time being of the essence of this agreement. And it is mutually agreed, between the parties to this agreement, that in case default is made in the payment of said sums above mentioned, or any part thereof, at the time specified, said Passumpsic Savings Bank shall be entitled to judgment for the full amount of said note and coupon and foreclosure of said mortgage according to the original terms thereof.
>
> "In witness whereof, said first party has hereunto subscribed his name, and said second party has caused its corporate name to be hereunto subscribed by its proper officers and its corporate seal attached, this the day and year first above written.
>
> "[Signed] James E. Whitehead.
> "The Deming Investment Company,
> "By D. S. Waskey, Vice Pres.
> "Witnesses:
> "John B. Snell.
> "Hattie L. Hackney.
> "Attest:
> "F. W. Stout, Secretary. [Seal.]"

And, in effect, that on July 12, 1913, and again on July 30, 1913, and yet again on August 2, 1913, pursuant thereto, he tendered the amount of money called for therein, to wit, $1,447.50 and interest, or $1,462.78, to the Deming Investment Company, which was refused, and which, he says, is all plaintiff is entitled to recover in the cause. By way of cross-petition he in effect alleged that the mortgaged lands were theretofore allotted to one Simon Benjamin, a duly enrolled citizen of the Choctaw Nation by blood; that he died November 10, 1904, after selecting his allotment, leaving him surviving as his only heirs at law Katie, his widow, and James and Sampson Benjamin, his minor children; that they sold and conveyed the land to Maggie Pitt, and she to the defendant G. C. Johnson, and he to defendant; that said sale was good and passed the title from the Benjamins, but nevertheless they were asserting title to the land adverse to plaintiff on the ground that the county court of Atoka county was without jurisdiction to appoint the guardian making the sale for said minors, and hence said sale was void; that the three Benjamins were necessary parties to the suit; and prayed that they be summoned to appear as such and answer and that his title as to them be quieted. The answer further alleged that on December 6, 1909, defendant, together with one Dobbs, were sureties for one Williams on a promissory note for $1,750, payable to the American National Bank of McAlester, which was secured by a mortgage on the land in question; that said mortgage was inferior to another mortgage given by said defendants Johnson to one Bowman for $210, dated January 14, 1909; that on February 18, 1911, he and said Dobbs became surety to said Williams on another note for $2,290, payable to said bank, and his wife, Ellen, being then the owner of the land, executed to said bank a mortgage on said land to secure said note of $2,290, the same being inferior to said mortgage of $1,750 executed to the bank, and also to the $210 mortgage given to said Bowman by the Johnsons; that, after executing said mortgage to the bank, Williams became insolvent and unable to pay the mortgage to the bank or to Bowman, and on March 23, 1912, caused the land to be conveyed to defendant and Dobbs, in consideration that they pay off the note of $210 to Bowman and the notes of $1,750 and $2,290 to the bank, which they did, so far as the bank was concerned, by executing their note for $4,000 to the bank and paying the balance to the bank in cash, whereupon his said notes were delivered to Williams; that thereafter Bowman foreclosed his mortgage for $210, and recovered in said suit an attorney's fee of $50, together with costs, amounting to $52.93, and a decree of foreclosure was entered, and the lands herein were sold to one Memminger, to satisfy the same, and the sale was confirmed, and a deed to the lands issued to Memminger, which was duly recorded, "thereupon barring all right of said bank to the land." He alleges that all the right and title in and to the lands by virtue of its mortgage aforesaid were held by the bank for the benefit of himself and Dobbs, and were lost by the refusal of Dobbs to furnish one-half of the money to pay the Bowman mortgage; that thereafter defendant bought the land back from Memminger for $913.63 for his own benefit, and not for the benefit of Dobbs, and so notified him; that Memminger quitclaimed the lands to defendants, who thereafter offered to convey to Dobbs one-half the land in consideration that he pay one-half of what defendant had paid for the land, but that he refused to pay same, ever since which said time defendant has been in peaceable possession as the owner thereof. He further alleges that, notwithstanding all of which, said Dobbs was asserting title thereto in virtue of the deed executed March 23, 1912, by Williams and wife, as aforesaid, and was also contending that defendant repurchased the land from Memminger for his benefit, and that he is entitled to one-half thereof, and is not liable to pay any part of the $4,000 note they executed to the bank. Wherefore he prayed that plaintiff take nothing; that the Benjamins, Memminger, and Dobbs be brought in to litigate their rights, if any they have, in the lands; that an account be stated between him and Dobbs; and that, in effect, his title to the land be quieted.

On January 15, 1914, plaintiff replied, admitting the execution of the contract, but denying all other allegations in the answer and cross-petition of the defendant Whitehead. After guardian ad litem had been appointed for the two Sampson minors, they, by answer and cross-petition, asserted title to the land as heirs of their father, as alleged, set forth the proceedings of the probate court of Atoka county, and assailed them as void for certain reasons, and prayed that their title to the land be cleared of their guardian's deed to Maggie Pitt, and her deed to the Johnsons, and the mortgage to the Deming Investment Company, sought herein to be foreclosed, and for general relief. The mother adopted their answer. Whitehead joined issue with them by reply, in effect a general denial. Pennington and McMillan also made default, and judgment was entered against them accordingly. Upon the issues thus joined there was trial to the court, who, on February 16, 1914, rendered, and on June 1, 1914, entered, judgment in favor of American National Bank (whose answer is not in the record) against Dobbs by default for $2,261.56, in favor of the bank, together with $226.15 attorney's fees and all costs by the bank therein expended, and perpetually enjoined Dobbs from claiming any interest in or title to the land and from making demand "against the defendant Whitehead [therefor?] or any sum of money by reason of any of the above transactions." At the same time he also rendered and entered judgment that the Benjamins take nothing by their suit, and perpetually enjoined them from asserting any title to the land, or attempting to convey any, or doing anything to "dispute" the title of Whitehead thereto. On June 1, 1914, he also, as shown by a separate judgment entry, rendered and entered judgment in favor of plaintiff, Passumpsic Savings Bank, against the defendant mortgagors, G. C. and Jazie Johnson, by default for $1,462.78 only, declared the same a lien upon the land, ordered it sold to satisfy the same, in case said sum was not paid in a certain time by the Johnsons or Whitehead, and gave judgment that Whitehead recover "all his costs herein expended from the plaintiff, Passumpsic Savings Bank, and the other defendants." After motion for a new trial filed by said bank only, and overruled September 4, 1914, the bank brings the case here, without making any of the defendants, save the Johnsons and Whitehead, parties defendant in error.

In the order overruling the motion for a new trial the judgment previously rendered was modified, so as to require Whitehead within 20 days to pay to the clerk of the court for the use of plaintiff $1,462.78, the amount tendered and alleged by Whitehead to be due on the mortgage. He was further ordered to give a bond in the penal sum of $750, conditioned that, if plaintiff appealed the case and, pursuant to the final order of this court, recovered against the mortgaged property a greater sum than that amount, the bond should stand as full surety for the amount so recovered, in lieu of the mortgage, and that said bond should be void in the event said mortgage was not released in 20 days after the approval of the bond. It was further ordered that plaintiff be paid said sum of $1,462.78 so paid into court within 10 days after it was paid in, upon depositing with the clerk said release, and that the payment and acceptance thereof and said release should in no wise prejudice plaintiff's right of appeal, and a recovery of a larger amount than the judgment, all of which was done.

[5] It is contended that this appeal should be dismissed, because Memminger, McMillan, Pennington, Dobbs, the American National Bank, and the three Benjamins were not made parties to this appeal. There is no merit in this contention as to the three first named, for the reason that Memminger disclaimed and passed out of the case and the two others were neither summoned nor appeared, and no judgment was rendered for or against them. In note 5, 2 R. C. L. 68, it is said:

> "Where, in a suit to foreclose a mortgage, certain persons were made defendants under a general allegation that they claimed to own or hold some right, title, or interest in the real estate, but there was no judgment for or against them, they seemingly having dropped out of the case, it was held that the failure to make them parties to the proceeding in error was not a ground for a dismissal." State ex rel. Hankins, Co. Atty., v. Holt, 34 Okl. 314, 125 Pac. 460.

[3] And, although Dobbs and the American National Bank were alleged by plaintiff to have some interest in the case, and were summoned, they were also, in effect, dropped from the suit by plaintiff, as it took no judgment against them. To be sure, on Whitehead's cross-petition against them, it was adjudged that Dobbs owed said bank in a sum certain and had no interest in the land in question as against Whitehead; but, as that judgment had nothing to do with the judgment in favor of plaintiff, rendered on the foreclosure of its mortgage, in effect that Whitehead owed plaintiff only $1,462.78 in settlement of the mortgage debt, as he contended, instead of $1,745, as plaintiff contended, we cannot see how a reversal of the latter judgment could possibly affect the judgment adjusting the rights aforesaid between the bank, Dobbs, and Whitehead, and for that reason the bank and Dobbs were not necessary parties to this appeal.

[2] Again, a reversal of the former judgment could not affect the question of what was due and owing plaintiff on the mortgage, for the reason that the bond executed subsequent to judgment now stands in place of the land, which no longer can be held to respond in execution for the debt, and hence we see no reason why plaintiff's appeal cannot be separately prosecuted without affecting any further litigation that might be waged by others concerning it. And besides, as all this litigation between Whitehead and the bank and Dobbs arose out of rights alleged to have accrued since the execution of plaintiff's mortgage and inferior to it, the bank and Dobbs were not necessary parties to its foreclosure in the trial court, and hence not necessary parties in this court. Neither were the Benjamins necessary parties to its foreclosure. Nor were they brought in by plaintiff, but by Whitehead by cross-petition, and as their claims to the land were not properly triable in that suit, but should have been tried in an independent action, it follows that the judgment secured against them by Whitehead, and the judgment in favor of plaintiff against Whitehead's grantors, were several and not joint judgments, and for that reason they are not necessary parties to this appeal.

[4] In support of the motion to dismiss, it is further urged that the case-made was not served upon G. C. and Jazie Johnson within the proper time. Assuming such to be the state of the record, as no deficiency judgment was asked against them as mortgagors, they are not necessary parties defendant in error. Page v. Turk, 43 Okl. 667, 143 Pac. 1047. It follows that none of the parties mentioned were necessary parties to this appeal, and, there being no merit in the remaining grounds in the motion to dismiss, the motion to that effect should be overruled.

[1] This sends us to the merits of the case. Upon the face of the agreement of April 9, 1913, plaintiff was entitled to recover, not only the full amount of his promissory note of $1,500, but also upon the past-due interest coupon of $45, and also $200 as an attorney's fee—in all $1,745, as insisted, instead of $1,462.78, as found by the trial court. There is no ambiguity in the contract. When Whitehead, pursuant thereto, paid $296.55, and agreed to further pay plaintiff, "on or before June 25, 1913, as full payment of the principal and interest then accrued on said loan, the sum of fourteen hundred forty-seven and 50/100 dollars ($1,447.50), time being of the essence of this contract, and if said sum of fourteen hundred forty-seven and 50/100 dollars shall not be paid to the Deming Investment Company, agent as aforesaid, on or be-

fore June 25, 1913, then the said Passumpsic Savings Bank shall be entitled to judgment in foreclosure action for the full sum of fifteen hundred forty-five dollars ($1,545) with interest thereon from July 1, 1913, * * *" and that he would interpose no defense to the foreclosure action, and plaintiff thereby agreed to deliver the interest coupons duly canceled and surrender, etc., and, by way of compromise of the mortgage indebtedness, receive said sum of $1,447.50 on or before June 25, 1913, and deliver said note and coupon and cancel the mortgage, and both agreed that time was of the essence of the contract, and when Whitehead failed to pay said amount on that day, as agreed, plaintiff was entitled to recover the full amount of the note and coupon sued, together with $200 attorney's fee according to the original terms thereof, and to foreclose the mortgage on the land as prayed.

It will not do to say that to enforce this agreement would be to enforce the payment of a penalty, and hence the court did right in refusing so to do; this for the reason that the note, secured by the mortgage sought to be enforced, was evidence of a subsisting debt to the amount of it, and the agreement valid and enforceable. This was squarely held in Royal Makepeace v. President, etc., College, 10 Pick. (Mass.) 298. There the facts were that the payee in a note for $4,310 agreed with the maker that, if the maker would convey to him certain land the sum of $3,200 should be allowed him as a credit on the note, and that upon receipt of the conveyance of the land and the maker's note for $500, payable in one year, with interest. the first note should be given up. In the agreement was this clause: "The above arrangement is to be carried into effect in three months." The land was conveyed within the time stated and $3.200 indorsed as a credit on the note, but no other payment and no note for $500 was made or tendered within the three months. Under this state of facts it was held:

> "That the note was not a penalty to enforce the performance of some other obligation, but that it was evidence of a subsisting debt to the amount of it, and that the agreement was in the nature of a composition, the conditions of which must be strictly complied with, and that the maker had not complied with the conditions of the agreement, and therefore the payee was entitled to recover the balance of the note after deducting the $3,200."

In the body of the opinion the court, speaking through Shaw, C. J., said:

> "The object of the plaintiffs was to insure the actual payment of the smaller sum, or, in failure of that, to retain their subsisting and legal claim for the larger; and we can perceive no claim, either in law or equity, on the part of the debtor, to have the benefit of the agreement, without a compliance with the condition upon which it was made. The case is within the reasoning and authority of Tufts v. Kidder, 8 Pick. (Mass.) 537. It is well settled, as well in equity as at law, that a creditor having entered into an agreement for a composition, is not bound to take less than his debt, unless that agreement shall be absolutely and strictly complied with. Mackenzie v. Mackenzie, 16 Ves. 372."

As an accord and satisfaction is defined to be "an agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account" (Bouvier's Law Dictionary), the most that can be said of this agreement is that it was an accord, well pleaded, for the reason that thereby the minds of plaintiff and Whitehead met on the proposition that $1,447.50 was to be accepted, if paid on or before June 25, 1913, in full of the mortgage debt. And for the reason that said accord was not executed, by payment and acceptance of the $1,447.50, pursuant to and within the time prescribed in the contract, for time was of the essence of the contract, plaintiff is entitled to recover upon the original cause of action; that is, on the note and mortgage sought to be foreclosed. 1 Am. & Eng. Encyc. of Law, 420, says:

> "An accord, in order to discharge a contract or cause of action, must be executed, and this execution of the accord is the satisfaction. Satisfaction consists in the actual performance by one party of the agreement of accord, and the acceptance by the other party of such performance in full satisfaction of the original cause of action or contract."

In Hearn v. Kiehl, 38 Pa. 147, 80 Am. Dec. 472, the court said:

> "Accord and satisfaction is a good plea by a debtor to the action of his creditor, but the legal notion of accord is a new agreement on a new consideration to discharge the debtor. And it is not enough that there be a clear agreement or accord, and a sufficient consideration, but the accord must be executed. The plea must allege that the matter was accepted in satisfaction. Mere readiness to perform the accord, or a tender of performance, or even a part performance and readiness to perform the rest, will not do. Such is the law between debtor and creditor."

This is in keeping with what we held in Houston Bros. v. Wagner, 28 Okl. 367, 114 Pac. 1106. There certain partners, as Houston Bros., plaintiffs in error, sued one Wagner, defendant in error, on three certain promissory notes. Defendant admitted the execution thereof, and pleaded what was intended as an accord and satisfaction, in that he had offered, and plaintiffs agreed to accept, in full payment of the indebtedness, a deed to certain real estate; that he had placed plaintiffs in possession and tendered them the deed, which they declined to accept; and the deed was brought into court and again tendered plaintiffs. There was judgment for defendant. In reversing the case, in the syllabus we said:

> "1. An accord must be completely executed to sustain a plea of accord and satisfaction. A part execution and tender of performance of the residue is insufficient.
>
> "2. Where, in an action on certain promissory notes, defendant pleaded accord and satisfaction, in effect, that pending the action it was agreed between defendant and plaintiff's agent that plaintiff would accept of defendant in full

satisfaction of said notes certain lots, whereupon defendant placed him in possession and later tendered a deed therefor, which was refused, and the evidence supported the plea, held, that a judgment for defendant was contrary to law."

And so we say the judgment in question is contrary to law, in that, while the agreement pleaded was a good plea of accord, the undisputed evidence discloses that the $1,447.50, agreed to be paid plaintiff, was not tendered on the date fixed therein, and hence was not accepted in satisfaction thereof, but, time being the essence of the contract, was rightfully refused. We are therefore of opinion that plaintiff was entitled to recover $1,500 on the note sued, also, on the past-due interest coupon thereto attached for $45, together with interest thereon at 10 per cent. per annum from July 1, 1913, also $200 as an attorney's fee, as stipulated in the mortgage, with interest thereon at 6 per cent. per annum from the date of suit, and for costs, and that the mortgage be foreclosed, and the land sold to satisfy the same, or the bond held to respond.

The cause is accordingly reversed and remanded, to be proceeded with according to the views herein expressed. All the Justices concur.

WILLIAMS v. DIESEL et al. (No. 7495.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. INDIANS 🔑15(2)—DEEDS—VALIDITY—ACT OF CONGRESS.

A member of the Creek Tribe of Indians, upon the alienation of whose allotted lands restrictions imposed by federal enactment did not expire until August 8, 1907, in order to effectuate an agreement entered into before that time with her grantee, executed and delivered three deeds purporting to convey such lands on March 2, July 1, and August 9, 1907, respectively. *Held*, that such deeds were inefficient to convey title and void, as violative of an act of Congress approved April 26, 1906 (c. 1876, 34 Stat. 144), then in force, section 19 of which provides: "And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void."

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39.]

2. JURY 🔑14(6)—CANCELLATION OF CONVEYANCE—INDIANS.

A suit seeking the cancellation of such deeds on the ground that same were executed in violation of Congressional enactment is one of equitable cognizance, wherein the parties are not entitled, as a matter of right, to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 71.]

(Additional Syllabus by Editorial Staff.)

3. INDIANS 🔑15(2) — DEED — VALIDITY — "AGREEMENT."

An agreement within the meaning of Act Cong. April 26, 1906, c. 1876, 34 Stat. 144, providing that "every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void," means a coming together of the parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39.

For other definitions, see Words and Phrases, First and Second Series, Agreement.]

Commissioners' Opinion, Division No. 3. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by Rena Williams against M. L. Diesel and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

S. H. Sornborger, of Sapulpa, for plaintiff in error. W. P. Root, of Sapulpa, and W. L. Cheatham, of Bristow, for defendants in error.

BLEAKMORE, C. This case presents error from the district court of Creek county, wherein Rena Williams, on May 23, 1913, commenced action against M. L. and Bertha Diesel for the cancellation of three deeds executed by her to A. H. Purdy on March 2, July 1 and August 9, 1907, respectively, purporting to convey certain lands allotted to her as a member of the Creek Tribe of Indians, exclusive of her homestead, on the ground that such deeds were violative of congressional enactment, and therefore void, the first two being executed prior to the removal of restrictions upon the alienation of the lands described, and the third an attempted ratification of the former conveyances and likewise void, and seeking also the cancellation of a deed to said lands from Purdy to the Diesels, of date September 25, 1907, recovery of the premises, etc.

Upon notice by his grantee to defend the action, Purdy filed his answer, setting forth, among other things:

> "That both plaintiff and defendant, recognizing that the deeds from plaintiff to A. H. Purdy of date March 2, 1907, and July 1, 1907, were void and of no legal effect in law, did on the 9th day of August, 1907, enter into a separate and independent contract in relation to the sale of said land, by which the plaintiff agreed with defendant A. H. Purdy and sold to A. H. Purdy the lands mentioned in plaintiff's petition, and made and executed a deed to A. H. Purdy, in pursuance of said contract so made on the 9th day of August, 1907, conveying to A. H. Purdy said lands for a new and independent consideration of the sum of $500, and this defendant denies that said last-mentioned deed was taken or given in ratification of the deeds mentioned and given by plaintiff to defendant on March 2, 1907, and July 1, 1907, or that there was in any manner or way a ratification of said deeds, and this defendant says that there was an adequate consideration paid for said lands on said 9th day of August, 1907, and the plaintiff received the same and executed the deed for said consideration, and independent of, and not in ratification of, said pre-existing deeds."

The Diesels also answered, alleging that they were bona fide purchasers from Purdy for a consideration of $1,500, and adopting as their own the answer of Purdy. To these answers plaintiff replied by way of general denial.

The case was tried to a jury. At the conclusion of the evidence offered on behalf of plaintiff demurrer thereto was sustained, and the court directed a verdict for defendants, and rendered judgment accordingly. Plaintiff has appealed.

Plaintiff is a half-blood Creek Indian, and the premises involved constitute her surplus allotment, restrictions upon the alienation of which existed until August 8, 1907, when they were removed by operation of law. She, being the sole witness in the case, testified:

"Q. The record, as your petition alleges, indicates that you made a deed of conveyance of your surplus allotment to Mr. Purdy on the 2d day of March, 1907. Do you recall that occasion? A. A deed? He didn't say it was a deed at that time; he said it was a contract; and he seen my husband out there and told him to bring me in and he would sign me a contract to pay me more than anybody else, and so my husband did so. Q. Well, you executed that deed in here did you? A. Yes, sir. Q. And he represented to you that it was a contract for what? A. Yes, sir. Q. That he would buy it then? A. Yes, sir. Q. When would he buy it? A. After the restrictions were removed. Q. That is what he represented to you? A. Yes, sir. Q. And in pursuance of that you signed what now seems to be a deed? A. Yes, sir. Q. Mrs. Williams, have you ever been to school? A. No, sir; I never have. What little learning I have I learned at home. Q. Are you able readily to read and write? A. No, sir. Q. You do write your own name? A. Yes; a little. Q. Well, did he pay you anything for it at that time? A. No, sir; he did not. Q. He simply promised to pay you more than anybody else? A. Yes, sir; after the restrictions were removed; yes, sir. Q. Well, at that time when was it supposed the restrictions would become removed? Under the act of Congress? A. He said in July some time. Q. The record shows you executed a deed under date of July 1, 1907. At that time did you receive any consideration in money or anything? A. Well, I went there, it was a picnic given there at home, and I went in and I told my husband I wanted some money, and he told me to go to Mr. Purdy and get $50. And that is all I ever did get. Q. Did you at any time, either before or after that, get any more? A. No, sir; that is all. Q. Now on the 9th of August, 1907, you appear to have made another deed? A. Yes, sir. Q. How came you to make that? A. He claimed that the restrictions were removed and that he would pay me the money after I signed the deed. But after I signed the deed, he says, 'There is nothing due you; I paid it to Sam;' and Sam said, 'Come out—' Q. Who is Sam? A. My husband, Sam Williams. Q. Where is your husband? A. I don't know. He said I could get it back if I tried; and I said, 'Why don't you help me?' and he said, 'I haven't anything to do with it.' * * *"

Cross-examination:

"Q. You didn't sell this to him on the 2d of March, 1907? A. No, sir; I contracted with him, when the restrictions were removed. Q. In writing? A. Yes, sir; he made a contract, but I never read it. Q. Have you a copy of it? A. That writing copy? Q. Yes? A. No. Q. You complain of that deed as being your contract? A. No, sir; he didn't say any deed; he said contract. Q. You didn't sign but one paper in March, 1907, did you? A. He said it was a contract. Q. You then signed but one paper? A. Yes, sir. Q. You signed no notes? A. No, sir; I never owed nothing. Q. You didn't make any notes to the International Bank? A. No, sir. Q. Sign them with your husband? A. No, sir. Q. After the second deed, did you make any written contract with Mr. Purdy at that time to sell the land to him? A. Yes, sir; I made it this way, that he would pay me $1,100 with the $50 I got that day before I made the contract. Q. That was just a verbal contract? A. Yes, sir. Q. You told him, if he would loan you that $50, you would sell the land when you got the— A. Yes; when I got the restrictions removed. Q. You didn't pretend to sell it to him that day? A. No. Q. What security did you give Mr. Purdy for the $50? A. I never gave him any security at all; I just went and got it and came out. Q. Didn't sign any note or mortgage at the bank? A. No, sir; didn't have anything to mortgage. Q. Didn't sign that deed as security? A. No, sir. The last deed? Q. No; I am talking about the second one. A. No. He wouldn't pay me all my money until the restrictions were removed. Q. You went back there on the 9th of August? A. My husband carried me back there. Q. Your husband carried you back there? A. Yes, sir. Q. You went voluntarily? A. He asked me to go. Q. And you signed the deed on that occasion? A. Yes, sir; to get my money. Q. Wasn't it discussed on that occasion that your debt to the International Bank, that they would be paid out of this consideration? A. No, sir; I never owed the bank anything that I know of. Q. Or the National Bank? A. It neither. Q. Do you remember the 10th of October, 1907, of giving Mr. Purdy a receipt for $850? A. No, sir; I don't know anything about that. Mr. Purdy came up to me in August. He wanted me to give him a receipt, and I said, 'For what?' and he said, 'The 120 acres of land;' and I said, 'I will pay you the $50, and see my attorneys.' Q. When was that? A. In August. Q. 1907? A. This year. Q. I am talking about 1907. Did you and Sam Williams and Mr. Purdy have a settlement on the 10th day of October, 1907? A. A settlement of what? Q. Consideration of that deed of August 9th? A. No, sir; he never paid me any money but the $50, and I will stay by that."

[1] By Act Cong. April 26, 1906, c. 1876, 34 Stat. 144, it is provided:

"And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void."

[3] An "agreement" within the meaning of the foregoing provision is defined as:

"A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing." Carter v. Prairie Oil & Gas Co., not yet officially reported, 160 Pac. 319.

The only testimony adduced at the trial relative thereto establishes conclusively every element of an agreement made between plaintiff and Purdy, while restrictions existed upon the alienation of her surplus lands that she should convey the same to him and be paid the consideration therefor when such restrictions were removed; and to effectuate this agreement the deeds of March 2, July 1, and August 9, 1907, were executed. The first two of these deeds were executed before the removal of restrictions, and admittedly are void for that reason alone; and the third, designed to the same end, and executed as a part of the same transaction immediately upon the law permitting the alienation of such lands becoming operative, was clearly a deed "for the making of which a contract or agreement was entered into before the removal of restrictions," and is likewise inefficient to convey title and void. If the deeds from plaintiff to Purdy were void, the Diesels, as purchasers from him, of course could take no title.

The doctrine announced in Carter v. Prairie Oil & Gas Co., supra, is determinative of this case. Therein it was held:

> "A citizen of the Creek Nation received $300 of the recited consideration of $3,600, and on July 2, 1907, prior to the removal of her restrictions made, executed and delivered a deed to a part of her allotment, void under section 19 of an act of Congress approved April 26, 1906. At the same time she took back from the grantees therein their two promissory notes, one for $1,700, payable August 9, 1907, the other for $1,600, payable August 9, 1908, and agreed to meet them at the same place on August 9, 1907, which she did. There on that day, her restrictions in the meantime being removed by operation of law, they took up both notes, paid her the note for $1,700, and took from her another deed for the same land, which recited the same consideration, and that $2,000 of it was that day cash in hand paid, and executed and delivered to her their note for $1,600, payable one year thereafter. Held that, although executed at different times, both deeds were evidence, or part of one and the same transaction, and should be construed together, and that, the first deed being void as in fraud of the statute, not only in that for the making of which an agreement was entered into before the removal of restrictions, but in that a part of the consideration of the first entered into the consideration for the second deed, the taint of illegality in that deed tainted the second, and that both are void. Held, further, that, being void, the subsequent purchaser of the land took no title.
>
> "As 'transaction' is derived from the Latin words 'trans,' meaning across, and 'agere,' to drive, evidence examined, and held, that the transaction here involved was putting, or driving, across the title to the land from plaintiff to the defendant grantees, and that the two deeds executed for that purpose were evidence or part of that transaction, and should be construed together, not only to determine what the contract or agreement evidenced thereby was, but with what intent it was made."

It is urged by defendants in error that the rule announced in Henley v. Davis, not yet officially reported, 156 Pac. 337, applies and should govern this case. Not so. The conveyances held to be valid and binding in Henley v. Davis, McKeever v. Carter, 157 Pac. 56, and Welch v. Ellis, 163 Pac. 321, No. 6806, were executed subsequent to the taking effect of the act of Congress approved May 27, 1908 (35 Stat. 312, c. 199), which was a revising act intended as a substitute for all former legislation relative to restrictions upon alienation of lands allotted to the members of the Five Civilized Tribes and operated to repeal the provisions of the act of April 26, 1906, supra; while here, as in the case of Carter v. Prairie Oil & Gas Co., the conveyances involved were executed during the time the provisions of the act of April 26, 1906, were in full force and effect.

[2] The pleadings here are in all essential particulars the same as those in Carter v. Prairie Oil & Gas Co., and upon the authority of that case this cause must be treated as one of purely equitable cognizance, where neither party is entitled as a matter of right to a trial by jury. We have reviewed evidence introduced on behalf of plaintiff, and hold that the judgment of the trial court sustaining the demurrer thereto is clearly opposed to such evidence, and is contrary to the law.

The judgment is therefore reversed, and the cause remanded for such further proceedings as justice and equity may require consistent with the views herein expressed.

PER CURIAM. Adopted in whole.

CITIZENS' STATE BANK OF FT. GIBSON v. STRAHAN et al. (No. 6073.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. PLEADING ⇨362(2)—PETITION—STRIKING PARTS.

Record examined, and *held*, that the trial court did not err in overruling defendant's motion to strike certain portions of plaintiffs' petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1148–1151.]

2. APPEAL AND ERROR ⇨187(2)—MISJOINDER OF PARTIES PLAINTIFF—FAILURE TO AMEND —WAIVER.

By virtue of our liberal statute which allows amendments as to parties at any stage of the proceedings, the question of misjoinder of parties plaintiff, being an exception which, if taken below, might have been obviated by an amendment, will be held to be waived unless raised in some manner before or at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1185.]

3. EXPRESS STATUTORY CONSTRUCTION—CONSTRUCTION OF STATUTES IN DEROGATION OF COMMON LAW.

In this jurisdiction it is provided by statute (section 2948, Rev. Laws 1910) that "the rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a view to effect their objects and to promote justice."

4. USURY ⇨142(1)—ACTION TO RECOVER—NECESSITY OF DEMAND—FORM.

Although demand and refusal be a requisite to the right of the plaintiff to commence an action for the recovery of usury paid, yet, when the law does not require any particular form or condition for either, any demand will be sufficient which notifies the lender that the borrower intends to claim the benefits given him by the statute.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 428, 429, 431.]

5. USURY ⇨142(1)—ACTION TO RECOVER—DEMAND—STATUTE.

Record examined, and *held*, that the demand herein constitutes a substantial compliance with the proviso of section 1005, Rev. Laws

1910, which provides: "Provided, such action shall be brought within two years after the maturity of such usurious contract; provided, further, that before any suit can be brought to recover such usurious interest, the party bringing such suit must make written demand for return of such usury."

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 428, 429, 431.]

6. APPEAL AND ERROR ⚷301—PRESENTATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL—AMOUNT.

The Supreme Court will not examine the record to ascertain whether the amount found by the court or jury is the correct amount, or, indeed, review any of the other alleged errors committed at the trial, which are not presented in the lower court for re-examination by motion for new trial or otherwise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753–1755.]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

On rehearing. Judgment affirmed.

For former opinion, see 158 Pac. 378.

Guy F. Nelson, of Oklahoma City, for plaintiff in error. W. D. Halfhill and O'Hare & Davidson, all of Muskogee, for defendants in error.

KANE, J. This was an action commenced by the defendants in error, plaintiffs below, against the plaintiff in error, defendant below, for the purpose of recovering twice the amount of certain usurious interest paid by the plaintiffs and retained by the defendant, contrary to section 1005, Rev. Laws 1910. Hereafter the parties will be called "plaintiffs" and "defendant," respectively, as they appeared in the court below. After the evidence was all in, the jury by direction of the trial court returned a verdict in favor of the plaintiffs for the sum of $773.16, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

Whilst the petition in error herein contains many assignments of error, counsel for defendant in his brief summarizes the points upon which he relies for reversal under the following subheads:

First. The court erred in overruling defendant's motion to strike from plaintiffs' second amended petition all reference to the borrowing of the sum of $500 on October 20, 1909, for which a note for $518.75 was given, due January 20, 1910; and all reference to the borrowing of $400 on November 24, 1909, for which a note for $412 was given, due January 24, 1910; and all reference to the payments made on said notes, to wit, the sum of $30.75 on January 20, 1910, and the sum of $12 on January 25, 1910—to which adverse ruling the defendant excepted.

Second. The court erred in overruling the defendant's demurrer to the evidence of plaintiff, to which the defendant excepted, and for error of the court in refusing to give the peremptory instruction requested by the defendant to find a verdict for the defendant, to which the defendant excepted.

Third. The court erred in giving a peremptory instruction to find a verdict for the plaintiffs in the sum of $773.16, to which defendant excepted.

Fourth. The court erred in overruling the defendant's motion for a new trial, to which the defendant excepted.

[1] The first assignment of error is based upon the assumption that the instruments mentioned in the motion to strike, upon which the usurious interest was alleged to have been paid, matured two years prior to the commencement of this action; therefore, they say, all right of action for double recovery of interest thereon was barred by that part of the statute which requires such action to be commenced within two years after the maturity of the usurious contract. The evidence tends to show that the various notes referred to in the motion to strike were simply renewals of several original notes; that all the notes involved herein, 13 in number, were part of the same contract, and simply evidenced the original loan of $900, which was the only money plaintiff ever received from the bank. In order to extend the time of payment of the original notes, renewal notes were made from time to time; the original consideration supporting them all. The contract to pay the borrowed sum of $900 did not finally mature until July 1, 1912, which was the date of maturity of the last renewal note. As this action was commenced in August, 1912, it is apparent that this was well within the statutory period of two years.

[2] The contention of counsel as to the second assignment is to the effect that, inasmuch as the evidence showed the plaintiffs jointly executed the notes upon which this action is based, and that all the payments of interest made upon such alleged usurious contract were made by plaintiff Kent Strahan, and that no payments were made or paid by plaintiff Maud Strahan; therefore it was error to overrule the defendant's demurrer to the evidence. The demurrer to the evidence is in the following form:

> "Comes now the defendant and demurs to the evidence offered by the plaintiffs for the reason that it does not prove facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiffs."

This did not directly present to the trial court for consideration the question of misjoinder of parties plaintiff now raised by counsel. Neither does this question appear to have been presented to the trial court for re-examination by the defendant in its motion for a new trial, the formal grounds for which are stated as follows:

> "First. For error of the court in overruling the objection of the defendant to the introduction of any evidence, to which the defendant at the time excepted.
>
> "Second. For error of the court in the admission of evidence, over the objection of the defendant, to which the defendant at the time excepted.
>
> "Third. For error of the court in excluding

evidence offered by the defendant, to which ruling the defendant at the time excepted.

"Fourth. For error of the court in overruling the demurrer of the defendant to the evidence, to which the defendant at the time excepted.

"Fifth. For error of the court in refusing the peremptory instruction offered by the defendant.

"Sixth. For error of the court in refusing instruction No. 1 offered by the defendant.

"Seventh. For error of the court in giving the peremptory instruction to find a verdict for the plaintiffs, over the objection of the defendant."

It is well settled that under liberal statutes, similar to ours, authorizing amendments as to parties, a misjoinder has lost much of its former importance, and unless raised in some manner before or at the trial it will usually be held to have been waived, and consequently cannot be raised for the first time on appeal. 15 Enc. Pl. & Pr. 581; White v. Portland, 67 Conn. 277, 34 Atl. 1022; Nelson v. Smith, 54 Ill. App. 346; Mattoon v. Fallin, 113 Ill. 249; Cofran v. Shepard, 148 Mass. 582, 20 N. E. 281; Cruchon v. Brown, 57 Mo. 38.

The question of misjoinder of plaintiffs not having been directly raised at the trial, we think it now comes too late. It is an exception which, if taken at the trial, might have been obviated by an amendment. The ample power, now given to courts, to allow amendments without costs, renders this objection comparatively unimportant, when it does not affect the merits of the case.

[3-5] The next contention of counsel is to the effect that the demand made by the plaintiffs for the return of the alleged usurious interest was not in substantial compliance with the part of the statute (section 1005, Rev. Laws 1910), which provides that:

"Before any suit can be brought to recover such usurious interest, the party bringing such suit must make written demand for" such usurious interest.

The demand was in the following form:

"Demand is hereby made upon you to return to, and pay to the undersigned, $112.35, the same being for usurious and illegal interest paid to you upon a certain loan made to us during the years of 1910 and 1911; the final payment and settlement made to you on or about the 12th day of July, A. D. 1912."

It seems that the amount stated in the demand was the sum plaintiffs conceived they had paid as usurious interest, and the contention is that, inasmuch as the demand was for a specific sum, which was not double the amount of the usury paid, it was not such a demand as the statute required as a condition precedent to the right of the plaintiffs to commence their action. In discussing the question of a proper demand in Miller et al. v. Oklahoma State Bank of Altus et al., 157 Pac. 767, which was an action similar to this, this court, in an opinion by Mr. Justice Brown, said:

"We also hold that under the second subdivision of said section 1005, where the borrower of money pays therefor a greater rate of interest than 10 per cent. per annum, he, or his legal representatives, may, within two years after maturity of such usurious contract, recover from the person, firm, or corporation taking or receiving such interest twice the amount of the interest so paid, provided that, before bringing such suit, the party bringing the same must make written demand of the party to be sued for payment of the sum so authorized by the statute to be recovered."

And again in the same opinion, speaking upon this question the court in effect reiterates its former statement as follows:

"Where interest has been paid greater than 10 per cent. per annum, the party paying the same may recover double the sum so paid, where the action therefor is within two years after maturity of the usurious contract and after due demand for payment of the sum entitled to be recovered."

Therefore we take it that it is settled law in this jurisdiction that, before commencing an action of this kind, the plaintiff is required to make written demand of the party to whom such usurious interest has been paid of the sum authorized by the statute to be recovered; that is, twice the amount of the interest so paid. Now the question arises whether the demand herein, which was not for twice the sum entitled to be recovered, but for a much smaller sum, was a substantial compliance with the terms of the statute. We find this question also answered—and rightly answered, we think—in the affirmative by a former opinion of this court. Ardmore State Bank v. Thompson, 164 Pac. 977, not yet officially reported. In that case, as in this, it was contended that, inasmuch as the plaintiff "did not make demand for the return of the usury before bringing his action, but that instead he made the demand for the return of the whole interest paid, the demand was not in substantial compliance with the statute." The court held that when the contract is usurious and the borrower makes a written demand requesting the return of the whole interest so paid, instead of twice the interest paid over and above the amount allowed by law, such borrower is within his rights.

In another case (Texmo Cotton Exchange Bank v. Liston, 160 Pac. 82), the demand was for a return of the usurious interest charged, reserved, taken, and received, and the forfeiture and penalty therefor, without stating any amount. The demand was held to be a substantial compliance with the provisions of section 1005, Rev. Laws 1910, relative to the demand for usury paid. In passing upon this question, the court, speaking through Mr. Commissioner Hayson, who prepared the opinion for the court, said:

"The written demand made by Liston was a substantial compliance with the provision in section 1005, Revised Laws 1910, relative to demand prior to the bringing of the suit. The party to whom usury is paid is in as good a position to know the amount of such usury as the party who pays. In most instances he is in a better position, and better qualified in both education and training. He may repay such usury upon written demand being made, and save himself the costs, expenses, and penalty incident to the litigation of the matter. But when a substantial compliance with the law has been

> met by the party who pays such usury, to the party receiving the usury, by serving upon such party who receives the usury a written demand for its return, and such demand is refused, and suit is brought and a recovery had, the cause will not be reversed because of some technical error as to the amount demanded, so long as the judgment is within the amount demanded in the written demand and is upheld by the evidence in the record."

And in still another case (Ardmore State Bank v. Lee, 159 Pac. 903), it was held, "The notice is not defective merely because a greater sum was demanded than was due." It is quite apparent from the foregoing cases, and others of like tenor which might be cited, that this court, there being no statutory requirement as to form, has uniformly held any form of demand sufficient which notifies the lender that the borrower intends to enforce his rights under the penalty clause of the usury statute. Generally, it may be said that, although demand and a refusal be a requisite to the right of the plaintiff to commence an action, yet, when the law does not require any particular form or condition for either, any demand will be sufficient which is understood by the parties to be a claim to money or property on one side and a refusal to pay or deliver on the other. 1 Cyc. 696; Kiefer v. Carrier, 53 Wis. 404, 10 N. W. 562; Smith v. Schulenberg, 34 Wis. 41; Colby v. Reed, 99 U. S. 560, 25 L. Ed. 484. In the latter case, the party making the demand demanded a sum largely in excess of that which he was entitled to. It was contended that this was not a proper demand. The court in passing upon the question thus raised says:

> "Responsive to the second request, the judge told the jury that where a party demands more than he is entitled to receive, that circumstance alone will not justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled, provided it is distinct, well known, and clearly distinguishable from that to which the demanding party had no right; that if the party demanded $45,000 of the stock when he was only entitled to $32,000 of the same, the defendant could not properly refuse to deliver what the plaintiff was entitled to receive, on the ground that the demand was excessive. Injustice and inconvenience would flow from any different rule, and, inasmuch as we are all of the opinion that the instruction was correct, it is not deemed necessary to pursue the subject."

The great weight of authority, both in the state and federal courts, is that usury statutes, being remedial, should be given a liberal construction that will carry out the intention of the lawmaking body. Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455; Farmers' Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; Eaker v. Bryant, 24 Cal. 87, 140 Pac. 310; Citizens' Bank v. Donnell, 172 Mo. 384, 72 S. W. 925; Albion Nat. Bank v. Montgomery, 54 Neb. 681, 74 N. W. 1102.

In this jurisdiction it is provided by statute (section 2948, Rev. Laws 1910) that:

> "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a view to effect their objects and to promote justice."

The object of requiring the plaintiff to make demand before the commencement of his action undoubtedly is to afford the defendant an opportunity to refund the penalty imposed upon him by statute by taking a rate of interest greater than is allowed by law without being put to the expense and inconvenience of litigation. In these circumstances, any demand which notifies the lender that the borrower intends to claim the benefits given him by the usury law constitutes a substantial compliance with the provisions of section 1005, Rev. Laws 1910, relative to the written demand for the return of the usury paid. And so we say here, as was said in effect in Colby v. Reed, supra, and the other cases hereinbefore cited, the demand being sufficient to notify the defendant that the plaintiff intended to claim the benefits given him by the usury statute, the mere fact that it was for a sum less than he was entitled to did not justify the defendant in refusing to tender at least the sum demanded, and then rely upon this technical defect in the demand to defeat any recovery.

[6] There is some contention, made for the first time in this court, that the judgment entered by the trial court is excessive. By referring to the grounds for new trial presented below, which elsewhere are set out in full, it will be seen that this question was not raised in the court below, nor presented to the trial court for re-examination in the motion for a new trial. It is well settled that the Supreme Court will not examine the record to ascertain whether the amount found by the court or jury is the correct amount, or, indeed, review any of the other alleged errors committed at the trial which are not presented in the lower court for re-examination by motion for new trial or otherwise. McDonald v. Carpenter, 11 Okl. 115, 65 Pac. 942; Osborne & Co. v. Case et al., 11 Okl. 479, 69 Pac. 263; Weaver v. Kuchler et al., 17 Okl. 189, 87 Pac. 600.

The latest expression by this court on this question called to our attention may be found in Frick-Reid Supply Co. v. Hunter, 148 Pac. 83, wherein the point was made that the judgment was excessive because the trial court allowed interest at the rate of 7 per cent. instead of 6 per cent. per annum from date of the rendition of the judgment. In passing upon this question, Mr. Justice Sharp, who delivered the opinion for the court, says:

> "As to the point that the judgment should bear 6 and not 7 per cent. interest per annum from date of rendition, we find that no objection, to the allowance or rate of interest that the judgment should bear, was made in the lower court either at the time the journal entry of judgment was prepared and filed or in the motion for a new trial. It is a rule of very common application that objections must be made in the trial court in order to reserve questions for

review. This assignment cannot therefore be considered."

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

ARKANSAS VALLEY NAT. BANK v. McCOLLOM et al. (No. 8587.)

(Supreme Court of Oklahoma. Jan. 9, 1917. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR 🔑323(3)—PARTIES ON APPEAL—DISMISSAL.

All parties against whom a joint judgment has been rendered, and whose interests will be affected by a reversal or modification of the judgment appealed from, must be made parties to the appeal; and where such is not done the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1796, 1802.]

2. APPEAL AND ERROR 🔑415—NAMES OF APPELLANTS—FOUNDATION FOR APPEAL.

The fact that the petition in error purports to be in the name of all of defendants in no wise cures the neglect to properly lay the foundation for appeal in the lower court (following Bowles et al. v. Cooney et al., 45 Okl. 517, 146 Pac. 221).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2139.]

Error from District Court, Pawnee County; Conn Linn, Judge.

Action by the Arkansas Valley National Bank against James M. McCollom and others. Judgment by default against defendant James M. McCollom, and judgment against defendant Anna McCollom, and plaintiff brings error. Dismissed.

F. C. Shoemaker, of Pawnee, for plaintiff in error. McNeill & McNeill, of Pawnee, for defendants in error Anna and Perry McCollom.

PER CURIAM. This action was brought by the Arkansas Valley National Bank, plaintiff in error, in the district court of Pawnee county, against James M. McCollom and Anna McCollom, defendants in error, upon three promissory notes executed by them to plaintiff, which notes were secured by a mortgage executed by defendants upon their lands. Certain other parties were joined as defendants, which we deem not necessary to mention. Anna McCollom answered, and set up as her defense to the action that certain usurious interest had been charged; that she was entitled to certain credits on said notes, which had not been made by plaintiff in error, etc. The cause was tried to a jury, and resulted in a verdict against Anna McCollom, upon which the court entered judgment, and also rendered judgment by default against James M. McCollom. The judgment recites:

> "It is therefore ordered, adjudged, and decreed by the court that the plaintiff do have and recover of and from the defendants J. M. McCollom and Anna McCollom the sum of $630.89, the amount so as aforesaid found to be due said plaintiff, and costs herein, taxed at $——; that said judgment bear interest at the rate of 10 per cent. per annum."

[1] It therefore clearly appears that this is a joint judgment. Motion to dismiss this appeal has been filed upon the ground, among others, that James M. McCollom has not been made a party hereto, that no case-made was served upon him or his attorney, that no summons in error has been issued or served upon him, and that, since the judgment was a joint judgment, he is a necessary party to this appeal. The motion will be sustained. It is a rule in this jurisdiction, too well settled to require the citation of authorities, that all parties to a joint judgment, whose interests will be affected by a reversal or modification of the judgment appealed from, must be made parties to the appeal, and, where such has not been done, the appeal will be dismissed.

[2] Plaintiff in error contends that Anna McCollom appeared and defended the action in her own right, and for and in behalf of her husband, in compliance with section 4685, Rev. Laws 1910, and for that reason James M. McCollom is not a necessary party to this appeal. This contention is without merit, in view of the fact that the judgment rendered herein was a joint judgment against both Anna and James M. McCollom. And the fact that the petition in error purports to be in the name of both defendants in error in no wise cures the neglect to properly lay the foundation for appeal in the lower court. Bowles et al. v. Cooney et al., 45 Okl. 517, 146 Pac. 221. Neither is there any merit in the contention that attorneys for defendants in error waived the issuance and service of summons in error and accepted service of case-made for said James M. McCollom, since said attorneys appeared only as attorneys for defendants Anna McCollom and Perry McCollom.

For the reasons stated, the appeal is dismissed.

STATE v. HUPPERT. (No. 7477.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR 🔑1130(4)—FAILURE TO FILE BRIEF—DISMISSAL.

Where the county attorney does not file any brief on behalf of the state on appeal, the appeal will be treated as having been abandoned and will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2970, 3205.]

Commissioners' Opinion, Division No. 3. Error from County Court, Rogers County; H. Tom Knight, Judge.

Action by the State of Oklahoma to confiscate an automobile; L. A. Huppert, intervener, and claimant. Judgment for intervener, and the State brings error. Dismissed.

W. M. Hall and D. M. Battenfield, both of Claremore, for the State. J. I. Howard and C. B. Holtzendorff, both of Claremore, for defendant in error.

HOOKER, C. This action was originally instituted in the county court of Rogers county by the state of Oklahoma, acting through the county attorney, to confiscate one certain automobile on account of it being used in the transportation of liquor in violation of law in said county. The proper proceedings were had for that purpose, and at the proper time L. A. Huppert intervened, claiming to hold a chattel mortgage duly recorded upon said automobile, and that, if the same was being used in transportation of liquor in violation of law, the same was without his knowledge or consent.

The cause was tried in the county court, and after the evidence for the intervener and the state was heard by the court, the jury being waived, a judgment was rendered in behalf of the intervener, directing the return of the automobile to him, from which judgment the state has appealed.

The county attorney has not filed any brief on behalf of the state, and under the rule of this court the appeal will be treated as having been abandoned, and the same is therefore dismissed.

PER CURIAM. Adopted in whole.

In re BYFORD'S WILL. (No. 7289.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. WILLS 🔑215—CONTEST—VALIDITY OF EXECUTION—CONSTRUCTION.

While, in a contest over the probate of a will, its construction is not before the court and cannot be determined, yet the court can examine the contents of the will as an incident, where it would aid in determining the validity of its execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523.]

2. WILLS 🔑25—EXECUTION—WILL OF FULL-BLOOD INDIAN — ACKNOWLEDGMENT AND APPROVAL.

The due execution and attestation of the will of a full-blood Indian member of the Five Civilized Tribes, devising real estate, which disinherits a parent, wife, spouse, or children of such Indian, involves the question of whether or not such will is acknowledged and approved by a judge of the United States Court for the Indian Territory, a United States Commissioner, or a judge of a county court of the state of Oklahoma pursuant to Act Cong. April 26, 1906, c. 1876, § 23, 34 Stat. 145, as amended by section 8, Act Cong. May 27, 1908, c. 199, 35 Stat. 312.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 53.]

3. WILLS 🔑25 — WILL OF FULL-BLOOD INDIAN—CONSTRUCTION—DISINHERITANCE.

A devise by a full-blood Indian testator of his real estate, which deprives the parent, wife, spouse, or children of such testator of the estate therein to which they or any of them would succeed upon his death intestate, disinherits such parent, wife, spouse, or children, so deprived, within the provisions of Act Cong. April 26, 1906, c. 1876, § 23, 34 Stat. 145.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 53.]

4. WILLS 🔑25—VALIDITY OF FULL-BLOOD INDIAN—ACKNOWLEDGMENT.

The will of a full-blood Indian member of the Five Civilized Tribes, devising real estate, which disinherits the parent, wife, spouse, or children of such Indian, is invalid, unless acknowledged and approved in conformity with the provisions of Act Cong. April 26, 1906, c. 1876, § 23, 34 Stat. 145, as amended by Act Cong. May 27, 1908, c. 199, § 8, 35 Stat. 312, and therefore not entitled to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 53.]

(Additional Syllabus by Editorial Staff.)

5. WILLS 🔑25—INDIANS—CONSTRUCTION OF STATUTE — "INHERITED" — "DESCEND" — "DISINHERIT"—"DISHERISON"—"HEIR."

Under Act Cong. April 26, 1906, c. 1876, § 22, 34 Stat. 145, providing that the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made or to whom a deed or patent has been issued for his share of the lands of his tribe, may sell the land inherited from such deceased Indian, the word "inherited" is synonymous with the word "descend," as used in the original agreement with the Creek Nation, approved by Act Cong. March 1, 1901, c. 676, 31 Stat. 861, and the supplemental agreement approved by Act Cong. June 30, 1902, c. 1323, 32 Stat. 500, and covers those cases where heirs take by purchase as well as by inheritance, strictly speaking; the term "disinherit," in this connection, meaning the act by which the owner of an estate deprives the person of the right to inherit it who would otherwise be his heir, and the term "disherison" meaning disinheriting, depriving, or putting out of an inheritance, and the word "heir" relating to the right of succession to the realty of a person dying intestate (citing Words and Phrases, First Series, Disherison; Second Series, Inherit).

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 53.

For other definitions, see Words and Phrases, First and Second Series, Descend; Heir.]

Commissioners' Opinion, Division No. 1. Error from District Court, Garvin County; F. B. Swank, Judge.

Petition by A. H. Shi for the probate of the will of Ellen Byford, deceased, opposed by Simeon Wesley and others. Judgment admitting the will to probate, and contestants bring error. Reversed and remanded.

W. H. Woods, United States Probate Atty., of Sapulpa, for plaintiffs in error. Tom Wallace, of Sapulpa, for defendant in error.

RUMMONS, C. This is a proceeding brought by the plaintiff in error to reverse the action of the district court of Garvin county admitting to probate the last will and testament of Ellen Byford, deceased. This cause was tried in the court below upon an agreed statement of facts, which is as follows:

"That Ellen Byford was a full-blood Choctaw Indian, and that her restrictions had never been

> removed by the Department of the Interior of the United States, or any representative thereof. That the only property that the decedent undertook to alienate by will in this case consisted of real estate and is of the value of about $4,500, and is composed of her homestead allotment and surplus allotment as a member of the Choctaw Tribe of Indians. That at the time of her death she was an adult, and she has no issue born since March 4, 1906; and that she left no husband surviving her. That the said Ellen Byford died on the 11th day of May, 1914, and at the time of her death she was a resident of Garvin county, Okl. That the will in question herein was duly and legally executed, as provided by the laws of the state of Oklahoma, but the same was not acknowledged before, nor approved by, a judge of the United States Court in the Indian Territory, nor a United States Commissioner, nor any county judge of the county court of the state of Oklahoma. That at the time of the execution of the will aforesaid the said Ellen Byford was of a sound and disposing mind and memory, and that the will was duly and properly signed, as is provided by the law of the state of Oklahoma on the 17th day of January, 1914, and the will herein is the only will left by the decedent, Ellen Byford, and that the contestants, Simeon Wesley and Nelson Wesley and Edmond Wesley, are the direct issue (children) of the said Ellen Byford, and are full-blood Indians. That Joshua Wesley and Florence Bedford, named in said will, are grandchildren of the decedent, Ellen Byford, and are also full-blood Choctaw Indians.
>
> "It is agreed that the sole and only questions to be determined herein are:
>
> "First. Whether or not a full-blood Indian having no issue born since March 4, 1906, in being, may make a valid will disposing of real estate, including her homestead.
>
> "Second. Whether or not under the terms of the will above referred to (which will is hereby referred to, and made a part of this agreed statement of facts), there is such a disinheritance as will bring this will under the supervision of the congressional act of May 27, 1908, necessitating that said will be acknowledged before and approved by a judge of the United States Court of the Indian Territory, or a United States Commissioner, or a judge of the county court of the state of Oklahoma."

The will offered for probate authorized and directed the executor, named therein, to sell all of the real estate of which testator died seised, and directed the payment by said executor of certain legacies as follows: To Nelson Wesley, son of testator, the sum of $500 in installments of $50 every three months; to Edmond Wesley, son of testator, the sum of $400 in installments of $50 every three months; to Simeon Wesley, son of testator, the sum of $400 in installments of $50 every three months; to Florence Bedford, granddaughter of testator, the sum of $200 in installments of $50 every three months; to Moses Wesley, grandson of testator, the sum of $500 in installments of $50 every three months; and to Joshua Wesley, grandson of testator, all the residue of the estate of testator.

[1, 2] The only question involved in the determination of this case is whether or not the provisions of section 23 of the act of the Congress of April 26, 1906, as amended by section 8 of the act of the Congress of May 27, 1908, governing the execution of wills, devising real estate, by full-blood Indians, are applicable to the will here in question. Said section 23 is as follows:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner." 34 Stat. 145.

Said section 8 is as follows:

> "That section twenty-three of an act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words, 'or a judge of a county court of the state of Oklahoma.'" 35 Stat. 312.

It is argued by counsel for defendant in error that, as it has been held by this court that, in a proceeding for the probate of a will, the only question to be determined by the court is the factum of the will or devisavit vel non, the question of whether or not the provisions of the will are valid and constitute a good devise or bequest was not before the court, and therefore, it having been agreed that the will in question was executed in conformity to the laws of Oklahoma, it was properly admitted to probate.

Unfortunately for defendant in error, this is no longer an open question in this jurisdiction. In the case of Bell v. Davis, 155 Pac. 1132, this court says:

> "Still another point made in one of the briefs as a reason for denying the probate of the will is that its execution was insufficient because it was not acknowledged before a judge of a United States Court, or a United States Commissioner, or a judge of a county court of the state of Oklahoma. This point depends upon whether or not decedent, a full-blood Indian, left surviving him parents, wife, or children, and disinherited some or all of them; and a consideration of the point does not involve a construction of the will, further than as an incident, and to the extent of determining the validity of its execution. * * * This will having been executed since the passage of the act of May 27, 1908, supra, if it does disinherit such persons, it is insufficient in its execution, as it was not acknowledged before and approved by a judge of a county court of Oklahoma."

In the case of Homer v. McCurtain, 40 Okl. 406, this court holds that whether a will is acknowledged before or approved by a judge of the United States Court for the Indian Territory, a United States Commissioner, or a judge of the county court of the state of Oklahoma, involves the question of due execution and attestation. In re Impunnubbee's Estate, 152 Pac. 346. Nor does the conclusion reached by this court in the cases above cited conflict with the cases of Taylor v. Hilton, 23 Okl. 354, 100 Pac. 537, 18 Ann. Cas. 385; Nesbitt v. Gragg, 36 Okl. 703, 129 Pac. 705; In re Allen's Estate, 44 Okl. 392, 144 Pac. 1055; and Chouteau v. Chouteau, 152 Pac. 373—relied upon by defendant in error. In those cases the question whether the formalities and requirements connected with the acknowledgment and approval of wills devising real estate, which disinherited persons belonging to the classes mentioned in said Acts of Congress, had been complied with, was not before the court and was not discussed by it.

[3-5] It therefore follows that the questions whether or not the will in question comes within the provisions of the acts of the Congress of April 26, 1906, and May 27, 1908, as to acknowledgment and approval of the will of full-blood Indians devising real estate, and whether or not said will has been executed in conformity therewith, were before the trial court for determination and are now before us for consideration. Whether or not this will was duly executed and a valid will under the provisions of the acts of the Congress above referred to depends upon the interpretation and definition of the word "disinherits," contained in the statutes. On behalf of defendant in error, it has been ably and ingeniously argued that the sons of the testator, plaintiffs in error, were not disinherited by the terms of said will, because provision was made for each of them therein. If the word "disinherit" were given the popular meaning which attaches to it, there might be ground for the contention of the defendant in error; but in construing this act of the Congress we must apply the legal meaning attached to the words used therein. In construing said acts, we must also take into consideration the history of legislation by the Congress with reference to the lands of the Indians and the apparent policy of the Congress in relation thereto.

Black's Law Dictionary defines "inherit": "To take by inheritance. Take as heir on the death of the ancestor." "Disinherit": "The act by which the owner of an estate deprives the person of the right to inherit the same who would otherwise be his heir." Bouvier's Law Dictionary defines "disinherit": "An act by which a person deprives his heir who, without such act, would inherit." "Disherison" is defined to be: "Disinheriting, depriving or putting out of an inheritance." 3 Words and Phrases, First Series, 2102. "To inherit is to take as an heir at law by descent or distribution." "The word 'inherited' as applied to real estate implies taking immediately from the testator upon his death as heirs." "'Inherit,' * * * as used in a will directing that testator's grandchildren are to inherit equally as one of his heirs at law, means to take by law and not under the will as one of the heirs at law of the estate. The words 'inherit' and 'heir' in a technical sense relate to the right of succession to the real estate of a person dying intestate, and when used in a statute, as well as in a will or other instrument, they will be taken to have been employed in their legal sense." 4 Words and Phrases, First Series, 3606. "The term 'inherited,' as used in Act of Cong. April 26, 1906, c. 1876, § 22, providing that the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection had been made or to whom a deed or patent has been issued for his share of the lands of the tribe to which he belongs or belonged, may sell the lands inherited from such deceased Indians, is synonymous with the word 'descend' as used in the original agreement with the Creek Nation, approved by Act Cong. March 1, 1901, c. 676, 31 Stat. 861, and the Supplemental Agreement approved by Act Cong. June 30, 1902, c. 1323, 32 Stat. 500, and covers those cases where heirs take by purchase as well as by inheritance strictly speaking." 2 Words and Phrases, Second Series, 1070; Shultis v. MacDougal (C. C.) 162 Fed. 331.

The history of the legislation by the Congress governing the lands of Indians, and particularly the lands allotted to full-bloods, shows conclusively that it has been the purpose of the Congress as to the full-bloods to encourage in every way the keeping and holding by such full-bloods of the lands allotted them and to discourage and restrict the alienation of such lands by the full-bloods. This being the case, we conceive that it was the purpose of the Congress by the provisions of act of March 26, 1906, under consideration, to restrict the alienation by will of the lands of full-blood members of the Five Civilized Tribes from their heirs at law and to throw around the execution of wills made by full-blood members of said tribes, seeking to alienate from their heirs at law the lands which would otherwise descend to them, additional safeguards and formalities. Holding this view of the purpose of Congress, and taking into consideration the legal meaning of the word "disinherit" as defined in the citations above quoted, we have reached the conclusion that any provision attempted to be made in the will of a full-blood member of any of the Five Civilized Tribes, which seeks to deprive or does deprive any heir at law of any part of the estate in lands which he would otherwise inherit by the law of descent and succession of this state upon the death of testator, is an attempt to disinherit such heir, and, if such heirs are of the class of persons described in act of the Congress of March 26, 1906, such will must be executed, acknowledged, and approved in conformity with the provisions of said act, or it will be invalid.

If the testator may bequeath to any heir at law, who is among the class of persons mentioned in said act of Congress, a sum of money in lieu of the estate in his lands which would descend to such heir upon his death intestate, the sufficiency of the sum of money to be bequeathed in lieu of such inheritable interest cannot be determined by the courts as a matter of law, and the validity of the will would be determined upon expert testimony as to the value of real estate, a matter both uncertain and indefinite, or the testator may at his will provide a bequest so small as to be in effect a total disinheritance in the popular acceptation of said term. We feel convinced that a devise by a testator of any real estate which deprives an heir at law of the estate to which that heir would succeed upon his death intestate is a legal disinheritance, and such heirs at law are thereby disinherited as to such real estate. Having reached this conclusion, it is apparent from the agreed statement of facts and the findings of the court in the instant case that the will disinherits the plaintiffs in error, and that some of the plaintiffs in error are among the classes of persons described in section 23 of the act of the Congress March 26, 1906, and that said will, not having been executed, acknowledged, and approved in accordance with the provisions of said act, is invalid and, and not being sufficiently executed, was not entitled to probate.

The judgment of the trial court should therefore be reversed, and the cause remanded, with instructions to the trial court to proceed in accordance with this opinion.

PER CURIAM. Adopted in whole.

GARLAND et al. v. UNION TRUST CO. et al.

(No. 6265.)

(Supreme Court of Oklahoma. April 24, 1917.)

(Syllabus by the Court.)

1. MORTGAGES 🔑307 — USURY 🔑34, 48 — RATE OF INTEREST—MORTGAGE LOAN—REMEDY.

The mortgage sought to be foreclosed was dated May 25, 1912, secured the repayment of a loan of $50,000, evidenced by 50 gold notes for $1,000 each, the first two being due December 1, 1912. All were payable to bearer or the registered holder thereof, with 6 per cent. interest per annum from June 1, 1912, and each provided that if any installment of principal or interest was not paid when due, "the principal of this and all of said notes shall become due and payable," and "said principal sum, if not paid at maturity, shall bear interest at the rate of 10 per cent. per annum with annual rests after maturity until paid." At the time the evidence of debt was made, executed and delivered, mortgagee deducted $2,500 from the principal sum of the loan, and exacted of the mortgagors a note for $2,750, payable one year after date, with 8 per cent. interest per annum until paid, upon which, on November 25, 1912, mortgagors paid the semiannual interest, amounting to $110. At the time the first two notes fell due, December 1, 1912, mortgagors defaulted, but on December 21st paid, as interest on the loan, $1,572.22, whereupon the mortgagee elected to accelerate the maturity of the principal of the loan and sued to foreclose therefor. *Held*, accepting the concession that the $2,500 deducted to be interest paid, and the mortgage of $2,750 to be interest charged on the loan, and the $110 semiannual interest to be also interest paid, as all interest paid and charged for the entire time the loan had to run, had the contract been performed, did not exceed the lawful rate, the trial court did right in holding the transaction free from usury. *Held*, further, that because the mortgagee, under the contract, by the exercise of his option accelerating the maturity of the loan, was entitled to demand more than the amount of the loan with legal interest to the time the loan is called does not make the transaction usurious. *Held*, further, that neither was the evidence of debt usurious upon its face because it provided for interest on the principal sum at 6 per cent. per annum before maturity and 10 per cent. thereafter, with annual rests until paid. Whether the increase of 4 per cent. was for the "detention" of money, in contravention of the statute, or was a penalty, being an increase to the maximum legal rate of interest only, the evidence of debt was a valid contract for the payment of interest. *Held*, further, that plaintiff was not entitled to recover on and have foreclosed its mortgage for $2,750, for, having been executed to secure the payment of interest charged and unearned at the time of the acceleration of the maturity of the principal debt of $50,000, said $2,750 mortgage, like the remaining unpaid interest coupons securing the interest on said debt of $50,000, was discharged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 897; Usury, Cent. Dig. §§ 83–89, 101, 102.]

2. MORTGAGES 🔑489—FORECLOSURE—INTEREST—SET-OFF.

The mortgage sought to be foreclosed was dated May 25, 1912, to secure the payment of a loan of $50,000, evidenced by 50 gold notes of $1,000 each, the two first being due December 1, 1912. All were payable to bearer or the registered holder thereof, with 6 per cent. interest per annum from June 1, 1912, and each provided that if any installment of principal or interest was not paid when due, "The principal of this and all of said notes shall become due and payable. * * *" At the time the evidence of debt was made, executed, and delivered, mortgagee deducted $2,500 from the principal sum of the loan, and exacted of the mortgagors a note for $2,750, payable 1 year after date, with 8 per cent. interest per annum until paid, upon which, on November 25, 1912, mortgagors paid the semiannual interest, amounting to $110. At the time the first two notes fell due, December 1, 1912, mortgagors defaulted, but on December 21st paid as interest on the loan $1,572.22, whereupon the mortgagee elected to accelerate the maturity of the principal of the loan and sued to foreclose therefor, which was done, whereupon the court rendered judgment in favor of plaintiff for $50,000, with interest thereon at 6 per cent. from December 1, 1912, to the date of the judgment, amounting in all to $52,666.67, together with 10 per cent. of that amount for an attorney's fee. *Held*, error, in that the court should have allowed interest at 6 per cent. on the $50,000 from June 1, 1912, to the date of the judgment, which, principal and interest, would be $54,166.66. And for this amount the court should have rendered judgment, had not defendants, on May 25, 1912, already paid $2,500, conceded to be interest in advance, upon which there should be allowed them interest at 6 per cent. from that date up to the date of the judgment that is, in all, $2,711.16, and had not defendants also already, on November 25, 1912, paid $110 as the semiannual interest on the $2,750 mortgage, upon which a like rate of interest should be allowed them from that time up to the date of judgment, or in all $115.64, and had not defendants also paid, on December 21, 1912, $1,572.22 as interest on the debt, upon which should be allowed 6 per cent. interest up to the date of the judgment, or in all, $1,642.64, making the total of interest paid by defendants in advance

$4,469.44, being an overpayment of interest on the debt of $302.78, which should be credited thereon, leaving due on the principal loan $49,679.22, for which the court should have rendered judgment, plus 10 per cent. of that amount as an attorney's fee, or in all $54,647.14.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1425–1430, 1470.]

3. USURY 🔑101—SET-OFF OF USURY—FORECLOSURE OF MORTGAGE.

The second mortgage upon the same property was made, executed, and delivered to secure a loan of $15,750 for 3 years, with coupons thereto attached for $787.50 each, payable semiannually, with interest at 10 per cent. per annum. $750 was deducted from the principal at the time of the loan, and retained as interest paid upon the loan, and the first coupon was paid when due. Upon failure to pay the second coupon, the mortgagee exercised his option, and accelerated the payment of the loan and foreclosed, whereupon he was met with a plea of usury, which the court sustained, and set off the debt with $4,650, and rendered judgment in favor of the mortgagee, foreclosing his mortgage for the balance of the debt. On appeal by the mortgagors, assigning that the court erred in allowing a set-off for said amount only, *held*, construing Rev. Laws 1910, § 1005, that the $750 deducted from the principal at the time the loan was made and the $787.50 paid to take up the first interest coupon, or in all, $1,537.50, was interest paid on the loan, which left 2 years and 6 months' interest charged and unpaid, or $3,937.50, twice the amount of which, or $7,875, the mortgagors were entitled to have set off against the mortgaged debt, and not $4,650, as found by the trial court, leaving due thereon $7,875, plus 10 per cent. thereof as an attorney's fee, for the payment of which the mortgage should be foreclosed.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 235–240.]

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by the Union Trust Company and the Union Trust Company, as trustee, against D. N. Garland and wife and J. C. Barr and wife on notes, and to foreclose a mortgage or deed of trust, and against one Silas Rowland, in which W. J. Walker intervened by answer and cross-petition. Decree for foreclosure, and for foreclosure by defendant Walker against defendants Garland and Barr, and such defendants bring error. Reversed and remanded, with directions.

See, also, 154 Pac. 676.

Stuart, Cruce & Cruce and L. D. Mitchell, all of Oklahoma City, for plaintiffs in error. Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendants in error.

TURNER, J. On January —, 1913, in the district court of Oklahoma county, Union Trust Company, a corporation, and the same Company as trustee, defendant in error, sued D. N. Garland and Inez, his wife, J. C. Barr and Ollie, his wife, plaintiffs in error, upon their 50 certain real estate gold notes of $1,000 each, made, executed, and delivered by them on May 25, 1912, to the Union Trust Company as trustee, all of which later came into its hands as registered holder. Two of said notes were payable December 1, 1912; 3 June 1, 1913; 2 December 1, 1913; 3 June 1, 1914; 2 December 1, 1914; 3 June 1, 1915; and 35 June 1, 1918. Each was made payable to bearer or to the registered holder thereof, and provided for 6 per cent. interest per annum from June 1, 1912. Each further provided that the principal sum, "if not paid at maturity, shall bear interest at the rate of 10% per annum with annual rests after maturity until paid." At the same time plaintiff sued to foreclose a mortgage or deed of trust, in favor of the Union Trust Company as trustee, given by defendants upon a certain 10-story building in Oklahoma City to secure the payment of said notes. Among other things the petition alleged that, by reason of defendants' failure to pay the two $1,000 notes falling due December 1, 1912, plaintiff had elected to declare the whole debt due and payable, pursuant to the terms of the mortgage, which provides that in case default should be made in the payment of any coupon or notes thereby secured when the same became due, the trustee may, upon certain conditions (complied with) declare the principal of all notes thereby secured immediately due and payable; that, although its lien was prior to that of all others upon the property, one Silas Rowland claimed some interest therein inferior to that of plaintiff's lien, and prayed judgment for the full amount of the mortgage debt, to wit, $50,000, with interest at 10 per cent. per annum and an additional 10 per cent. as an attorney's fee, and for a foreclosure of the mortgage, and that Rowland's interest in the property, if any he have, be declared inferior and subject to the lien of the mortgage.

For answer defendants, after denying every allegation in plaintiff's petition, except such as were specifically admitted, as a second defense, admitted the execution and delivery of the notes and mortgage sued, and alleged that the consideration for same was the loan of $50,000; that plaintiff, through its officers and agents, knowingly and wrongfully and with intent to violate the laws of the state, with reference to the charging of usurious interest, charged, reserved, and received from defendants, and that defendants paid plaintiff $2,500 cash at the time of the loan as interest for the use of said money from the date of the execution of said instruments until December 21, 1912, and executed to plaintiff a note for $2,750, bearing 8 per cent. interest, and payable one year thereafter, and made interest payments amounting to $1,572.22, or in all $6,822.22, being interest exacted during that time at the rate of 27 per cent. per annum; and that by reason of such usurious charge defendants were entitled to set off against plaintiff's demand twice said sum so reserved, to wit, $13,644.44. For further answer defendants submitted a calculation to show that on the face of the evidence of debt and the commission note of $2,750, the usury reserved and charged was $12,830, and prayed that double said amount, or $25,660, be set off against plaintiff's demand. For further answer they allege for the reason that, by the terms of the bonds and the coupons thereto attached, there is reserved and charged 6 per cent. interest per annum upon the bonds before maturity and 10 per cent. thereafter until paid, the same are usurious because, they say, this increase of 4 per cent. was for the "detention" of money in contravention of the statute, and entitles defendants to set off against the debt twice the amount thereof. By amendment a count was added to the petition, praying judgment on the note for $2,750 and for a foreclosure of the mortgage by which the same was secured; said note having matured since the beginning of the suit. For reply, after a specific denial of all new matter set up in the answer, the Union Trust Company, after reciting the fact of the loan and the dates upon which it was payable, said:

> "That at the time of the execution of the notes or bonds and deed of trust securing the payment of said indebtedness the said defendants above named paid to plaintiff the sum of $2,500, and executed and delivered to the Union Trust Company their note for $2,750, with interest at 8 per cent. per annum, payable on May 25, 1913, secured by a second mortgage upon said property, and that plaintiff is still the owner and holder of said note, and same has never been transferred or negotiated and is unpaid.
>
> "Plaintiff further states that the sum of $2,500, which was paid to plaintiff at the time of the making of said loan, the sum of $2,750 which the defendants promised to pay plaintiffs on May 25, 1913, together with the several interest payments alleged to have been made by the said defendants to plaintiff, was a part of the interest which accrued upon said loan for the entire time said loan run, and was not payment of interest for the dates set forth in the answer and cross-petition of said defendants, and was a part performance of the entire contract.
>
> "Plaintiffs further state that under the terms of said contract there would have accrued upon the $2,000 payable December 1, 1912, at 6 per cent. the sum of $62; that there would have accrued on the $3,000 which became due on June 1, 1913, the sum of $165; that there would have accrued on the $2,000 which became due and payable on December 1, 1913, the sum of $182; that there would have accrued on the $3,000 which matured on June 1, 1914, at 6 per cent. the sum of $302; and there would have accrued on the $3,000 due and payable on June 1, 1915, at 6 per cent. the sum of $543; and that there would have accrued on the sum of $35,000, which became due and payable on June 1, 1918, at 6 per cent., the sum of $12,635; that there would have accrued on the note for $2,750 which matured May 25, 1913, at 8 per cent., the sum of $220, which with the $2,500 paid at the time of the execution of the papers and the $2,750 evidenced by said note due May 1, 1913, would have amounted in the aggregate to $18,740, being all of the interest which the plaintiffs exacted and which the defendants contracted to pay on said loan.
>
> "Plaintiffs further state that under the law they were entitled to collect interest at 10 per cent. per annum; that the interest which would have accrued on $2,000 maturing December 1, 1912, at 10 per cent. would have amounted to $103.33; that plaintiffs are entitled to collect on the $3,000 which matured on June 1, 1913, at 10 per cent., the sum of $305; that plaintiffs are entitled to collect on the $2,000 due December 1, 1913, at 10 per cent., the sum of $303.30; that plaintiffs are entitled to collect on the $3,000 due December 1, 1914, at 10 per cent., the sum of $605; that plaintiffs are entitled to collect on the $2,000 due December 1, 1914, at 10 per cent., the sum of $503.33; that plaintiffs are entitled to collect on the $3,000 due June 1, 1915, at 10 per cent. the sum of $905; that plaintiffs are entitled to collect on the $35,000 due June 1, 1918, at 10 per cent., the sum of $———, amounting in the aggregate to $23,783.32, being the maximum amount of interest which plaintiffs were entitled to collect under the law.
>
> "Plaintiffs further state that under the terms of said contract as hereinbefore stated, defendants were only required to pay the sum of $19,740, and the plaintiffs were entitled to collect under the law the sum of $23,783.32, there being a difference of $4,043.32 which plaintiffs were entitled under the law to collect, and which amount is less than the defendants agreed to pay or the plaintiffs exacted from the said defendants, and by reason thereof said loan was not usurious"

—and asked that the same be foreclosed. Then came one W. J. Walker and intervened, and for answer and cross-petition, after denying generally the allegations set forth in the petition, set up a mortgage of $15,750 on the premises made, executed, and delivered to Silas Rowland by Garland and wife and Barr and wife on May 25, 1912, and by said Rowland, for value and before maturity, assigned to him, and prayed that the same be decreed a first lien on the property and foreclosed. And after Garland and wife and Barr and wife had answered and pleaded that the same was usurious and Walker had joined issue by general denial, and Barr had pleaded that he, pending the suit, had been adjudged a bankrupt, and Rowland had disclaimed, there was trial to the court upon the issue of usury joined between the Union Trust Company and Garland and wife and Barr and wife in the enforcement of plaintiff's $50,000 mortgage, whereupon the court on October 20, 1913, found, from the evidence and the agreed statement of facts, the facts substantially to be: That on May 25, 1912, defendants, to secure a loan of $50,000, executed the notes and mortgage sought to be foreclosed; that the notes were for $1,000 each, payable as pleaded, with interest at 6 per cent. per annum, payable semiannually; that when the mortgage was executed, defendants paid plaintiff, as a commission for making the loan, $2,500, and also executed to plaintiff the promissory note of $2,750 declared on; that each of the $1,000 notes contained:

> "Said principal sum if not paid at maturity shall bear interest at the rate of 10 per cent. per annum with annual rests after maturity until paid,"

—and the mortgage reserved to the mortgagee the right to accelerate the payment of the debt, as pleaded, if any installment of the principal or interest was not paid when due; and also contained the words "appraisement waived," and provided for an attorney's fee, etc. The court further found plaintiff to be the owner; that the mortgage was duly recorded; that default had been made in the payment of the two notes of $1,000 each, due December 1, 1912; that plaintiff had duly declared the default and its election to declare the entire debt thereby secured due and payable; that plaintiff was entitled to a foreclosure thereof, and that there was due and owing thereon $52,666.67, with interest thereon at 6 per cent. per annum from that date, October 20, 1913, together with $5,266.66 as an attorney's fee, for all of which he gave judgment and decreed the same to be the first lien upon the property. The court further found that when defendants executed to plaintiff their promissory note for $2,750, they also executed to plaintiff a mortgage on the same property to secure its payment as pleaded; that said mortgage contained the words "appraisement waived," and also provided for 10 per cent. additional as an attorney's fee in the event of foreclosure; that the same was duly recorded; that plaintiff was entitled to foreclose it, and that there was due and owing thereon $2,953.08, with interest at 6 per cent. per annum from October 20, 1913, together with $295.30 as an attorney's fee, for all of which he gave judgment and decreed the same to be a second lien upon the property; that the title of the defendants and Walker in and to the mortgaged property was inferior and subject to the plaintiff's judgment, and so ordered, adjudged, and decreed; and that the property be sold to satisfy the debt. Thereafter, on the issues tried to the court upon the issue of usury joined between the defendants and Walker in his suit to foreclose his mortgage, the court found that there was usury in that transaction to the extent of $4,650 only, and that Walker was entitled to recover $11,100 only thereon, together with $1,500 as an attorney's fee and to have his mortgage foreclosed, and so adjudged and decreed, to reverse which defendants only bring the case here, and contend the court erred in holding that there was no usury in plaintiff's mortgage, and not in holding there was usury in the Walker mortgage, but in holding that $4,650 only was the extent of the usury therein.

[1] 39 Cyc. 918, 919, says that, in order to constitute usury, there must be an unlawful intent; the subject-matter must be money or money's equivalent; a loan or forbearance; the sum loaned be absolutely or conditionally repayable; and that there must be an exaction for the use of the loan of something in excess of that allowed by law. Rev. Laws 1910, § 1002, reads:

> "Interest is the compensation allowed for the use or forbearance, or detention of money, or its equivalent."

Section 1004 prescribes that:

> "The legal rate of interest shall not exceed six per cent. in the absence of any contract as to the rate of interest, and by contract parties may agree upon any rate not to exceed ten per cent. per annum. Said rates of six and ten per cent. shall be respectively, the legal rate and the maximum contract rates of interest."

And, section 1005:

> "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section shall be deemed * * * usury."

There was no usury in this transaction. In Metz v. Winne, 15 Okl. 1, 79 Pac. 223, the court said in the syllabus:

> "The law of this territory prohibits the taking or contracting for any higher rate of interest than 12 per cent. per annum, and makes it unlawful to deduct more than one year's interest from the loan in advance, but it is not unlawful to compute the interest for the entire time the loan is to run, and contract to pay such sum in installments of such sums and at such times as the parties may by contract agree."

This is what was, in effect, done here, and the question is: Computing the interest for the entire time the loan had to run, does the interest reserved exceed the legal rate? If so, the loan is usurious; otherwise not. In other words, the test is as laid down in J. I. Case, etc., Co. v. Tomlin et al., 174 Mo. App. 512, 161 S. W. 286. There, referring to Taylor v. Buzard, 114 Mo. App. 622, 90 S. W. 126, the court said:

> "In that case the test of usury in a contract is said to be 'whether it would, if performed, result in securing a greater rate of profit on the subject-matter than is allowed by law.'"

Accepting, then, the concession that the $2,500, or, rather, to be exact, the $2,325 (the difference is immaterial) deducted from the principal sum at the time the loan was made and the $2,750 note executed at the same time, together with interest thereon as reserved therein ($110 of which, being semiannual interest thereon, was paid when due), were for interest paid and charged and not a commission, as found by the court, applying the test stated, the contract, if performed, would have exacted of defendants interest as follows:

Principal.	From What Date.	Date Due.	Time.	Rate.	Amt. of Interest.
$ 2,000	6-1-12	12-1-12	6 mo.	6%	$ 60
3,000	" " "	6-1-13	1 yr.	"	180
2,000	" " "	12-1-13	18 mo.	"	180
3,000	" " "	6-1-14	2 yr.	"	360
2,000	" " "	12-1-14	30 mo.	"	300
3,000	" " "	6-1-15	3 yr.	"	450
35,000	" " "	6-1-18	6 yr.	"	12,600

Total interest provided for in the bonds.....	$14,220
Interest collected in advance....................	2,325
Note for additional interest....................	2,750
Interest on $2,750 note for 1 year at 8 per cent.	220
Total interest collectable under the contract	$19,515

Or a little over 8 per cent. interest on the loan, which, of course, was not usurious. In Georgia Southern R. Co. v. Trust Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153, it is said:

> "A calculation will show that if the bonds ran to full maturity, as contemplated, the lender of the money would not receive, in the aggregate, as much as 8 per cent. per annum for the use of the money, although at the beginning he put out on each bond only $850, and

at the end received $1,000. The $150 added to the 6 per cent. interest annually received would not amount to as much as 8 per cent. per annum on $850 for the full term. That the bonds by their terms bore interest from a date previous to their delivery makes no difference, because, notwithstanding this fact, the gross amount of interest for the full term would not have been equal to 8 per cent. per annum. So the original contract, if the bonds ran 40 years, was not usurious; and it does not appear that they contained any stipulation which would prevent a fair and legal adjustment of the interest between the parties in case the bonds became due earlier because of a default in paying interest. Nor does it appear that in providing for the maturity of the bonds in case of such default, there was any device or contrivance to cover up usury."

This was the method adopted to determine whether there was usury in the loan sought to be collected in Metz v. Winne, supra. In that case Metz, on August 27, 1901, borrowed of Winne $600 for 10 years and executed, payable to him, a promissory note for that amount, together with 10 interest coupon notes for $42 each. At the same time he also executed, payable to Winne, a promissory note for $150, due September 1, 1902, together with another note of $30, due at the same time. The $600 note and coupon notes were secured by a first, and the $150 and $30 notes were secured by a second, mortgage on the same property. Winne assigned the $600 note and interest coupons; and, when Metz failed to pay the first coupon when due, Winne took it up and sued on it, as well as on the $150 note, and to foreclose his second mortgage, which contained a provision that, in the event the mortgagor failed to pay any interest note secured by the first mortgage, the holder of the second might pay it, and the sum so paid should become a lien secured by the second, and the holder thereof entitled to an immediate foreclosure. Defendant pleaded usury; and, in holding such there was not, Burford, C. J., said:

"The facts specially pleaded in the answer are that the defendants borrowed from Winne $600, payable in 10 years, with interest at 7 per cent., and that they executed 1 note for $600 and 10 notes for $42 each, representing the interest for the 10 respective years; that they also executed the note for $150, which was for additional interest, and aver that such sum was usurious and excessive. A mere matter of mathematical calculation is sufficient to refute the conclusion of the pleader. Parties may contract for a rate of interest not to exceed 12 per cent. The interest on $600 for 10 years at 12 per cent. is $720. The interest contracted for as shown by these notes is as follows: Ten notes, $42 each, $420; 1 note, $30 and 1 note $150, total, $600, which is $120 less than the maximum interest the mortgagee was entitled under the law to deduct. It is argued that the law does not permit more than 1 year's interest to be deducted in advance. Section 848, Wilson's Stat. 1903, provides: 'The interest which would become due at the end of a term for which a loan is made, not exceeding one year's interest in all, may be deducted from the loan in advance if the parties thus agree.' But it is not alleged or contended that any portion of the interest claimed was deducted from the loan in advance. On the contrary, it appears from the pleading that the mortgagors borrowed and received $600, and executed interest notes, payable in installments after the first year. If they comply with the contract, they will have the use of the principal sum for the period of 10 years, and the presumption is that they will do so. We know of no law that will prevent a borrower from paying all the interest on a loan at the end of 1 year, or in such installments as he may desire and the parties may agree upon, so long as the person making the loan does not exact over 12 per cent. per annum, nor deduct more than 1 year's interest from the amount of the loan in advance. The courts do not undertake to make contracts for individuals, nor to relieve them from burdensome obligations voluntarily assumed and entered into."

To be sure, in that case no interest was taken out of the principal sum, while here $2,325, or less than 5 per cent. was so taken, and a note executed for $2,750 payable in 1 year. But this distinction makes no difference, for, referring to the Winne Case, Kane, J., in Covington v. Fisher, 22 Okl. 207, 97 Pac. 615, said:

"It is true that in that case the interest was not taken out of the principal sum, but the case holds that the mortgagee had a right to contract for the payment of a part of the interest covering the entire period of the 10-year loan at the end of the first year, and for such a sum to be paid at that time as would be largely in excess of the maximum legal rate, if computed only for the period of a year; but the court holds it proper to make the computation for the entire time, and the principle to be drawn from the opinion is that the contracting for the payment of interest in advance does not make the transaction usurious."

We are therefore of opinion that there is no merit in defendants' contention, in effect, that the $2,325 deducted as interest in advance, together with the exaction of a note for $2,750, with interest thereon at 8 per cent. for a year, and the further exaction of $1,572.22 as interest on the loan up to December 21, 1912, or in all, $6,822.22, was the exaction of usury at the rate of some 27 per cent. for a loan of $50,000 from the date of the mortgage up to that time. This for the reason that, although such rate seems excessive computed, as it is, for a part only of the time the loan had to run, the same is not excessive when those payments are spread out over the entire time the contract, if performed, had to run, as we have seen.

But before passing this $50,000 mortgage, it might be well to add that, because plaintiff, under the contract, by the exercise of its option accelerating the maturity of the loan, was entitled to demand and receive more than the amount of the loan, with legal interest to the time the loan was called, it does not follow that the plea of usury should prevail. On this point 29 Am. & Eng. Encyc. of Law, 508, says:

"A provision by way of penalty accelerating the maturity of a loan on default in payments by the borrower will not necessarily render the loan usurious, though through the exercise of such option the lender may be entitled at law to demand the return of more than the amount lent with legal interest. Thus, where in consideration of a loan an obligation is taken for an amount as principal greater than the amount of the loan, but the interest stipulated therefor is less than the highest legal rate, so that if

> the contract is carried out according to its terms no more than the principal with legal interest will be paid, a provision that upon default in the payment of the interest the entire principal shall become due at the option of the lender will not render the transaction necessarily usurious, though upon such default and the exercise by the lender of his option more than the amount lent with legal interest to the time when the loan is called will be payable. And the same rule has been applied where installment notes were given for the principal and interest for the full term of the loan."

In Goodale v. Wallace et al., 19 S. D. 405, 103 N. W. 651, 117 Am. St. Rep. 962, 9 Ann. Cas. 545, the court said:

> "It is further contended by the appellants that as there was a stipulation in the mortgage that if the mortgagors should fail to pay any portion of the above-mentioned sum, either principal or interest, promptly at the times they should become due, the whole sum—both principal and interest—should at once become due and collectable, therefore the contract was clearly usurious, as the whole amount of the principal of the notes would become due and payable upon default in the payment of the first note; but this contention is untenable, for the reason that such stipulation is in the nature of a penalty from which the mortgagors could relieve themselves by a prompt payment of the notes when due. Webb on Usury, § 120; 2 Am. & Eng. Ency. Law, p. 468. The author, in speaking of this class of cases, says: 'So, if the provision for the payment of excessive interest is dependent on contingency which the borrower may avoid by paying the debt, with legal interest, the loan will not be deemed usurious.' State v. Elliott, 61 Kan. 518, 59 Pac. 1047; Tholen v. Duffy, 7 Kan. 405. A similar clause is frequently inserted in mortgages, but the stipulation has never been held as constituting a contract for the payment of usurious interest, so far as our researches extend."

There is no authority holding the contrary, so far as we know. By this we do not mean to intimate that plaintiff, had it sued therefor, which it did not, was entitled to recover in this action on the interest coupons not due at the time the trustee accelerated the maturity of the principal debt and foreclosed therefor. On the contrary, on this point, we mean to say that recovery upon those coupons could not be had for the reason that the moment the principal debt and interest, accrued up to the time to which the maturity of the debt was accelerated, are paid, the remaining undue interest coupons are discharged. This is in keeping with authority (Dugan et al. v. Lewis et al., 79 Tex. 246, 14 S. W. 1024, 12 L. R. A. 93, 23 Am. St. Rep. 332; R. R. Co. v. Mer. Trust Co., 94 Ga. 306, 21 S. E. 701; Goodale v. Wallace, supra; Moore et al. v. Cameron et al., 93 N. C. 51), and is plaintiff's theory of the case. It is also carried into the judgment of the court who permitted a recovery for the principal debt only, together with interest thereon at 6 per cent. from December 1, 1912, or the time when the first two notes fell due, up to the date of the judgment. There was no error in this, so far as the question of usury is concerned, and the judgment must stand, provided, of course, the court did not err in the amount of interest due on the loan.

But, say defendants, this contract is usurious because it provides for interest on the principal sum at 6 per cent. per annum before maturity, or from June 1, 1912, until paid, and, if not paid at maturity, 10 per cent. thereafter, with annual rests until paid. And it is contended by counsel for defendants, not that this increased rate of interest is a penalty and unenforceable, but that it renders the contract usurious because, they say, this increase of 4 per cent. was for the "detention" of money in contravention of the statute, supra. Not so. Being an increase to the maximum legal rate only, the contract was a valid contract for the payment of interest. 39 Cyc. 953, denominates such excess of interest as a penalty, but adds:

> "Whether such penalty for the nonperformance of the contract is enforceable or not, all authorities are agreed that the contract is not usurious, but remains a valid and enforceable obligation against the debtor."

And so we have held in a case where, as here, the increase was the extent of the maximum legal rate only. National Life Ins. Co. v. Hale, 154 Pac. 536, L. R. A. 1916E, 721. In that case this court, speaking through Collier, C., held that where a promissory note drawing 5½ per cent. interest, payable semiannually, contained a clause providing that the rate shall be increased to the maximum legal rate of interest, in the event of default in payment of either principal or interest at maturity, such increased rate was a valid contract for the payment of interest.

[2] We said just now that the court did right in holding there was no usury in the $50,000 loan, and that the judgment of the court in favor of plaintiff for $52,666.67 (principal and interest from December 1, 1912, the date the mortgagors defaulted in the payment of the two $2,000 notes, up to the date of the judgment) must stand, unless the court erred in calculating the interest due on the debt up to that time. And this he did for the reason that, as plaintiff, by the express terms of the evidence of debt, was only entitled to recover thereon 6 per cent. interest from June 1, 1912, until maturity (the 10 per cent. thereafter is not contended for), plaintiff was entitled to recover 6 per cent. only on the debt from that date until the date of the judgment, which, principal and interest, would be $54,166.66. And for this amount the court should have rendered judgment, less $2,500, conceded to be interest paid at the time the loan was made, with 6 per cent. interest thereon from May 25, 1912, to the date of the judgment, amounting, principal and interest, to $2,711.16, less also $110, paid as semiannual interest on the $2,750 mortgage, with interest thereon from November 23, 1912, at 6 per cent. per annum up to the date of the judgment, amounting, principal and interest, to $115.64, and less, also, $1,572.22, paid as interest on the debt, together with interest thereon at 6 per cent. per annum from December 21, 1912, to the

date of the judgment, amounting, principal and interest, to $1,642.64, or in all, as interest already paid upon the loan, $4,469.44. And, as said sum exceeds the interest on the loan at 6 per cent. from June 1, 1912, to the date of the judgment by $302.78, the court should have applied that amount in reduction of the principal debt and rendered judgment in favor of plaintiff for $49,679.22, 10 per cent. of which should have been adjudged as an attorney's fee. And this is the judgment the trial court should have rendered.

In Miller v. Fergerson (Ky.) 47 S. W. 1081, the facts were that plaintiff sold defendant a certain lot for $1,120, and afterwards loaned him $650 from that time with which to erect a house upon the lot. As the debt aggregated $1,770, they counted 6 per cent. thereon for 5 years from April 24, 1894, making the principal and interest $2,301, and defendant gave plaintiff 60 notes therefor of $38.35 each, with interest from maturity, payable, respectively, July 1, 1894, and the first of each month thereafter. In the evidence of debt it was agreed that in case defendant defaulted in the payment of as many as 4 of the notes, plaintiff would have the right to treat them as all due and payable. The first one fell due and was paid; 13 fell due and were not paid. Whereupon plaintiff elected to treat them all due and sued to recover, not only on the 13 notes, but asked judgment on the remaining 46, with interest from the time the action was commenced until paid. The court rendered judgment for the full amount claimed. In reversing the case, the Supreme Court held that 6 per cent. upon the indebtedness up to the date of the judgment was all plaintiff was entitled to recover. In passing the court said:

> "In the second place, although, as consideration for the land, the agreement between the parties to add interest to the principal sum of $1,120 was legal and permissible, still, as appellee, taking advantage of the misfortune of appellant, has come into a court of equity for enforcement of that agreement, at a time and in a manner not reasonably anticipated when it was made, he must consent to such judgment as, under the circumstances, a chancellor ought to render. In our opinion, accepting the answer as true, appellant is entitled to recover of appellee, in addition to $650, the aggregate of $1,120, and interest thereon at rate of 6 per cent. from date of the land sale until date of the judgment appealed from. Wherefore the judgment is reversed, and the case remanded, for proceedings consistent with this opinion."

And so we hold that plaintiff was entitled to recover 6 per cent. on this debt from its inception to the date of judgment. And, as the trial court should have done, so we will do, that is, upon the undisputed facts, render such judgment as the trial court should have rendered, which is, that plaintiff have judgment for $49,679.22, together with $4,967.92 as an attorney's fee, the judgment to draw interest as decreed by the court.

We said just now that plaintiff was not entitled to recover for the remaining interest coupons not due at the time the trustee declared the principal debt due and foreclosed therefor. This, we said, was for the reason that the moment the principal and accrued interest, up to the time of the acceleration of the maturity of the debt, are paid, the remaining undue interest coupons are discharged. For the same reason, contrary to the holding of the court, plaintiff is not entitled to recover on its second mortgage of $2,750; for, like the undue coupons, having been executed to secure the payment of interest charged and unearned at the time of the acceleration of the maturity of the debt, it also was discharged. It is for this reason that plaintiff cannot recover on said mortgage, and not for the reason that said mortgage was a part of a scheme to exact usury, as contended by defendant. We are therefore of opinion that the court erred in rendering judgment on said mortgage, as stated, and in ordering it foreclosed.

We are therefore of opinion that, there being error as indicated in the judgment of the trial court in determining the amount due on the $50,000 mortgage of the Union Trust Company, the judgment foreclosing the same should be reversed and modified, and that the judgment foreclosing the $2,750 mortgage should be reversed, with directions to dismiss the suit as to it.

[3] As to the judgment foreclosing the Walker mortgage, it is assigned that the court erred, not in holding that the same was usurious, but in holding that defendants were entitled to a set-off of $4,650 only on the mortgage debt. There is no dispute as to the facts. The evidence discloses that the mortgage on its face secured a loan of $15,750 for 3 years, with coupons thereto attached for $787.50 each, payable semiannually, with interest at 10 per cent. per annum; that $750 was deducted from the principal at the time of the loan, and retained as interest paid upon the loan; that the first coupon was paid when due; that Walker, the assignee of the mortgage, upon failure to pay the second, exercised his option to accelerate the payment of the loan and foreclosed, whereupon he was met with a plea of usury, which the court found to be sustained by the evidence, and pursuant thereto set off the debt with $4,650, and rendered judgment in favor of Walker, foreclosing his mortgage for the balance of the debt, as stated. The governing statute, section 1005, supra, in full reads:

> "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section shall be deemed a forfeiture of twice the amount of interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm or corporation taking or receiving same, in an action in the nature of an action of debt, twice the amount of the interest so paid: * * * Provided, further, that before any suit can be brought to recover such usurious interest, the party bringing such suit

must make written demand for return of such usury."

As stated in Miller v. Oklahoma St. Bank (Okl.) 157 Pac. 767, the provisions of this section of our statute are substantially the same as section 5198 of the Revised Statutes of the United States, construing which, in Haseltine v. Central Nat. Bank, 183 U. S. 132, 22 Sup. Ct. 50, 46 L. Ed. 118, the court said:

> "Two separate and distinct classes of cases are contemplated by this section: First, those wherein usurious interest has been taken, received, reserved, or charged, in which case there shall be 'a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon'; second, in case usurious interest has been paid, the person paying it may recover back twice the amount of the interest 'thus paid from the association taking or receiving the same.' While the first class refers to interest taken and received, as well as that reserved or charged, the latter part of the clause apparently limits the forfeiture to such interest as the evidence of debt carries with it, or which has been agreed to be paid, in contradistinction to interest actually paid, which is covered by the second clause of the section."

From which we learn that, if no interest on this loan had been paid, defendants would have fallen into the first class mentioned, and been entitled to set off against plaintiff's demand a sum equal to the entire interest which the mortgage carried; that is, interest on $15,750 for 3 years at 10 per cent. per annum, or $4,725. And, on the other hand, if all the interest called for by this evidence of debt had been paid, defendants would have fallen into the second class, and, had the mortgagee foreclosed for the principal sum, defendants would have nothing to set off, but would have been compelled to resort to an action in the nature of an action of debt to recover twice the amount of interest paid. All of which seems clear enough. But what shall we say when the facts are, as here, that the interest on the loan has partly been paid and part remains unpaid or charged? We say part has been paid, for the court, in effect, found that $750 was deducted from the principal at the time the loan was made, and that the same was interest and rendered the transaction usurious; and it is conceded that the first interest coupon of $787.50 was paid, or in all $1,537.50 was interest paid on the loan. As this left 2 years and six months interest charged and unpaid, does the statute mean defendants are entitled to set off twice the interest charged by the evidence of debt, that is, $4,725, and, in another action, in the nature of an action of debt, recover against the mortgagee twice the $1,537.50 interest paid? If it does, there would be a double recovery of the interest paid to the extent of the amount of the first coupon, for it is clear that that much of the interest paid would be merged in the set-off. Then, what does it mean? It means, in this case, that so far as the interest paid is concerned, twice that must be recovered in a separate action in the nature of an action of debt, leaving only, as a subject of set-off, twice the remaining interest of 2 years and 6 months charged, or twice $3,937.50, that is, $7,875, which, deducted from the principal debt of $15,750, leaves $7,875, for which the mortgage should be foreclosed, plus 10 per cent. of that amount for an attorney's fee, since defendants assign as error that plaintiffs should not have been allowed any attorney's fee at all. In the headnotes to the Haseltine Case, supra, it is said:

> "Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a consolidation, cannot be set off in an action upon the note, as the remedy provided by U. S. Rev. Stat. § 5198 [U. S. Comp. St. 1916, § 9759], where such usurious interest has been actually paid, viz., a recovery in an action in the nature of an action of debt, or twice the amount of the interest thus paid, is exclusive."

Which means that, as the remedy by separate action for the recovery of twice the usurious interest paid is exclusive, no part of it can properly be merged in a set-off of twice the interest which the evidence of debt carries, and that where, as here, both set-off and separate action should be employed to meet the situation, each should be employed to operate within its proper sphere. So far as the present application of this statute is in conflict with Miller v. Altus State Bank, supra, the same is overruled.

There is no merit in the remaining assignments of error.

The cause is therefore reversed and remanded, with directions to modify the judgment and foreclose, pursuant to the views herein expressed. Let the costs of this appeal be equally divided between the Union Trust Company and the defendants Garland and Barr and the intervener Walker. All the Justices concur, except THACKER, J., who concurs in conclusion.

THACKER, J. (concurring). In no aspect of the loan contract in the instant case does there appear to me to be any taint of usury. And I concur in the conclusion reached in the opinion of the court that there is no usury in this contract. But, in concurring in this conclusion, I feel it my duty to dissent from the reasoning by which the contract is tested for usury and found to be within the law.

Under the statutes applicable to the instant case (Laws 1910, p. 253, the same being section 1005, Rev. Laws 1910, and section 915, Stat. 1890, the same being section 1007, Rev. Laws 1910), 10 per cent. per annum is nominally the highest rate of interest permitted by law; but, since the borrower may deduct interest in advance out of the loan for 1 year at the highest rate permitted, these statutes really permit a lender to charge interest at 10 per cent. per annum, plus interest at this rate upon the amount of interest so taken in advance. However, in this opinion, I shall, in deference to the statutes cited, at times speak of the amount actually delivered to the lender, plus the interest taken by the borrower in advance for the first year as the amount of the loan.

In this case, following the case of Metz et al. v. Winne, 15 Okl. 1, 79 Pac. 223, a test for usury is found by computing interest at the highest rate permitted by law upon the full amount loaned for the entire time for which the loan was made; and the fact that this method of computation does not give even an approximately invariable result in limiting benefits that may be taken by lenders and burdens that may be imposed upon borrowers, except where interest is not taken before it could be earned by the amount loaned at the highest rate permitted by law, does not appear from the opinion of the court to affect the applicability of the same in any case.

In the Metz Case, where a loan of $600 for 10 years bore interest to the amount of $222, payable at the expiration of the first year, and to the amount of $42 payable at the expiration of each succeeding year, making a total of $600, the fact that interest at the highest rate of 12 per cent. on $600 would amount to $720 was considered a correct test, showing that the total of $600 called for as interest by the contract was free from the taint of usury. In that case the contract required the payment of $150 over and above the interest that could have been earned under the law at the expiration of the first year of the loan; and it must be obvious that this gave the lender and deprived the borrower of the benefit of an equal amount of the principal loaned, at least so long as this amount had not been actually earned as interest, over and above all other interest payments, by the amount originally loaned. It seems obvious that the loan of $600 in that case could not have earned so much as $720, in view of the times and amounts of interest called for by the contract, unless the question of benefit to the lender and burden to the borrower should be ignored in the test for usury; and to ignore benefits and burdens would seem to me to defeat the only purpose of the limit upon the rate of interest. The reasoning in the Metz Case, which is followed in the instant case, apparently leads to the conclusion that if the contract had required the borrower of the $600 to allow the lender to retain $72 as interest in advance at 12 per cent. for the first year of the loan, and further required the borrower to pay the lender the additional sum of $648 at the end of the first year, as unearned but anticipated interest for the remaining 9 years, thus making a total of $720 required to be paid as interest at the expiration of the first year of the loan, the contract would have been free from the taint of usury, notwithstanding the fact that the borrower had paid the lender at the end of the first year an amount equal to the entire amount of the original $600 loaned, plus $120, which would be 20 per cent. on that amount, to say nothing of the $600 to be paid at the end of the loan period. Under the test for usury applied in the Metz Case, and in the instant case, it appears that the contract now before the court might have required the borrower to allow the lender to retain $5,000 as interest in advance, and to pay the latter at the end of the first year of the $50,000 loan the additional sum of $18,783.32, so that the borrower would have the benefit of a loan of only $45,000 for the first year and of only $26,116.68 for the remaining years of the loan, while the lender would get a correspondingly greater benefit than he would have received if no interest had been taken before it was actually earned by the loan.

If the reasoning of these cases is correct, and the same test is to be applied in all cases to which the same appears to be applicable from the reading of the opinions therein, it appears, for example, that the lender of $100 for 20 years might charge and collect $10 in advance, so that the borrower would only actually receive $90, and at the expiration of the first year, as unearned but anticipated interest, $190 more, making in all $200, which is more than twice as much as the amount actually loaned, and still hold the borrower's obligation to pay $100 at the expiration of the 20 years.

In the case of Fowler v. Equitable Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786, where the highest rate of 10 per cent. per annum allowed by the statutes of Illinois was charged on a loan for 5 years and where 3 per cent. of the same for the full term of the loan was taken in advance, the Supreme Court of the United States, in holding that the same was not usurious under the decisions of that state, said:

> "It is to be observed that out of the principal sum loaned the trust company retained, by way of discount, what was claimed to be the present value of such amount as would pay, in advance, 3 per cent. of the stipulated interest for the whole period of the loan, 5 years. In view of this feature in the case there was much discussion at the bar as to whether it was permissible, in Illinois, for the lender to exact and receive interest in advance upon a loan made at the highest rate allowed by its laws. In view of numerous decisions of the Supreme Court of that state, it is not necessary to examine this question upon principle; for it is the settled doctrine of that court that the mere taking of interest in advance does not bring a loan within the prohibition of usury. In Goodrich v. Reynolds, 31 Ill. 490, 498 [83 Am. Dec. 240], it was said: 'The remaining plea sets up usury in this, that the interest was made payable semiannually. It has long been settled such reservation is not usurious. The whole interest may be lawfully reserved in advance.' McGill v. Ware, 5 Ill. 21, 28; Mitchell v. Lyman, 77 Ill. 525, 529, 530; Brown v. Scottish-American Mortgage Co., 110 Ill. 235, 239; Hoyt v. Pawtucket Sav. Inst., 110 Ill. 390, 394; Telford v. Garrel, 132 Ill. 550, 554 [24 N. E. 573]. Whether that doctrine would apply where the loan was for such period that the exaction by the lender of interest in advance would, at the outset, absorb so much of the principal as to leave the borrower very little of the amount agreed to be loaned to him we need not say. The present case does not require any expression of opinion upon such a point, for the interest reserved

in advance on the loan to Fowler was only of 3 per cent. out of 10 per cent., and a reservation to that extent, it would seem, is protected by the decisions of the state court. The defense of usury, so far as it rests upon the fact that 3 per cent. of the stipulated interest was taken in advance by the lender, must therefore be overruled."

The Illinois rule, however, does not seem to be in accord with the rule generally followed, nor to be sound in principle; and the above intimation that a loan might not be regarded as usurious unless it was "for such period that the exaction by the lender of interest in advance would, at the outset, absorb so much of the principal as to leave the borrower very little of the amount loaned him" should be understood to be applicable only where the Illinois rule prevails, if there. In Law of Usury, by Webb, secs. 112-116, pp. 126-132, it is said:

"The question whether a contract calling for the payment of the highest legal rate of interest in advance is usurious or not is one upon which the authorities are not in harmony. The statutes upon the subjects of interest and usury do not ordinarily specify the particular time during the life of the loan or forbearance at which the interest shall be paid. Such statutes ordinarily provide that the rate of interest shall be a certain amount 'per annum'; and, while there is no additional provision that the interest shall be payable at the end of the year, or at the time of the maturity of the loan, if it be for a period less than one year yet some of the courts have construed the statutes to so mean. In the Ohio case of Penn Mutual Ins. Co. v. Carpenter (40 Ohio St. 260), the court discussed the subject at some length, concluding that: 'A construction of the language of the statute as applicable to the rate of interest only, and not to the time of payment, which will permit the payment of interest at periods shorter than the time a note has to run, furnishes, in our view, no reasonable ground for the advancement of interest before it accrues or is earned. * * * In Ohio, express statutory authority has been given in many instances to banks and other corporations to reserve interest in advance. But the fact that such authority has been expressly granted by statute furnishes the strongest implication that it is denied to all others.' In other states of the Union, the contrary rule prevails, and, it is held that the taking of interest in advance is not usurious. Thus in Illinois, it is held that if a borrower of $3,000, for 1 year, at 10 per cent. interest, receives but $2,700, for which he gives his note for $3,000, with 10 per cent. interest after maturity, the transaction is free from usury. In the early Indiana case of Cole v. Lockhart (2 Ind. 631) the court reviewed the cases which had been decided at that time, and declared that the taking of the highest rate of interest in advance was not usurious.

"Why there should have been such profligate expenditure of learning, consumption of words, and vexation of mind over a question of which there is but one just solution is difficult to understand. Interest is compensation for the use of money. If the amount of the interest is deducted in advance, it is plain that the borrower never uses the interest so paid. He does not receive the full amount of his loan. He cannot use that which he was to receive unless it is paid to him. He cannot employ money kept out of his possession. It renders the borrower no service, performs no purpose, pays no debts, buys no property, satisfies no wants, and accomplishes nothing, as far as the borrower is concerned, for which he should be compelled to pay interest. If mathematical accuracy, combined with justice, should be aimed at, it seems that the interest should be paid at maturity, together with interest upon the interest then due, for one-half the time of the loan.

"Where the interest is taken in advance for a period less than 1 year the Supreme Court of Wisconsin, in the case of Tallman v. Truesdell (3 Wis. 443), makes the following distinction: 'It is contended that the payment of interest semiannually at the rate of $12 for the loan or use of $100 for 1 year; or, in other words, $6 at the end of 6 months, virtually gets interest on the $6 so received during the remaining 6 months of the year. The statute is silent as to the time when the interest may be paid, and only prescribes the rate for a specified term. It is difficult to distinguish clearly between the case when a loan of $100 is made for 6 months at the rate of 12 per cent. per annum, and at the expiration of the time the lender receives his money back with $6 interest, and the case where a loan of $100 is made for 1 year at the rate of 12 per cent. per annum, and at the end of 6 months $6 should be paid as interest, and at the expiration of 1 year, $106 are paid. It is true that the borrower loses the interest on the $6 which he paid at the end of 6 months, for and during the remaining 6 months of the year, but it is not true that he pays interest on the $6 to the lender. The lender may or may not get interest on this sum, but if he does, he does not get it from the borrower, since it is not a contract with him for a greater rate than 12 per cent. That a distinction between the cases like the foregoing has been attempted is certainly true, but it has never been rendered sufficiently clear for practical purposes. Where interest is taken in advance the case is different. If the lender reserves his 12 per cent. at the time of the loan, the borrower gets $88, for which he promises to pay $100 at the end of the year. In this case he actually pays to the lender interest on the $12 reserved; that is, the $12 which he pays at the time of the loan is equal to $10.56 interest on the $88 actually received, and $1.44 at the rate of 12 per cent. on the $12 reserved. This would clearly exceed the rate prescribed by the statute. But we do not think it was the design of the statute to make any deduction from the rate of 12 per cent. agreed upon, in cases where the term for the loan is less than a year, or where the interest is agreed to be paid oftener than once a year.

"As stated in a preceding section, if the amount of interest and commissions collected does not exceed the amount of interest allowable by the highest legal rate, there is no usury. So where the amount of interest collected in advance, together with the interest upon it, at the highest lawful rate, does not aggregate more than would be allowed by law as interest upon the principal, there can be no usury. Upon this theory it is held that there is no usury where the bond of the debtor bears no interest, but includes the amount of the debt with interest upon it to the time of the maturity of the bond."

In the editorial note, commencing at page 1156, to the case of Ellis v. Terrell, 109 Ark. 69, 158 S. W. 957, 37 Ann. Cas. 1153, it is said upon the authority of a large number of cases there cited:

"The practice, originating in the custom of banks and those dealing in commercial paper in the course of trade, of taking interest in advance on short-term loans, though admitted to be usurious in principle, has become a recognized legal right; and, in the absence of statutory prohibition, the courts are unanimous in upholding its legality where the loan or forbearance is for a period of time of one year or less."

In idem it is said:

"In Purvis v. Frink, 57 Fla. 519, 49 So. 1023, the court construing a statute providing that a debtor shall not be required to pay a greater sum than the actual principal sum received, with 10 per cent. interest per annum, held that the reservation of interest from the principal of the note in quarterly amounts made the transaction usurious. In some jurisdictions it has been held that since the right to take interest in advance originated in the custom of banks and those dealing in commercial paper, such right must be confined to commercial transactions."

The decisions from the states holding this are cited in connection with the last above statement. In idem it is further said:

"Where the loan or forbearance is for more than 1 year, the decisions are not in accord as to whether taking interest in advance for the full period of time will constitute usury. The majority of cases support the holding of the reported case that to take the highest rate of interest in advance for the entire period of time is usury."

In support of this last proposition the editor cites in addition to the case annotated the following cases: Marsh v. Martindale, 3 B. & P. (Eng.) 154; Fowler v. Equitable Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; Branch Bank v. Strother, 15 Ala. 51. In the case of Smith et al. v. Parsons et al., 55 Minn. 520, 57 N. W. 311, it was held:

"When a 'bonus' is exacted by the lender as a consideration for making a loan, it is, in computing, for the purpose of determining whether the loan is usurious, to be deducted as of the date when it is payable. If payable at the time of the loan, it is to be deducted from the principal as of the date of the loan, and the remainder, or what the borrower receives and retains, is to be taken as the basis for computation."

In that case, where the loan was of $20,000 for 5 years, with a specification that the same should bear interest at the rate of 7 per cent. per annum, and where the borrower contracted to pay and paid the lender as a bonus or commission for making the loan 5 per cent. on said $20,000 and rendered the lender services of the value of $500, the court said:

"These considerations furnished a basis for making a computation to ascertain if the interest or compensation for the use of the money actually to be received and retained by the borrower was at the rate of more than 10 per cent. per annum on that amount or those amounts. The interest on the several amounts, at that rate, from the dates of the advances to the time of paying the last installment, November 4, 1884, was about $930. By the terms of the notes there was payable on and before October 1, 1884, as interest, $1,400. It is a mode of computation which defendants cannot complain of, to deduct the bonuses from the principal $20,000 as of the date of November 4, 1884, and calculate the interest on the remainder, $18,500, at the rate of 10 per cent. from that date to the maturity of the notes, add the $930 to that, and to their sum add the principal retained by the borrower, $18,500, aggregating $26,553, and compare that with what by the terms of the notes and mortgage the borrower was to repay to the lender, $20,000 principal, and $7,000 interest. The usurious character of the transaction is apparent."

In the case of McCall v. Herring, 116 Ga. 235, 42 S. E. 468, where the borrower contracted to pay $1,600, with interest thereon at the rate of 7 per cent. per annum, but actually received from the lender only $1,520 because of the fact that the lender's agent retained $80 from the principal as his commissions, the court said:

"The contentions raised by the demurrer, and insisted on as reasons sufficient to justify the court in striking the plea necessarily lead to the determination of the question whether the averments of the plea, when taken to be true, characterize the transaction as a usurious one. If they do, the court erred in striking the plea, because the deed relied on by the plaintiff as the basis of the establishment of her lien would be void. If they do not, the court committed no error, and the validity of the security deed is unaffected. In the case of Clarke v. Havard, 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499, Presiding Justice Lumpkin, in the course of a very able opinion which he delivered in that case, and in which he considered the rulings made by this court in a number of cases preceding it, said: 'A money lender cannot, in this state, lawfully contract for or reserve any greater rate of interest than 8 per cent. per annum, and the prohibition is just as strong against doing so indirectly as it is against doing so openly and without pretense. * * *' Accepting the rulings made in that case as being sound, our next inquiry, in order to fully meet the demurrer, is whether when the $80 retained by the agent of the lender is added to the interest contracted to be paid, it appears that the aggregate of these sums is greater than the highest rate of interest allowed by law to be charged. The borrower gave his note for $1,600, and agreed to pay interest thereon at the rate of 7 per cent. per annum, $112. The commission retained amounted to $80. The borrower, according to his plea, received $1,520 interest. upon which sum at the rate of 8 per cent. per annum, the highest allowed by law in this state, is $121.60. This would make the amount of interest to maturity, 5 years, $608. Any greater sum than $608 received as interest for this time on this amount would be usury. But, according to the averments of the plea, the interest contracted to be paid, seven per cent. on $1,600 for five years, was $560, which, added to the $80 retained as commissions, aggregates $640 (not including in this calculation any interest on the $80), as interest on the $1,520 received by the borrower. Thus it is clear that the borrower would pay and be liable to pay $32 more than the highest legal rate during the period of the loan for the sum borrowed. And the result is the same if we treat as chargeable to the borrower the $16 which, in one part of his amended plea, he admitted the plaintiff was entitled to receive from him for preparation of abstract, etc. These figures are conclusive to our minds that, when the principles ruled in the Clarke Case, supra, are applied to the facts set out in the plea and by demurrer admitted to be true, the transaction represented by the promissory note, which is the foundation of the action in the present case, was usurious.

"Counsel, however, contend that if the $80 paid by the borrower as commissions is to be treated as interest reserved, then the transaction would not be usurious, for the reason that this amount which was deducted from the face of the note must be treated as the payment of interest pro tanto in advance; that $80 represents 1 per cent. on the amount contracted to be loaned for the full term, 5 years; and that as the balance of the interest contracted to be paid amounts to 7 per cent. the whole rate of interest, when so treated, aggregates 8 per cent., and is within the lawful limit, and that the payment of 1 per cent. of interest in advance under these circumstances does not render the transaction usurious. An examination discloses that the adjudicated cases are somewhat in conflict on the question whether a reservation of the highest legal rate of interest in advance renders a loan transaction usurious, but a majority of those which we have had opportunity to consult draw a distinction, in this respect, between what is termed a long and a short loan. Counsel for defendant in error argues that on principle no such distinction exists, and we agree with him. We are unable to see any reason why on principle the reservation of the highest rate of interest in advance on short-term loans does not render the contract usurious. * * * Mr. Webb, in his treatise on Usury, § 111, declares, on the authority of a large number of adjudicated cases cited in note 3, page 126: 'That it is not usury to discount commercial paper in the ordinary course of business is absolutely settled. This rule of law arose out of custom, and does not depend upon statute.' Mr. Tyler, in his work on Usury, p. 298, declares that: 'The courts uniformly hold, at the present day, that the interest for ordinary paper having the usual time to run, such as is the practice by banks, may be taken in advance, by way of discount, and not subject the paper to the taint of usury. It is obvious, however, that the length of time the paper has to run must have a controlling effect upon this question. If the note has a short time to run, the interest may be taken in advance; whereas the time may be so lengthened out as to make the taking of the interest, in advance, palpably usurious.' Whether, then, there is, in principle, any difference in such transactions in taking the highest legal rate on short and long time loans is not now a question with which we are materially concerned; for undoubtedly, according to the authorities generally, the proposition that taking the highest rate of interest in advance does not render the transaction usurious may be considered settled on short loans. Indeed this court, in the case of Mackenzie v. Flannery, 90 Ga. 590, 16 S. E. 710, ruled that 'to take 8 per cent. interest in advance by way of discount on short loans, in the usual and ordinary course of business, is not usurious.' And in the case of Union Savings Bank v. Dottenheim, 107 Ga. 614, 34 S. E. 221, Mr. Justice Cobb said: 'It is also well settled that a contract providing for the payment of the highest lawful rate of interest in advance is not usurious, though many of the courts which recognize this as an established rule express doubts as to whether upon principle such practice should be allowed to prevail.'

"Just where the line is to be drawn, so as to determine what is a short and what a long term loan, does not seem to have been settled. The period of 1 year seems to have been fixed in the case of Tallman v. Truesdell, 3 Wis. 443. But the rule that interest at the highest legal rate may be taken in advance on long loans without rendering the contract usurious is not established by the authorities generally. There are a number of cases so ruling, in many of which the rulings are made on statutes. Certainly there are no decisions of this court which so declare, and we are not aware of any authority which binds us so to rule. While we accept the doctrine almost universally applied to short loans, in the absence of controlling authority we decline to extend that rule in the case of long loans. On principle it cannot be done, nor ought it to be, for reasons which are tersely stated by Mr. Webb in his work cited supra, 113, in the following language: 'Interest is compensation for the use of money. If the amount of the interest is deducted in advance, it is plain that the borrower never uses the interest so paid. He does not receive the full amount of his loan. He cannot use that which he was to receive, unless it is paid to him. He cannot employ money kept out of his possession. It renders the borrower no service, performs no purpose, pays no debts, buys no property, satisfies no wants, and accomplishes nothing, as far as the borrower is concerned, for which he should be compelled to pay interest.' While the language of Mr. Justice Cobb in the Dottenheim Case cited above is very broad, it was not, as we understand it, meant to include interest on long-time loans, but evidently referred to the rule, which seems so generally to prevail, that the highest rate of interest may lawfully be taken in advance on short loans. If it be contended that this language referred to long as well as short loans, it may be replied that that question was not one which was passed on by the court in that case. If the contention of the defendant in error is sound, then it would lead to this result: If a loan of $500 were made for a term of 5 years at the rate of 8 per cent. per annum, then at the time of making the loan the lender could reserve the interest for the whole period, and give to the borrower only $300 in satisfaction of his contract; if such a loan were made for 10 years, the law would be fully met by the lender handing to the borrower $100 and accepting his obligation to pay him $500 at the end of the period; if it were made for 15 years, instead of the borrower receiving anything from the lender, the former would not only get nothing, but would pay the lender $100 for the privilege of executing to him his promissory note."

Interest is not the compensation allowed by law or fixed by the parties for an obligation to permit the borrower to use or detain money or for the future forbearance on the part of the lender to demand the same; but, as stated in Black's Law Dictionary, it is defined as follows:

"Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money. Civ. Code Cal. § 1915; Williams v. Scott, 83 Ind. 408; Kelsey v. Murphy, 30 Pa. 341; Williams v. American Bank, 4 Metc. (Mass.) 317; Beach v. Peabody, 188 Ill. 75, 58 N. E. 680."

The right to the compensation allowed by law or fixed by the parties "for the use or forbearance or detention of money" logically arises out of and follows, and does not precede, such "use or forbearance or detention of money"; and, accordingly, loan contracts for more than 1 year usually call for the payment of interest after and not before it is earned.

If a contract did not require the payment of interest before it was earned by a loan, and this definition was kept in mind, a voluntary payment of money in advance to meet and cover unearned interest as it accrues in the future would easily be seen to be more in the nature of a return of that much of the principal debt than a payment of interest in the first instance, though taking on the character of a payment of interest as the latter accrues.

In the absence of a contract to the contrary, and as a general rule under the provisions in contracts, interest is not due and payable until it has been earned by the loan, except when taken in advance, as authorized by section 915, Stat. 1890 (section 1007, Rev. L. 1910) for not to exceed 1 year; and, as aptly stated in a note to Story v. Livingston, 13 Pet. 359, 10 L. Ed. 200, the rule for casting interest in this country when partial payments are made is as follows:

"The rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remain-

> ing due. If the payment is less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance. State of Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 13 [7 Am. Dec. 471]; Van-Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313 [10 Am. Dec. 333]; Williams v. Houghtaling, 3 Cow. 86, and note; Hicks v. Atkins, 4 Mass. 103; Dean v. Williams, 17 Mass. 417; Fay v. Bradley, 1 Pick. 194; French v. Kennedy, 7 Barb. (N. Y.) 452; Hosack v. Rogers, 9 Paige's (N. Y.) 461; Smith v. Shaw, 2 Wash. C. C. 167 [Fed. Cas. No. 13,107]; Dunlop v. Alexander, 1 Cranch C. C. 498 [Fed. Cas. No. 4,166]; Russell v. Lucas, Hempst. 91 [Fed. Cas. No. 12,156A]."

Also see: Woodward Baldwin & Co. v. Jewell et al., 140 U. S. 247, 11 Sup. Ct. 784, 35 L. Ed. 478. The act of June 17, 1910, (Laws 1910, p. 253; section 1005, Rev. Laws 1910) reads as follows:

> "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section shall be deemed a forfeiture of twice the amount of interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm or corporation taking or receiving same, in an action in the nature of an action of debt, twice the amount of interest so paid: Provided, such action shall be brought within two years after the maturity of such usurious contract: Provided, further, that before any suit can be brought to recover such usurious interest, the party bringing such suit must make written demand for return of such usury."

Section 915, Stat. 1890 (section 1007, Rev. Laws 1910), reads as follows:

> "The interest which would become due at the end of a term for which a loan is made, not exceeding one year's interest in all, may be deducted from the loan in advance if the parties thus agree."

If, as seems indisputable, the purpose of the statutory inhibition against the taking of more than a specified amount of interest is to limit the burden that may be imposed upon the borrower, and the corresponding benefits that may be taken by the lender, we should look to the essence of the transaction and to the net result in benefit to the lender and burdens to the borrower, with due regard to the terms of the contract in respect to times and amounts of interest payments and to the rights of the parties to contract for the payment of actually earned interest at such times as they desire without affecting the question, for a standard test.

I think the statutory limitation upon the burden the lender may impose and the corresponding benefit he may take contemplates the casting of interest according to the partial payment rule hereinbefore stated, treating interest paid in advance of accrual above the product of a computation at the highest legal rate to the date of payment as sterilizing or destroying the interest-producing power of an equal amount of the principal until such advance interest could be actually earned by the loan at the highest rate of interest permitted by law.

Taking the contract in the Metz Case for use in making an illustration, it appears to me that a correct test for usury might be found in the fact that the $600 loaned could have earned, at the rate of 12 per cent. per annum, $72 at the end of the first year, when $222 that must be treated as interest was paid; that this payment, being $150 over and above the interest that could have been lawfully earned up to that time, sterilizes and destroys the interest-producing power of an equal amount of the $600 loaned, so that only $450 of the same could bear interest until the next interest-paying time, at the end of the second year of the loan, when, at the highest rate permitted, it could produce $54; that, as $54 is $12 more than the $42 called for by the contract at that time, this deficiency should be covered by applying $12 of the $150 excess already in the hands of the lender to the same, with the result that this excess would be reduced to $138 and a corresponding amount of barren principal would become interest producing, so that, for the third year $462 of the $600 would bear interest; that at the end of the third year, when another installment of $42 as interest was due under the contract, this $462 could produce at the highest rate of interest permitted by law $55.44, which would be $13.44 more than the contract required to be paid at that time, so that the unearned interest in the hands of the lender would be reduced to $124.56 for the next year and $475.56 of the $600 loaned would bear interest during the fourth year, and so on until, at the end of the ninth year, nearly all of the excess in the hands of the lender would be earned and absorbed, and nearly all of the loan of $600 would begin to bear interest again. As a result of this method of computation, the $600 loaned could have earned, at 12 per cent. per annum, $72 the first year, $54 the second year, $55.44 the third year, $57.05 the fourth year, $58.85 the fifth year, $60.82 the sixth year, $63.08 the seventh year, $65.60 the eighth year, $68.44 the ninth year, and $71.61 the tenth year, making a total of $626.89. It appears to me that this method of computation gives due consideration to the proportions of the contract, that is, to the times of payment and the amounts required to be paid by the same, in testing for usury. It takes into account the fact that the borrower was required to pay $150 at the end of the first year of the loan as interest that had not been earned; and it also takes into account the fact that each subsequent installment of interest called for by the contract was less than could have been earned at that time within the law.

Although I think the above method of computation gives a correct test, I am not quite as certain of this as I am of the fact that the standard adopted in the instant case and in the Metz Case is fundamentally wrong.

(13 Okl. Cr. 447)

SCOFIELD v. STATE. (No. A-2610.)

(Criminal Court of Appeals of Oklahoma. May 26, 1917.)

(Syllabus by Editorial Staff.)

WITNESSES 🔑379(1)—IMPEACHMENT OF WITNESS.

In a prosecution for selling liquor where the case was closely contested, the refusal to allow defendant to impeach employed detectives by showing that they had made statements out of court as to who had made a sale contradictory to their testimony in court was reversible error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1247.]

Error from County Court, Woods County; Gus Hadwiger, Judge.

John Scofield was convicted of selling one pint of whisky to one Ralph McAfee, and sentenced to pay a fine of $50, and to imprisonment for 30 days, and he brings error. Reversed.

L. T. Wilson, of Alva, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The appellant was convicted of selling one pint of whisky to one Ralph McAfee for the price of $1. The transaction is alleged to have occurred in a barn in the town of Waynoka. Ralph McAfee, the prosecuting witness 17 years of age, together with Ralph Trull, a young man 21 years of age, had come from Texas to Woods county a short time before this transaction, and testify that they met this defendant, a total stranger to them, on the streets of Waynoka, and asked him if he knew where they could get some whisky, and he told them that he had some or could get some. The defendant then went away, according to their testimony, and returned within a short time with a bundle under his arm, and directed them to this barn where the alleged sale is said to have taken place. The prosecuting witnesses and a man by the name of Cham Beeman preceded the defendant to the barn. Beeman was not a witness in the case. McAfee and Trull both testify that the defendant appeared at the barn with a quart of whisky wrapped up in an old pair of trousers and emptied out a pint of the whisky into another quart bottle and sold it to McAfee for the sum of $1. The defendant testified that he saw these people going to the barn, and was suspicious and followed them up there in order to get a drink, and that when he got there they were just opening a quart of whisky which Beeman had at that time; that he did not sell any whisky on that occasion to anybody. Several citizens of Waynoka testify to the good reputation of the defendant for peace and as a law-abiding citizen. Upon the trial, the court, over the objection and exception of defendant's counsel, limited the cross-examination of these prosecuting witnesses in an endeavor on the part of said counsel to show their interest in the matter that they were employed detectives of the sheriff and were to receive money for giving evidence in the case. The objections to such questions were sustained to such an extent that counsel for defendant made an effort to withdraw from the case. However, the court thereafter permitted a limited cross-examination along this line, but an effort was made by counsel for the defendant to impeach the prosecuting witness Ralph Trull, it being the theory of the defendant that if the prosecuting witnesses bought any liquor on that occasion it was sold to them by Beeman and not by him. Counsel for defendant asked the witness Trull if he did not state, in the presence of one Homer Davidson, in the town of Waynoka, on the 23d day of September before the trial, to Mr. Scofield, that he did not see how he could be convicted, as he did not make the sale. To which question an objection upon the part of the state's counsel was sustained, and to which ruling the defendant's counsel excepted, and also in the same conversation if he did not say that Mr. Scofield, the defendant, took no money, but that Cham Beeman took the money, to which he answered, "I don't think I did." Homer Davidson was then placed upon the stand in behalf of the defendant, and was asked whether or not Trull had stated, in substance, the impeaching matters inquired about, to the first of which the court sustained an objection and refused to permit the witness to answer, and as to that part of the conversation in which Trull had said that he did not say that Beeman took the money, the impeaching witness, Davidson, testified that he did so state, which answer, upon objection by the state's counsel, was stricken out, and the jury instructed not to consider it on the ground that the testimony was without weight in the case and was to be given no credence as to Cham Beeman.

There is no question in the minds of the members of this court that the rulings of the trial court relative to this impeaching evidence were erroneous, and in view of the fact that this is a closely contested case in which the defendant, a farmer of good reputation as a law-abiding citizen, was convicted on the evidence of total strangers to him, that did not live in that community and were, as the record clearly discloses, employed detectives, it was competent for the defendant to impeach these witnesses by showing that they had made contradictory statements out of court relative to who made this sale than that testified to in court. Why the state did not call Beeman as a witness in this case does not appear from the record, although he was present during all the time that the other state witnesses testify they had their dealings with the defendant, and as Beeman had an equal opportunity to make the sale, if one was made, the defendant had a right to impeach one of the prosecuting witnesses by showing that he did state, out of court, that Beeman was the man who did make the sale and receive the money. After an examination of the entire record we are convinced that this defendant was not accorded that fair and impartial trial to which he was entitled under our Constitution and statute. The judgment is therefore reversed.

(13 Okl. Cr. 431)

GLAZE v. STATE. (No. A-2491.)

(Criminal Court of Appeals of Oklahoma. May 26, 1917.)

(Syllabus by the Court.)

1. LARCENY 🔑14(1)—LARCENY OF LIVE STOCK —STATUTE.

Section 2652, Rev. Laws 1910, defines "larceny" as the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof. Under this definition, a conviction for the larceny of live stock accomplished by fraud is authorized.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34, 37.

For other definitions, see Words and Phrases, First and Second Series, Larceny.]

2. CRIMINAL LAW 🔑1182—CONVICTION—AFFIRMANCE.

When all the evidence introduced at a trial fairly warrants a conviction and no prejudicial error of law is disclosed, a judgment of conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203–3214.]

3. CRIMINAL LAW 🔑1172(1) — APPEAL — HARMLESS ERROR — INACCURATE INSTRUCTIONS.

When instructions given by the court are poor in form but free from prejudicial error, the judgment will not be reversed on the ground that they are not precisely accurate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154.]

Error from District Court, Caddo County; Will Linn, Judge.

Olin Glaze was convicted of larceny, and he brings error. Affirmed.

H. W. Morgan, of Anadarko, and Giddings & Tripp, of Oklahoma City, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Olin Glaze, plaintiff in error, was convicted at the February, 1915, term of the district court of Caddo county, on a charge of larceny, and his punishment fixed at three years in the state penitentiary. The information charges the larceny of two head of cattle, the property of J. C. Childers. Oklahoma Giles was jointly charged, but separate trials were had.

The proof on behalf of the state discloses the following state of facts: J. C. Childers lived about three miles east of Carnegie in Caddo county, and was a farmer. Olin Glaze, plaintiff in error, and Oklahoma Giles, lived near by, and were horse traders. In January, 1915, Giles came to the home of the prosecuting witness and inquired for a bull, and was informed that the witness had a bull, a heifer, and a cow for sale, and was told by Giles that plaintiff in error, Glaze, would buy them. Witness priced the two yearlings at $70. Giles told him that he did not think Glaze would pay the money, but had a mare to sell; that he, Giles wanted the mare, and that if plaintiff in error would trade the two yearlings for the mare, he, Giles, would pay $72.50 for the mare, and said he would go and get Glaze and have him bring the mare over. Glaze rode the mare over, and asked the witness if he had some yearlings to trade for the mare. Witness told him he did not. There was quite a little talk about trading the mare for the yearlings. Witness refused to trade the yearlings for anything, unless he knew he was going to get the money, as he did not want to trade, but wanted to sell. An effort was made to induce the witness to go in search of Giles with a view of getting the money from him for the mare. He would not go, but after considerable persuasion let his son go with Glaze and told both of them that there would be no trade unless he got the money; that if Giles did not have the money, that would be the end of it. About an hour later Giles and Glaze and the boy came back and wanted witness to go to Carnegie to get the money. He got in the buggy with Giles and drove off. Glaze appeared to be on horseback. After going some little distance, a brother-in-law of Giles overtook them with a story, which proved to be untrue, that Giles' wife and baby had been crippled in a runaway. Giles got out of the buggy, got on a horse, and started off. As he rode away, prosecuting witness asked him what he was to do, and Giles told him to meet him in Carnegie the next morning. He was told that witness would meet him there. He then said: "Maybe not to-morrow; I will see you soon"—and went on away. The brother-in-law to Giles got in the buggy and drove the witness home. When they got home, the yearlings were gone. This occurred on Thursday. Witness Giles nor the plaintiff in error said anything further about the matter, nor did either of them bring the money to pay for the yearlings. On Monday the witness went after the money again, and was told by Giles that he did not have it, that he had expected to get the money from his father, but that the money had been spent. Witness was never paid.

Newton Childers, son of the prosecuting witness, corroborates the testimony of his father. In addition, he says that when he went with Glaze to find Giles, Glaze told him, Giles, that the old man (meaning the prosecuting witness) would not let the cattle go until he got the money; that Giles said, "Let's go and see the old man," which they did, and after the prosecuting witness and Giles left to go to Carnegie that Glaze and he without instructions to do so, got the cattle and drove them over to Glaze's place. He rode the mare, and when he got over there started to pull the bridle off and leave her, whereupon Glaze told him that he had better keep her; that she might be all he would ever get for the cattle; that he did not know what to do, and rode the mare back home because Glaze told him to.

Pearl Childers, daughter of the prosecuting witness, testified to hearing the conversation with Olin Glaze, Oklahoma Giles, and her father concerning the yearlings and their desire to trade the mare for them; that her father declined to consider any trade of any kind, and said the money was what he wanted, and in speaking to plaintiff in error said: "When you get the money, Olin, you get the cattle and not before."

Witness E. C. Kelley for the state testified to having a transaction with the defendant Glaze and Oklahoma Giles, in which the two parties, working together, fleeced him out of a horse. It was a similar transaction to the one had with Childers.

The evidence clearly indicates that the plaintiff in error, Glaze, and his codefendant, Giles, were working together in a scheme to defraud the farmers of the community out of their property.

Witness Wesley Bees for the state testified to facts corroborating the testimony of Kelley as to the manner in which he was defrauded.

Witness Bogle for the state testified to a similar transaction, wherein he was defrauded by the same parties. Apparently this witness got $5 for a horse worth $125 through the fraudulent conduct of these men.

The testimony in behalf of the defendant by himself and his witnesses attempted to establish the contention that the mare was traded outright for the yearlings in question, and therefore they had committed no crime.

The jury found against the plaintiff in error, and convicted him of larceny.

A careful reading of the record by any fair-minded man would not permit of any other conclusion than that of guilt. This plaintiff in error and Giles, without doubt, had conspired together to defraud the prosecuting witness out of his property. The proof of similar transactions by them which tended to show the manner in which they were conducting their business and the system which they used in defrauding the citizens of the community were competent.

[1] It is contended by counsel for the plaintiff in error that the proof shows no violation of the statutes of this state. With this contention we cannot agree. Section 2652, R. L. 1910, is as follows:

> "Larceny is the taking of personal property, accomplished by fraud or stealth, and with intent to deprive another thereof."

This definition is broad enough to cover the charges in this case; in fact, was intendfor just such transactions. The proof clearly establishes the crime of larceny by fraud.

[2, 3] There is ample law, as well as ample facts, to support this judgment of conviction.

It is next complained that the court erred in giving instructions Nos. 9 and 10, which are as follows:

> "No. 9. You are instructed, gentlemen of the jury, that there has been submitted for your consideration testimony relative to other trades entered into by the defendant in conjunction with others, wherein certain property was alleged to have been obtained by fraud or stealth. This evidence, gentlemen of the jury, is submitted to you for your consideration as the same may or may not tend in determining whether or not the defendant obtained the property described in the information, from the prosecuting witness, J. C. Childers, by fraud or stealth, with the intent to deprive the owner thereof, and for said purpose only.
>
> "No. 10. You are instructed, gentlemen of the jury, if you believe from the evidence in this case beyond a reasonable doubt that the defendant, acting in conjunction with others, by fraud or stealth and with the intent to deprive the owner thereof obtained possession of property of parties other than the prosecuting witness, J. C. Childers, and that the same constituted a part of a plan of the defendant in obtaining possession of said property, with the intent to deprive the true owner thereof, then you might consider such facts as a circumstance in arriving at the intent of the defendant at the time of obtaining possession of the property for which he is prosecuted, and as to the guilt or innocence of the defendant of the crime charged."

These instructions might be improved upon in form, but there is nothing in them prejudicial to the substantial rights of the plaintiff in error.

Again, counsel complain of the court's action in admitting testimony of the witnesses, Kelley, Bees, and others, in reference to other similar transactions. This testimony was properly admitted. There is no question but that these parties were in a conspiracy to obtain property by fraud. In the case at bar their efforts were successful, as they appear to have been in a number of other instances. The law of this state protects the law-abiding citizens from conduct of this kind.

The judgment is entirely righteous, and the record is without prejudicial error.

Affirmed.

DOYLE, P. J., and MATSON, J., concur.

(13 Okl. Cr. 440)

BEAUBEIN v. STATE. (No. A-2603.)

(Criminal Court of Appeals of Oklahoma. May 26, 1917.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW 🔑1086(14)—ADMISSION OF EVIDENCE—ASSIGNMENT OF ERROR—REVIEW.

Where the record does not show that counsel for appellant objected or excepted to the admission of the evidence complained of, his assignment of error thereon is not reviewable, because not properly preserved.

2. CRIMINAL LAW 🔑977(3)—ENTRY OF JUDGMENT—TERM OF COURT—STATUTE.

Rev. Laws 1910, § 5943, providing that the time appointed for judgment must be at least 2 days after verdict if the court intends to remain in session so long, or if not at as remote a time as can reasonably be allowed, does not require that a judgment must be pronounced at the term at which a conviction is had; and, if the court is unable to render judgment at such term, it may be rendered at a subsequent term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2489, 2492.]

3. CRIMINAL LAW 🔑1183—APPEAL—MODIFICATION OF JUDGMENT.

Where the evidence in a prosecution for selling intoxicating liquor did not warrant a fine of $283 and an imprisonment for 115 days, the appellate court, in furtherance of justice, would modify the judgment to impose a fine of $50 and an imprisonment for 30 days.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195-3198.]

Appeal from County Court, Pottawatomie County; Hal Johnson, Judge.

Ben Beaubein was convicted of selling intoxicating liquor, and he brings error. Modified and affirmed.

G. A. Outcelt, of Tecumseh, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. It is alleged that the evidence is insufficient to sustain the conviction. We have examined the record, and find that the evidence on the part of the state, both direct and circumstantial, if believed by the jury, was sufficient to sustain the judgment.

[1] It is also contended that the court erred in admitting improper and prejudicial evidence, but the record does not show that counsel for the appellant made any objections or took any exceptions to the admission of the evidence complained of. This assignment of error is not subject to review under previous decisions of this court because not properly preserved.

[2] It is also contended that the court was without jurisdiction to pronounce judgment and sentence at the time that sentence and judgment were rendered. The verdict was returned on the 2d day of September, 1915, and thereupon the court appointed the 13th day of September, 1915, at the hour of 8:30 a. m. as a time for pronouncing judgment and sentence. On the 4th day of September, 1915, the defendant filed a motion for new trial, which was pending in said court until the 25th day of October, 1915, when the same was overruled and the sentence pronounced and judgment rendered. The appellant at that time objecting to the jurisdiction of the court to pronounce sentence and render judgment because the term of court at which the verdict was returned had expired by operation of law, the court did not pronounce judgment upon the date fixed. There is a recital in the case-made to the effect that on the 13th day of September, 1915, the day fixed for pronouncing judgment, the appellant was a fugitive. However, counsel for appellant contend that the court could have pronounced judgment in this case in his absence, it being a misdemeanor, and his failure to do so deprived the court of jurisdiction to pronounce judgment at a later date. Section 5944, Revised Laws 1910, provides:

> "For the purpose of judgment, if the conviction is for misdemeanor, judgment may be pronounced in the defendant's absence."

Section 5943, Revised Laws 1910, provides:

> "The time appointed [for judgment] must be at least two days after the verdict, if the court intend to remain in session so long; or, if not, at as remote a time as can reasonably be allowed."

It is discretionary with the court in misdemeanor cases to pronounce judgment in the absence of the defendant, but it is not mandatory that the court do so. Therefore the holding of this court in the case Ex parte Sparks, 9 Okl. Cr. 665, 132 Pac. 1118, is controlling in this instance. In that case it was held:

> "The statute does not require that a judgment must of necessity be pronounced at the same term of the court at which a verdict of guilty in a criminal case is rendered. If the court is unable to render judgment at such term, it may be rendered at a subsequent term."

[3] We find no reversible error in the record. The punishment imposed was a fine of $283 and imprisonment for 115 days. The evidence does not warrant the imposition of this extreme penalty in this case. This court, therefore, in furtherance of justice, will modify the judgment to the extent of imposing a fine of $50 and imprisonment in the county jail for 30 days, and the judgment, as thus modified, is affirmed.

(22 N. M. 502)

STATE ex rel. BACA et al. v. BOARD OF COM'RS OF GUADALUPE COUNTY et al. (JONES & GLEASON, Interveners). (No. 1902.)

(Supreme Court of New Mexico. Dec. 30, 1916. Rehearing Denied May 10, 1917.)

(Syllabus by the Court.)

1. JUDGMENT 🔑217—"FINAL JUDGMENT"—ENTRY—STATUTE.

In this jurisdiction, by reason of section 4185, Code 1915, there are no terms of court except for jury trials, and a judgment which disposes of all, or one or more, of the separate and independent causes of action in the case, becomes a final judgment upon its rendition and entry, in the sense that the same passes from the further control of the court, and except a default judgment (section 4227, Code 1915), and an irregularly entered judgment (section 4230, Code 1915), and except for such purposes as all courts always retain control over their judgments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394.

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. Appeal and Error 🔑169 — Review — Questions Raised Below.

It is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034.]

Appeal from District Court, Guadalupe County; Leahy, Judge.

Action by the State of New Mexico, on the relation of Placido Baca y Baca, for himself and others similarly situated, against the Board of County Commissioners of the County of Guadalupe and others, in which Jones & Gleason, a partnership, intervened. Injunction dissolved, and relators appeal. Affirmed.

See, also, 21 N. M. 713, 158 Pac. 642.

On the 10th day of August, 1914, an election was held in the town of Santa Rosa under the local option statutes, to determine whether or not the sale of intoxicating liquors should be prohibited within the prescribed district. At the election 130 votes were cast in all; the election officers certifying to 47 votes in favor of prohibition and 83 votes against prohibition. This action was thereafter instituted in the district court to enjoin the county clerk, county treasurer, board of county commissioners, and county sheriff of Guadalupe county from issuing licenses for the sale of intoxicating liquors within the said town, upon the ground that, by reason of certain illegal votes having been cast at said election, the true result had not been declared or ascertained by the election judges, and that the actual result of said election was in favor of prohibition. The court was asked to purge the election returns of the alleged illegal votes and declare the true result of such election. All the defendants defaulted, with the exception of the county clerk, who appeared and answered, denying the allegations of the complaint. Jones & Gleason, copartners, operating the only saloon in the town, were allowed to intervene in the suit.

The allegation of the complaint upon which the alleged fraud in the election in question is based is as follows:

> "That approximately sixty-five (65) persons, among them being the following named persons, to wit," omitting names, "and certain other persons whose names are at this time unknown to plaintiff, offered to and did vote against prohibition at the said election, all of whom were illegal voters, in that, as inducement therefor, they directly or indirectly received, agreed or contracted to receive, or accepted gifts, valuable consideration, or some office, place, or employment, and that certain of said persons were also intimidated and in other and divers ways unduly influenced into voting against prohibition, and that said illegal and fraudulent votes to the number of approximately sixty-five (65), as aforesaid, were among and constituted a part of the said eighty-three (83) votes declared by the said board of county commissioners of the county of Guadalupe to have been cast against prohibition at said election, and that, had it not been for said illegal and fraudulent votes, the returns would have shown that a majority of the votes cast were for prohibition."

The trial court, after hearing the evidence presented, made certain findings, incorporated in a final decree, to the effect that certain votes against prohibition had been cast in violation of the Corrupt Practices Act, but that the majority of the legal votes had been cast against prohibition. As a result of this conclusion he dissolved the injunction.

This case was first presented for consideration in this court upon a motion to strike out the bill of exceptions on a number of grounds, and in an opinion handed down June 12, 1916, and reported in 21 N. M. 713, 158 Pac. 642, this court struck the bill of exceptions.

F. Faircloth, of Santa Rosa, for appellants. C. W. G. Ward and Chester Hunker, both of Las Vegas, for other appellants. E. R. Wright, of Santa Fé, for appellees.

HANNA, J. (after stating the facts as above). [1] The one assignment of error presented for our consideration attacks the findings and conclusions of law as the same appear in the final judgment or decree, and at the threshold of our consideration of the case our attention is directed to the fact that the judgment or decree was entered on November 4, 1915, and the findings of fact and conclusions of law upon which the said judgment or decree was based were incorporated therein. No formal objections or exceptions to either the findings of fact or conclusions of law appear of record, except certain exceptions taken by each party to the findings and conclusions which were filed in the clerk's office on November 19, 1915, or at a time subsequent to the entry of the final judgment. It is here contended by appellee that the judgment of November 4, 1915, became final when entered, and that the court was without further jurisdiction, except to grant an appeal or to set aside the judgment for irregularity within one year. We do not understand that appellant questions the fact that the judgment or decree was final, and it is evident that appellant could not so contend, because at a former hearing of this cause, upon a motion to dismiss the appeal, appellant took the position that the judgment of November 4th was a final one, which contention was sustained by this court. In the case of Fullen v. Fullen, 21 N. M. 212, 153 Pac. 294, this court, passing upon the question of final judgments, held:

> "In this jurisdiction, by reason of section 4185, Code 1915, there are no terms of court except for jury trials, and a judgment which disposes of all, or one or more, of the separate and independent causes of action in the case, becomes a final judgment upon its rendition and entry, in the sense that the same passes from the further control of the court, and except a default judgment (section 4227, Code 1915), and an irregularly entered judgment (section 4230, Code 1915), and except for such purposes as all courts always retain control over their judgments."

Therefore, the judgment in question being a final one in its character, the error which the appellants now insist upon necessarily relates to matters which were not considered by the court, and which the court was not given an opportunity to correct.

[2] "It is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the court below." It is therefore clearly apparent that the exceptions of November 19th were interposed at a time after the judgment of November 4th had become final, and after the jurisdiction of the court to change the same had passed, except as to irregularities under statutory authority. In arriving at this conclusion we are not unmindful of the fact that appellant contends that, this being a case tried before the court without the intervention of a jury, no exceptions were necessary. In this counsel rely upon the provisions of section 4214, of the Code of 1915, which section has been construed by the territorial Supreme Court in the case of Neher v. Armijo, 11 N. M. 67, 66 Pac. 517, and in that case it was pointed out that the section in question, while dispensing with the necessity for a formal exception does not dispense with the necessity of an objection in order to preserve the error complained of. See, also, Cunningham v. Springer, 13 N. M. 259, 82 Pac. 232.

For the reasons stated, we are of the opinion that the judgment of the district court must be affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(22 N. M. 493)

In re ATCHISON, T. & S. F. RY. CO.

(No. 2056.)

(Supreme Court of New Mexico. May 8, 1917.)

(Syllabus by the Court.)

TAXATION ⚿301(1)—PROPORTIONATE REDUCTION—RATE—STATUTE.

Under section 12, c. 54, Laws 1915, the levies specified therein are subject to proportionate reduction only when the aggregate rate of the levy for all county purposes, with stated exceptions, is in excess of five mills.

Appeal from District Court, Sierra County; M. C. Mechem, Judge.

From an order of the district court denying relief against two levies made by the county, the Atchison, Topeka & Santa Fé Railway Company appeals. Affirmed.

W. C. Reid, George S. Downer, and C. M. Botts, all of Albuquerque, for appellant. H. L. Patton, Atty. Gen., Geo. C. Taylor, Asst. Atty. Gen., and E. D. Tittmann, of Hillsboro, for appellee.

PARKER, J. This is an appeal by the Atchison, Topeka & Santa Fé Railway Company from an order of the district court of Sierra county denying appellant relief against two levies made by the county. The appellant contends that the general county and general road levies made by the county for the taxes of 1915 are excessive, in view of the fact that they are severally in excess of the ascertained rate, after proportionately reducing the maximum rate allowed therefor. Appellant's entire theory is based upon its construction of section 12 of chapter 54 of the Laws of 1915. That section provides that the counties shall not levy more than five mills on the dollar, for all county purposes, with stated exceptions. It also provides for a maximum rate for state and other levies. The particular paragraph of the section pertinent to the conclusion to be reached in this case provides:

> "Each of the tax levies provided by law in force at the time this act takes effect, except said special levies, shall be and hereby is proportionately reduced, so that the aggregate amount of such tax levies shall not exceed the maximum rates respectively specified in this section."

The appellant proffers a mathematical formula which it asserts is the only method by which the portion of the section can be given practical application. It relies somewhat, also, upon the construction given by the different departments of state and certain public officials, which is the same as that for which appellant contends in this case. But it entirely overlooks the plain words of the statute. The Legislature clearly provided that certain levies should be proportionately reduced, but only in the event that they exceeded, in the aggregate, more than the new maximum rate specified in the same act. Levies, prior to the passage of the act of 1915, were made upon the basis of one-third of the assessed value of property. The law, at that time, provided for certain maximum rates for each of the levies authorized by law, with the exception of two levies which were not limited by such maximum rates. The Legislature has eliminated those provisions as to the maximum rates for each of the purposes specified theretofore by law, and has declared, in effect, that the rate of levy for any specified purpose for which levies are authorized is immaterial so long as the aggregate of the levy for all county purposes, with certain exceptions, shall not exceed five mills on the dollar. In the event that the ag-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

gregate of such rates of levy does exceed the five mills, then the Legislature provided that the levies should be proportionately reduced so that the aggregate rate should not exceed the five-mill general maximum. It said no more nor less than this, and no other construction of the paragraph of the section is permissible or justified by the plain intent of the Legislature. Whether the Legislature was speaking to only a proportionate reduction of the levies made in 1914 or those made in 1915, or whether it contemplated that in the event a reduction became necessary the basic figures should be the rate of the levy actually made for each specified purpose or the maximum rate of the levy specified by law for each purpose, it is unnecessary to determine in this case. All that the court determines in this case is that the portion of section 12, c. 54, Laws 1915, heretofore quoted, provides for a proportionate reduction only in the event that the aggregate rate of the levies made by the county, with stated exceptions, is in excess of five mills, the maximum aggregate rate specified by the law of 1915. The findings of the trial court and the admission of appellant show that the aggregate of the levies of the county, in this case, did not exceed five mills.

The judgment of the trial court is therefore affirmed, and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

(22 N. M. 501)

In re MARRON & WOOD. (No. 1961.)

(Supreme Court of New Mexico. May 19, 1917.)

(Syllabus by the Court.)

ATTORNEY AND CLIENT 🔑59—DISBARMENT PROCEEDINGS—COSTS—STATUTE.

Costs are the creatures of statute, and in the absence of statute authorizing the taxation of costs none can be taxed in disbarment proceedings. *Held*, that section 4282, Code 1915, does not authorize taxation of costs in disbarment proceedings.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 76.]

On motion to retax costs. Motion granted. For former opinion, see 160 Pac. 391.

Harry S. Bowman, Asst. Atty. Gen., for the State. A. B. Renehan and D. K. Sadler, both of Santa Fé, for respondents.

HANNA, C. J. The respondents have filed a motion in this case to retax the costs, on the theory that the taxation of costs against them by the clerk was without authority of law. In 6 C. J. 613, it is said:

> "In the absence of statute giving costs in such cases [disbarment], the general rule is that none can be recovered by either party."

In 2 Thornton on Attorneys at Law, § 895, it is said that costs are the creatures of statute, and the general rule is that none can be recovered in disbarment cases, in the absence of statutory authority therefor. See, also, 4 Cyc. 917, and cases cited in each of the foregoing authorities.

The only statute in this state which could be claimed as authority for the taxation of costs against the respondents is section 4282, Code 1915, which reads as follows:

> "For all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

An act of the Legislature of 1917, dealing with the taxation of costs in disbarment cases, need not be considered, because this motion was filed before that act was passed. Section 4282, quoted supra, was originally section 1 of article "Costs" in the Kearney Code, and has been carried into the Code of 1915 as it was originally adopted. The statute is an exact duplicate of one in Missouri, which in turn was no doubt copied from Massachusetts. An investigation of the cases in those states fails to disclose any case wherein the statute was applied to disbarment cases. Whether the rule of ejusdem generis should be applied to the statute of this state, or whether disbarment proceedings are civil in their nature, we do not deem it necessary to decide. We are satisfied that the statute did not contemplate actions other than the ordinary and usual ones, where a matter is being litigated by two antagonistic parties. And this conclusion is not affected by the fact that perhaps it may be true that the state is a party to disbarment cases. The proceeding is special and does not fall within the terms of the statute.

We are therefore of the opinion that the taxation of costs against the respondents was erroneous, and the motion to retax the costs will therefore be granted; and it is so ordered.

PARKER and ROBERTS, JJ., concur.

(30 Idaho, 411)

STATE v. CUMMINS.

(Supreme Court of Idaho. May 5, 1917.)

1. EXPRESS STATUTORY PROVISION.

Section 25, S. B. No. 62, Sess. Laws 1909, p. 17, makes the transportation of intoxicating liquors into a prohibition district, or into any point or place in this state, where the sale of intoxicating liquors is prohibited by law, a misdemeanor.

2. CONSTITUTIONAL LAW 🔑295—DUE PROCESS—PROHIBITION DISTRICT—VALIDITY OF STATUTE.

This section does not contravene the provisions of the fifth or fourteenth amendments to the Constitution of the United States, nor the provisions of section 1, art. 1, of the Constitution of the state of Idaho.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 841.]

3. INTOXICATING LIQUORS 🔑17—TRANSPORTATION INTO PROHIBITION TERRITORY—VALIDITY.

An act, prohibiting the transportation of intoxicating liquors into territory where the sale thereof is prohibited by law, is a valid exercise of the police power.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 21–23.]

Appeal from District Court, Minidoka County; Edward A. Walters, Judge.

Dan Cummins was convicted of transporting intoxicating liquors into a prohibition district, and he appeals. Affirmed.

T. Bailey Lee, of Burley, for appellant. J. H. Peterson, Atty. Gen., T. C. Coffin and Herbert Wing, Asst. Attys. Gen., E. G. Davis, of Boise, and Homer C. Mills, Pros. Atty., of Rupert, for the State.

BUDGE, C. J. Appellant was convicted of the crime of unlawfully transporting liquors into a prohibition district. A motion for a new trial was overruled. This appeal is from the judgment and from the order overruling appellant's motion for a new trial. The information was brought under section 25, S. B. No. 62, Sess. Laws 1909, p. 17, which reads as follows:

> "Sec. 25. Any person, firm, corporation, society or club within this State who shall accept for shipment, transportation or delivery, or who shall ship, transport or deliver any intoxicating liquors to any person, firm, corporation, society or club in any prohibition district in the State of Idaho, or to any point or place in this State where the sale of intoxicating liquors is prohibited by law, except as may be authorized by this act or the interstate commerce law of the United States, shall be guilty of a misdemeanor and punished as provided in section 30 of this act."

The charging part of the information reads as follows:

> "That the said D. H. Cummins, on or about the 17th day of April, A. D. 1914 at Paul, in the county of Minidoka, state of Idaho, did willfully, knowingly and unlawfully ship, transport and deliver intoxicating liquors from Jerome, Idaho, into a prohibition district of the state of Idaho, to wit, Paul, Minidoka county, Idaho, well knowing that he, the said D. H. Cummins, was transporting intoxicating liquors, to wit, whisky, into a prohibition district of the state of Idaho, to wit, Paul, Minidoka county, Idaho. That said transportation of intoxicating liquors was not authorized by the law of the state of Idaho, or the interstate commerce law of the United States, or for any other lawful purpose, and contrary to Senate Bill No. 62 of the Session Laws of the State of Idaho for the year 1909."

Appellant assigns the following errors:

> "(1) The court erred in overruling defendant's demurrer to the information.
>
> "(2) The court erred in overruling defendant's objection to the introduction of any evidence touching his transportation of intoxicating liquors into Minidoka county.
>
> "(3) The court erred in overruling defendant's motion that he be discharged, and the cause dismissed.
>
> "(4) The court erred in overruling defendant's motion for a new trial."

And further assigns that:

> "The evidence is insufficient to support the verdict, there being in the record no evidence whatever to sustain it."

[1, 2] The main contention of appellant is that the transportation of intoxicating liquors through a prohibition district does not come within the purview of the statute above quoted, for the reason, as appellant urges, that to so hold would make the statute unconstitutional, in that it would then contravene the provisions of the fifth and fourteenth amendments to the Constitution of the United States, and section 1, art. 1, of the Constitution of the state of Idaho, for the reason:

> "That it unequivocally prohibits the use and enjoyment by one of his own property, and in effect deprives him thereof without due process of law."

Since the briefs in this case were filed, this court decided the case of In re Crane, 27 Idaho, 671, 151 Pac. 1006. The objections to the constitutionality of such legislation are thoroughly reviewed in that opinion, and the conclusion there reached is adverse to the contention of appellant in this case. It is unnecessary to here review all the authorities considered in the Crane Case. It will be noticed, however, that the opinion in that case quotes with approval the following language from Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205:

> "And so, if, in the judgment of the Legislature," the possession of intoxicating liquors "would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question."

[3] We hold, therefore, that under the section of the statute above quoted the transportation of intoxicating liquors to any point or place in this state, where the sale of intoxicating liquors is prohibited by law, is a misdemeanor. This is a valid exercise of the police power. Clark Distilling Co. v. Western Maryland R. Co., 37 Sup. Ct. 180, 242 U. S. 311, 61 L. Ed. 326 (decided January 8, 1917); In re Crane, supra; Glenn v. Southern Express Co., 170 N. C. 286, 87 S. E. 136, distinguishing and modifying State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562.

The information is sufficient to charge the crime of transporting intoxicating liquors into a prohibition district under the provisions of this section of the statute. The evidence shows conclusively that appellant procured the whisky at Jerome, Idaho, and that he transported it upon the train into Paul, Minidoka county, Idaho, which was then within a prohibition district, within which the sale of intoxicating liquors was prohibited by law.

There is no force in appellant's contention that he had not delivered any of the whisky to any person, that he was retaining it in his own possession, and that he was merely transporting it through the prohibition district to his own home. It is not necessary, under the provisions of the statute, to either plead or prove that the liquor was delivered to any person.

The evidence is sufficient to sustain the verdict and judgment.

The judgment is therefore affirmed.

MORGAN and RICE, JJ., concur.

(30 Idaho, 415)

STATE v. BUTTERFIELD.

(Supreme Court of Idaho. May 5, 1917.)

1. PUBLIC LANDS 🔑17—GRAZING—"CATTLE RANGE"—STATUTE.

Under section 6872, Rev. Codes, if the usual and customary use of a range has been for cattle, it is a "cattle range."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 23.

For other definitions, see Words and Phrases, Cattle Range.]

2. PUBLIC LANDS 🔑17—GRAZING—"SHEEP AND CATTLE RANGE."

If the usual and customary use of a range has been for both cattle and sheep, it is not a cattle range under said section, but a "cattle and sheep range."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 23.]

3. PUBLIC LANDS 🔑17—GRAZING—ABANDONMENT OF CATTLE RANGE.

The exclusive right of cattle men, as against sheep men, to the use of certain range which has first been occupied by the cattle men, may be abandoned by their act in entirely ceasing to use said range, or by permitting the customary use of it for sheep in common with cattle, without protest, or asserting an exclusive right.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 23.]

4. PUBLIC LANDS 🔑17—GRAZING—SHEEP RANGE.

If cattle men and sheep men jointly use the range in the usual and customary manner of using it for a period of time long enough to create a custom, if the cattle men know of such joint use and do not protest against it nor claim a prior and exclusive right to the same, then the herding or grazing of sheep upon such range is not unlawful, even though it be a fact that, before such customary joint use for both sheep and cattle, the land was used exclusively for cattle.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 23.]

5. PUBLIC LANDS 🔑17—GRAZING SHEEP ON CATTLE RANGE—EVIDENCE.

The evidence in this case *held* insufficient to justify a verdict of guilty of grazing sheep upon a cattle range.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 23.]

6. PUBLIC LANDS 🔑17—CATTLE RANGE—ABANDONMENT—EVIDENCE—INSTRUCTIONS.

Proof of customary use of a range for both cattle and sheep in common is proper evidence to consider in determining whether such range has been abandoned as a cattle range, and an instruction to this effect, requested by defendant, should have been given by the trial court.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 23.]

7. PUBLIC LANDS 🔑17—GRAZING SHEEP ON CATTLE RANGE—OFFENSE—CONSTITUTIONALITY OF STATUTE.

Held, that said section 6872, Rev. Codes, is not unconstitutional and void. State v. Horn, 27 Idaho, 782, 152 Pac. 275, and State v. Omaechevviaria, 27 Idaho, 797, 152 Pac. 280, approved and upheld.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 23.]

Appeal from District Court, Washington County; Ed L. Bryan, Judge.

A. G. Butterfield was convicted of having violated section 6872, Rev. Codes, by herding, grazing, and pasturing sheep upon a cattle range, and he appeals. Reversed and remanded.

Alfred A. Fraser, of Boise, and E. R. Coulter, of Weiser, for appellant. T. A. Walters, Atty. Gen., and Lot L. Feltham, of Clarkston, Wash., for the State.

McCARTHY, District Judge. This case was commenced in the probate court of Washington county, upon a complaint charging the defendant with a violation of the provisions of section 6872, Rev. Codes. Upon the trial in said court, the defendant was found guilty as charged in the complaint, and an appeal was taken from the judgment to the district court for Washington county. Upon the trial in the district court the defendant was again found guilty, and the court sentenced him to pay a fine of $25 and the costs of the action. The appeal herein is from said judgment of the district court.

The principal assignments of error relied upon by appellant, are: First, that the court erred in refusing to give certain instructions which were requested by him; second, that the evidence is insufficient to justify the verdict; and, third, that the statute upon which the prosecution is based is unconstitutional and void.

The complaint alleges that the defendant herded, grazed, and pastured, and permitted and suffered a band of sheep to be herded, grazed, and pastured, on the range in question, said range being then and there cattle range previously occupied by cattle, and range then and there usually occupied by cattle growers, the said defendant having full knowledge of the character of said range.

It is stipulated by and between the parties that the tract of land or range mentioned in the complaint has ever since the year 1885 been used both as a cattle and sheep range in the usual and customary use of such range as a cattle or sheep range. The defendant was convicted of permitting and suffering sheep to be herded, grazed, and pastured upon said range. The case was prosecuted under the provisions of section 6872, Rev. Codes, which reads as follows:

> "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

There is evidence in the record to the effect that the range was first used for horses and cattle in 1874, and has been used continuously for horses and cattle ever since. The evidence shows that sheep came upon the range about 1885. There is evidence that since 1890 the defendant himself has ranged sheep upon the range in question. The stipulation is to the effect that ever since 1885 sheep have ranged upon it in the usual and customary use of it as a sheep range. No protest on the part of the cattle men and no claim of exclusive right on their part is shown in the evidence up to within a few days prior to the commencement of this action.

The defendant requested several instructions on the question of abandonment, among others the following:

> "The jury are instructed that, if you find from the evidence that continuously since the year 1885 the range or tract of land mentioned in the complaint has been jointly used both as a cattle and sheep range in the usual and customary use of such range, then you should take this fact into consideration upon the question as to whether or not such range had been abandoned as an exclusive cattle range."

This and all other instructions on that question requested by the defendant were refused by the trial court. The trial court instructed the jury upon the question of abandonment, saying that the state must show that the range had not been abandoned as a cattle range, and that, if the evidence proved that it had been abandoned as a cattle range, the verdict must be for the defendant. The trial court did not define in its instructions what is meant by the word "abandonment," as used in this action. In the case of State v. Omaechevviaria, 27 Idaho, 797, 152 Pac. 280, this court apparently recognizes the defense of abandonment in this class of cases, saying in substance that the state must show that the range had not been abandoned as a cattle range. The defense of abandonment was not made in that case, and therefore the court did not enter into a detailed discussion of that subject. The trial court in this case followed substantially the language used by the Supreme Court in State v. Omaechevviaria, supra. However, in the present case the defense of abandonment was specifically raised by the defendant, and the evidence produced makes it necessary to treat specifically of that question.

[1-4] The statute says that:

> "Priority of possessory right * * * is determined by the priority in the usual and customary use of such range."

If the usual and customary use of the range has been for cattle, then it is a cattle range. If the usual and customary use of the range has been for sheep, then it is not a cattle range. If the usual and customary use of such land has been by both cattle and sheep, then it is not a cattle range, but a cattle and sheep range. It is the contention of the state in this case that, if the range is first used for cattle, then the joint use of the range by cattle and sheep for a period of time however long will not divest it of its character as a cattle range. The state contends that the defense of abandonment does not apply unless the cattle men absolutely and entirely cease to use the range for cattle. The first part of section 6872 may seem to give some color to this contention. The last part of it, however, seems to be against this contention. If the priority of possessory right depends upon the usual and customary use of the range, and the range has been used for a time long enough to create a custom by both cattle men and sheep men, without any protest on the part of the cattle men, then it would seem that the usual and customary use of that range is a joint use by both sheep and cattle. The right which is given the cattle men by this statute is an exclusive right as against sheep men to certain range which they first use for cattle. The term "cattle range," as used in this statute, means an exclusive cattle range. If the exclusive right can be abandoned by the act of the cattle men in entirely ceasing to use the range, it seems to us that it can also be abandoned by them by permitting the customary grazing of sheep upon the land in common with the cattle without protest. Evidence tending to show that they had permitted the sheep men to use said range jointly with them since 1885, without protest, is therefore evidence tending to show that said range had been abandoned as a cattle range. If cattle men and sheep men jointly use the range in the usual and customary manner of using it for a period of time long enough to create a custom, if the cattle men know of such joint use and do not protest against such use of the range for sheep, nor claim a prior and exclusive right to the same, then the herding or grazing of sheep upon such range is not unlawful, even though it be a fact that, before such customary joint use for both sheep and cattle, the land was used exclusively for cattle. We therefore think that the court should have given to the jury the instruction requested by the defendant and quoted above, to the effect that they might take proof of the joint use of the range into consideration in determining whether or not the cattle men had abandoned their claim to the range as a cattle range.

[5, 6] Counsel for respondent, in their brief, contend that to recognize the defense above mentioned would be tantamount to recognizing adverse possession as a defense and would be tantamount to holding that the sheep men, by committing trespasses in the past, have acquired a license to commit crime. The defense of adverse possession as such does not apply, nor is it to be conceded for one moment that any one can acquire the right to commit crime by reason of having committed it in the past. The point is that under this particular statute the question of whether a man is committing a crime by herding his sheep upon a certain range depends upon the character of that range. The character of the range, in turn, depends upon the past acts and attitude of the cattle men and sheep men in regard to it. The act of the defendant himself, among others, may thus tend to prove the character of the range.

The question of abandonment is, in the first instance, a question of fact for the jury.

In our judgment, however, the uncontradicted evidence and the stipulation as to a customary joint use from 1885 until May, 1916, without protest, establishes an abandonment of the range as a cattle range within the meaning of that term as used in the statute. We therefore conclude that the evidence is insufficient to support the verdict of guilty and the judgment of conviction based thereon.

[7] So far as the constitutional questions raised in this case are concerned, they were passed upon by this court in State v. Horn, 27 Idaho, 782, 152 Pac. 275, and State v. Omaechevviaria, supra. While the questions involved are close, this court does not see fit to overrule those decisions.

The judgment of conviction is reversed, and the case is remanded to the trial court, with direction to take such future action as may appear proper in view of this decision.

MORGAN and RICE, JJ., concur.

(40 Nev. 423)

ROBERSON v. KILBORN. (No. 2254.)*

(Supreme Court of Nevada. June 4, 1917.)

1. DEPOSITIONS ⚷71—ANSWERING QUESTIONS—CONTUMACIOUS REFUSAL—PENALTY—STRIKING PLEADING.

Where plaintiff in giving his deposition refused under advice and command of his counsel to answer certain questions until the court had ruled that they should and must be answered, his refusal was not contumacious, nor was he a recalcitrant witness, and it was error, before ruling that the questions must be answered, to strike his complaint.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 132.]

2. DEPOSITIONS ⚷71—ANSWERING QUESTIONS—CONTUMACIOUS REFUSAL—PENALTY—STRIKING PLEADING—DISCRETION OF COURT.

Conceding questions propounded in taking a deposition were legal and pertinent, it was an arbitrary exercise of authority to enter judgment against defendant before giving him an opportunity to answer the questions propounded and ruled to be proper.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 132.]

Appeal from District Court, Washoe County; T. F. Moran, Judge.

Suit by George Oliver Roberson against George D. Kilborn. From an order striking the complaint and giving judgment for defendant, plaintiff appeals. Reversed and remanded, with instructions.

George Springmeyer, of Reno, for appellant. Homer Mooney, of Reno, for respondent.

SANDERS, J. George Oliver Roberson, appellant, brought suit in the district court of Washoe county against George D. Kilborn, respondent, to recover damages alleged to have been suffered by reason of the publication of an alleged libelous article in the Nevada State Journal, a daily newspaper published by respondent in the city of Reno. After service of summons, and before answer, it was stipulated by the parties, through their respective counsel, that the deposition of appellant might be taken on application of respondent. Pursuant to the terms of the stipulation, appellant's deposition was taken, signed, sworn to, returned, and filed. Thereafter, respondent served on appellant's counsel a written notice to the effect that on the 4th day of April, 1916, he would move the court for an order striking out the complaint on file in the cause and dismissing the same, and for an order that judgment be entered in favor of respondent, on the grounds that appellant refused to give his deposition, and refused to answer as a witness questions to him propounded, and, in support of the motion, that he would rely on the papers and pleadings in the cause, including the purported deposition. The motion came on for hearing, and was submitted to the court for its decision on the 4th day of April, 1916. On said date, the court, it appears, caused to be made and entered the following minute order:

> "Be it further remembered, that in open court, on April 4, 1916, defendant duly moved the court for an order striking out plaintiff's complaint and for judgment for defendant on the grounds stated in the aforesaid notice of motion; that plaintiff, acting by and through his counsel, then and there offered to make answer on his deposition to all questions and interrogatories which the court might declare to be proper, competent, relevant, or material, and which the court might direct, require, or order him to answer; that said matters were then and there duly argued by respective counsel for plaintiff and defendant, and submitted to the court for its decision."

Thereafter, on the 24th day of August, 1916, the court made its ruling, decision, and order sustaining the motion, upon the following grounds (excerpt from decision):

> "Without going further into the deposition and picking out each question separately, we think we have pointed out enough in connection with what we have observed in the record of the proceeding to warrant the court in making a ruling on this motion. The alleged libel is set out merely to show what relevancy the questions propounded by defendant's counsel could have to same. All the questions mentioned in this opinion are relevant and should have been answered. The plaintiff has refused to answer proper questions to such an extent as to defeat the taking of his deposition.
>
> "For the reasons given, the complaint of plaintiff is stricken out, and judgment is given against him. It is so ordered."

The taking of the deposition of a party to a suit before trial is strictly a statutory proceeding, embraced by chapter 54 of the Civil Practice Act (Rev. Laws, §§ 5419-5449). Section 479 of the act provides that, if a party refuse to give his deposition before trial, his pleading may be stricken out and judgment be taken against him. Section 496 of the act provides that, refusal to answer as a witness, or to subscribe a deposition, may be punished as a contempt by the court or officer; and, if the witness be a party, his complaint may be dismissed or his answer

*Rehearing denied August 1, 1917.

stricken out. Whether a court may, under section 496 of the act, strike a pleading of a party witness before his being adjudged guilty of a contempt—quære.

[1] The court based its ruling and decision upon the ground that appellant refused to answer proper questions to such an extent as to defeat the taking of his deposition. It is not pretended that the witness refused to give his deposition. It clearly appears from the record that the excuse of the witness for not answering the questions was that under the advice of his counsel and, in fact, by reason of the command of his counsel, he declined to answer. His refusal to answer was not, therefore, contumacious; nor can it be said that he was a recalcitrant witness. He proffered his willingness to answer the questions when ruled upon by the court, and, upon the hearing of the motion, it appears that his counsel offered to make answer to all questions propounded which the court should rule to be pertinent and legal, and which the court might direct, require, and order him to answer.

The facts thus presented are entirely different from those the court had to deal with in the case of Maxwell v. Rives, 11 Nev. 220. There the examination was conducted in the presence of the court, and the witness refused, and continued his refusal, to answer questions ruled by the court to be proper. Here the witness refused to answer pending a ruling by the court, and his excuse, as before stated, for not answering, was that he did so under the advice of his counsel.

[2] Conceding, but not deciding, that the questions propounded were legal and pertinent, it was an arbitrary exercise of authority to enter judgment against appellant before giving him an opportunity to answer the questions ruled to be proper.

In applying a statute in a proceeding of this kind to a similar state of facts as here presented, the Supreme Court of Indiana decided that, it is only where a party refuses to attend and testify that he may be punished as for a contempt, and his pleadings stricken out. If it appears that he did attend and testify, and merely refused to answer certain questions under the advice of his counsel, without any disrespect to the court, but because there is nothing in the complaint upon which to base such questions, it will be error to punish him as for contempt, or to strike out his pleadings. Chaffin v. Brownfield, 88 Ind. 305.

In the case of Livesley v. O'Brien, 6 Wash. 553, 34 Pac. 134, cited by respondent in support of the regularity of the judgment here complained of, the court's overruling of a motion to strike the interrogatories to be propounded to a party witness was in effect an approval by the court of the interrogatories. In that case the court said that motions of this character are directed to the discretion of the trial court, and its action in passing thereon will not be reversed unless the record shows an abuse of discretion.

No harm could have resulted to respondent by giving to appellant an opportunity to answer the questions when the court had ruled them to be proper. In fact, it might have enabled respondent to obtain the information which he professed to want. But to refuse to give appellant an opportunity to answer the questions when so ruled upon might deprive appellant of a constitutional right. Citizens' National Bank v. Alexander, 34 Ind. App. 597, 73 N. E. 279; Lawson v. Black Diamond Coal Mining Co., 44 Wash. 26, 86 Pac. 1120.

The judgment is reversed, and the cause remanded. The district court is instructed to revoke the order striking appellant's complaint and to enter an order reinstating the same.

McCARRAN, C. J., and COLEMAN, J., concur.

(84 Or. 310)

TONEY v. TONEY et al.

(Supreme Court of Oregon. May 22, 1917.)

1. Deeds 🔑210—Recital of Consideration—Contradiction.

Where a deed is attacked on the ground of fraud or imposition, the recital of a consideration therein is only prima facie evidence that the consideration has in fact been paid; a fraudulent grantee cannot tie the hands of a court of equity by inserting in the deed such a recital contrary to the fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635, 636.]

2. Trusts 🔑69 — Resulting Trusts — Conveyance Without Consideration.

Where property is conveyed without consideration, and the circumstances unequivocally rebut the presumption of a gift, equity will charge the grantee with a resulting trust in favor of the grantor.

3. Husband and Wife 🔑49½(8) — Conveyance—Presumption of Gift—Circumstances Rebutting.

Where a wife sued her husband for divorce, their married life having been infelicitous, and he contested the suit, being obliged to provide his wife with suit money, and, after decree of divorce for the wife, she sued out execution, and compelled her husband to pay the money adjudged to be due her with costs, and later the wife attached an interest which the husband had in a millinery store, and seized some of his clothing and personal effects, and carried it away with her, and demanded that he pay her $50 as a consideration for its return, the circumstances were such as to clearly rebut the presumption that the husband intended to make a gift to his wife when he conveyed to her, without consideration, property worth about $6,000.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254.]

4. Deeds 🔑211(3) — Intoxication — Sufficiency of Evidence.

In suit by a divorced husband to set aside a deed to his wife on the ground that it was executed without consideration when he was intoxicated, and was a victim of fraud, artifice, and imposition, evidence *held* to show that the wife defrauded and imposed on her husband, taking advantage of him when he was intoxicated, pursuant to a design to despoil him of all his property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 644, 645.]

5. Deeds ⚷17(2)—Inadequacy of Consideration.

Inadequacy of consideration may be so gross as to shock the conscience, and in such case equity will seize on slight circumstances of fraud and oppression as a ground for setting aside the transaction, a principle applicable to a transfer without any consideration, where the relations of the parties preclude the conclusion that a gift was intended.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 26, 27.]

In Banc. Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Suit by Jesse D. Toney against Alta E. Toney and O. C. Olsen. From a decree for plaintiff, defendant Toney appeals. Affirmed.

This is a suit brought to set aside a deed executed by plaintiff in favor of appellant on the 7th of September, 1915, to lot 6 in block R, lot 9 in block F, and lots 4, 7, and 8 in block L, in the townsite of Haines, Baker county; the said deed also purports to transfer to appellant some furniture and household goods and an automobile. It appears that plaintiff and appellant were married in November, 1911. That in October, 1914, appellant brought suit for divorce against plaintiff. The suit was contested. A decree was passed on the 25th of June, 1915, granting appellant a divorce, giving her a money judgment for $1,063.33 and a one-third interest in the property in dispute in this case, all of which belonged to plaintiff prior to the date of the said decree. Appellant was also given by the decree a one-ninth interest in 280 acres of land in Baker county, an undivided one-third interest in which had belonged to plaintiff. Immediately after the entry of the decree in her favor appellant issued execution, levied on plaintiff's property, and forced payment of her money judgment. Appellant subsequently sold to plaintiff's brothers her undivided interest in the 280 acres of land, receiving therefor $1,667. On the 31st of August appellant brought suit against plaintiff for the partition of the property involved in this litigation, and a few days thereafter plaintiff executed the deed in controversy. Appellant having acquired all of the property involved in the partition suit, this suit was dismissed. The case at bar was brought on the 25th of April, 1916. Plaintiff bases his claim to a cancellation of the deed on the fact that it was executed without consideration; that he was intoxicated at the time when the deed was executed; and that he was the victim of fraud, artifice, and imposition on the part of appellant. Shortly after the bringing of this suit, and on the 8th of May, 1916, a deed was placed of record in Baker county, whereby appellant transferred the property in dispute to O. C. Olsen. A supplemental complaint was filed joining Olsen as a party defendant, and subsequently, and under date of July 1, 1916, Olsen reconveyed to appellant. No answer was filed by Olsen, nor was he called as a witness. The findings of the lower court were in accord with plaintiff's contentions, and a decree was entered setting aside the deed and giving plaintiff judgment against appellant for $1,400, being the value of the automobile, and $500 being the value of the furniture and household goods. This personal property had been taken out of the state by appellant, and the only relief which an Oregon court could give plaintiff was a money judgment for the value of the property. The defendant Alta E. Toney appeals.

J. B. Cordiner, of Spokane, Wash. (Cordiner & Cordiner, of Spokane, Wash., and O. B. Mount, of Baker, on the brief), for appellant. Joseph J. Heilner, of Baker (James H. Nichols, of Baker, on the brief), for respondent.

McCAMANT, J. (after stating the facts as above). Appellant's explanation of the execution of the deed in controversy is that plaintiff sought an interview with her on the morning of September 6, 1915; that he expressed a desire that appellant should have all of the property involved in the partition suit, stating that he had not treated her properly during their married life. She claims that the deed was executed pursuant to this understanding, and that plaintiff thoroughly understood its import. Plaintiff claims that an arrangement was entered into between the parties on this same day for the settlement of the partition suit, appellant to take two houses, including the one in which the parties had been living, and plaintiff to take the remainder of the property. Plaintiff testifies that he suggested that the parties should go over to the bank in Haines and execute the necessary deeds; that appellant refused to do this, insisting that the papers should be made out by her attorney at La Grande; that on the following day the parties went to La Grande; and that appellant fraudulently prepared a deed covering all of the property involved in the partition suit, the household furniture and effects, and plaintiff's automobile as well. Plaintiff further claims that while he was under the influence of liquor he was induced to sign the deed without reading it, under the belief induced by appellant that the deed was operative merely to convey to appellant that portion of the real property which she was to receive under the verbal agreement entered into for the settlement of the partition suit.

[1] The deed recites a consideration of $1 and other valuable considerations. Appellant contends that this recital is binding on plaintiff, and that evidence is not admissible for the purpose of showing that the conveyance was executed without consideration. In sup-

port of this contention the case of Finlayson v. Finlayson, 17 Or. 347, 21 Pac. 57, 3 L. R. A. 801, 11 Am. St. Rep. 836, is cited. If this case sustains the contention of appellant in this regard, it must be deemed to be overruled by the later decisions of Velten v. Carmack, 23 Or. 282, 288, 31 Pac. 658, 20 L. R. A. 101, and North American Co. v. Cole, 61 Or. 1, 6, 118 Pac. 1032. These later decisions establish the principle that where a deed is attacked on the ground of fraud or imposition, the recital of a consideration therein is only prima facie evidence that the consideration has in fact been paid. A fraudulent grantee, in other words, cannot tie the hands of a court of equity by inserting in the deed such a recital contrary to the fact. This we understand to be the rule in other jurisdictions. 13 Cyc. 614; 17 Cyc. 651 to 652, and cases cited. In this case there is no contention that a consideration was given plaintiff for the property described in the deed. The evidence indicates that the property was worth in the neighborhood of $6,000.

[2] Where property is conveyed without consideration, and the circumstances unequivocally rebut the presumption of a gift, equity will charge the grantee with a resulting trust in favor of the grantor. Bennett v. Hutson, 33 Ark. 762; Giffen v. Taylor, 139 Ind. 573, 37 N. E. 392; Myers v. Jackson, 135 Ind. 136, 34 N. E. 810, 812; Lingenfelter v. Ritchey, 58 Pa. 485, 98 Am. Dec. 308; McDermith v. Voorhees, 16 Colo. 402, 27 Pac. 250, 25 Am. St. Rep. 286. This court is committed to a doctrine closely approaching that announced in the foregoing authorities. Gray v. Beard, 66 Or. 59, 68, 133 Pac. 791.

[3] Do the circumstances of this case clearly rebut the presumption that plaintiff intended to give the property in dispute to appellant? It appears from the testimony that both plaintiff and appellant had been previously married; that their married life was infelicitous; that the divorce suit was contested; that during the pendency of the suit plaintiff was obliged by the court to provide appellant with suit money; that immediately after the divorce decree appellant sued out execution thereon and compelled plaintiff to pay the money adjudged to be due her with accruing costs. The partition suit seems to have been brought by appellant without any effort to divide the property amicably. These facts would seem to preclude any contention that the relations between the parties were cordial at the time when the deed was executed in appellant's favor. The antagonistic relations of the parties are further emphasized by circumstances which transpired subsequently. In December, 1915, on the maturity of a note for $600, which plaintiff had given appellant, she assigned the note to one E. C. Tuckey, brought action thereon in Tuckey's name, and attached an interest which plaintiff had in a millinery store. Thereafter appellant seized some clothing and personal effects belonging to plaintiff, and to which appellant had no claim of any kind. She carried this property with her to Spokane, and demanded that plaintiff should pay her $50 as a consideration for its return to him. We have no hesitation in saying that the evidence in the case at bar forecloses any contention that plaintiff intended to present appellant with the property described in this deed. In so far as the case involves the real property, we think it clear that the decree of the lower court can be upheld under the doctrine of a resulting trust.

We also think that the evidence sustains plaintiff's contentions as to fraud and imposition. It appears by an overwhelming preponderance of the testimony that plaintiff for many years had been a drinking man; that his marital troubles drove him to excessive drinking in the summer of 1915; that he was under the influence of liquor more or less for a number of months at that time; and that by the 7th of September his system was so poisoned with alcohol as to make him an easy prey to the avarice of appellant. While appellant testifies that she saw but little of plaintiff during the summer of 1915, her testimony in this respect, as in other respects, is unbelievable. The parties were living at that time in the same house in the village of Haines. Appellant must have seen plaintiff every day, and must have been fully apprised of his habits and the mental condition arising therefrom. Appellant cites 17 Am. & Eng. Enc. of Law (2d Ed.) 401. In this authority the following principle is announced:

> "Where a person seeks to avoid responsibility for a contract on the ground of intoxication alone, it must appear that the drunkenness was so excessive that he was utterly deprived of the use of his reason and understanding, and was altogether incapable of knowing the effect of what he was doing."

This authority was called to the attention of this court in the case of Fagan v. Wiley, 49 Or. 480, 484, 90 Pac. 910. While the rule announced in the Encyclopædia was accepted as a correct statement of the law, it was also held in the above case that where a party under the influence of liquor purchases property at an exorbitant price the burden devolves on the vendor of showing the perfect good faith of the transaction. In this case we are dealing with a conveyance wholly without consideration. While the evidence fails to show that plaintiff was utterly deprived of the use of his reason and understanding at the time when he executed the deed, it does show that he was broken both mentally and physically as the result of continued excessive indulgence in drink. It appears that he had been drinking for an hour at Haines before he went with appellant to La Grande to execute the deed, and that while the deed was being prepared he was drinking mixed drinks in a saloon in La Grande. It further appears that when he returned to Haines after executing the deed later on the same day he was visibly intoxicated. The principle cited in the Encyclopædia of Law is also announced in Ruling Case Law. It is qualified, however, by the following language:

> "It should be noted, however, that complete intoxication is necessary only when the contract is sought to be avoided on the ground of mental incapacity. Where the avoidance is sought on the ground of fraud, even partial intoxication may be sufficient if it was brought about by the act or connivance of the other party or if an undue advantage was taken of the intoxicated person." 6 R. C. L. 598.

[4] We think this case is clearly one wherein appellant took advantage of an intoxicated person, pursuant to a design to despoil him of substantially all he had in the world.

[5] Inadequacy of consideration may be so gross as to shock the conscience, and in such case equity will seize on slight circumstances of fraud and oppression as a ground for setting aside the transaction. 4 R. C. L. 501; Archer v. Lapp, 12 Or. 196, 202, 6 Pac. 672; Sherman v. Glick, 71 Or. 451, 461, 142 Pac. 606. This principle is applicable to a transfer of property without any consideration to support it, where the relations of the parties preclude the conclusion that a gift was intended. The evidence clearly shows that plaintiff remained ignorant of the contents and effect of this deed for months after its execution.

There are other circumstances in the record which strongly tend to prove appellant's bad faith. Although plaintiff's automobile was transferred to appellant by the deed in question plaintiff continued to use the automobile for approximately two months after the execution of the deed. At the end of that time appellant drove the automobile to La Grande and executed a bill of sale thereof in favor of her attorney. The testimony on appellant's behalf is that the bill of sale was given to secure a fee of $75, which she owed her attorney, but it also appears that appellant was in funds and able to pay any debt of that size which she owed; also that her attorney was advised of her circumstances, and knew that she was solvent, and that any claim he had against her was good without security.

We are satisfied from the evidence that the deed executed by appellant in favor of the defendant Olsen was executed with intent to put the property out of the reach of plaintiff. It appears that the deed was antedated, and the circumstances suggest that it was executed immediately after plaintiff received her copy of the summons and complaint in this case. Her explanation of the transaction is unbelievable, and the ingenuity of her counsel has been able to suggest nothing which can account for this deed on any other theory than that above suggested. Appellant's effort to cover up the property and thus to deprive plaintiff of his remedy discredits appellant's contentions. The evidence amply sustains the findings and conclusions of the lower court.

The decree of the lower court is affirmed.

(84 Or. 319)

ENTERPRISE MERCANTILE & MILLING CO. v. CUNNINGHAM.

(Supreme Court of Oregon. May 22, 1917.)

1. Replevin 🔑59 — Complaint — Sufficiency.

A complaint in replevin seeking to recover possession of a dwelling house on the land of the defendant, which recites no facts to overcome the presumption that the building was real estate, was insufficient, and a demurrer thereto should have been sustained.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 215–218.]

2. Fixtures 🔑29 — Severance of House — Replevin.

Negotiations by a homesteader for the sale of his improvements together with a relinquishment of his possessory right to the land as homesteader did not constitute a constructive severance of the house from the realty, which would entitle a creditor to replevin the house as personal property.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 60, 61.]

3. Fixtures 🔑29—Conversion or Change of Form—Severance of House.

Constructive severance of a fixture must arise from the intention of the owner as evidenced by his acts, and the disclosed purpose of a future severance would not change the character of a building from real estate to personal property.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 60, 61.]

In Banc. Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Replevin by the Enterprise Mercantile & Milling Company against D. M. Cunningham. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Plaintiff began an action in replevin, alleging inter alia:

> "That plaintiff is the owner of and entitled to the immediate possession of the following described personal property: One small dwelling house situated on the northwest quarter of the southeast quarter, section 20 in township 1 south of range 45 E. W. M., and of the value of $100."

Then follow allegations of the wrongful withholding of possession to plaintiff's damage and a prayer for judgment. Defendant demurred to the complaint, contending that it appears therefrom that the property of which recovery is sought is real estate, and therefore not subject to replevin. The demurrer having been overruled, defendant answered with a general denial. Upon the trial defendant objected to the introduction of any evidence by plaintiff for the reason that the complaint does not state a cause of action. The objection being overruled, the trial proceeded, resulting in a judgment for plaintiff, from which defendant appeals.

D. W. Sheahan, of Enterprise, for appellant. J. A. Burleigh, of Enterprise, for respondent.

BENSON, J. (after stating the facts as above). There are 17 assignments of error, but we shall consider but two: (1) The demurrer to the complaint; and (2) the defendant's motion for a directed verdict.

[1] The complaint seeks to recover possession of a dwelling house located on land of the defendants, but recites no facts which would take the property out of the classification of real estate where, prima facie, it belongs. The opposing counsel have each cited a single case supporting their several contentions. Plaintiff relies upon Brearley v. Cox, 24 N. J. Law, 287, which supports his claim that the pleading is sufficient. Defendant cites Bridges v. Thomas, 8 Okl. 620, 624, 58 Pac. 955, 956, which says:

> "In our judgment the court correctly sustained the demurrer to the petition. We have been cited [to] but one case which states a different rule. The Supreme Court of New Jersey, in the case of Brearley v. Cox, 24 N. J. Law, 287, held that it was no cause for demurrer to a declaration in replevin that it was brought for 'a barn, shingle mill, office, and shed,' for the reason that such things, while ordinarily fixtures and a part of the realty, yet they might be personalty, and whether they were or not was a matter of evidence. The case is disposed of on the theory that the facts showing whether such things were real or personal was evidence, and that it was not proper to plead evidence. We do not consider the case based on sound reasoning. There are strong reasons why the rule should be otherwise. If one is entitled to maintain the action of replevin, and to have the property seized and delivered to him, before a court should permit its process to be used to sever a building from its resting place, and cause it to be placed on wheels and transported back and forth like live stock or other chattels, the character of which cannot be questioned, the one desiring such process should be required to plead a state of facts which, if proven, could leave no question as to his right to maintain the action, and to possession of the building."

The latter case clearly states the better rule, and it is the rule already adopted by this court in Van Orsdol v. Hutchcroft, 163 Pac. 978, in which Mr. Justice Moore says:

> "As nearly every building is put up with the intention that it shall become and remain a part of the land on which it rests, it necessarily follows that, in order to overcome the presumption that a building is real property, a pleading must allege facts showing the structure was placed on a temporary foundation and erected with the intention that it should be removed, or that it had been taken from its original support so as to be moved away."

It follows that the demurrer should have been sustained.

[2] Even if the complaint were sufficient, the defendant's motion for a directed verdict should have been allowed, upon the evidence. There is no dispute as to the substantial facts in the case. One A. W. Fisher was the occupant of the house and the land upon which it is situated, and was indebted to the plaintiff. Fisher began negotiations with defendant for the sale of his improvements, together with a relinquishment of his possessory right to the land as a homesteader. While such negotiations were pending, plaintiff began an action against Fisher, and undertook to attach the house as personal property upon the theory that the negotiations for the sale of the house constituted a constructive severance of it from the realty, thereby changing its nature. Thereafter and before judgment, defendant purchased the relinquishment of the possessory right to the land together with the improvements thereon, went into possession thereof, filed the relinquishment and his own application for the land, and subsequently received a patent therefor. After judgment, the sheriff went through the form of an execution sale of the house at which plaintiff became the purchaser and then brought this action.

[3] It has been held in a long line of cases that the relinquishment of the possessory right of a homesteader is a marketable commodity.. Fain v. United States, 209 Fed. 525, 126 C. C. A. 347, and cases there cited. It is fundamental that a constructive severance of a fixture must arise from the intention of the owner as evidenced by his acts, and there is not a vestige of evidence in the record of any intention upon the part of Fisher to sever the house from the land and, in fact, it was never severed. Nor, indeed, could the disclosed purpose of a future severance act to change the character of the building from real estate to personal property. The motion for a directed verdict should have been allowed.

The judgment will be reversed, and the cause remanded, with directions to enter judgment for the defendant.

(84 Or. 323)

STATE v. NEWLIN.

(Supreme Court of Oregon. May 22, 1917.)

1. INTOXICATING LIQUORS 🔑221 — SUFFICIENCY OF INDICTMENT—STATUTE.

Under the direct provisions of Laws 1915, p. 166, § 33, it is not necessary that an indictment should disclose that a party charged with the illegal sale of intoxicating liquor did not have legal authority to sell such liquor, or that he was not within any of the exceptions provided for by the act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 240–248.]

2. INTOXICATING LIQUORS 🔑223(3)—PLEADING—PROOF.

In a prosecution for the illegal sale of intoxicating liquors, designated in the indictment as "ethyl alcohol," as "alcohol" and "ethyl alcohol" are practically synonymous, there is no merit in the contention that in disclosing merely a sale of alcohol there was a failure of proof, and that the court erred in instructing the jury that "ethyl alcohol is, as a matter of law, intoxicating liquor."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 271.]

3. WITNESSES 🔑345(1) — IMPEACHMENT — PRIOR CONVICTIONS.

In view of statutory provision that to impeach a witness it may be shown by examination of the witness that he has been convicted either of a felony or misdemeanor, in a prosecution for the illegal sale of intoxicating liquors, where defendant testified that he had been convicted but once, the state was properly permitted to show in rebuttal that there were five prior convictions of defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1126.]

4. INTOXICATING LIQUORS ⚷239(10) — INSTRUCTIONS.

In a prosecution for the illegal sale of intoxicating liquors, where there was evidence that a witness for the state and another went to a point near defendant's place on the day that this sale was alleged to have been made, and that such other went into the defendant's store and came out in a short time with a bottle of alcohol, from which the witness drank, the court properly refused to instruct that there was no evidence that defendant on the day stated made a sale to such person.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 342-345.]

5. CRIMINAL LAW ⚷1159(4)—REVIEW—EVIDENCE.

The credibility of the evidence is for the jury, and does not concern the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Adolph Newlin was convicted of selling intoxicating liquor in violation of law, and he appeals. Affirmed.

On January 20, 1917, the defendant was indicted for selling intoxicating liquor in violation of the provisions of chapter 141 of the Laws of Oregon of 1915, the charging part of the indictment reading as follows:

> "The said Adolph Newlin, on the 11th day of January, 1917, in the county of Union and state of Oregon, did then and there wrongfully, willfully and unlawfully sell intoxicating liquor, to wit—ethyl alcohol—to one Joe Hickey, by then and there, him, the said Adolph Newlin, selling and delivering the said intoxicating liquor to the said Joe Hickey, and receiving therefor the sum of fifty cents, lawful money of the United States, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

To this indictment the defendant filed a general demurrer, which being overruled, a plea of not guilty was entered and a trial had resulting in a judgment of conviction, from which this appeal is taken.

F. S. Ivanhoe, of La Grande (Ivanhoe & Marker, of La Grande, on the brief), for appellant. John S. Hodgin, Dist. Atty., of La Grande, and Geo. M. Brown, Atty. Gen., for respondent.

BENSON, J. [1] It is first contended that defendant's demurrer to the indictment should have been sustained because the statute which forms the basis of the prosecution permits the sale, under certain specified restrictions, of ethyl alcohol by registered pharmacists, and that in order to sufficiently describe a crime, the indictment should disclose the fact that defendant was not then one of the privileged class or that the sale was in violation of one or more of the restrictions. Section 33 of the act referred to contains the following provision:

> "And it shall not be necessary in the first instance, for the state to allege or prove that the party charged did not have legal authority to sell such liquor, or was not within any of the exceptions provided by this act."

We need not consider what merit might be found in defendant's contention in the absence of this clause; but, since it exists, there was no error in overruling the demurrer.

[2] The next contention is that since the evidence disclosed merely a sale of alcohol, without any specific evidence that it was ethyl alcohol, there was a failure of proof and that the court erred in instructing the jury "ethyl alcohol is, as a matter of law, intoxicating liquor." An examination of the authorities discloses the fact that "alcohol" and "ethyl alcohol" are practically synonymous. Examining Webster's Dictionary, we find it defined thus: "Alcohol: Pure spirits of wine; pure or highly rectified spirit called ethyl alcohol." The Standard Dictionary and many others support this position, and therefore there is no merit in defendant's contention upon this point.

[3] It is also urged that the trial court erred in permitting the state to offer in evidence the judgment rolls of five prior convictions for the unlawful sale of intoxicating liquor after the defendant had admitted upon cross-examination that he had been convicted of a crime. The defendant had testified that there had been but one such conviction, and in rebuttal the state was permitted to show that there had been five. In State v. Bacon, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8, Mr. Justice Lord says:

> "On the subject of the impeachment of a witness, the Code provides 'that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a crime.' Code, § 830, p. 274. And the word 'crime,' as defined by the Code, includes both felonies and misdemeanors. It may therefore be shown by the examination of the witness that he has been convicted either of felony or a misdemeanor, and the record may also be introduced to prove that fact."

We can see no good reason for the contention that it was error to admit the evidence of more than one conviction. If the fact that a witness has been convicted of one criminal offense has a tendency to discredit his testimony, we may fairly infer that several convictions would simply add to the effect of such inference. The following authorities support this view: 40 Cyc. 2610; People v. Kelly, 146 Cal. 119, 79 Pac. 846, 847; People v. Eldridge, 147 Cal. 782, 82 Pac. 442, 444.

[4, 5] It is further insisted that there was error in refusing to give to the jury the following requested instruction:

> "I instruct you, gentlemen of the jury, that there is no evidence in this case that defendant made an unlawful sale of intoxicating liquor on the 11th day of January, 1917, to the person mentioned in the evidence as a fireman that witness Hickey claims furnished with a

bottle of alcohol; and you will not consider any testimony on this trial concerning any sale claimed to have been made by defendant to said alleged fireman, or that any such person may have furnished any intoxicating liquor to said witness, or that any liquor said witness may have received from such alleged fireman was intoxicating liquor, or that the same was ever purchased from defendant."

The court very properly refused this request for there is evidence to the effect that Hickey and a man, whose name is not disclosed, but who was understood by the witness to be a fireman in the railroad service, went to a point across the street from defendant's place on the same day that the sale charged in the indictment is alleged to have occurred; that there they each contributed 50 cents for the purchase of alcohol; and that the fireman went into the defendant's store and came out in a short time with a bottle of alcohol, from which the witness Hickey drank. We are not concerned as to the credibility of the evidence; that is for the jury, and it is sufficient to say that in the face of this evidence it would have been decidedly improper for the court to have given such an instruction. There are other assignments of error, but none of them are of such a nature as to change the result, and they need not be considered.

The judgment is affirmed.

(84 Or. 328)

MONROE et al. v. WITHYCOMBE et al.

(Supreme Court of Oregon. May 22, 1917.)

1. Pleading 🔑214(1) — Demurrer—Admission.

For purposes of an appeal, demurrers to the complaint admit the facts pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 529.]

2. Fish 🔑1—Ownership in State.

Fish are feræ naturæ, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 1.]

3. Navigable Waters 🔑36(1)—Title of State to Land Under Navigable Water—Admission of Territory.

On its admission to the Union Oregon was vested with title to the land under the navigable waters within the state, subject to the public right of navigation, and to the common right of citizens of the state to fish.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–182, 184, 200.]

4. Fish 🔑8—Regulation by State.

In the exercise of its police power, and for the welfare of all its citizens, the state can regulate or even prohibit the catching of fish.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 16.]

5. Fish 🔑11 — Master Fish Warden — Power.

The master fish warden of the state, holding a position created and exercising an authority defined by the Legislature, cannot do what the Legislature cannot empower him to do.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 21.]

6. Constitutional Law 🔑208(1) — Privileges and Immunities—Exclusive Right to Catch Salmon—Monopolies.

In Oregon the Legislature cannot grant to one person an exclusive right to catch salmon at a place and in waters where all citizens have the right to fish, because, when that which belongs equally to all the citizens of the state is taken from all and vested in only one citizen, it is equivalent to transforming a public right into a monopoly, exercisable by only one citizen, and therefore violative of Const. art. 1, § 20, providing that no law shall be passed granting to any citizen or class of citizens privileges or immunities, which, on the same terms, shall not equally belong to all citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 665, 666, 669–674.]

7. Constitutional Law 🔑62—Separation of Powers—Delegation of Legislative Power.

There is a large class of cases where the Legislature may vest in administrative officers power to determine when particular cases do or do not fall within a competent rule established by the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102.]

8. Constitutional Law 🔑62—Separation of Powers—Delegation of Legislative Power.

The Legislature may delegate to a board the power to stock a stream with fish and close it against fishing, providing the order is not discriminatory.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102.]

9. Constitutional Law 🔑74—Delegation of Legislative Power to Board—Interference by Court.

In cases where the Legislature may delegate to and vest in an administrative board a power, the courts will not attempt to control or interfere with the judgment and discretion of the administrative officers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124.]

10. Constitutional Law 🔑60 — Legislative Power—Delegation.

The Legislature can neither directly nor indirectly empower a mere administrative board to do that which the Legislature itself cannot do.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 90, 93.]

11. Fish 🔑10(2)—License to Build Fish Traps—Prior Rights—Statute.

Under Laws 1913, p. 225, providing that it shall be unlawful for the master fish warden or board of fish commissioners to grant a license to any person to build fish traps in any locality in the Columbia river when in their judgment the same interfere with a prior right of fishing, etc., the mere issuance by the master fish warden to defendant of licenses to build fish traps in the Columbia river did not foreclose inquiry into the existence of prior fishing rights at the locality involved in suit by aggrieved persons to prevent the construction of the traps, since the statute makes no provision for a notice or hearing, and makes no attempt to vest the warden with judicial authority, so that the doctrine that courts cannot interfere with the judgment and discretion of administrative officers has no application.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 20.]

12. CONSTITUTIONAL LAW 🔑80(2)—ADJUDICATION OF RIGHTS BY OFFICER OR BOARD—STATUTE.

Laws 1913, p. 225, construed as an attempt to vest the master fish warden or board of fish commissioners with judicial power to adjudicate constitutional rights, would be unconstitutional to the extent of such an attempt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 144.]

13. FISH 🔑10(2)—FISH TRAPS—CONFISCATION OF PILING—STATUTE.

Though a person licensed to do so by the master fish warden is not entitled to construct salmon traps in the Columbia river or to maintain the piling driven at each of three places, it would be inequitable to command the warden and board of fish commissioners to remove and confiscate the pilings under the provisions of Laws 1913, p. 226, § 2, when they were driven pursuant to licenses presumably issued in good faith.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 20.]

In Banc. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by C. G. Monroe and others against James Withycombe and others, constituting the State Board of Fish and Game Commissioners, R. E. Clanton, Master Fish Warden, and R. S. Farrell. From a decree for plaintiffs, defendants appeal. Complaint and suit dismissed as to the warden and members of the board, but decree affirmed as to defendant Farrell.

C. G. Monroe and ten other natural persons, together with the Sanborn Cutting Company, a corporation, in May, 1915, commenced this suit for themselves and all others similarly situated, or who might desire to join in the suit, for the purpose of preventing R. S. Farrell from constructing pound net fish traps on the north shore of Welch's Island, in the Columbia river, a navigable stream. The defendants are James Withycombe, I. N. Fleischner, Marion Jack, C. F. Stone, and F. M. Warren, who constitute the state board of fish and game commissioners, R. E. Clanton, who holds the position of master fish warden, and R. S. Farrell, who holds three licenses, issued to him on April 1, 1915, by the master fish warden, purporting to authorize the holder to construct and maintain that number of pound net fish traps at designated places on the north shore of Welch's Island. The Sanborn Cutting Company is a corporation organized and existing under the laws of Oregon with its principal place of business in Astoria, Or., and is engaged in the business of catching, packing, and preserving salmon. Each of the remaining plaintiffs is a citizen and resident of Oregon and is engaged in catching salmon. The corporation holds two licenses, issued on May 1, 1915, authorizing it to operate two seines in the waters of the Columbia river for the purpose of catching salmon; and each of the remaining plaintiffs was licensed on May 1, 1915, to catch salmon in the waters of the Columbia river with a gill net.

Large quantities of salmon are found in the Columbia river and are of great commercial value. The salmon industry has grown to great proportions, and for many years has been one of the principal industries of this commonwealth. Thousands of the citizens of Oregon earn their livelihood by catching salmon, and annually the business aggregates hundreds of thousands of dollars. Salmon are generally taken by gill nets and seines. A gill net is made of twine so tied as to form meshes for the purpose of gilling the fish, and is hung between two lines, one being known as the float, because it floats on the surface, and the other as the lead, because weighted down and kept beneath the surface of the water so as to suspend the net vertically. Seines are likewise made of twine, one edge of the seine being provided with floats and the other with sinkers so that it will hang vertically in the water, and when its ends are brought together or drawn ashore the seine incloses the fish caught within it. Gill nets and seines are floating fishing appliances; but a pound net fish trap is a permanent and fixed structure. A pound net fish trap, as it is usually constructed in the Columbia river, has three parts: The heart, pot, and lead. The heart is constructed by selecting some point in the river, ranging from 200 to 800 feet from the shore line, according to the conditions found, and driving piling in the bed of the river so as to form the letter V with the point of the V upstream. The point of the V is not closed, but it is left open, and at this opening piling are driven so as to form a hollow square, and this square makes the pot. Commencing at the lower end of the inner arm of the V, piling are driven at convenient distances apart on a straight line to the shore. Webbing sufficiently wide to reach from the bed of the river to a point 2 or 3 feet above extreme high water is strung along and attached to the piling in the lead and heart of the trap. Webbing is also used in the pot, but, instead of being affixed to the piling, it is so arranged that it can be lifted. Any salmon that migrate upstream and encounter the trap naturally attempt to pass the barrier, and in making the attempt generally find their way into the heart and then into the pot of the trap, where the fish are lifted from the water.

Welch's Island is within the boundaries of Oregon. Pursuing its westward course to the sea, the main channel of the river runs along the north side of Welch's Island. This channel extending along the north side of the island is not only a part of the main ship's channel, but, according to the complaint, it has also been the natural gill net and seining ground for the fishermen of the Columbia river, and is "the most valuable drifting ground for gill nets and the most valuable ground for operating seines in the Columbia river." It further appears from the complaint that from time out of mind fishermen have taken salmon out of this channel and the waters along the north side of the island by means of gill nets and seines, and that during the fishing season fishermen habitually, daily and hourly, navigate their gill nets and seines in these waters, which, prior to the issuance of the licenses to Farrell, were universally recognized as a common ground of fishing for all fishermen operating gill nets and seines. Continuing, the complaint avers that:

> "The citizens of the state of Oregon licensed to operate gill nets and seines are entitled of right, and are entitled under and by virtue of the laws and statutes of the state of Oregon, to the free and unobstructed use of said channel and the waters thereof, for the purpose of navigating the same with both gill nets and seines, and have been exercising such right, accordingly as herein alleged, for time immemorial."

One license attempts to authorize Farrell to construct a pound net fish trap at a point on the north shore of the island about 800 feet from the mouth of Multnomah slough, another trap is to be located about 4,200 feet below the first, and the third is to be about 1,000 feet below the second trap. Upon receiving the licenses Farrell commenced to construct traps at the three specified places; and, unless restrained, he proposes to complete the three traps so that they will extend out into the channel for a distance of 500 or 800 feet from the shore line. The plaintiffs say that they have been using and intend to continue to use gill nets and seines in the waters of the river along the north side of the island, but if Farrell is permitted to build the traps plaintiffs will be prevented from using their seines and nets, and it will have the effect of giving the exclusive use of that fishing ground to Farrell. The plaintiffs further allege that the licenses held by Farrell were issued in violation of chapter 128, Laws of 1913, and that, although the plaintiffs petitioned to have the traps confiscated, the master fish warden and board of game and fish commissioners nevertheless refused to do so.

All the defendants filed a joint demurrer; the members of the board of game and fish commissioners and the master fish warden joined in a second demurrer; and a third demurrer was filed by Farrell. The trial court overruled the three demurrers, and, when the defendants declined to plead further, a decree was entered declaring that "the public have the prior right of fishery and prior right to navigate the waters and channel of the Columbia river in front of Welch's Island" for the purpose of operating gill nets and seines, enjoining Farrell from constructing fish traps, and commanding the board of game and fish commissioners to cancel the licenses held by Farrell within 20 days from the date of the decree. All the defendants appealed.

Geo. M. Brown, Atty. Gen., Chriss A. Bell, of Portland, and Frank Spittle, of Astoria, for appellants. G. C. & A. C. Fulton, of Astoria, for respondents.

HARRIS, J. (after stating the facts as above). [1] For the purposes of this appeal the demurrers admit the facts alleged in the complaint, and consequently throughout the discussion it must be assumed that the complaint speaks the truth, notwithstanding the fact that the plaintiffs make frequent use of the superlative degree. The Columbia river is a navigable stream. The waters along the north shore of the island are "the most valuable drifting ground for gill nets and the most valuable ground for operating seines on the Columbia river"; and these waters have always been "recognized as a common ground for fishing."

[2] Fish are classified as feræ naturæ, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common. State v. Hume, 52 Or. 1, 5, 95 Pac. 808; Portland Fish Co. v. Benson, 56 Or. 147, 154, 108 Pac. 122; State v. Catholic, 75 Or. 367, 374, 147 Pac. 372; Harper v. Galloway, 58 Fla. 255, 51 South. 226, 26 L. R. A. (N. S.) 794, 19 Ann. Cas. 235; 11 R. C. L. 1041.

[3] Upon its admission to the Union Oregon was vested with the title to land under the navigable waters within the state, subject to the public right of navigation and to the common right of the citizens of this state to fish. Hume v. Rogue River Packing Co., 51 Or. 237, 246, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732. Quoting the language of Mr. Justice Moore in Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1, 12, 137 Pac. 766, 770:

> "The right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state."

[4] In the exercise of its police power and for the welfare of all its citizens the state can regulate or even prohibit the catching of fish. State v. Schuman, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754; State v. Hume, 52 Or. 1, 6, 95 Pac. 808; State v. Catholic, 75 Or. 367, 374, 147 Pac. 372; Harper v. Galloway, 58 Fla. 255, 51 South. 226, 26 L. R. A. (N. S.) 794, 19 Ann. Cas. 235.

Farrell relies entirely upon the three licenses from the state for his asserted right to construct the traps, and consequently the legality of the disputed right depends upon the legality of the authority attempted to be conferred. If Farrell is permitted to erect the traps specified in the licenses, the traps will have the effect of excluding gill net and seine fishermen from the waters in which it is admitted that previously all the citizens of this state had a common right to fish. In short, if it is lawful to authorize Farrell to erect these traps, it is lawful to prohibit all other citizens of Oregon from exercising a right that is conceded to be common to all, and to grant to Farrell alone the exclusive right to fish in waters covering an area of more than a mile in length by 200 or more feet in width; and if it is lawful to grant to a single individual the exclusive right to fish in that area it is likewise lawful to grant an exclusive right to fish in a larger area.

[5] The licenses relied upon are issued by the master fish warden. His position is created and his authority is defined by the Legislature, and therefore he cannot do what the Legislature cannot empower him to do. If the Legislature cannot grant an exclusive right to fish to one person, then the state could not through its master fish warden authorize the construction of the three controverted pound net fish traps when they will have the effect of conferring an exclusive right upon a single person, because the state cannot lawfully do indirectly what it cannot do directly.

In most jurisdictions where the question has been presented for ultimate judicial decision it has been determined that the Legislature has power to grant to a single person an exclusive right to catch floating fish. Payne v. Providence Gas Co., 31 R. I. 295, 77 Atl. 145, Ann. Cas. 1912B, 65; State v. Leavitt, 105 Me. 76, 72 Atl. 875, 26 L. R. A. (N. S.) 799; Phipps v. State, 22 Md. 380, 85 Am. Dec. 654; Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Heckman v. Swett, 107 Cal. 276, 40 Pac. 420; 2 Farnham on Waters and Water Rights, § 370. See, also, Gough v. Bell, 21 N. J. Law, 156, 165, and Gough v. Bell, 22 N. J. Law, 441, 459, criticizing the prior case of Arnold v. Mundy, 6 N. J. Law, 1, 78, 10 Am. Dec. 356. In Washington it has been held that it is lawful to grant to a single person exclusive control for a reasonable distance and for a limited period. Walker v. Stone, 17 Wash. 578, 50 Pac. 488; Halleck v. Davis, 22 Wash. 393, 60 Pac. 1116.

[6] In this jurisdiction, however, the rule is firmly established that the Legislature cannot grant to one person an exclusive right to catch salmon, because, when that which belongs equally to all the citizens of this state is taken from all and vested in only one citizen, it is equivalent to transforming a public right, exercisable by all citizens alike, into a private right and a monopoly, exercisable by only one citizen, and it is therefore in violation of article 1, § 20, of the state Constitution, which commands that:

> "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

See Hume v. Rogue River Packing Co., 51 Or. 237, 259, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 372; Eagle Cliff Fishing Co. v. McGowan, 70 Or. 1, 15, 137 Pac. 766. See, also, Slingerland v. International Con. Co., 43 App. Div. 215, 223, 60 N. Y. Supp. 12, affirmed in 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 494.

Not even the Legislature could have granted to Farrell the exclusive right to take salmon in waters where all the qualified citizens of Oregon have the common right to take floating fish; and therefore the licenses issued by the master fish warden do not legalize the construction of the traps which Farrell proposes to build. The question presented here is not whether all pound net fish traps are per se unlawful; but the sole question for decision is whether the traps which Farrell proposes to build would be unlawful, and that question is determined by the effect which it is conceded that the traps would have upon the common right of all the qualified citizens of this state. It is not necessary to decide whether the state can lawfully empower one person, to the exclusion of others, to take shellfish from a specified area of a navigable stream whose bed is owned by the state; nor is there any need to discuss the right to erect wharves and other similar structures in aid of navigation, since the proper exercise of that right is easily distinguishable from the instant case where an attempt is made to authorize only one person to fish for salmon for his own personal benefit and private profit without any advantage to the public.

The defendants contend, however, that the issuance of the licenses to Farrell forecloses any subsequent inquiry concerning the existence of prior fishing rights. Since this contention arises out of the language found in chapter 128, Laws 1913, such portions of the statute as are now material are here set out:

> "It shall be unlawful for the master fish warden or the board of fish commissioners to grant a license to any person, firm, partnership or corporation, to build or set up fish traps or any other fixed fishing appliance, or drive piles therefor, in any locality in or on the Columbia river and its tributaries in this state, when in their judgment the same interferes with a prior right of fishing." Section 1.
>
> "Whenever any fish trap or any other fixed fishing appliance is built or set up in violation of this act, the master fish warden of the state of Oregon is hereby empowered, authorized and directed to confiscate and sell said fish trap, and to remove all the piling driven for such purposes immediately, and he is authorized and directed to pay into the hatchery fund of that district of the state of Oregon the proceeds of said sale." Section 2.

The argument of the defendants is to the effect that chapter 128, Laws 1913, prohibits the master fish warden and board of fish commissioners from issuing a license for a pound net fish trap if in their judgment the trap will interfere with a prior right of fishing; that the enactment confers upon the officers power to exercise their judgment and discretion, and that in the absence of fraud an exercise of such judgment and discretion will not be interfered with by the courts; that the issuance of the licenses to Farrell presupposes that the master fish warden and the board exercised their judgment and discretion and determined that the issuance of the three licenses to Farrell and the construction of the licensed traps would not interfere with any prior fishing rights; and that therefore the courts will not and cannot prevent the construction of the traps, because to do so would be to interfere with and supervise the judgment and discretion of the board and master fish warden. Before attempting to discuss the argument of the defendants, it is proper first to make a brief survey of the legislation in force at the time of the passage of chapter 128, because it may be assumed that this statute was adopted with reference to the laws then in effect. Section 5272, L. O. L., created a board of fish commissioners whose duty it was to appoint one master fish warden. The name and personnel of the board has since been changed; for it is now known as the state board of fish and game commissioners. Chapter 287, Laws 1915. The board was clothed with various powers. Sections 5278, 5282, 5313, and 5316, L. O. L. Section 5237, L. O. L., defined the closed season on the Columbia west of the Deschutes river. Section 5294, L. O. L., made it unlawful to operate and maintain a pound net "without first having obtained from the fish warden a license therefor as hereinafter provided." By the terms of section 5298a, L. O. L., a qualified person desiring to operate a pound net was required to "make application in writing to the fish warden" specifying the location of the pound net, "and upon payment of a license fee as hereinafter provided, said fish warden shall issue to such applicant a license to operate the character of appliance desired in said application." All licenses expired on the 31st day of March following their issuance. Section 5303, L. O. L. After the owner constructed a pound net he was required to file a map with the fish warden "giving the exact description and location thereof." Section 5304, L. O. L.

It is not necessary to pursue the suggestion found in Evanhoff v. State Industrial Acc. Com., 78 Or. 503, 516, 154 Pac. 106, and determine whether the present form of our state Constitution enables the Legislature to clothe the master fish warden and board of fish commissioners with judicial power to inquire into and decide upon the existence of prior fishing rights, for the reason that it is obvious that the Legislature has neither given nor attempted to give the warden and board authority to render a final adjudication of constitutional rights.

[7-9] There is a large class of cases where the Legislature may vest in administrative officers power to determine when particular cases do or do not fall within a competent rule established by the Legislature (6 R. C. L. pp. 176, 179); and likewise the Legislature may delegate to a board the power to stock a stream and close it against fishing, provided the order is not discriminatory (Portland Fish Co. v. Benson, 56 Or. 147, 108 Pac. 122; 11 R. C. L. 1042); and in such classes of cases the courts will not attempt to control or interfere with the judgment and discretion of the administrative officers. There is, however, an impassable chasm between the power to prohibit all persons from fishing in a stream and an attempt to give one person an exclusive right to fish.

[10] The power of a board to close a stream exists only because the Legislature, which delegates the power, itself has power to close the stream; but not even the Legislature can lawfully favor one citizen with the exclusive right to fish in a navigable stream, and consequently the Legislature can neither directly nor indirectly empower a mere administrative board to do that which the Legislature itself cannot do. All the citizens of Oregon have a common right to fish in the waters mentioned in the complaint, and to deprive any one citizen of that right is to violate the state Constitution.

[11] To say that the mere issuance of the licenses closes any further inquiry into the existence of prior fishing rights because the courts cannot interfere with the judgment and discretion of administrative officers is to say that these plaintiffs can be deprived of a right without a hearing, without an opportunity to be heard, and even without notice. Chapter 128, Laws 1913, makes no provisions for a notice or a hearing, and it makes no attempt to vest the warden or board with judicial authority; and therefore the issuance of the licenses did not involve any of the elements of a final judicial adjudication of the fishing rights of these plaintiffs. If, on the other hand, the warden and members of the board are considered as mere administrative officers without judicial powers, the licenses issued by them to Farrell are invalid because they operate to confer an exclusive right upon Farrell. While the Legislature has power to authorize administrative officers to issue licenses, yet the validity of such licenses, when issued, is to be determined by the results which follow an exercise of the authority named in the license rather than by the mere words found in the paper called the license.

[12] While chapter 128, Laws 1913, does not attempt to vest the warden or board with judicial power to adjudicate constitutional rights, nevertheless, if in its present form it is regarded as an attempt to do so, it would to the extent of such an attempt be unconstitutional; if, on the other hand, the warden and board be regarded as officers with only administrative powers, the validity of the licenses issued to Farrell is to be determined by the results wrought by them, and when so determined they are ascertained to be ineffective; and therefore in either

event the plaintiffs are entitled to a decree preventing the construction of the traps.

Farrell drove three piling at each of the places designated by the three licenses, and plaintiffs allege that they petitioned the master fish warden and board to remove and confiscate them pursuant to section 2 of chapter 128, Laws 1913. The defendants argue that, when the plaintiffs petitioned for the removal and confiscation of the piling on the authority of chapter 128, they precluded themselves from afterwards questioning the validity of the statute. It is true that the plaintiffs do contend that chapter 128 is unconstitutional to whatever extent it may be said to attempt to confer upon the warden and board authority to render a final adjudication of fishing rights or to grant exclusive rights to fish; but it is also true that the plaintiffs never at any time contended that section 2 was invalid or that the whole chapter was unconstitutional for all purposes, although it may be invalid to whatever extent it may attempt to confer power to adjudicate existing rights or to grant exclusive rights.

[13] While Farrell is not entitled to construct the traps or to maintain the piling driven at each of the three places, yet it would not be equitable to command the warden and board to remove and confiscate the nine piling under the provisions of section 2 of chapter 128, Laws 1913, when the piling were driven pursuant to licenses which were presumably issued in good faith; and therefore the mandatory injunction prayed for by the plaintiffs is denied.

The acts of the warden and board complained of by the plaintiffs were fully consummated before this suit was begun; it does not appear that the warden and board propose to issue licenses in the future for traps along the island; and therefore the complaint and suit are dismissed, without costs as to the warden and members of the board; but the licenses issued to Farrell are annulled, and as to him the decree is affirmed.

(84 Or. 678)

SEAWEARD v. FIRST NAT. BANK OF ONTARIO. *

(Supreme Court of Oregon. May 29, 1917.)

1. Mortgages 🔑497(1) — Foreclosure — Judgment—Conclusiveness.

Where, in a suit to foreclose a conveyance treated as a mortgage, the Supreme Court decreed strict foreclosure, to be avoided upon payment of the amount due within 90 days, defendants did not lose their right to recover rents and profits collected by the mortgagee pending the appeal by failing to apply to the trial court when the mandate was sent down to have the amount of such rents and profits credited on the sum to be paid for redemption, as the determination of that issue would have been equivalent to the institution of an action at law, and the defendants, having only 90 days within which to redeem, were not required to speculate upon the trial of such issue.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471, 1473.]

2. Judgment 🔑949(2) — Pleading Former Adjudication—Sufficiency.

In a suit to foreclose a conveyance treated as a mortgage, the judgment was modified on appeal so as to deny attorney's fees. Thereafter the mortgagor's assignee sued to recover rents and profits collected by the mortgagee pending the appeal, and the mortgagee pleaded the decree in the foreclosure suit in bar, setting forth copies of the pleadings, decree, mandate, etc., as exhibits. By way of recoupment and counterclaim the mortgagee sought to recover attorney's fees and certain other expenses. The reply alleged that the question whether defendant was entitled to recover the sum so claimed ought to have been litigated in the former action, and referred to the exhibits attached to the answer, thereby making such exhibits a part thereof and alleged that by reason of such adjudication defendant was estopped from claiming such sums. *Held*, that the reply was sufficient in details to present the question of former adjudication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1796, 1803.]

3. Judgment 🔑678(1) — Conclusiveness—Persons Concluded.

A judgment or decree is conclusive, not only on those who are parties to the action or suit, but also on all persons in privity with them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195, 1221.]

4. Judgment 🔑585(2) — Conclusiveness—Identity of Causes.

The test of identity of causes as bearing upon the question of res judicata is the identity of the facts essential to their maintenance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1093.]

5. Judgment 🔑627—Conclusiveness—Parties Concluded.

Where, in a mortgage foreclosure suit, attorney's fees were denied on appeal, the judgment was conclusive in a subsequent action by the mortgagor's assignee against the mortgagee in which the mortgagee counterclaimed for and sought to offset such attorney's fees, and no sum could be allowed or offset for such fees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1141-1143.]

6. Pledges 🔑27—Care of Property—Reimbursement.

Mortgagees assigned the mortgage and secured notes to a bank as collateral security for a debt. The mortgagors were unable to pay and conveyed the land to the bank, taking an option to repurchase, which they did not exercise. The bank canceled the notes and mortgage and surrendered them. An option to repurchase was subsequently given the mortgagees, who failed to exercise it, and the bank foreclosed, treating the conveyance to it as a mortgage. The bank had taken possession of the land and received the rents, issues, and profits, and the mortgagees sued to recover rents and profits received subsequent to the decree in the foreclosure suit. *Held*, that the bank was entitled to an allowance of sums paid by it in caring for and superintending the management of the farm under the general rule that a trustee, though not entitled to compensation for services performed personally in discharging the trust, may recover the reasonable value of services of others employed by him.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 67, 68.]

*Rehearing denied July 3, 1917.

In Banc. Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by J. H. Seaweard against the First National Bank of Ontario, Oregon. From a judgment for plaintiff for an insufficient amount, each party appeals. Modified and remanded.

This is an action by J. H. Seaweard against the First National Bank of Ontario, Or., a corporation, to recover $2,614.16 as money had and received to the use of T. M. Seaweard and E. F. Seaweard, partners as Seaweard Bros., which claim is alleged to have been assigned to the plaintiff. This action is a continuation of the suit of the First National Bank v. Seaweard, 78 Or. 567, 152 Pac. 883. The facts there set forth and here involved are to the effect that about January 1, 1911, T. M. Seaweard and E. F. Seaweard sold and conveyed a farm in Malheur county, Or., to Emil E. Dean, Earl M. Dean, and A. M. Johnston, who as part consideration therefor gave the vendors four promissory notes of $5,000 each, and secured the payment thereof by a mortgage of the farm. T. M. Seaweard and E. F. Seaweard, on February 14, 1913, were indebted to the defendant herein on their matured promissory notes in the sum of $14,437.23, to secure which they assigned as collateral and pledged to an officer of the bank the notes for $20,000 and the mortgage securing them. Being unable to pay the matured installments of these obligations, the makers thereof and their wives, on February 21, 1913, executed a deed of the farm to an officer of the bank, who took the title in trust for his principal and gave the vendors last named an option to repurchase the land on or before May 24th of that year by paying the amount of the notes for $20,000, together with the taxes and other expenses which the bank might incur in operating the farm, whereupon the four notes were marked, "Paid," the mortgage canceled, and these instruments surrendered to the makers. The officers of the bank then took possession of the farm with the right to receive the rents, issues, and profits thereof. The option referred to not having been exercised, the officers of the bank executed to T. M. Seaweard and E. F. Seaweard an option to repurchase the farm on or before November 1, 1913, upon the payment of their indebtedness to the bank, the taxes, and the expenses of keeping the premises in repair. The latter option not having been exercised, the bank commenced a suit against T. M. Seaweard, E. F. Seaweard, Emil E. Dean, Earl M. Dean, and A. M. Johnston, and the wife of each, treating the conveyance of the farm to an officer of the bank as a mortgage, alleging that such transfer was made pursuant to an agreement with T. M. Seaweard and E. F. Seaweard, setting forth the latters' matured promissory notes, which stipulated for the payment of a reasonable sum as attorney's fees in case suit or action was instituted to collect any part thereof, and praying a foreclosure of the lien created by the deed to an officer of the bank. The answer of T. M. Seaweard and E. F. Seaweard denied that such conveyance was executed with their consent, and for a further defense alleged substantially that the notes for $20,000 and the mortgage securing them were pledged as collateral to the bank, which converted them to its own use, thereby becoming liable for the payment of such obligations, less, however, the indebtedness of T. M. Seaweard and E. F. Seaweard to the bank, aggregating $15,485.72, which sum was tendered in satisfaction of their matured notes but upon condition that the bank deliver to them the notes for $20,000 and the mortgage securing them, which, it will be remembered, had been surrendered to the makers. The reply controverted the allegations of new matter in the answer, and the cause being at issue was tried resulting in a decree as prayed for in that complaint awarding to the bank a recovery of its indebtedness against T. M. Seaweard and E. F. Seaweard and $1,500 as attorney's fees provided for in their promissory notes, and they appealed.

After a trial in this court, that decree was modified by disallowing any sum as attorney's fees and ordering that unless within 90 days from the entry of the mandate in the lower court T. M. Seaweard and E. F. Seaweard paid to the bank the amount of their indebtedness to it, less $15,485.72, the sum so tendered, and $334.24, which had been obtained by the officers of the bank in operating the farm, the lien of the deed of the premises should be foreclosed, but in case such payment was made a deed should be executed by the holder of the legal title to T. M. Seaweard and E. F. Seaweard. First Nat. Bank v. Seaweard, supra. The amount so specified was paid within the time limited, whereupon a demand was made upon the bank for the payment of $2,614.16, which sum it had received in the year 1915 and during the pendency of the appeal, as rents, issues, and profits of the farm. Upon a refusal to pay any part of that sum, this action was instituted. The answer herein denies the material averments of the complaint, sets forth the facts hereinbefore stated, and for a further defense and by way of counterclaim alleges, in effect, that in operating the farm during the year 1915 the bank was entitled to $78.42 for caring for the premises; that it had paid out $212.15 for taxes, repairs, etc.; that in the suit to foreclose the lien the bank had been obliged to employ attorneys, to whom it paid $1,500, and had also disbursed the further sum of $350.05 as expenses incurred in that suit, the prosecution of which was necessitated by the failure and refusal of T. M. Seaweard and E. F. Seaweard to pay their indebtedness to the defendant—all of which facts the plaintiff knew when he took an assignment of the claim here sued upon. For a second defense and by way of offset, the facts hereinbefore detailed are substantially repeated, and it is averred, in effect, that in the decree foreclosing the lien all accounts between T. M. Seaweard and E. F. Seaweard and the bank were considered and finally determined, and the decree rendered in that suit bars the maintenance of this action, setting forth copies of the pleadings, decree, mandate, etc., therein, and making them a part of the answer, designated as Exhibits "A," "B," "C," "D," and "E." For a third defense and by way of recoupment, the facts hereinbefore specified are reiterated, and it is alleged generally that at all the time the possession of the farm was held by the bank it was entitled to $78.42 for caring for the premises; that it paid out $212.15 as taxes and for repairs, etc.; that in the suit to foreclose the lien the bank was compelled to pay $1,500 as attorney's fees and also to disburse $350.05 as expenses in prosecuting that suit, amounting to $2,140.62, which outlay could have been avoided if T. M. Seaweard and E. F. Seaweard had paid their obligations to the banks; and that all such facts were known to the plaintiff when he took an assignment of the claim referred to. The reply put in issue all the averments of new matter in the answer, except the payment of $212.15 for taxes, etc., for which sum it is admitted a credit should be allowed. The reply in referring to the exhibits set forth in the answer contains a paragraph the material part of which reads:

> "Plaintiff admits that said defendant paid out the sum of $1,500 for attorney fees, and the sum of $350.05 for court costs, filing fees, transcript, taking of testimony, printing bills, and other incidental expenses of said litigation in said Bank-Seaweard Case, all of which are the same sums referred to in defendant's first answer and defense, and denies that, by reason of acts therein complained of, defendant was damaged in the sum of $1,850.05, or any other sum whatsoever, and alleges that the question whether or not the defendant was entitled to recover said sum of $1,500 for attorney fees or any part thereof, and said sum of $350.05 or any part thereof, was and ought to have been litigated in said Bank-Seaweard Case, and the plaintiff hereby refers to Exhibits 'A,' 'B,' 'C,' 'D,' and 'E' attached to the said affirmative answer and defense of defendant to plaintiff's complaint, and hereby makes said exhibits and each thereof a part hereof, and alleges that by reason of said adjudication defendant is and ought to be precluded and estopped from alleging or claiming any sums whatsoever as attorney fees and costs by reason of said litigation in said Bank-Seaweard Case."

Based on these issues, this case was tried, without the intervention of a jury, upon an agreed statement of facts, from which the court deduced conclusions of law to the effect that the plaintiff was entitled to recover from the defendant $2,614.16, the sum received by it in the year 1915 as rents, issues, and profits of the farm, against which the defendant was entitled to offset and recoup $1,500 as attorney's fees incurred in prosecuting the foreclosure suit, $212.15 paid out for taxes, repairs, etc., and $78.42 as compensation for caring for the farm, and that the defendant was entitled to the remainder with interest thereon from November 12, 1915. A judgment having been rendered in accordance with these findings, each party separately appeals.

R. W. Swagler, of Ontario, Or. (W. H. Brooke, of Ontario, Or., on the brief), for appellant. Wells W. Wood, of Ontario, Or. (McCulloch & Wood, of Ontario, Or., on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1] It is maintained by defendant's counsel that, when the mandate in the foreclosure suit was sent down, an opportunity was presented to contest in the lower court the right of the bank to retain the sum of money which it had received as rents, issues, and profits of the farm in the year 1915, pending the appeal; but no advantage having been taken of that fitting occasion, and such fact having been set forth in the answer herein as a bar to a recovery, an error was committed in awarding any part of that sum to the plaintiff. The decree in that suit having been for a strict foreclosure, to be avoided, however, upon the payment within 90 days from the entry in the lower court of our mandate of the amount due the defendant from T. M. Seaweard and E. F. Seaweard, it is possible that upon their application the time might have been enlarged and the decree opened so as to allow them to show, in case there was no conflict in respect thereto, the sum which was so received as rents and profits. Such leniency is not generally indulged, and the party seeking redemption under a decree of that kind is required to pay the specified sum of money within the time limited. 2 Wiltsie, Mort. Foreclosure, § 977.

In the case at bar, a controversy existed as to the credits to which the defendant claimed it was entitled and should withhold from the money which it had received. This sum, it will be remembered, was obtained after the appeal was taken in the foreclosure suit, and for that reason the accounting therefor could not have been heard or determined in the trial of that cause unless it had been sent back for that purpose. The entry of our mandate in the lower court was tantamount to an exercise of a ministerial duty, and, while possibly the decree might there have been opened for the purpose of crediting on account of the sum to be paid for redemption the money received as rents and profits pending the appeal, a dispute in respect to the remainder, if any, so to be applied existed, and the determination of that issue would have been equivalent to the institution, as in this instance, of an action at law to recover money had and received to the use of T. M. Seaweard and E. F. Seaweard, the plaintiff's assignors. Such a remedy, though equitable in character, could not have been tried in a court of equity to which the case of the First National Bank v. Seaweard, supra, pertained, unless such cause had been remanded for that purpose. Aside from this, as the plaintiff was allowed only 90 days after the entry of the mandate within which to redeem the real property from the decree of a strict foreclosure, he could not well afford to take the chances of speculating upon a trial of the issue in an action at law as to the amount of credit to which he was justly entitled by reason of the defendant's collection of the rents, issues, and profits of the farm during the year 1915 and pending the appeal, but was compelled to pay the entire sum demanded in order to protect his rights, and hence no error was committed in the respect alleged.

In the case of First Nat. Bank v. Seaweard, supra, it was held in effect that while a determination of the amount due the plaintiff from the defendants therein on their matured promissory notes was essential, requiring that copies of these obligations should be set forth in the pleadings and the originals offered in evidence, the foreclosure there involved was not based on such notes, but upon the conveyance of the farm to an officer of the bank, wherein the deed was treated as a mortgage; and that the promissory notes for $20,000 having been marked, "Paid," and surrendered to the makers, no attorney's fee could be predicated even upon the latter negotiable instruments. For that reason the decree in the lower court in that suit allowing $1,500 as such fee was modified by denying a recovery of any sum for that purpose, and as a consequence of the conclusion thus reached by this court preventing that plaintiff from obtaining any part of the costs and disbursements which it had incurred in the prosecution of the suit. L. O. L. § 567; Spores v. Maude, 81 Or. 11, 158 Pac. 169.

[2-4] It will be borne in mind that the plea of res judicata put forth by the reply substantially shows that the foreclosure suit, wherein the defendant in this action was plaintiff and T. M. Seaweard and E. F. Seaweard, who assigned their claim to the plaintiff herein, were defendants, presented an issue as to the right of the bank to recover an attorney fee; that such controversy was ultimately decided on the merits January 18, 1916, by this court denying any relief therefor, which facts are to be inferred by setting out in hæc verba the decree in that case, thereby supplying an averment to that effect. Fowlkes v. State, 14 Lea (Tenn.) 14. And that the question there considered and determined is the identical dispute here involved. Such statement is sufficient in details to present the question of former adjudication. 9 Ency. Pl. & Pr. 619; 23 Cyc. 1225. A judgment or decree is conclusive, not only on those who were parties to the action or suit, but also on all persons in privity with them. Schuler v. Ford, 10 Idaho, 739, 80 Pac. 219, 109 Am. St. Rep. 233, 3 Ann. Cas. 336. The test of identity of causes for the purpose of determining the question of res adjudicata is the identity of the facts essential to their maintenance. Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314. The allegations of new matter in the reply are deemed to have been controverted as upon a direct denial. L. O. L. § 95. The stipulations of fact upon which this action was tried contains a clause to the effect that in the suit of the First Nat. Bank v. Seaweard, supra, plaintiff paid to its attorneys for their services $1,500, which was a reasonable sum for that purpose. Considering such agreed statement in connection with the issue last referred to, the trial court deduced the conclusion of law that the bank was not barred by the former decree from offsetting against the sum of money now sued for the payment so made as attorney's fees. An inspection of the exhibits mentioned discloses no uncertainty exists in respect to the identical question decided on the merits in that suit, which final determination is controlling herein as the law of the case, as much so in relation to such fee as to the costs and disbursements which the bank incurred in the prosecution of that suit. Powell v. Dayton, etc., R. Co., 14 Or. 22, 12 Pac. 83; Thompson v. Hawley, 16 Or. 251, 19 Pac. 84; Murphy v. Albina, 22 Or. 106, 29 Pac. 353, 29 Am. St. Rep. 578; Kane v. Rippey, 22 Or. 299, 29 Pac. 1005; Portland Trust Co. v. Coulter, 23 Or. 131, 31 Pac. 280; Baker County v. Huntington, 48 Or. 593, 87 Pac. 1036, 89 Pac. 144; Baines v. Coos Bay Nav. Co., 49 Or. 192, 89 Pac. 371; Oliver v. Synhorst, 58 Or. 582, 109 Pac. 762, 115 Pac. 594; State v. McDonald, 59 Or. 520, 117 Pac. 281; Meyer v. Livesley, 61 Or. 55, 120 Pac. 749; Benbow v. The James John, 61 Or. 153, 121 Pac. 899; Williams v. Pacific Surety Co., 70 Or. 203, 139 Pac. 934; Hanna v. Alluvial Farm Co., 79 Or. 557, 152 Pac. 105, 156 Pac. 265.

[5] The question of attorney's fees having been considered and finally determined by this court upon the merits on the former appeal, the conclusion thus reached is binding upon the defendant herein, which was a party to that suit, and also upon T. M. Seaweard and E. F. Seaweard and their assignee, the plaintiff herein, who took the chose in action with knowledge of their rights in the premises. The allowance therefore of any sum as attorney's fees in this action must be denied, and no offset against the sum sued for can be awarded for that purpose.

[6] The plaintiff's counsel complain of the trial court's allowance of $78.42, or any other sum, as compensation to the defendant for its care of the farm during the pendency of the former appeal and while the bank held

possession of the premises. It is argued that the pledgee in possession performed such service for its own benefit and not for the pledgors' advantage, and hence it is not entitled to any remuneration for such services. A pledgee is a trustee, and under the rule prevailing in England he is not allowed any compensation for labor or trouble bestowed upon the trust estate. Such rule, however, finds little favor in the courts of the several states of the Union, where it is generally held that the trustee cannot recover compensation for services which he personally performs in discharging the trust, but that when others are engaged by him for that purpose he may recover the reasonable value of the services so performed. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257, and notes. The legal principle thus stated is not in conflict with the rule announced in the case of Caro v. Wollenberg, 163 Pac. 94, where it was ruled that services personally rendered by a trustee did not constitute a valid charge against the trust estate or the cestui que trust.

In the case at bar, the defendant, being a corporation could not personally care for or superintend the management of the farm, but was compelled to discharge that duty by others for the performance of whose services it is justly entitled to a reasonable compensation. The sum awarded for that purpose does not exceed the measure allowable, and hence it should not be disturbed.

It is conceded that the sum of $212.15 is a just claim for money paid out for taxes, repairs, etc., and was properly allowed as an offset against the sum of money received as rents. That sum and $78.42, the compensation for the care of the premises, aggregating $290.57, should therefore be deducted from $2,614.16, leaving $2,423.57 as due the plaintiff with interest at 6 per cent. per annum from the time this opinion is handed down. Baker County v. Huntington, supra; Sargent v. American Bank & Trust Co., 80 Or. 16, 39, 154 Pac. 759, 156 Pac. 431; Hayden v. City of Astoria, 164 Pac. 729, decided by this court May 1, 1917.

The judgment herein will therefore be modified in the particulars specified, and, under the amendment of section 3 of article 7 of the Constitution, the cause will be remanded for the purpose of entering such final determination.

(84 Or. 386)

NOYES-HOLLAND LOGGING CO. et al. v. PACIFIC LIVE STOCK & LUMBER CO. et al.

(Supreme Court of Oregon. May 29, 1917.)

COURTS 🔑207(3)—LEGAL PROCEEDINGS.

The Supreme Court will not continue an injunction restraining a plaintiff in ejectment from proceeding because a chancery suit affecting defendants' right to the property is pending on appeal, where the parties are solvent and defendant's rights can be adequately protected after determination of the chancery appeal.

Department No. 1. Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Cross-bill by the Noyes-Holland Logging Company and the Portland Lumber Company against the Pacific Live Stock & Lumber Company and M. T. O'Connell. From a dismissal of the cross-bill, plaintiffs appealed and obtained a temporary injunction from a Supreme Court justice. On motion to dissolve such temporary injunction. Dissolved.

The Pacific Live Stock & Lumber Company began an action in ejectment to recover from the plaintiffs here the possession of the southwest quarter of the southwest quarter of section 3, township 7 north, range 3 west, in Columbia county. These plaintiffs interposed a cross-bill in equity, whereby they sought to correct an alleged mistake in a contract between the Portland Lumber Company and M. T. O'Connell, granting them the right of way for a logging railroad over his land so that they could justify their possession of the land in dispute under the agreement as thus amended. As part of the relief sought under the cross-bill, they prayed for injunction against the prosecution of the law action, and to that end obtained a temporary restraining order pendente lite. The circuit court heard the cross-bill on its merits after issue formed thereon, and dismissed it, allowing the ejectment action to proceed. These plaintiffs then appealed, and gave a bond stipulating for the payment of all costs, disbursements, and damages which might be adjudged against them on the appeal. Their opponents, however, prepared to try the action of ejectment, whereupon plaintiffs in the suit applied to and obtained from one of the justices of this court ex parte a temporary injunction, forbidding the prosecution of the action. The case has been presented to us on a motion to dissolve this temporary injunction.

Hugh Montgomery and Platt & Platt, all of Portland, for appellants. Thomas Mannix, of Portland, for respondents.

PER CURIAM. The leading case on this subject is Livesley v. Krebs Hop Company, 57 Or. 352, 97 Pac. 718, 107 Pac. 460, 112 Pac. 1. It was there decided that, although injunction was not within the original jurisdiction of this court, yet in order to preserve its jurisdiction over the subject of the suit on appeal, it would issue a temporary restraining order pendente lite. In that suit the plaintiffs sought to prevent the Krebs Hop Company from enforcing a judgment against them on the ground that the company was insolvent, and that, having a good reason for resisting the judgment on appeal, the remedy would be entirely lost to the plaintiff on account of the insolvency of the concern claiming the judgment. Manifestly, under such circumstances, the court would find its efforts futile to render complete justice in the case on account of the inability of the company to restore what it might have unjustly collected. In Kellaher v. Portland, 57 Or. 575, 110 Pac. 492, 112 Pac. 1076, Mr. Justice Eakin said:

> "This court cannot, by injunction, protect property rights, or enjoin acts that might result in damage to a litigant. That is the province of the circuit court, and this court can only review its action on appeal."

To a like effect is Brice v. Younger, 63 Or. 4, 123 Pac. 905.

In this case there is no suggestion of the insolvency of either party, or that the estate of either of them in the land will be irretrievably clouded or destroyed unless the injunction be continued to the end of the litigation. As said in Brice v. Younger, supra, the plaintiff in ejectment would proceed at his peril while the cross-bill remains open for the consideration of this court. If the proceeding in chancery is well founded, the court can exercise its equitable powers in restoring the defendant in ejectment to its former situation at the expense of opposing parties. There is no pretense that the equitable authority of the court will be paralyzed if occasion should arise for its use.

All the cases hold that injunction in such instances rests in the sound discretion of the court. The temporary restraining order having been granted without notice to the opposing parties, it is, of course, subject to dissolution on a proper hearing, and the question of whether or not the justice who granted it abused his discretion is not here involved. It not being apparent to the court that the rights of either party will be prejudiced beyond repair by withholding this injunction, an order will be entered dissolving the temporary restraining order, so that the action in ejectment may regularly proceed, subject, of course, to the final disposition of the cross-bill.

(84 Or. 389)

BISHOP v. HENRY et al.

(Supreme Court of Oregon. May 29, 1917.)

1. Mechanics' Liens 🔑1—Mines and Minerals 🔑112(1)—Nature of Lien.

A mechanic's or miner's lien is a creation of the statute, which must be looked to for the right to file any such lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 1; Mines and Minerals, Cent. Dig. § 233.]

2. Mines and Minerals 🔑114—Claim of Lien—Ownership of Property.

L. O. L. § 7445, requiring every laborer or materialman claiming a lien on a mine, etc., to file a claim, containing a statement of his demand, with the name of the owner or reputed owner, if known, and the name of the person by whom he was employed, or to whom he furnished the materials, is complied with by a statement that the person against whom the lien is claimed is the owner and reputed owner, or by a statement in the alternative that a designated person is the owner or reputed owner.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236.]

3. Mines and Minerals 🔑114—Claim of Lien—Ownership of Property.

Under L. O. L. § 7445, the claim of lien need not state the name of the owner when such owner is not known.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236.]

4. Judgment 🔑707 — Conclusiveness — Persons Not Parties.

H., the daughter of a person formerly owning an interest in mining claims, obtained letters of administration, and with the consent of defendant, who also owned an interest, entered into possession for the purpose of working the property, and representing the interest of the estate. Defendant then made no claim that the estate had no interest. A controversy having arisen, H. abandoned the administration of the estate, and she and her associates filed relocation notices, and obtained supplies and labor from persons who believed her and her associates to be the owners of the claim. Afterwards defendant brought suit and obtained a decree declaring him the sole owner of all the claims as against H. and her associates. *Held* that, as against the persons furnishing labor and supplies and claiming liens, who were not praties to the suit, the decree took effect as of its date, and did not determine their rights.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230.]

5. Mines and Minerals 🔑112(3)—Liens—Consent of Owner.

As H. and her associates went into possession with defendant's permission, he should have posted notices as provided by L. O. L. § 7444, in the case of owners of a mine worked by lessees or by persons other than the owner, if he desired to prevent liens attaching to the claims.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 235.]

6. Mines and Minerals 🔑114 — Liens — Claim of Lien.

Lien notices stating that H. and her associates were the agents of the owner of the claim and were the owners and reputed owners thereof were sufficient without naming defendant; as L. O. L. § 7445, requiring the name of the owner or reputed owner, "if known," was apparently intended to apply to such a case where title in fee was in the government, and neither party had much more than a possessory right.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236.]

7. Mines and Minerals 🔑117—Liens—Enforcement—Attorney's Fees.

In a suit to foreclose mining liens for labor performed and materials and supplies furnished by plaintiff and by other persons who had assigned their claims to plaintiff, it was immaterial whether reasonable attorney's fees should be allowed for all the claims in the aggregate or singly.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239.]

In Banc. Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Suit by F. W. Bishop against Susie Norwood Henry and others to foreclose liens. From a decree denying foreclosure as against the defendant R. C. Crawford, plaintiff and defendant Joe Kingsbury appeal. Modified.

This is a suit to foreclose certain quartz mining liens on what is commonly known as the Norwood mines. Those claimed by plaintiff are for labor performed and materials and supplies furnished by him and his assignors between March 1 and November 3, 1913. Defendant Kingsbury claims a lien for services commenced in 1908 and continued until November 3, 1913. The court decreed a lien upon a certain mill upon the premises, but denied any upon the mining claims. Plaintiff and defendant Kingsbury appealed.

A brief statement of the facts leading up to this controversy is as follows: In 1893 H. W. Norwood made amended locations of three of the mining claims, the Keystone, Empire, and Amadore. His wife, Cora S. Norwood, made amended locations of three others, the Snowflake, Lilly, and May Flower. The Lilly, Amadore, and another, the Nettie May, were conveyed to defendant Crawford. Afterwards these were all known as the Keystone mines for a time. Mr. and Mrs. Norwood and Mr. Crawford each claimed a one-third interest therein and developed the claims in common as a group. Crawford advanced money to the Norwoods upon this arrangement. Mr. Norwood died, and in 1903 Mrs. Norwood executed two mortgages covering her interest in the premises. These were foreclosed in 1904, and the property sold to defendant A. W. Eastham, trustee. In 1908 defendant Susie Norwood Henry, a daughter of H. W. Norwood, went to Baker county, where she applied for letters of administration of his estate, which were granted. She understood and represented that three of the claims in question belonged to his estate. She consulted with defendant Crawford, who made no claim to the contrary, and who believed that the Norwoods still owned an interest in the mines. With his permission she and Grace Carmalt entered into possession of the premises, moving into a cabin thereon, for the purpose of working the property and representing the one-third interest belonging to the Norwood estate. It was mutually understood that Crawford was to continue his possession, represent his one-third interest, that all were to co-operate and work the mines as a group, and that each had a one-third interest therein respectively. This plan was continued until a controversy arose in 1909, when Crawford presented a claim against the Norwood estate for assessment work done on the mines for it which was disallowed. During that year, objections being made by Crawford to the final settlement of the estate, Susie Norwood Henry abandoned the administration thereof, and she and her associates on different dates filed relocation notices upon the quartz claims embraced in the Keystone group, and also located other claims. These were afterwards known as the Norwood mines. So far as the county records showed, Susie Norwood Henry and her associates were the owners of the claims. Early in the summer of 1913 the last-named claimants commenced the construction of a mill upon the premises, and requested and obtained from plaintiff, a hardware merchant in Baker, and his assignees, other merchants, credit for hardware, merchandise, supplies, meat, etc., for about 30 days, until the mill could be operated and returns realized. Mrs. Henry and Grace Carmalt resided upon the mining claims, were reputed to be and were believed by these merchants to be the owners thereof. Defendant Crawford lived about a quarter of a mile from the mines, and, as he states, could see what was being done thereon. The mill was built and run for a short time. Meanwhile Crawford had succeeded to the interest of A. W. Eastham in the mines, the date of which is not clearly indicated by the record; it probably being developed in the suit hereafter mentioned. After arrangements were made, a considerable portion of the supplies furnished to the mines and the labor performed thereon. Crawford commenced a suit on July 26, 1913, against Susie Norwood Henry, Grace Carmalt, Steve Chaplin, and A. W. Eastham, trustee, in which a decree was entered August 31, 1914, declaring that the claims were not subject to relocation by Susie Norwood Henry and her associates, and that as to them Crawford was the sole owner of all the claims constituting the Keystone group. The findings of fact and conclusion of law of the circuit court in that suit were introduced in evidence, but not the whole record. It appears that Norwood's interest as well as that of Mrs. Norwood had been conveyed.

O. B. Mount, of Baker (A. A. Smith, of Baker, on the brief), for appellants. C. H. McCulloch, of Baker, for respondent.

BEAN, J. (after stating the facts as above). Crawford resists the liens sought to be foreclosed in this suit begun November 26, 1913. He consented to the removal of the mill, which has been sold for $500, and a portion of the proceeds are in the hands of the county clerk. The question involved herein relates to the mining claims. The several liens were filed to secure payment for materials and supplies furnished and labor performed in the development of the mines. The lien notices were similar. In that of Hans C. Olson it is stated in part thus:

"That the said mining claims are known as the Norwood group of mining claims, and are situated about eight miles northeast of the city of Baker; that the same are contiguous and are worked through common shafts, tunnels, excavations, and workings and by means of one mill or ore reduction works; that said labor so performed was upon said Norwood group of mining claims above described, and upon that certain five-stamp mill situated upon said mining claims, all of which said mill, mill buildings, structures, and machinery being situated upon the said Norwood group of mining claims and used in the working and mining of the same; that the said Susie Norwood Henry, Grace Carmalt, and Steve Chaplin were the agents of the owners of said mining claims, mill, structures, and machinery, and hired this claimant to perform the work, labor, and services aforesaid; and the said Susie Norwood Henry, Grace Carmalt, and Steve Chaplin are the owners and reputed owners of said mining claims hereinabove described and of said mill, structures, and machinery, and caused said work and labor to be performed."

In one or two of the lien notices the name of A. W. Eastham, trustee, is included as owner.

It is contended by defendant Crawford: (1) That the lien notices were not effective and do not support the liens, for the reason that the name of R. C. Crawford, who was afterwards declared to be the sole owner, was not stated therein; and (2) that Crawford never authorized the expenditure upon the mines. Section 7444, L. O. L., provides in part as follows:

> "Every person who shall perform labor upon, or furnish material for the working or development of any mine, * * * and any person who shall do work or furnish material for any road, tramway, train [trail], flume, ditch or pipe line, building, structure or superstructure used for, or in connection with the working or development of any such mine, * * * and any person who shall perform labor or service in freighting or packing any material or supplies for the use, working or development of any such mine, * * * and any person who shall furnish any provisions, materials or supplies for the working or development of any such mine, * * * structure or superstructure * * * shall have a lien upon such mine, * * * to secure to him the payment for the work or labor done, or material furnished: * * * Provided, that when two or more mines, lodes, mining claims or deposits are owned or claimed by the same person or persons, and worked through a common shaft or tunnel, * * * then all the mines, * * * shall, for the purpose of this act, be deemed one mine; and provided further, that this section shall not be deemed to apply to the owner or owners of any mine, * * * when the same shall be worked by a lessee or lessees, or by any person or persons other than the owner: * * * Provided further, that the owner or owners * * * post, or cause to be posted, * * * a notice in writing, * * * stating the name or names of the lessees, or other person or persons other than the owner operating said property, and that the owner or owners thereof will not be responsible for any debt or debts contracted by the lessee or lessees, or other person or persons other than the owner, in connection with the working, operation or development of such property. * * * The failure of any owner or owners of such property to post the notices above provided for, and secure the proper recording thereof, shall be deemed conclusive proof of the consent of such owner or owners that his or their interest in such mine shall be subject to any lien filed under the provisions of this act."

Section 7445, L. O. L., provides in substance that it shall be the duty of every laborer or materialman claiming a lien, within 60 days after he has ceased to labor or furnish materials therefor, to file with the proper county clerk a claim containing a true statement of his demand, after deducting all just credits and offsets, "with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged."

[1-3] A mechanic's or miner's lien is a creation of the statute to which we must look for the right to file any such lien. 2 Snyder on Mines, § 1705. The provision of the statute that the claim of lien shall state the name of the owner or reputed owner, if known, is complied with by a statement that the person against whom a lien is claimed is the owner and reputed owner. A statement in the alternative that a designated person is the owner or reputed owner is also sufficient under such a statute. 2 Jones on Liens (3d Ed.) § 1401; Gordon v. Deal, 23 Or. 153, 31 Pac. 287; Haines Com. Co. v. Grabill, 78 Or. 375, 381, 152 Pac. 877; Arata v. Tellurium Gold and Silver Min. Co., 65 Cal. 340, 4 Pac. 195, 344; Abelman v. Myer, 122 App. Div. 470, 106 N. Y. Supp. 978; McPhee v. Litchfield, 145 Mass. 565, 14 N. E. 923, 1 Am. St. Rep. 482; Minor v. Marshall, 6 N. M. 194, 27 Pac. 481. Our statute contemplates that in certain cases the name of the owner may not be known, and in such event it is unnecessary that the notice contain the same. 2 Jones on Liens (3d Ed.) § 1401.

[4, 5] There is no claim in this suit that Crawford posted any notice of nonliability within the purview of the statute. His main reliance is based upon the decree of August 31, 1904. As to the claimants who were not parties to that suit, the decree is analogous to a foreclosure of the former claims, other than his own, and took effect as of that date. It does not determine the rights of these lien claimants which were created before that time and were not foreclosed nor affected. At the commencement of their connection with the mines Susie Norwood Henry and Grace Carmalt went into possession thereof for the purpose of working the properties and representing the one-third interest supposed to belong to the Norwood estate. This was all done with the consent and acquiescence of defendant Crawford. In so far as these claimants are concerned, the authority given by Crawford and his sanction for these parties to work the mine was of just as much force as though he had leased the property to Mrs. Henry and her associates and executed a written lease therefor. Had he desired not to become liable for any work done upon these mines by the parties whom he let into possession, he should have posted notices as provided by the statute. See Haines Com. Co. v. Grabill, supra. Crawford's position is entirely different from what it would be had the parties incurring the indebtedness entered into possession of the mines without his sanction or authority. Loud v. Gold Ray Realty Co., 72 Or. 155, 142 Pac. 785; Post v. Fleming, 10 N. M. 476, 62 Pac. 1087; Hamilton v. Delhi Min. Co., 118 Cal. 148, 50 Pac. 378; 27 Cyc. 772.

[6] In Bitter v. Mouat Lumber & Inv. Co., 10 Colo. App. 307, 51 Pac. 519, it was held that a lien claimant can be charged only with knowledge of the ownership of property as apparent upon the public records. In equity and good conscience defendant Crawford should not now be allowed to claim that Mrs. Henry and Grace Carmalt were not the owners, rightfully in possession of and working the claims in suit, when he permitted them to hold out to the world that they were the rightful owners thereof. He stood idly by from 1907, when he allowed them to take possession of the mines, until 1913, when most of the indebtedness for which liens are claimed was incurred. Then, as he states, in July, 1913, or somewhere along there, he concluded that he owned all the mines. Prior to that time he claimed only a one-third interest. As to these lien claimants the die was cast before Crawford brought his suit. See Bigelow on Estoppel (2d Ed.) p. 453. By a tardy suit which became effectual in August, 1914, he should not be allowed to defeat the claims of those who in good faith extended credit on account of the mines to which were charged merchandise and supplies furnished in the development thereof. Our statute directing that a notice of lien shall state the name of the owner or reputed owner of the property sought to be charged, if known, seems to have been enacted for just such a case as this where the title in fee is in the United States government, and neither party has much more than a possessory right to the claims. The lien notices, the complaint, and the proof are in conformity with the statute, and are sufficient to sustain the liens. 13 Ency. Pl. & Pr. p. 969 et seq.

Objection is made to the amount of defendant Kingsbury's claim. The work was done during the several years named, and accurate accounts do not appear to have been kept by him. With a little assistance he constructed a 90-foot tunnel, other work was done on the mines, and supplies and materials were transported in the development thereof. After a careful consideration of all the evidence, $1,111.50 is found to be due Kingsbury and allowed him upon his own lien, and the further sum of $228.50, due upon the lien of his assignor, Hans C. Olson, making a total of $1,340, together with $125 attorney's fees. The claims of plaintiff are approved as found by the trial court.

[7] Objection is made to the form of the allowance of attorney's fees for plaintiff. We see no merit in this claim nor any material difference in allowing reasonable attorney's fees for all the claims in the aggregate or singly. The decree of the trial court is modified as herein indicated and the amounts allowed claimants will be declared to be a lien on the mines described in the complaint.

GREIGER v. SALZER et al. (No. 8529.)

(Supreme Court of Colorado. May 7, 1917.)

1. INSURANCE 🔑33—INSURANCE COMPANIES—ISSUANCE OF STOCK.

Rev. St. 1908, § 3117, regulating the issuance of stock in insurance companies, being special in character and passed after the general act regulating incorporation of stock companies, governs the organization of insurance companies in cases of conflict with the general law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 38.]

2. INSURANCE 🔑33—STOCK SUBSCRIPTIONS—PERSONAL LIABILITIES.

Rev. St. 1908, § 3117, authorizing the commissioner of insurance to designate certain incorporators to receive stock subscriptions and pay a certain amount thereof to the commissioner before the company may do business, renders the persons so delegated personally liable for the subscriptions, although they may have retired from the company before plaintiff subscribed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 38.]

3. INSURANCE 🔑33—ACTIONS—PARTIES DEFENDANT.

In action to recover stock subscriptions against insurance company incorporators designated by the commissioner of insurance under Rev. St. 1908, § 3117, to receive such subscriptions, the proposed insurance company, which never had a legal existence, is not a necessary party defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 38.]

En Banc. Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by G. Greiger against Louise K. Salzer and Willis M. Marshall, as executors, and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Barnett & Campbell and John E. Fetzer, all of Denver, for plaintiff in error. Doud & Fowler, of Denver, for defendants in error executors. Hayt, Dawson & Wright, of Denver, for defendants in error Marshall and others. S. E. Marshall, of Denver, for defendants in error Marshall and Iliff. Isham R. Howze, of Denver, for defendant in error Moore.

BAILEY, J. This action is to recover money paid for shares in a projected life insurance company, undertaken to be organized under the laws of the State, but never in fact perfected. Defendants below, defendants in error here, with others, filed with the Secretary of State articles of incorporation for The United States Postal Insurance Company, with a capital stock of $1,000,000.00, divided into 10,000 shares of $100.00 each. In conformity with section 3117, R. S. 1908, there was presented to the State Insurance Commissioner, at the same time, a certified copy of such articles for his approval. These were duly certified by the Attorney General as conforming to law, and returned by him to the Insurance Commissioner, who thereupon approved the same, and, under the statute, named the defendants to take subscriptions to the stock of the company, they having been designated in the articles as its board of directors for the first year. Books were opened for subscriptions, and, under the direction and control of the defendants, meetings were held at which company bylaws and an official seal were adopted, and other preliminary steps taken. Stock was sold, some of which was paid for in full, other subscriptions were partially paid, and there were still other sales upon which nothing was ever paid. It appears that nearly $76.000.00 was collected from such sales, about $66.000.00 of which was spent in salaries, general, incidental and promotion expenses. Having failed to secure subscriptions and collections for the amount necessary to perfect the organization, the proposition collapsed, and the question now is whether the defendants are liable for a return of the money so subscribed and paid in.

Plaintiff below, plaintiff in error here, bases his right to recover upon the statute of the State governing the incorporation of insurance companies, and upon general principles. At the close of his testimony, on motion, an order of non-suit was entered and the cause is here for review on error.

Section 3117, supra, upon which the plaintiff chiefly relies, reads as follows:

> "* * * They [the incorporators] shall file a copy of the articles of incorporation with the commissioner of insurance, who shall submit the same to the Attorney General for examination; and if found by him to be in accordance with the provisions of this act, and not inconsistent with the constitution of this State, he shall certify and deliver back the same to the commissioner, who shall commission the persons named in the certificate of incorporation, or a majority of them, to open books for the subscription of stock in the company, at such time and place as they shall deem it convenient and proper, and shall keep the same open until the full amount specified in the certificate of incorporation is subscribed.
>
> "Whenever such capital stock has been subscribed and not less than the amount required by this Act shall have been fully paid in, and deposited with the commissioner of insurance, as required by this act, they shall notify the commissioner, who shall cause an examination to be made, either by himself or some disinterested person, especially appointed by him for the purpose, who shall certify under oath that the provisions of this Act have been complied with by said company, as far as applicable thereto. Such certificate shall be filed in the office of said commissioner, who shall thereupon deliver to such company a certified copy thereof, which shall be recorded in the office of the recorder of deeds of the county wherein the company is to be located, before the authority to commence business is granted."

Section 3112, R. S. 1908, provides that no life insurance company shall be permitted to be incorporated for business until a deposit of $100,000.00, either in cash, or in approved securities, is made with the State, as a guarantee fund to protect policy holders, and the business of the company.

[1, 2] Plaintiff contends that under section 3117, supra, the commissioners therein mentioned are trustees of an express trust, and their duties are to conserve the funds received from the sale of stock, to deposit the statutory amount with the Commissioner of Insurance, and that until the stock has been fully subscribed and the required amount of money so deposited, they are personally liable for the preservation and integrity of such fund.

A decision of the issues depends upon a construction of the sections of the statute referred to above. If these sections are wholly without import, then possibly the defendants may escape liability, but if, on the other hand, they are to be ascribed significance and meaning, then the defendants ought to be held to respond according to their express mandate.

These sections are distinct from the law governing the incorporation of other companies. They were enacted to safeguard the rights of those taking policies in such companies, and beneficiaries thereunder. The legislative idea manifestly was to prevent any company from lightly and prematurely assuming liability imposed by the issuance of policies of insurance. Under the statute no company may issue a policy until after all of its capital stock has been subscribed, a deposit of certain amount of funds made with the Insurance Commissioner, and upon certificate from that official attesting that these conditions have been complied with. The State Insurance Commissioner is required by law to designate the persons, or a majority of them, who are named in the certificate of incorporation, to assume the responsibility of securing stock subscriptions, of collecting the same, and of turning over such collections in amount to meet the demands of the statute, to the proper State official, before the company may undertake business. It is plain that during this embryonic period the affairs of the projected company are governed by these sections, and the duties and liabilities of those named for the preliminary work are determined and controlled thereby. These duties are positive and explicit, and unless the statute be applied and enforced those named as commissioners are without restraint, regulation, or direction whatsoever, and may make such disposition of the stock and assets of the company as meets their pleasure or whim. The legislature could never have intended or contemplated such a situation. The statute is a child of experience, and is calculated to abate, or at least minimize, evils which have arisen in the past in the organization and conduct of insurance companies. Unless it can be construed to accomplish such end, it is impotent for any purpose, and the legislature which achieved it has produced a worse than useless thing. The commissioners under the statute were to get the entire capital stock of the company subscribed, and to collect thereon and pay over to the Commissioner of Insurance at least $100,000.00. Their responsibilities ceased only when these duties were performed. The fund to be raised was for a specific purpose, and could not lawfully be diverted. Neither was the organization itself complete, nor could it lawfully do business, until the commissioners had performed their duties in this connection.

The statute is special in character, was passed after the general act, and rules the organization of insurance companies, whereever repugnant to or in conflict with provisions relating to the incorporation of stock companies in general. This is fundamental. 36 Cyc. 1151. The principle is declared in this State in Purmort v. Tucker Lumber Co., 2 Colo. 470; Edwards v. D. & R. G. R. R. Co., 13 Colo. 59, 21 Pac. 1011.

The record shows that the defendants set out to perform some at least of their duties under the statute; offices were rented, books were opened and stock subscriptions were received and money collected thereon. An attempt was made to complete the organization of the company, under the general incorporation laws; meetings were held, the defendants in error were elected officers and directors, agents were employed to sell stock and substantially everything was done which might have been done had the organization of the company been complete, except the issuance of insurance. Later, some of the defendants who had been elected directors resigned, and other stockholders, who had not been designated as commissioners, were chosen to succeed them. Finally, after expending approximately $66,000.00 of the $76,000.00 received from stock subscriptions, the abortive company became defunct, never having obtained authority to do business. It is manifest that consideration for payments made for its stock has totally failed, and plaintiff now seeks a return of his money from those who set in motion, and are responsible for, the instrumentality through which he was induced to part with it.

It is well settled in England that, where a corporation has nominally organized only, as in this case, and abandons or never attempts the business for which it was projected, the corporators and promoters are liable, on general principles, to those who purchased and paid for its stock. Johnson v. Gaslett, 3 C. B. (N. S.) 569, 3 Mewes Eng. Case Law Digest, 1162–1512; Nockles v. Crosby, 3 Barne & Cress, 814, 10 Eng. Com. Law Rep. 367; Chaplin v. Clarke, 4 Ex. 403; Walstab v. Spotswoode, 15 Mees. & W. (Ex.) 501; Green v. Barrett, 1 Sim. 45, 3 Mewes Eng. Case Law Dig. 1381. In 10 Cyc. at page 265, the principle is stated as follows:

> "A person who has paid money for shares in a company which never comes into existence, or who has paid money afterward to a scheme which is abandoned before it is carried into execution, has paid it on a consideration which has failed, and he therefore may recover it back in an action at law, as so much money had and received to his use, unless it can be shown that he has consented to or has acquiesced in the application of the money which those into whose hands it has come have made of it, and he may maintain a bill in equity for the same purpose. Where a person has paid money to the promotors of a projected corporation under an agreement that the shares shall be issued to him when the company is formed, he will be entitled to recover his money back from them unless the organization of the company is accomplished within a reasonable time."

In 7 R. C. L. 86, the rule is laid down generally that promotors or incorporators who receive payments of subscriptions to stock of a proposed corporation are personally liable for the return of the money paid, in case of failure to perfect the corporation.

In Miller v. Denman, 49 Wash. 217, 95 Pac. 67, 16 L. R. A. (N. S.) 348, a statute similar in principle to the one here involved was construed by the court. That statute provides for the formation of trust companies, and among other things it requires that those who are the incorporators shall be the first board of directors, and that prior to doing business the stock shall be fully subscribed and paid-up, and that thereafter a certificate of authority shall issue from the Secretary of State. In construing the statute, and discussing the duties and liabilities of the directors thereunder, the court said:

> "Chapter 176, p. 367, Laws 1903, is an act relating to trust companies. Section 2 provides for the execution of a certificate of organization by not less than seven persons mentioned in section 1. These persons, under section 5, constitute the first board of directors. Sections 1 and 3 provide that, before the corporation shall be authorized to transact business, the capital stock shall be fully paid and the Secretary of State shall issue to the company a certificate of authority. From these and other provisions it is evident that the organization would not be complete until all conditions precedent in the act required had been performed and the certificate of the Secretary of State had been issued. Necessarily subscriptions and payments of capital stock could only be solicited * * * by the original incorporators, * * * or by their duly authorized agents. They were authorized to receive money on subscriptions, but it was their duty to preserve the same as a trust fund to be used in perfecting the organization, or returned to the subscribers if the enterprise proved abortive. They stood in a position similar to that of the promotors of an ordinary corporation, and incurred at least as much liability. It was not necessary for the appellant to plead or prove that the respondents had been guilty of conspiracy or fraud, although he might properly do so. The respondents assumed certain trusts, duties, and liabilities by becoming the original incorporators and directors of the proposed company, the organization of which they intended to perfect in compliance with the trust company act. If they collected less than the original subscriptions on capital stock, and failed to return the same when the enterprise proved unsuccessful, for want of sufficient funds, they violated their trust, and became liable to the subscribers whether such failure resulted from their conspiracy, fraud, or negligence. If they permitted a portion of their number to divert the funds to an unauthorized purpose, they were guilty of such negligence and breach of trust as would compel them to respond to subscribers who might thereby suffer loss. It, therefore, is unnecessary to discuss * * * whether the appellant made a case of conspiracy or fraud."

After citing several of the English cases referred to above, and quoting from Johnson v. Goslett, supra, the court continues as follows:

"The case of Hudson v. West, 189 Pa. 491, 42 Atl. 190, is especially applicable to the facts before us, not only on the question of the liability of the original promotors or directors, but also as to the effect of an investment of subscription money claimed to have been made, with the alleged ratification and consent of subscribers. In that case the court said: 'This question seems to be of the simplest character. There was no pretense of any compliance on the part of the defendants with the terms of the contract. They received the plaintiff's money in consideration that they would form a company and give him stock therein to the amount of $10,000.00, and they did nothing of the kind. They certainly cannot keep the plaintiff's money in those circumstances. Their want of success in the formation of the company is no concern of the plaintiff, and it is no defense in this action.'"

The court then quotes section 162 from Alger on the Law of Promotors, as being in point, which reads thus:

"When a subscriber for shares in a projected corporation has paid money thereon in advance to the promotors, and the scheme proves abortive, he may recover back his money. This right rests on the failure of the consideration on which the money was paid. But the scheme is not to be deemed abortive until the formation of the corporation has been abandoned, or has become impracticable, or a reasonable time for the formation has elapsed. It is reasonable, in the absence of an agreement to the contrary, that the expense of exploiting the proposed undertaking should, in case it collapses, fall upon the original projectors, and not on those who advanced their money on the faith of the ability of the projectors to do that which they undertook to do."

In commenting upon the authorities this is said:

"We think the principles announced in the above authorities apply with especial force to the facts of this case, and that the defendants, as original directors occupying a position kindred to that of promotors, would be liable to the plaintiff for the return of his subscription, even though they have been guilty of neither fraud nor conspiracy. There was sufficient evidence of * * * breach of trust, and failure of duty to require the question of their liability to be submitted to the jury."

Under the statute defendants in error were charged with the specific and express duty of securing subscriptions to the entire capital stock of the company, and of depositing with the Insurance Commissioner $100,000.00, either in cash or approved securities, as a guarantee fund against company liabilities. That they resigned as directors could in no way alter or affect their duties or liabilities under the statute. They could not avoid these by resigning from the directorate of the company, nor could they, or any of them, be released except upon performance, or by consent of all the beneficiaries, or through appropriate proceedings in a court of equity. Beech on Trustees, §§ 488, 489; Dilliard v. Winn, 60 Ala. 285; Ross v. Barclay, 18 Pa. 179, 55 Am. Dec. 616. It is no defense that defendants, or some of them, were not acting as directors when plaintiff purchased his stock, or that they, as individuals, never received the money. Neither can they claim that they did not know or understand that they had been appointed as commissioners, with duties and liabilities such as are now claimed were imposed by the statute. As incorporators of the company they were bound to know the law, and their duty under it. It is not necessary, however, to resort to this principle to charge them with liability, as the record affirmatively shows that they fully understood what their duties were, and the effect of the statute. They adopted advertising matter in the nature of letters, to persuade prospective purchasers that their interests would be faithfully protected, and their money applied according to law, in which is set forth the purpose and intent of the statute as they construed it. These matters establish actual knowledge and complete comprehension on the part of the defendants of the entire situation. A part of one letter so used is as follows:

"In regard to the questions asked in your letter we wish to say that the company was incorporated May 13th, and the amount of business on the books is, of course, nothing at this time, the law requiring that no business can be written until our capital stock is fully paid up and deposited with the State. The stock which has been sold up to date aggregates a little more than $200,000.00 and the amount paid in is small, owing to the fact that the amount subscribed is to be paid on the monthly payment plan.

"You ask in regard to the amount of stock now for sale, and the treasury stock reserved, and the amount of stock given to original incorporators, officers, etc. In reply to this, would say that an Insurance Corporation is very unlike most any other corporation; the capital cannot be used for development purposes. No promotion or treasury stock can be held out. The entire capital stock must be paid for and invested in securities, prescribed by the statutes, and remain in the custody of the State, unimpaired. The statutes of this State require that the Superintendent of Insurance make an examination annually with an appraisement and valuation of the assets and liabilities of each Legal Reserve Life Insurance Company organized and operating under its laws. As a result, no such organization has failed since the creation (in 1873) of the legal reserve requirements."

A portion of another letter sent out by the vice-president and general manager reads as follows:

"* * * We have no hesitancy in asking you to put a small amount of money in stock of this character, for as far as the possibilities of loss are concerned, I would say they are eliminated entirely. After the company is formed the entire capital stock must be held by the State of Colorado in securities satisfactory to the Commissioner of Insurance, and until the entire capital is paid in, the money collected is held intact by the Central Saving Bank & Trust Company and will draw 3% interest while deposited and should such a thing occur that the Company would not be formed, the money you have paid will all be returned. If you wish more evidence along this line that what I say is true, you may make further inquiries by writing the Central National or Saving Bank as above referred to."

When these, and similar, communications were sent to prospective investors, none of the defendants had resigned as directors of the company. The written authority from the Commissioner of Insurance was accepted by the defendants, and they embodied an interpretation of the statute in their advertising literature, and set in motion machinery for extracting money from the public. In law they must be held to have undertaken the trust, charged with full knowledge of their duties and responsibilities thereunder, and it is too late now to change or modify the situation. Once having put their hands to the plow, the defendants may not voluntarily turn back, or abandon the enterprise, and thus escape liability.

Some of the defendants contend that they cannot be held because the company as such, and not the commissioners, received stock subscriptions, dissipated the funds, and did the other acts of which complaint is made. The records of the company show that the defendants were present when action was originally taken relative to stock subscriptions and as to other matters concerning which they were empowered to act, as commissioners under the statute. At one directors' meeting one of the defendants was elected president, one vice-president and general manager, one secretary and treasurer, one chief medical director and one general counsel. They were present at other meetings where money was paid out, salaries fixed, stock salesmen engaged, and stock selling arrangements perfected. It is contended that these, and similar acts, show, or tend to show, that the company and not the statutory commissioners took charge of the stock subscriptions, collected the money, and spent it in violation of the statute, but to us they appear conclusive of the fact that the defendants were cognizant of every act done, and that all that was done was with their advice, approval and assistance, and that but for their participation and sanction nothing whatever could have been done. Extracts from the company minute book show that the defendants merely employed the company as a convenient instrument with which to carry out their plan of organizing and perfecting it. That this is an effective way to complete such an organization is apparent; and had the defendants been mindful of their statutory duty, this method of performing it might well have been the best that could have been adopted. In law, however, the company was merely the agent of the commissioners; its acts, its knowledge, its contracts and the funds arising therefrom, were all theirs, and they are liable in law for the result of such agency. Indeed, under the facts of this case, the defendants ought not to be heard to question or deny liability. They were charged with the duty of collecting and conserving the fund in question, and if they permitted another to usurp their functions, and collect and dissipate such fund, they are as clearly liable as though they did the thing themselves.

[3] It is urged also that the complaint is defective in that the United States Postal Insurance Company is not joined as defendant. The company had, and has, no legal existence as an insurance company, and as we are now advised, is entitled to no consideration from any standpoint. It has no legal rights and no legal status, and is not asking to be made a party. The question here involved is one solely between purchasers of stock and these defendants. The attempt seems to be to use the projected company as a shield to aid defendants in escaping personal liability, and this should not be countenanced.

The record plainly discloses that the defendants were responsible for everything done in connection with the attempt to perfect the organization of the proposed insurance company, and while actual fraud is not charged or proven, it does appear that they were grossly negligent and utterly regardless of, and totally indifferent to, their duties and responsibilities under the law, as commissioners, and this of itself, without more, is sufficient to fix liability.

The intent of the statute is so clear that there is no room for a reasonable difference of opinion about it. It was intended thereby to guard against and make impossible the very thing which happened to this company. If those who were designated under the statute to administer its affairs, during the formative period, had properly performed their duties and functions, the calamity which overtook the company through a dissipation of its assets, could never have come upon it.

Judgment reversed, and cause remanded to the trial court for further proceedings in conformity with the views herein expressed.

TELLER, J., not participating.

BOARD OF COUNTY COM'RS OF ARAPAHOE COUNTY et al. v. UNION PAC. R. CO. et al. (No. 8677.)

(Supreme Court of Colorado. April 2, 1917. Rehearing Denied June 4, 1917.)

1. COUNTIES ⚿165, 192—TAXATION—SPECIAL LEVY—LEGALITY—RECOVERY—STATUTE.

Although Mills' Ann. St. 1912, § 1330 (Laws 1891, p. 111, § 2), provides that "neither the board of county commissioners nor any officer of the county shall add to the county expenditures in any one year anything over and above the amount provided for in the annual appropriation except as herein otherwise specially provided," etc., excess warrants issued in 1912–13 on funds created in 1911, after such funds had been exhausted, were not invalid, and plaintiffs could not recover a special tax of 1.7 mills paid under protest, levied by the board of county commissioners and included in its annual appropriation bill of 1913, for a special fund for liquidation, payment, and redemption of the same warrants, and all orders and claims in view of section 1321 (Laws 1893, p. 100, § 1), providing that it shall be the duty of the board of county commissioners of any county having unliquidated and unpaid warrants or orders drawn upon any fund, for the payment of which there are no funds in the county treasury, and to pay which the incoming taxes are already levied are insufficient at the same time other taxes are levied for the year, in addition to the other taxes provided by law, to levy a sufficient tax, etc., for the purpose of creating a special fund for payment and redemption of all such unliquidated and unpaid warrants and orders; the act of 1891 in so far as this case is concerned being directory.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 246–248, 300–302.]

2. Officers 🔑110—Directory Statutes.

Statutes prescribing the manner, form, and time within which public officers are required to discharge the public functions are regarded as directory unless there is something which shows a different intent.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 176–179, 182–184.]

3. Counties 🔑192—Taxation—Retroactive Laws—Prospective Construction.

Mills' Ann. St. 1912, § 1321 (Laws 1893, p. 100), authorizing board of county commissioners of counties which have, "or shall have, any unliquidated and unpaid county warrants," etc., to make a special levy, etc., applies to warrants issued after the date of its passage.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300–302.]

En Banc. Error to District Court, Arapahoe County; John A. Perry, Judge.

Action by the Union Pacific Railroad Company and others against the Board of County Commissioners of Arapahoe County and another. From a judgment for plaintiffs, defendants bring error. Reversed.

Walter M. Morgan and Thomas E. Watters, both of Denver, for plaintiffs in error. C. C. Dorsey, E. I. Thayer, and William B. King, all of Denver, for defendant in error Union Pac. R. Co. E. E. Whitted, of Denver, for defendant in error Colorado & S. Ry. Co. E. N. Clark, of Denver, for defendant in error Denver & Rio Grande R. Co. H. T. Rogers, of Denver, for defendant in error Atchison, T. & S. F. Ry. Co.

ALLEN, J. During the last quarter of 1913, the board of county commissioners of Arapahoe county included in its annual appropriation bill and among its several levies the following:

> "For 'Special Fund' for liquidation, payment and redemption of all registered warrants, and all orders and claims against all funds prior to the fiscal year 1913, 1.7 mills on each dollar of assessed valuation, $27,710.00."

This special levy was made for the purpose of paying certain excess warrants which were issued in 1912 and January, 1913, upon certain funds created in 1911 for the fiscal year 1912, and which excess warrants were registered after the respective funds upon which they were drawn had become exhausted. Taxes were collected under this special levy, and by the plaintiffs below were paid under protest. This action was brought by the plaintiffs below, four several railroad companies, as taxpayers in their own behalf and in behalf of other taxpayers similarly situated, against Arapahoe county and its treasurer. The chief purposes of the action were: (1) To prevent the disbursement of the money paid by the plaintiffs under such special levy; (2) to have the said special levy and the alleged excess warrants declared null and void; and (3) to obtain judgment for repayment of taxes paid under said levy. The trial court denied the injunctive relief sought, but held the special levy and the appropriation of the fund raised thereby invalid, and ordered the return to plaintiffs of the taxes they had paid under said special levy.

According to the findings of fact of the trial court, it was shown upon the trial of this cause that the alleged excess warrants were issued in good faith, in proper amounts respectively, in payment for materials furnished and necessary to be furnished and for labor and service done and performed and necessary to be done and performed for the county. The court further found that, in the case of the roads and bridges fund, the expenditures or issuance of excess warrants was due to the great and unusual and practically unprecedented floods of the year 1912 which could not have been anticipated, and, in the case of other funds, the difference between the amount appropriated and the amount of the warrants was due to errors of judgment upon the part of the county board and to its inability to anticipate the exact amounts which would be necessary to accomplish the purpose for which such funds were created by the appropriation made in 1911.

The special levy in question was, or could have been, made pursuant to chapter 54 of the Session Laws of 1893, particularly section 1 thereof; the same being section 1321, Mills' Ann Sts. 1912, and section 1375, R. S. 1908, reading as follows:

> "It shall be the duty of the board of county commissioners of any county of this state which has, or shall have any unliquidated and unpaid county warrants or orders, drawn on any fund, for the payments of which there are no funds in the county treasury of such county, and to pay which the incoming taxes already levied are insufficient, at the same time other county taxes are annually levied for the current year, in addition to the other taxes provided by law, to levy a sufficient tax, not exceeding five mills on the dollar of assessed property, as shown by the assessment roll of such county of the current year, for the purpose of creating a 'Special Fund' for the liquidation, payment and redemption of all such unliquidated and unpaid warrants or orders. A like levy shall be so made at such time, annually, until all of such unliquidated and unpaid warrants or orders shall be fully liquidated, paid and redeemed, principal and interest, as provided in this act."

[1] Counsel for defendants in error, plaintiffs below, insist that the excess warrants in question, issued after the funds on which they were respectively drawn had been exhausted, are invalid because of the provisions of section 2 of the Act of 1891 (Laws 1891, p.

111), being section 1330, Mills' Ann. Sts. 1912 (section 1216, R. S. 1908), as follows:

> "Neither the board of county commissioners, nor any officer of the county shall add to the county expenditures in any one year anything over, and above the amount provided for in the annual appropriation resolution of that year except as is herein otherwise specially provided. And no expenditure for improvements to be paid for out of any fund of the county shall exceed in any one year the amount provided for such improvements or purpose in the annual appropriation resolution; provided, however, that nothing herein contained shall prevent the board of county commissioners from ordering any improvement, the necessity of which is caused by any casualty or unforeseen contingency happening after such annual appropriation is made, if there shall be money in the county treasury belonging to the proper fund out of which payment for such improvement can be made."

[2] Statutes prescribing the manner, form, and time within which public officers are required to discharge the public functions are regarded as directory, unless there is something in the statute which shows a different intent. People v. Earl, 42 Colo. 238, 248, 94 Pac. 294. Where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, the provision may generally be regarded as directory. 36 Cyc. 1158.

The purpose of the act of 1891, hereinbefore quoted, may be as was stated in Beshoar v. Las Animas County, 7 Colo. App. 444, 448, 43 Pac. 912, to compel antecedent determination of the exact amount which should be used for the general purposes of the county as well as the sums which might be applied to other purposes, and to compel the county commissioners to consider and decide with great care the levy which should be made and the objects to which the moneys might be realized from it should be put. But the fact also remains, as was stated by this court in Bent County v. Santa Fé Ry. Co., 52 Colo. 609, 617, 125 Pac. 528, 530, as follows:

> "However desirable it may be that the affairs of the several counties be conducted on a cash basis, from the revenues derived each year from taxation, it is a matter of common knowledge that to do so is practically impossible, and the General Assembly has frequently recognized the fact and made provision therefor."

One of such provisions which may reasonably be deemed to be referred to in the above quotation from the Bent County Case is the act of 1893, hereinbefore quoted, and under which the special levy in question might have been made. If the act of 1891 were at all times strictly complied with, it is very likely that no occasion would ever arise for acting under the provision of the act of 1893 quoted. The act of 1893 was evidently enacted because it is practically impossible to comply strictly with the requirements of the act of 1891 in all counties at all times. Therefore section 2 of the act of 1891, hereinbefore quoted, so far as the same applies to such expenditures as are represented by the excess warrants in this case, should be held directory, in view of the foregoing circumstances and in view of the further fact that nowhere in the act of 1891 is it provided that warrants issued or indebtedness incurred in violation of the provisions of section 2 thereof shall be void or the county absolved from all liability thereon. This court has intimated, in the case of La Plata County v. Hampson, 24 Colo. 127, 132, 48 Pac. 1101, 1103, that such warrants and indebtedness may be binding upon the county. In that case, the defense of the county in a suit upon claims was that the appropriation available for the year had been exhausted prior to the presentation of the claims. The court said:

> "If the defense of the county was good at the time presented, it would, nevertheless, have been the duty of the county authorities to have made provision for these claims at the earliest possible moment, when they could legally have made an appropriation therefor, to wit, at the time of making the next annual appropriation."

[3] Defendants in error contend that the act of 1893 was intended only to provide for a special levy for the redemption of warrants theretofore issued and excess warrants outstanding at the time of the passage of the act. But, as was said in the Bent County Case, "the act contains expressions that might include indebtedness subsequently incurred." The act provides that a special levy shall be made in those counties that have, "or shall have, any unliquidated and unpaid county warrants or orders drawn on any fund," etc. This clearly shows that the act was intended to cover and provide for warrants that might be issued after the date of the passage of the act as well as warrants theretofore issued.

The act of 1891 had been tried and tested. It had become a matter of common knowledge that to place and keep the financial affairs of a county upon a cash basis in strict compliance with the statute of 1891 was practically impossible; that county officials in an effort to discharge all of their public duties pursuant to this and other provisions of the law enjoined upon them, on account of contingencies arising that were unforeseen and could not be anticipated at the time of making and providing the annual appropriations, had been obliged from time to time to incur necessary indebtedness in excess of the appropriations and issue warrants therefor; that many such warrants in some counties were outstanding after the exhaustion of the funds on which they were drawn; and that evidently more under like circumstances would be issued in the future, and if not redeemed would tend to leave bona fide claims unpaid and also tend to impair the financial credit of the county.

The Legislature evidently recognized this situation, and as a matter of public policy passed the statute of 1893, hereinbefore quoted, intending thereby to afford relief and to allow the county board to make a special levy for the purpose of creating a fund to redeem all such outstanding warrants, whether such had been, or in the future would be, issued under like circumstances. The wording of the act, as hereinbefore pointed out, sustains this view of the meaning and the purpose of the statute.

The special levy and the taxes collected thereunder were valid, and it therefore follows that the trial court was right in refusing the injunction prayed for by plaintiffs below, but was in error in rendering judgment for the plaintiffs for the repayment of the taxes paid under the special levy. The judgment is reversed, the cause remanded, and the court directed to dismiss the complaint.

Reversed.

WHITE, C. J. (specially concurring). I agree that the judgment should be reversed, but not upon the grounds stated in Mr. Justice ALLEN'S opinion. In fact, I dissent from the construction placed upon the statutes therein discussed, and think he has erred in stating the facts of the case.

The undisputed record is that the warrants issued in 1912 and January, 1913, for the payment of which the special levy in question was made, were issued after the fund upon which they were drawn was entirely exhausted, and were not issued "upon certain funds created in 1911 for the fiscal year 1912." Moreover, the entire taxes to create such fund had been collected and paid out prior to the issue of such warrants or the contracting of the indebtedness for the payment of which they were issued. The act of 1891 (sections 1215, 1216, and 1217, R. S. 1908) prohibits adding to the county expenditure in any one year anything above the annual appropriation therefor, except that the board of county commissioners are permitted to order "any improvement, the necessity of which is caused by any casualty or unforeseen contingency happening after such annual appropriation is made, if there shall be money in the county treasury belonging to the proper fund out of which payment for such improvement can be made." Section 1216, supra, declares that no contract shall be made by the board of county commissioners and no liability against the county created by any officer of the county, whether the object of the expenditure shall have been ordered by the board of county commissioners or not, unless an appropriation shall have been previously made concerning such expense, and makes every officer of the county "who shall undertake to create any liability against the county, except such as he is by statute required to do," personally liable upon his official bond for such indebtedness. Section 1364, R. S. 1908, provides that, when the county commissioners shall deem it necessary to create an indebtedness for making or repairing public roads or bridges, they may upon 30 days' notice submit the question to a vote at a general election, and that upon authorization by the people the commissioners "shall be authorized to contract the debt in the name of the county."

Having in mind these express statutory provisions governing the subject, I am unable to understand how it can be held that county commissioners have authority to do that which they are therein expressly prohibited from doing. Bent County v. A., T. & S. F. Ry. Co., 52 Colo. 609, 125 Pac. 528, quoted from in the majority opinion, has no application to the facts of this case. In that case it was stipulated:

> "That the contract for the repairs was made on the 30th day of August, 1904; that on said date 'there was in the proper fund sufficient money to pay for the construction of said bridge'; that the fund so on hand was afterwards consumed in the necessary repairs of other bridges and roads before warrants could be issued for the contract in question."

And it was held that the particular contract was valid, and:

> "If any contracts for road and bridge work, or claims allowed against such fund, were illegal, they were contracts made and claims allowed subsequent to the making of the contract in question."

In the case at bar there was neither a fund, nor a tax levy to create a fund, when the work was ordered or when the warrants were issued. Therefore the indebtedness attempted to be created was not a liability against the county, but by statute (section 1217, supra) was a personal liability of the public officials who attempted to create it. There being no valid indebtedness against the county for this work, the warrants issued therefor were equally invalid.

Section 1 of the act of 1893 (section 1375, R. S. 1908) has no application to the facts of this case. The act makes it the duty of the board of county commissioners of any county which "has, or shall have, any unliquidated and unpaid county warrants or orders, drawn on any fund, for the payments of which there are no funds in the county treasury of such county, and to pay which the incoming taxes already levied are insufficient," to make a special levy or levies from time to time to pay the same. Clearly "unliquidated and unpaid county warrants or orders," as therein used, have reference to legal obligations, and none other. A county official may not deliberately order work done, and create an indebtedness therefor, and thereafter impose upon the public payment of the same, in face of the law expressly prohibiting such acts, and making him and his bondsmen personally liable for such indebtedness.

But, apart from this, the judgment should be reversed. The object of the proceeding was to enjoin the county treasurer "from paying the warrants in question or disbursing any of the moneys created by the special levy of 1.7 mills; that the excess warrants of $22,210.69 be declared null and void; that, as an incident to the injunctive relief asked, judgment be entered against the county of Arapahoe and the county treasurer for the taxes paid by the plaintiffs respectively by reason of the alleged illegal levy," with interest, etc. There were many such warrants, person offering to vote shall be found on said certified registry list"—registration is a condition precedent to holding an annual town election and, as there was no such registration, due to an entire omission of duty by officers, the election was void, and defendants were not entitled to the office of trustees of the town of Hudson.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 111.]

3. Elections ⚷285(3) — Contests — Pleadings—Failure of Registration.

In a contest suit, allegation that the board of registration failed to sit fairly implied that there had been no registration of the voters prior to the election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 269, 274.]

En Banc. Error to Weld County Court; Fred W. Stover, Judge.

Contest proceedings by Charles Kugel and others against A. A. Fish and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Charles F. Tew and Walter E. Bliss, both of Greeley, for plaintiffs in error. F. J. Green and Mann & Mann, all of Greeley, for defendants in error.

WHITE, C. J. This controversy is over the right to the offices of trustees of the town of Hudson and involves the question of the validity of an alleged annual election for officers of such town. At the election plaintiffs in error and defendants in error were opposing candidates, and the former were declared elected. Thereupon defendants in error instituted contest proceedings which resulted in a judgment in their favor, and the opposing parties prosecute this writ of error. The judgment was based upon the finding that certain designated votes cast for plaintiffs in error were illegal. It was alleged by contestees, and admitted by contestors, that there was no registration of the electors for this election, and the evidence clearly established that there was none. Contestees were their own successors, having been elected at a previous election. They sought to exclude as evidence each and every ballot cast at the election in question upon the ground that they were illegal, not having been cast by registered electors. They were unsuccessful in this regard, the court holding that registration was not essential to a valid election for town officers. Plaintiffs in error rely solely upon the alleged invalidity of the election, coupled with their right to hold over as incumbents of the offices.

[1] It is well settled that where the law requires registration of voters preceding an election, and provides that no one shall be permitted to vote unless he is registered, and no registration is had, the election, where the omission occurs, is of no force and effect, and no one may claim the right to an office as a result thereof. State v. Hilmantel, 21 Wis. 566; State ex rel. v. Stumpf, 23 Wis. 630; State ex rel. v. Frazier, 98 Mo. 426, 11 S. W. 973; Nefzger v. Davenport, etc., R. Co., 36 Iowa, 642; People v. Kopplekom, 16 Mich. 342; 15 Cyc. 302.

[2] The law of this state provides that elections in towns shall be held on the first Tuesday in April at places in each ward or precinct designated by its board of trustees; or, if there be no wards or precincts, then at some place so designated therefor in such town. Section 6622, R. S. 1908. The section also requires that the board of trustees "shall appoint the judges of election," and makes provision for the holding of a special election if for any reason officers have not been elected at the time and in the manner provided by law. It further provides that:

> "All elections for municipal officers shall in all respects be held and conducted in the manner prescribed by law in case of county elections."

And section 2249, R. S. 1908, declares that:

> "No vote shall be received at any election unless the name of the person offering to vote shall be found on the said certified registry list."

The Constitution declares that all elections shall be free and open, and commands the General Assembly to pass laws to secure the purity of elections and guard against abuses of the elective franchise. Article 2, § 5; article 7, § 11. To the end that elections be free and open, and to discharge the duty imposed by the Constitution, the Legislature enacted the aforesaid statutes. They provide for the organization of boards of registration, and require the registration of electors, and forbid the reception of votes at any election unless the name of the person offering to vote is found on the certified registry list.

We are of the opinion that the law required the registration of voters as a condition precedent to holding an annual town election, and, as there was no such registration, the purported election was a nullity. 6 Amer. & Eng. Ency. of Law (1st Ed.) 290. We are dealing here with an entire omission by the officers to perform their duties, not with an imperfect performance thereof. As said in State ex rel. v. Frazier, supra:

> "We are not now dealing with a mere irregularity in the workings of a registration law. There was, in this case, a total failure to comply with a law making the registration of voters an essential preliminary to an election. The effect of such failure is no longer an open question. * * * This court has expressly declared that it entirely invalidates the election"—citing authorities.

But are the electors to be deprived of their right to vote when the registration board failed to meet and thus furnished no opportunity to register? We answer the question in the affirmative. People v. District Court, 33 Colo. 14, 20, 84 Pac. 694. A law does not become unconstitutional simply because its officers neglect their duty in its administration. Such officers may be compelled by law to act in the premises. Moreover, the statutes here under consideration expressly provide for a special election, if for any reason officers have not been elected at the time, and in the manner provided by law. In People v. Kopplekom, supra, there was no opportunity of registration, and the point was raised whether votes cast by unregistered persons should be counted. It was admitted that acts requiring registration of voters were valid, but contended that those otherwise qualified could not be deprived of their right to vote simply because they were unregistered when the officers designated to conduct the registration failed for any cause to do so. In disposing of the question, it is said:

> "It is not to be disguised that this reasoning has considerable strength, but it has failed, however, to satisfy us. The statute in question is grounded upon the same article of the Constitution which gives the right to vote, and its object, as expressly declared in the title, is 'further to preserve the purity of elections, and guard against the abuses of the elective franchise, by a registration of electors.' In accordance with this declared object, the act proceeds to provide for the organization of boards of registration, and to require the electors to register, and expressly forbids all voting by persons not registered. The administration of the statute is confided to the local officers elected by the people themselves, for the discharge of other municipal duties, and who may be compelled by law to act. It contemplates general obedience and continuous administration, and nowhere, in terms, makes any provision for its own nullification, either through violence, or the negligent or willful failure of officers to organize or preserve boards. It does not speak the language of a mere offer, or proposition to the electors, to register or not, but utters the language of law; unconditional, absolute, imperative; and declares that all who do not register shall not vote. If the Legislature had expressly declared that no one should be deprived of his vote for not registering whenever the means of registration should be unprovided, the statute must have been regarded as equivalent to a legislative proposition to the electors to register or not, as they should see fit; and the introduction of the same idea, by construction, would produce the same result."

In Perry v. Whitaker, 71 N. C. 475, where no registration books at all were opened, the registration books of a prior election were used, thereby depriving many citizens of the right to vote, because they were not registered, the election was declared void. Zeller v. Chapman, 54 Mo. 502, recognizes the same rule holding that if registration officers refuse to act, or fail to perform the duties imposed upon them, the election is void.

[3] Defendants in error make a point as to whether the language of the pleadings constitutes an allegation and admission that no registration for such election was had in the town, claiming that the language of the allegation was only that the board of election judges refused to sit, etc., while the admission was "that no one was registered," etc. We think this is too technical for consideration, and that the fair import of the language used is that there had been no registration of the voters prior to the election. But, apart from this, the evidence discloses, and the record conclusively shows, that there was no registration of voters, and the real contention in the case was whether a registration was essential to a valid election. As the right of defendants in error to these offices rested solely on an election which was invalid, the court could not lawfully adjudge them entitled thereto; and, as plaintiffs in error were entitled to hold over by virtue of a previous election, they should not have been disturbed in their possession of the offices until their successors were elected and qualified.

The judgment is therefore reversed, and the case remanded for proceedings not inconsistent with the views herein expressed.

HUSTON v. OHIO & COLORADO SMELTING & REFINING CO. (No. 8806.)

(Supreme Court of Colorado. April 2, 1917. Rehearing Denied June 4, 1917.)

1. Assignments 🔑80—Right of Action—Fraud.

Assignment from wife's executor to plaintiff of stock purchased by her and taken by plaintiff in lieu of wife's cash bequest *held* not to transfer any right of action against the corporation for fraud in the sale of stock.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 147.]

2. Assignments 🔑80 — Sale of Stock — Right of Action—Fraud.

The sale of stock does not transfer a right of action for damages caused by false representations made to the vendor by the person from whom he purchased.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 147.]

3. Assignments 🔑131 — Action by Assignee of Stock — Sufficiency of Complaint.

Complaint charging fraud in sale of stock *held* insufficient to show assignment of cause of action to complainant.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 220-226.]

4. Assignments 🔑80—Fraudulent Sale of Stock — Representations Made to Plaintiff's Wife.

Plaintiff had no right of action for misrepresentations made to himself and wife inducing his wife to purchase stock, upon the ground that he elected to take the stock in lieu of wife's cash bequest, relying on such representations.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 147.]

5. Fraud 🔑24—Misrepresentation—Proximate Cause.

A misrepresentation is not actionable unless it is a proximate and immediate cause of the transaction.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8.]

6. Pleading 🔑236(1) — Allowance of Amendment—Discretion of Court.

Where plaintiff had twice amended his complaint and had apparently pleaded fully the facts relied on, there was no abuse of discretion in refusing a further amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601.]

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by Charles C. Huston against the Ohio & Colorado Smelting & Refining Company. Demurrer to amended complaint sustained, and plaintiff brings error. Affirmed.

John T. Bottom, of Denver, and Frederick P. Smith, of Helena, Mont., for plaintiff in error. Yeaman & Gove and Kenaz Huffman, all of Denver, for defendant in error.

ALLEN, J. Charles C. Huston, plaintiff below, sought to recover of the defendant company money which had been paid by one Martha D. Huston during her lifetime to the defendant for shares of its capital stock. A demurrer to the amended complaint was sustained by the trial court, and this is the principal alleged error to be considered.

The amended complaint alleged, among other things, in substance the following: That Martha D. Huston purchased the shares from defendant at times prior to June 13, 1903, and was induced to purchase same by means of certain misrepresentations of the defendant and its agents communicated to the plaintiff, who, relying upon and believing defendant's representations to be true, communicated them to his wife, the said Martha D. Huston; that Martha D. Huston died domiciled in the state of Ohio in January, 1904, disposing of all of her property by will and bequeathing much of the same to the plaintiff, her husband; that the plaintiff, in lieu of $10,000 in cash bequeathed to him, elected to receive and did receive the said stock of the defendant company, while still, and because, relying upon the said false representations of the defendant; "that under and by virtue of an assignment of the certificates of shares held by Martha D. Huston, deceased, made to him by Henry L. Rich, as executor of the last will and testament of Martha D. Huston, deceased, the plaintiff succeeded to any and every right, or authority, in law or equity, to recover from defendant company * * * any damages that might have resulted because of any fraud or deceit in and about the sale of said shares of stock to Martha D. Huston."

[1] The most important question raised by the demurrer is: Was the cause of action, if any, possessed by Martha D. Huston against the defendant assigned to the plaintiff?

The amended complaint also alleges that the fraud, deceit, and misrepresentations of the defendant were not known to or discovered by the plaintiff at any time prior to the year 1911, which was about seven years after the death of the said Martha D. Huston. Neither the plaintiff nor the executor therefore at the time the stock was assigned to the plaintiff by the executor knew of any cause of action existing or having accrued against the defendant.

Under these circumstances, unless it otherwise appears from the assignment, it is reasonable to conclude that the assignor did not intend to transfer to the assignee any cause of action against the company as incident to the assignment of the stock. From the allegations of the complaint, apart from mere conclusions, it does not appear that anything more was expressly assigned than the stock itself. As to what passes with an assignment, the following is stated in Corpus Juris:

> "The cardinal rule to be applied is to ascertain the intention of the parties as to what interests, rights, or property they intended to pass under the assignment, and to carry out such intention as nearly as may be done without violence to the language used by them." 5 C. J. 949.

From the allegations of the complaint it appears that the plaintiff merely received an assignment of the stock. No more can pass with an assignment of stock under the circumstances of this case than that passing with the sale of stock under ordinary circumstances.

[2] "A sale of stock does not transfer a right of action for damages caused by false representations made to the vendor by the party from whom the vendor purchased." 1 Cook on Corp. (6th Ed.) § 355.

In the case of Kenedy v. Benson (C. C.) 54 Fed. 836, a receiver sold property of a cattle company to defendants and took in payment certain shares of stock. He kept the stock and settled with the company for cash. Afterwards he individually brought suit against the defendants for damages for fraudulent representations made at the time of the sale as to the value of the stock. The court held that the defendants transferred the stock to the cattle company, and the right of action, if any existed, belonged to the cattle company, and further stated:

> "The right to an action for the recovery of damages having thus vested in that company, it would not pass to any third person to whom the company might sell or assign the stocks in question as a mere incident thereto."

[3] It can be said of the complaint in the instant case as was said of the complaint in that case, that:

> "There are no facts averred which show a transfer or assignment of the right to claim damages from the defendants by reason of the alleged false statements in regard to the value of the stock."

The right of action growing out of fraud is usually a personal right to the extent that it does not pass with an assignment of the thing to which the right relates. Worsham v. Brown, 4 Ga. 284; Mullinax v. Lowry, 140 Mo. App. 42, 124 S. W. 572; Steele v. Brazier, 139 Mo. App. 319, 123 S. W. 477; Fox v. Hirschfeld, 157 App. Div. 364, 142 N. Y. Supp. 261; 5 Corpus Juris, 952, note 22 (e).

In accord with the foregoing rule is the case of Norris v. Colo. Turkey Honestone Co., 22 Colo. 162, 43 Pac. 1024.

The demurrer was properly sustained upon the ground that it does not appear that there was any assignment of the cause of action to the plaintiff. It is not necessary, therefore, to pass upon the question of the assignability of the cause of action either under the laws of Ohio or of Colorado.

[4] The plaintiff also attempts to state a cause of action independent of that which might have accrued to Martha D. Huston or her legal representatives, upon the ground that he elected to take the stock in lieu of the cash bequeathed to him under the will because he believed in the alleged false representations of the defendant. But these alleged false representations were made, if at all, long prior to the time plaintiff made his election, and were made, as he says, to induce him and his wife to purchase additional shares. They were not made with the purpose or intention of influencing plaintiff to accept an assignment of the shares in the manner pleaded, and plaintiff cannot base an independent cause of action upon such alleged misrepresentations.

[5] In Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202, and Wheeler v. Dunn, 13 Colo. 428, 437, 22 Pac. 827, this court, quoting from Kerr on Fraud and Mistake, thus states the rule:

> "A misrepresentation goes for nothing unless it is a proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place."

We think our conclusion is also borne out by 2 Cooley on Torts (3d Ed.) 940.

[6] It appears from the record that the parties below stipulated that the motion to strike interposed to the first complaint should be treated as a demurrer. Thereupon the court sustained the demurrer, and plaintiff by leave of court filed an amended complaint. This was further amended by filing a supplemental complaint. Plaintiff having twice exercised the privilege of amending, and apparently pleading fully the facts relied on, there was no error or abuse of the court's discretion in refusing plaintiff the right to amend further. The right to amend further was discretionary with the court. King v. Mecklenburg, 17 Colo. App. 312, 315, 68 Pac. 984. Unless it appears that such discretion is abused, a court of review will not interfere. Anthony v. Slayden, 27 Colo. 144, 60 Pac. 826.

The judgment is affirmed.

Affirmed.

WHITE, C. J., and BAILEY, J., concur.

SOWERS v. PITCHER et al. (No. 8826.)

(Supreme Court of Colorado. March 5, 1917. Rehearing Denied June 4, 1917.)

MUNICIPAL CORPORATIONS 🔑125 — CLASSIFIED CIVIL SERVICE—CITY CHARTER.

Denver City Charter Amendment Feb. 14, 1913, § 292, making the classified service include "all offices, positions and employment" with certain exceptions, refers to the offices, etc., and not their incumbents, and does not automatically bring a person then holding office under the protection of the civil service law so as to prevent her discharge except in accordance with its terms.

En Banc. Error to District Court, City and County of Denver; Hon. Charles C. Butler, Judge.

Mandamus by Ella Sowers against Clair J. Pitcher, as Commissioner of Finance of the City and County of Denver and ex officio Treasurer of the City and County of Denver, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

William W. Grant, Jr., and Frank McLaughlin, both of Denver, for plaintiff in error. James A. Marsh and Jacob J. Lieberman, both of Denver, for defendants in error.

BAILEY, J. The question to be settled is whether plaintiff automatically was brought into the classified service of the City and County of Denver for the reason that, since 1909 she had continuously been employed in the office of the Treasurer and was so employed in February, 1913, when Section 292 of the Charter was amended, bringing that department within the civil service. Plaintiff in error, plaintiff below, was discharged from the service on August, 8, 1914, by defendant in error, defendant below, Commissioner of Finance and Ex-Officio Treasurer of the City and County. Plaintiff sued out an alternative writ of mandamus to compel payment of the remainder of her salary for August, 1914. Judgment was rendered for defendant and the case comes here for review on error.

It is agreed that unless plaintiff was brought within the classified service by the Charter amendment of February 14, 1913, Section 292, she is not entitled to the benefits of Section 304 of the Charter, governing the manner of discharge. It is also admitted that if she was not automatically placed under civil service by that Section, then she came into such service only by taking and passing an examination, and by working as a probationary appointee for the six months prior to her discharge, and that then defendant could, and did, exercise a lawful discretion in dismissing her at the expiration of the probationary period.

This case is ruled by Shinn v. People, 59 Colo. 509, 149 Pac. 623, where, in construing Section 10 of the civil service law of 1907, as amended by an initiated act in 1912 (Laws 1913, p. 682) to read as follows:

> "All appointive officers and employés in the civil service of the state and of all state institutions shall be included in the classified service * * *"

—the court said:

"The legislature deemed it necessary, in order to make Section 10, as originally enacted, apply to persons occupying positions then brought into the classified service, to thus provide: 'All persons occupying positions in the classified service when this act takes effect shall retain their positions until removed therefrom under its provisions.' This provision was omitted from the act of 1912, which is a clear legislative declaration that it was not the intent of the people, by the initiated act, to have it apply to persons * * * who had not qualified by taking the required examination. The omission of the paragraph negatives the contention of counsel for Shinn that by the provision in question he personally was placed in the classified service. The manifest intention of the people, in view of all the provisions of the civil service law was to make the provision of amended Section 10 apply to appointive offices and to the positions to be filled, rather than to persons. The scope of the application of this law is to be gathered from all of its provisions which must be considered together to correctly ascertain its meaning. It should be liberally construed to enforce its ostensible object, which is to promote the efficiency of the civil service by employing persons only who have shown, by proper examination, qualifications for positions therein, and not to put in, or keep in the service, persons who have not so qualified. Thus considered and thus construed, Shinn was never in the classified service. The application of the law extends only to those who have taken an examination, and thereby showed the necessary qualifications, and to those who should do so in the future."

Plaintiff invokes Section 292 of the Charter to demonstrate that, by its provisions, she automatically came within the scope of the civil service act. That section, so far as it bears on this controversy, is as follows:

> "The classified service, under this article, shall include all offices, positions and employments elected, appointed or serving under the authority in any way of the City and County, except the following: Each Commissioner and all his elective officers, and * * * the attorney and his professional assistants, all other heads of * * * departments * * * all Commissioners * * * provided the police and chief of the fire department, with their subordinates, shall not be classified as heads of departments, but shall be in the classified service."

In Shinn v. People, supra, it was held that Section 10 of the amended civil service law referred to the offices, and to the positions to be filled, rather than to the persons then occupying the offices. This conclusion is equally applicable to the like provision contained in Section 292 of the Charter. The scope of the application of the law is to be gathered from the act as a whole. It provides for examinations, as a preliminary to entering the classified service, and this applies to all seeking positions with the municipality under the act, whether already holding a place or not, since the act itself does not specifically provide that those already having employment with the city should hold over and be in the classified service. The intent to place the position, and not the individual filling it, at the time of the adoption of the Charter amendment, under civil service regulations, is more clearly apparent from the language of Section 292, supra, than it was from the section of the statute construed in Shinn v. People, supra. The precise situation is presented here, in principle, which was present in the Shinn Case and we conclude, upon that authority, that plaintiff was not automatically placed within the classified service by the passage of Section 292. That provision affected only the "offices, positions and employments" and not the then incumbents. Plaintiff came within the classified service only when she took and passed the civil service examination, and accepted employment thereunder, as a probationary appointee. Her subsequent discharge, within the six months' probationary period, was, by express charter provision, within the discretion of defendant, and was therefore lawful. The judgment of the lower court must be affirmed.

Judgment affirmed.

DENVER & R. G. R. CO. v. DA VELLA.
(No. 8556.)

(Supreme Court of Colorado. April 2, 1917. Rehearing Denied June 4, 1917.)

COMMERCE 🔑27(8)—INTERSTATE COMMERCE—RAILROAD EMPLOYÉS.

Where a section hand, when injured, was engaged in inspecting and repairing a railroad track used in interstate commerce, as well as in removing old rails from the side of the track, he was engaged in interstate commerce, whether or not the assumption was warranted that the old rails were taken from the track.

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by Oresta Da Vella, Royal Italian Consul, as administrator of Vincenzo Plasteno, against the Denver & Rio Grande Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. N. Clark and R. G. Lucas, both of Denver, for plaintiff in error. F. W. Sanborn and Geo. Allan Smith, both of Denver, for defendant in error.

GARRIGUES, J. Vincenzo Plasteno was accidentally killed while employed by plaintiff in error as a section hand on its railroad. He left, as his sole surviving heir, his mother, who was dependent upon him for support, and who at the time of the accident was a subject and resident of the kingdom of Italy. This action was instituted on her behalf by defendant in error as administrator of the estate of the deceased. The jury returned a verdict of $2,000 against the company, and it brings the case here on error.

The complaint alleges substantially that defendant, a railroad corporation, is a common carrier engaged in interstate commerce; that deceased was in its service as a section hand and track repairer, and while so employed on September 21, 1912, near the station of Chester, Colo., was so badly injured by one of the trains of defendant, through its carelessness and negligence, that he died the next day. It was stipulated on the trial that defendant was, at the time stated, a common carrier by railroad, engaged in interstate commerce on its line of railroad, and at the siding or station near Chester, where deceased was injured, and is subject to the provisions of the federal Employers' Liability Act.

On defendant's narrow gauge line between Salida and Grand Junction is a station or siding called Chester. Two miles west of this, at a point called Tank 7, is a section house, used as headquarters for two section crews, one working east and the other west. From Chester easterly there is a heavy upgrade to the top of Marshall Pass. Each section foreman had power to employ and discharge section hands, who worked under his direction and control. There is evidence showing that it was the duty of the foreman to go with the men each day over his section, inspect the track, keep it in repair for train service, and remove old ties and rails, and for this work he was furnished with a push car. It was the custom of the foreman to sit on the front end of this car, which the men pushed over the track, and in this way they inspected the track and roadbed, and, upon discovering anything out of repair, would stop and fix it. September 20, 1912, the foreman received orders from the roadmaster to gather up the old rails along the track on his section and put them on a car at Chester. The next morning the foreman, with three section hands, one of whom was the deceased, started out with the push car for the purpose of inspection and gathering old rails. When they reached Chester, they had picked up four rails, and, after placing these on a car, were intending to continue their work a mile and a half east of Chester, which would necessitate their pushing the car upgrade. About this time a heavy freight train, going east, came in, propelled by three engines, one of which was at the rear of and pushing the train. While this freight was standing on the main line, the foreman ordered his gang to fasten the push car by means of a rope to the knuckle of the drawhead on the tender of the rear engine, so that the train would pull them up the heavy grade. This was done, the foreman and the men, in obedience to his order, got on the push car, and in a few minutes the train pulled out. It appears that the freight had orders to pull in on a siding to allow a passenger train to pass. This apparently was unknown to the section men, who thought it was going to pull out, instead of which it simply went up past the switch and then began to back in on the siding. The men remained on the push car, which was in some manner derailed as the train was moving backwards, and deceased was run over by the tender and engine and fatally injured. There is no direct or positive evidence as to the immediate cause of the accident, other than this. The engineer on the rear engine testified that, when he received the order to back up and saw the men on the push car, he did not execute it until it had been repeated the third time. There was evidence that the side track was in bad condition; that it was constructed of rails of different weights, which made the track uneven; that many of the ties were rotten, and into some of them no spikes had been driven. There was also testimony to the effect that the wheels of the push car had from one to one and a quarter inches play, and that the car "had a habit of getting off the track."

1. Upon the question of negligence there was a fair conflict in the evidence, and we think the case should not be reversed on the ground that there was insufficient evidence to sustain the verdict.

2. A section hand, employed in looking after and repairing the track of a railroad company engaged in interstate commerce, while employed in such work, is an employé engaged in interstate commerce; and, it being stipulated that defendant was engaged in interstate commerce, the inquiry is: Was the work which deceased was doing at the time of his injury a part of the interstate commerce in which defendant was engaged?

It was an interstate track and roadbed, which defendant was obliged to keep in repair to move cars carrying interstate commerce. Deceased, at the time of his injury, was engaged in inspecting and repairing the track, as well as removing old rails, which were along the side of, and which we think it fair to assume were taken from, the track. But whether this is a warranted assumption or not makes no material difference in this case, because a part of the duties of deceased at the time, and in which he was engaged, was to inspect and repair the track. The following cases support the conclusions herein announced: Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; Pedersen v. Delaware Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; St. Louis Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; N. C. R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; N. Y. Cent. & H. R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298.

The judgment will be affirmed.

Affirmed.

WHITE, C. J., and SCOTT, J., concur.

STEWART v. NEWTON LUMBER & INVESTMENT CO. (No. 8864.)

(Supreme Court of Colorado. May 7, 1917.)

1. CONTRACTS ⟹333(5) — COMPLAINT — CONSTRUCTION.

In an amended complaint, alleging that plaintiff had given her note for a certain sum, secured by a deed of trust reciting that, in addition to certain real estate, it included a building to be erected thereon, "the money secured by this deed of trust being advanced for the purpose of being applied for the construction of such improvement," and that defendant had failed to advance a portion of the sum promised, for which portion plaintiff prayed judgment, the words quoted did not show that the money was to be paid direct for the erection of the building, but, when considered with a paragraph of the complaint, alleging that defendant agreed to release the deed of trust if plaintiff was not paid the sum promised on or before certain date, showed that the money was to be paid direct to plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1652, 1653.]

2. Pleading 🔑362(1)—Complaint—Motion to Strike.

Since such amended complaint as filed stated a cause of action, it was error to render the complaint defective by striking out the portion which alleged an agreement to release the deed of trust if plaintiff was not paid the specified sum on or before a certain day.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147, 1154, 1155.]

Error to District Court, Pueblo County; C. S. Essex, Judge.

Action by Elizabeth Stewart against the Newton Lumber & Investment Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. J. Galligan, of Pueblo, for plaintiff in error. Adams & Gast, of Pueblo, for defendant in error.

TELLER, J. The plaintiff in error, who was plaintiff below, alleges that the trial court erred in sustaining a demurrer to her amended complaint, as well as in striking out parts of it.

The complaint, as amended, alleges that on March 9, 1914, she executed and delivered to the defendant her promissory note for the sum of $6,000, with a deed of trust securing the same; that said deed of trust recited that in addition to the real estate described in it, it "included a two-story brick residence to be erected upon the above premises, the moneys secured by this deed of trust being advanced for the purpose of being applied to the construction of such improvement"; that all of said $6,000 was to be paid to plaintiff on or before May 1, 1914; "that she had received only $4,170 of said money, though she had often demanded that defendant pay her the balance of said sum; that there was due her a balance of $1,830 and $176 interest paid on an amount named in the note which she had never received. Plaintiff demands judgment for $2,006.

The sole ground of demurrer was that the complaint does not state a cause of action since it is said:

> It "shows on its face that the moneys in said complaint referred to were by the agreement of the parties hereto to be advanced for the purpose of being applied to the construction of a building on the lots in said amended complaint described, and contains no allegation that the defendant has refused to advance said moneys for said purpose, and contains no allegation that the plaintiff desires to use said moneys for said purpose."

If the complaint, after the granting of the motion to strike, was defective in the respect named, it yet remains to consider whether or not the portions stricken out supplied the alleged deficiencies.

[1] In that part of paragraph 2 which was stricken out it is alleged that the defendant promised and agreed to release the deed of trust in the event that plaintiff was not paid the sum of $6,000 on May 1, 1914—

> "the date upon which plaintiff should receive said amount, and the said entire amount of $6,000 would be paid plaintiff by said defendant on or before May 1, 1914."

It is then alleged that the delivery of the note and deed of trust was in consideration of defendant's said promises. That the entire sum was to be paid to plaintiff on May 1, 1914, is twice alleged later in said paragraph. To sustain the demurrer it is necessary to ignore these allegations and construe the recital in the deed of trust as giving the plaintiff a right simply to have $6,000 applied, through the defendant, on the construction of the residence mentioned as a part of the security. Such is not the fair import of the language of the complaint. A statement that the money was to be advanced for the purpose named does not necessarily mean that the defendant was to pay it out; and, in the face of the positive allegation that it was to be paid to plaintiff on a certain day, it cannot be said that the complaint fails to show a right to the funds.

[2] It thus appearing that the amended complaint as filed stated a cause of action, it follows that the court erred in striking out that part of the complaint which contained the allegations above mentioned. The effect of the court's order was to render the complaint defective, and so lead to a dismissal of the suit. The complaint sets out some transactions with the defendant which are closely connected with and somewhat explanatory of the giving of the note and deed of trust, and it is highly probable that some of these facts may have an important bearing on the rights of the parties to this litigation. The defendant should be required to answer, and the case be tried on its merits.

The judgment is reversed, and the cause remanded for further proceedings in harmony with the views above expressed.

WHITE, C. J., and HILL, J., concur.

NORKETT v. MARTIN. (No. 8840.)

(Supreme Court of Colorado. May 7, 1917.)

Physicians and Surgeons 🔑18(8)—Care and Skill Required—Proof of Standard.

The jury must be guided by expert testimony in determining whether a physician exercised such care and skill as his employment required; and unless a standard is established by testimony of physicians they have no standard, and the case for malpractice must fail.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 43.]

Error to District Court, Denver County; Charles C. Butler, Judge.

Action by Margaret L. Norkett, an infant, by next friend, Alice Norkett, against H. H. Martin. Judgment for defendant, and plaintiff brings error. Affirmed.

Frank McLaughlin and B. B. Laska, both of Denver, for plaintiff in error. William J. Miles, of Denver, for defendant in error.

TELLER, J. The plaintiff in error, a minor suing by her next friend, was plaintiff below in an action against defendant in error, a physician, to recover damages for alleged negligence in diagnosing and treating an ailment from which she was suffering. A verdict was returned for the defendant, and a judgment of dismissal entered thereon.

The only error alleged is in an instruction which reads as follows:

> "In considering whether the defendant, in his diagnosis, care and treatment of the plaintiff's injury or disease exercised ordinary care, you cannot set up a standard of your own, but must be guided in that regard solely by the testimony of the physicians, and if you are unable to determine from the testimony of the physicians what constituted ordinary care and skill under the circumstances of this case, there would be a failure of proof upon the only standard for your guidance, and the evidence would be insufficient to warrant any verdict for the plaintiff."

Counsel concede that this instruction is a copy of one which was approved in McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870, but insist that a difference in facts renders that case inapplicable. We cannot agree with that conclusion. The court there was considering, and discussed at some length, by what evidence a jury should be guided in determining whether or not a physician had exercised such care and skill as his employment required, and held that it was a question for experts. It also held that "if no standard was established by the testimony of physicians, then the jury had no standard." This case is clearly within the rule thus laid down. The principle on which the rule is based was announced by the court in Jackson v. Burnham, 20 Colo. at page 536, 39 Pac. 577, and is supported by abundant authority.

The instruction was correct, and the judgment is affirmed.

WHITE, C. J., and HILL, J., concur.

WHEELER v. PEOPLE. (No. 8787.)

(Supreme Court of Colorado. May 7, 1917.)

1. Criminal Law 🔑1166½(7) — Appeal — Selection of Jury.
   Error in sustaining a challenge by the people to a juror in a criminal case is not ground for reversal, where it does not appear that the jury, as finally chosen, was not competent and impartial, or that defendant exhausted his peremptory challenges before the jury was secured.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3116.]

2. Criminal Law 🔑1152(2)—Discretionary Ruling—Qualifications of Juror.
   The trial court's determination as to a juror's qualifications will not be disturbed on appeal in a criminal case in the absence of an abuse of discretion.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3056.]

3. Perjury 🔑32(1) — Evidence — Amended Record.
   In a prosecution for perjury, it was not error to admit in evidence a duly amended record showing that the case wherein the perjury was committed was one for assault with intent to kill, though such record originally showed, through error, that murder was the offense charged.
   [Ed. Note.—For other cases, see Perjury, Cent. Dig. § 108.]

4. Courts 🔑116(1)—Records—Amendment.
   The court has inherent power to correct its own record to make it speak the truth.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 369.]

5. Courts 🔑117 — Records — Collateral Attack.
   A court's record is not subject to collateral attack.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 374.]

6. Perjury 🔑15—Nature of Offense.
   Perjury may be committed in the trial of a case the record of which contains error necessitating a reversal.
   [Ed. Note.—For other cases, see Perjury, Cent. Dig. § 62.]

7. Perjury 🔑11(2)—Materiality of Testimony.
   Perjured testimony, to be material, need not be directly to the main issue, but it is sufficient that it have a tendency to prove any material fact in the chain of evidence.
   [Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 39, 45–48½, 49½, 53, 54.]

8. Perjury 🔑11(2) —Materiality of Testimony.
   In a prosecution for assault with intent to murder, testimony as to whether the defendants were at the place where the alleged offense was committed at the time it was committed was material, and hence the giving of false testimony in respect thereto constituted perjury.
   [Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 39, 45–48½, 49½, 53, 54.]

9. Perjury 🔑29(4)—Pleading and Proof—Variance.
   In a prosecution for perjury, there was no fatal variance between an information, charging that defendant testified, "in substance and effect," that he did not know the defendants then on trial were among those who went with him in his wagon to the point near where an assault with intent to murder was committed, and the transcript of defendant's testimony, from which it appeared that he attempted to convey the impression that such defendants might or might not have been with him at that time, but that he was unable to state positively either way.
   [Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 101–106.]

10. Perjury 🔑31 — Administration of Oath—Presumption.
    In a prosecution for perjury, it will be presumed, in the absence of evidence to the contrary, that the oath was properly administered to defendant in the case wherein he is alleged to have committed the perjury.
    [Ed. Note.—For other cases, see Perjury, Cent. Dig. § 107.]

11. Perjury 🔑10—Administration of Oath—Waiver of Objection.

Where defendant on trial for perjury did not object to the form of the administration of the oath, at the time he gave the false testimony, he cannot claim that its administration was not in conformity with law.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 36, 37.]

12. Criminal Law 🔑829(1)—Refusal of Instructions Covered.

In a prosecution for perjury, the refusal of an instruction defining the words "willfully" and "corruptly" was not error, where instructions given sufficiently defined these terms for the purposes of the case, and under such instructions the jury, in finding a verdict of guilty, must have found that the testimony was willfully and corruptly given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

13. Perjury 🔑38—Findings.

A finding, in a prosecution for perjury, that defendant knowingly swore falsely necessarily implies a finding that he swore willfully and corruptly.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 139.]

14. Criminal Law 🔑823(6) — Refusal of Instruction Covered—Perjury.

In a prosecution for perjury, it was not error to refuse an instruction that defendant should be acquitted, if at the time of giving the alleged false testimony, through embarrassment, excitement, or fear, he was unable to recall the fact to which he was testifying, where the jury were instructed that false swearing under an honest belief that the statements are true is not perjury, that they were to determine from the evidence whether such honest belief existed, and that if defendant swore falsely without reasonable grounds to believe his statements true, he was guilty of perjury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158.]

15. Criminal Law 🔑1172(1)—Harmless Error—Submission of Issues.

In a perjury case, the submission to the jury of the question of the materiality of the alleged testimony did not require reversal, where such testimony was clearly material.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154.]

Error to District Court, Boulder County; Neil F. Graham, Judge.

Zell Wheeler was convicted of perjury, and brings error. Affirmed.

Oscar A. Johnson and Guy D. Duncan, both of Boulder, for plaintiff in error. Fred Farrar, Atty. Gen., and Ralph E. C. Kerwin, Asst. Atty. Gen., for the People.

BAILEY, J. Plaintiff in error was tried and convicted in the District Court of Boulder County of the crime of perjury because of certain testimony he had theretofore given in the trial of a criminal case in that court. Judgment was entered on a verdict of guilty, and the case now is here for review on error. Only a few of the numerous assignments of error have been urged.

[1, 2] It appears that one of the talesmen disclosed upon voir dire that he had been summoned as a special venireman, but had not served as a juryman, during the year previous to the trial of the plaintiff in error. He was challenged by the people, the challenge was resisted, and sustained by the court. This is the first assignment argued. It is neither shown nor alleged that the jury, as finally chosen, was not competent and impartial, or that the defendant exhausted his peremptory challenges before the jury was finally secured. Defendant was entitled to a trial by a competent jury, but not by any particular persons, even though those whom he preferred may have been competent. 24 Cyc. 324. As the court is the trier of the juror's qualifications, its decisions should not be disturbed, except upon abuse of a discretion thus exercised. Union Gold Mining Company v. Rocky Mt. Nat. Bank, 2 Colo. 566; Collins v. Burns, 16 Colo. 7, 26 Pac. 145; Babcock v. People, 13 Colo. 515, 22 Pac. 817.

[3-6] The case in which the alleged perjured testimony was given was one for assault with intent to murder. In the introduction to the clerk's record of the case it was made to appear that the defendants therein had been arraigned upon the charge of murder. The record itself, however, shows that in the information the defendants were charged with the offense of assault with intent to murder. At the beginning of the trial an attempt was made to correct this error nunc pro tunc, which, however, seems to have been abandoned. Shortly afterward, the judge who presided at the trial of the case in which the improper entry occurred made and entered in open court an order correcting the record. The record so amended was introduced in evidence in the case at bar, over the objection and exception of plaintiff in error, on the ground that he had a right to rely upon the record as it stood previous to correction. This position is untenable. The court has inherent power to correct its own record so as to make it speak the truth. Breene v. Booth, 3 Colo. App. 470, 33 Pac. 1007; Pleyte v. Pleyte, 15 Colo. 44, 24 Pac. 579. Neither is the record subject to collateral attack. Moreover, the state of the record in a previous case does not concern the plaintiff in error, as perjury may be committed even in a trial the records of which contain error of a character to necessitate a reversal.

[7, 8] Error is assigned because the court refused to direct a verdict of not guilty on the ground that the alleged perjured testimony was immaterial. Perjured testimony to be material need not be directly to the main issue; if it has a tendency to prove any material fact in the chain of evidence, that makes it material. If it be substantially material it is sufficient. 30 Cyc. 1419. The term "material matter" refers not only to the main fact which is the subject of inquiry, but also to any fact or circumstance which tends to corroborate or strengthen the

proof adduced to establish the main fact. Thompson v. People, 26 Colo. 496, 59 Pac. 51; In re Franklin County, 5 Ohio Dec. 691; People v. Greenwell, 5 Utah, 112, 13 Pac. 89. It was contended by the People that, on the morning of the assault, Wheeler was hired by the defendants and others to drive them from Erie to a point near Hecla Heights, in Boulder County, which he did, and that after they left his wagon they went to a straw stack and immediately began shooting at the Hecla mine property. To show that the defendants were at the place where the alleged offense was committed at the time it was committed was one of the material facts to be established. No other single fact in the chain of facts could well be more material.

[9] It is also urged that there is a fatal variance between the language used in the information in stating the alleged false testimony, and the proof in this behalf adduced at the trial. The information charges that the defendant testified "in substance and effect" that he did not know whether the defendants then on trial were among those who went with him in his wagon to a point near Hecla Heights on a certain morning in April, 1914. From the transcript of his evidence it is clear that he did substantially so testify. It is clearly manifest that he desired, and attempted, to convey the impression that the defendants might, or might not, have been with him at that time, but that he was unable to state positively either way. This proof corresponds in substance to the charge made in the information, and this is all that the law requires. 30 Cyc. 1442.

[10, 11] It is alleged that there was not sufficient evidence to show that the oath had been properly administered to the defendant, or that it had been given to him while he had his right hand raised. In the absence of any evidence to the contrary, it will be presumed that the oath was properly administered. Thompson v. People, supra. Besides, no objection was made at the time to the form of its administration; plaintiff in error took the oath, and testified under it, and cannot now claim that its administration was not in conformity with law. 30 Cyc. 1417.

[12, 13] The refusal to give a certain offered instruction, in which the words "wilfully," and "corruptly" were defined, was not error. Other instructions sufficiently defined these terms, so far as they are applicable to this case, and under these instructions the jury must have found the testimony to have been given wilfully and corruptly in order to have returned a verdict of guilty. Whether it was given wilfully and corruptly was a matter for the jury to determine, and if the jury found that the defendant knowingly swore falsely, the wilfulness and corruption is necessarily implied. 30 Cyc. 1457; Morgan v. State, 63 Miss. 162; Brown v. State, 57 Miss. 424.

[14] Error is urged upon the refusal to give another instruction, the substance of which was that if defendant, at the time he gave the alleged false testimony was, through embarrassment, excitement or fear, unable to recall the fact to which he was testifying, he should be acquitted. Instruction number 7, as given, in substance instructs the jury that false swearing under an honest belief that the statements are true, is not perjury; that they are to determine from the evidence whether such honest belief exists; that if he swore falsely without reasonable grounds to believe his statements true, he was guilty of perjury. This instruction covers the question, if there be a question, of Wheeler's mental condition at the time, and the refusal of the modified instruction is not prejudicial error. There was testimony to the effect that he disclosed no embarrassment at the trial; that previously, before the grand jury, he readily remembered that defendants were in the wagon with him at the time in question; that shortly before the trial he repeated this statement to the district attorney and others; and that when arrested, immediately after giving the alleged perjured testimony, he admitted that he had lied while on the stand, and requested an opportunity to go back and correct his statements.

[15] By instruction number 9 the question of the materiality of the alleged perjured testimony was submitted to the jury, and this is assigned as further error. In Thompson v. People, supra, the same question was raised, and the court passed upon it in the following language, which is applicable to the point here involved:

> "The next error relied on is the giving of instruction number eight which is substantially in the language of the information, because it leaves to the jury the question of the materiality of the alleged false testimony. That on a trial for perjury, the question of the materiality of the testimony is one of law for the court, is well settled, and in this particular the instruction as given was objectionable. As we have seen from an examination of the testimony, the evidence of plaintiff in error was material, and the district court would have been compelled so to charge, and must necessarily have so found in overruling the motion for a new trial; so that the submission of the question of the materiality of the evidence to the jury, they having found in their verdict that the false testimony was material, in no way prejudiced the rights of plaintiff in error. State v. Lewis, 10 Kan. 157; Montgomery v. State, 40 S. W. (Tex. Cr. R.) 305."

Other errors assigned have not been argued, and do not merit discussion. Plaintiff had a fair and impartial trial, and the judgment will be affirmed.

Judgment affirmed.

WHITE, C. J., and ALLEN, J., concur.

PEOPLE by PALMER, Dist. Atty., ex rel. FRANCIS et al., v. ESCHEMAN.

(No. 9065.)

(Supreme Court of Colorado. May 7, 1917.)

Time 🔑4—"Year Preceding"—Irrigation Districts — Elections — Statute — Construction.

Rev. St. 1908, § 3445, provides that district election shall be held on the first Tuesday after the first Monday in each year. Laws 1915, p. 299, § 3, amending Rev. St. 1908, § 3443, provides that at all elections held for director of an irrigation district every citizen owning agricultural land within the district who has paid property taxes within said district during the "year preceding" shall be entitled to vote. *Held*, that the words, "preceding year," mean the preceding twelve months, and not the preceding calendar year.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 4.]

Error to District Court, Costilla County; A. Watson McHendrie, Judge.

Action by the People, by John I. Palmer, District Attorney of the Twelfth Judicial District, on the relation of Ira E. Francis and others, against Henry Escheman. Judgment for defendant, and plaintiff brings error. Affirmed.

John I. Palmer, Dist. Atty., of Saguache, F. B. Webster, of San Luis, and Melville & Melville, of Denver, for plaintiff in error. Elias H. Ellithorp, of San Luis, for defendant in error.

TELLER, J. This was an action under chapter 28 of the Code to remove defendant in error from the office of director of an irrigation district, and to seat in his place one who was the opposing candidate at the district election in December, 1915. It is stipulated that if the words, "year preceding," in section 3 of chapter 104 of the Session Laws of 1915 mean the 12 months immediately preceding the date of the election, or during the calendar year of 1915, the defendant in error should be declared elected; but if those words mean the calendar year of 1914, then the relator Grimwood should be declared elected to said office.

The law provides that district elections shall be held on the first Tuesday after the first Monday in each year. Section 3445, R. S. 1908. For the plaintiff in error it is urged that the word "year" used in a statute is ordinarily considered to refer to a calendar year beginning January 1st and ending December 31st. We think the words in the statute in question mean the preceding 12 months, and not the preceding calendar year. This construction appears better to effect the purpose of the act than would the other construction. There is no apparent reason why a property owner in the district who has paid taxes on property therein during the year 1915 should be denied the right to vote because, perchance, he purchased the property in 1914 after the taxes had been paid. The law should be liberally interpreted to give the owners of land in the district who possess the qualifications named in the act a voice in the affairs of the district, and so effect the evident purpose of the Legislature.

The act of 1915 removed some of the restrictions on voters which were imposed by the law of 1907, thus enlarging the class entitled to vote at district elections; and to hold that the same act, by the words quoted, restricts the right to vote to those who have paid taxes 11 months or more before the election is to narrow the right without any good reason therefor. The words "preceding year" have been given the construction here given to them in Bovce v. Boyle, 25 Colo. App. 165, 136 Pac. 467.

The judgment is affirmed.

WHITE, C. J., and HILL, J., concur.

CHICAGO, B. & Q. R. CO. v. SCHOOL DIST. NO. 1 IN YUMA COUNTY et al.

(No. 8512.)

(Supreme Court of Colorado. May 7, 1917.)

1. Statutes 🔑6 — Enactment — Revenue Bills.

Sess. Laws 1911, p. 585, amending Rev. St. 1908, § 5895, providing for the establishment and maintenance of schools and the raising of revenue therefor, is not a revenue law within the meaning of Const. art. 5, § 31, requiring revenue bills to originate in the House of Representatives.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 5.]

2. Statutes 🔑6 — Enactment — Revenue Bills.

Under Const. art. 5, § 31, requiring that revenue bills originate in the House of Representatives, the Senate having power to originate Gen. Laws 1877, §§ 2447–2544, being an act to establish and maintain school systems, although such act included provisions for the raising of necessary revenue, the Senate thereafter had the power to originate acts amendatory of the School Act, which provided for the levy and collection of school taxes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 5.]

3. Statutes 🔑6 — Enactment — Revenue Bills—"Defraying Expenses of the Government"—"Service of the Government" —"Levying of Taxes."

The levy of school taxes is not taxation for "defraying expenses of the government" or for the "service of the government," and is not "the levying of taxes" in the strict sense of the words within the meaning of Const. art. 5, § 31, requiring that all revenue bills originate in the House of Representatives.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 5.

For other definitions, see Words and Phrases, First and Second Series, Levy of Taxes.]

4. Words and Phrases—"Government."

"Government" is the exercise of authority in the administration of the affairs of the state, community, or society; the authoritative direction and restraint exercised over the actions of men in communities, societies, or states (citing Words and Phrases, Government).

5. CONSTITUTIONAL LAW ⇨48 — CONSTRUCTION OF STATUTE.

Where a statute is assailed as unconstitutional and there are two possible interpretations, the court will adopt that construction by which the statute will be constitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Statutes, Cent. Dig. § 56.]

6. CONSTITUTIONAL LAW ⇨48 — CONSTRUCTION OF STATUTE—CONSTITUTIONALITY.

A statute must be held constitutional unless the contrary appears beyond all reasonable doubt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Statutes, Cent. Dig. § 56.]

Error to District Court, City and County of Denver; James H. Teller, Judge.

Action by the Chicago, Burlington & Quincy Railroad Company, a corporation, against School District No. 1, County of Yuma, and another. Judgment for defendants, and plaintiff brings error. Affirmed.

E. E. Whitted and Thos. R. Woodrow, both of Denver, for plaintiff in error. Jo. A. Fowler, of Denver, for defendants in error.

ALLEN, J. This was an action brought by the Chicago, Burlington & Quincy Railroad Company to recover a portion of the "Special School Tax" paid by the company under protest to the treasurer of Yuma county. The school board of the defendant, school district No. 1, certified to the board of county commissioners of Yuma county a 20-mill levy, the board made the same, and the assessor used the levy in extending taxes against the property of the plaintiff railroad company. The levy was certified and made under chapter 206 of the Session Laws of 1911, being an act entitled

> "An act to amend section five thousand eight hundred and ninety-five (5895) of the Revised Statutes of Colorado, 1908."

The complaint was drawn upon the theory that this act is one for raising revenue, within the meaning of section 31 of article 5 of the Constitution of the state of Colorado, and, the bill having originated in the Senate, the act is unconstitutional and void because enacted in violation of the above constitutional provision. A demurrer to the complaint was sustained, and, the plaintiff electing to abide by the complaint, judgment was entered for defendants. Plaintiff brings the case here upon error. The sole question presented by the assignments of error and briefs of counsel is the constitutionality of chapter 206 of the Session Laws of 1911.

Chapter 206 of the Session Laws of 1911, the act in question, was an act amending section 5895, Revised Statutes of 1908. That section was a part of the school laws of the state, which are embraced in chapter 124 of the Revised Statutes of 1908. These laws were enacted in obedience to section 2 of article 9 of the Constitution, which is as follows:

> "The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year."

The first legislation pursuant to the above constitutional requirement was chapter 92 of the General Laws of 1877, entitled "Schools," the same consisting of an act entitled "An act to establish and maintain a system of free schools," approved March 20, 1877. G. L. 1877, pp. 807–841, §§ 2447–2544. The section of the act of 1877 corresponding in its subject-matter to section 5895, R. S. 1908, was section 66. This section, among others, was amended by the Laws of 1881, p. 211. The school laws were carried into the General Statutes of 1883 under chapter 97 thereof, and section 66 became section 67, G. S. 1883, § 3062. The act was again amended in 1887 by an act entitled "An act to amend chapter 97 of the General Statutes entitled 'Schools.'" Session Laws 1887, p. 379. The act of 1887, among other things, amended section 67, and that section, as amended, became section 5895, R. S. 1908.

As a first step in the consideration of the case at bar, it is proper to determine whether or not the act of 1877, above mentioned, was an act "for raising revenue" within the meaning of section 31 of article 5 of the state Constitution, which reads:

> "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose amendments, as in case of other bills."

The main purpose of the act of 1877 was "the establishment and maintenance of a thorough and uniform system of free public schools throughout the state." The provisions which it contained for the levy and collection of taxes was incident to the main purpose, but such provisions were necessary in order that the main purpose might be carried out and a school system established and maintained. With respect to the taxation provisions being incident to the main purpose of the statute, the act of 1877 is analogous to many laws, both state and federal. In the case of Assurance Co. v. Clayton, 54 Colo. 256, 130 Pac. 330, the court, in speaking of chapter 193 of the Session Laws of 1907, which was an insurance act, used the following language:

> "A bill designed to accomplish some well-defined purpose other than raising revenue, is not a revenue measure. Merely because, as an incident to its main purpose, it may contain provisions, the enforcement of which produces a revenue, does not make it a revenue measure. Revenue bills are those which have for their ob-

ject the levying of taxes in the strict sense of the words. If the principal object is another purpose, the incidental production of revenue growing out of the enforcement of the act will not make it a bill for raising revenue."

In the case of Geer v. Board of Commissioners, 97 Fed. 435, 38 C. C. A. 250, the United States Circuit Court of Appeals had under consideration, among other things, the constitutionality of the act of 1889 (Session Laws Colo. 1889, pp. 31, 32), authorizing counties to refund their judgment and bonded debts, which act provided for certain levies for carrying out the purposes of the act. To the contention that the act, having originated in the Senate, was void because it was a bill "for raising revenue," within the meaning of section 31, art. 5 of the state Constitution, the court replied:

> "But a bill for raising revenue, within the meaning of this provision of the Constitution, is one which provides for the levy and collection of taxes for the purpose of paying the officers and of defraying the expenses of the government. This act was not of that character. Its main purpose was to authorize certain quasi municipal corporations to refund their debts. The provisions for the levy and collection of taxes which it contained were mere incidents to the general refunding legislation which it carried. * * * These provisions raise no revenue for the government, but, on the other hand, the act expressly provided that the moneys derived from the levies made under it should not be appropriated to pay the officers of the state or of the county, or to defray the expenses of governing the people. * * *"

The language quoted from the above cases is in accord with numerous authorities. U. S. v. Mayo, 26 Fed. Cas. No. 15,755; U. S. v. James, 26 Fed. Cas. No. 15,464, 13 Blatch. 207; Northern Counties Trust v. Sears, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188; U. S. v. Norton, 91 U. S. 569, 23 L. Ed. 454; Twin City Bank v. Nebeker, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134; Fletcher v. Oliver, 25 Ark. 289; Commonwealth v. Bailey, 81 Ky. 395; 1 Story on the Constitution (5th Ed.) 880; 36 Cyc. 946. The case of Fletcher v. Oliver, supra, contains the following expression:

> "There are many laws that provide for raising money by taxation that are not revenue laws. The law under which the city derives the power to tax the property within its limits, originated in the Senate. The law organizing schools, and permitting the levy of a tax for that specific purpose, originated in the Senate, and no one ever dreamed of calling them revenue laws."

[1, 2] Under the authorities cited (and there appear to be none to the contrary) there can be no question but that the act of 1877, providing for the establishment and maintenance of a system of free schools, was not an act "for raising revenue" within the meaning of section 31 of article 5 of the state Constitution. The Senate, therefore, had the power to originate the bill which became the act of 1877. If the Senate had the power to originate a general and complete statute, as was the act of 1877, there does not appear to be any good reason why the Senate cannot originate a series of acts when each is but a part of the complete and general law and all, taken together, are, and amount to the same, as one complete and general act.

It is true that in a general act, as in the act of 1877, the provisions for the levy and collection of taxes are incident to the main purpose of the statute, while in a special act such provisions may be all that is contained in the same. But it appears from most of the authorities cited that the general act under consideration in those cases was upheld, not only because the taxation features therein were incident to the main purpose of the act, but also because the taxation provided for was not that kind of taxation which was for paying officers or defraying the expenses of the government.

The act of 1911, in controversy, considered by itself, does not provide for any other taxation than that for the support and benefit of a school system. So far as pertinent to the subject under consideration, the act reads as follows:

> "5895. On or before the day designated by law for the commissioners of each county to levy the requisite taxes for the then ensuing year, the school board in each district shall certify to the board of county commissioners a statement showing the aggregate amount, which, in the judgment of said school board, it is necessary to raise from the taxable property of said district, to create a special fund for any of the purposes specified in section 51 of this chapter; said statement shall also show the items composing said aggregate and the purpose to which it is intended to devote each sum so itemized. It shall thereupon be the duty of the county commissioners to levy, at the same time that other taxes are levied, such rate, within the limits allowed by law, as will produce the aggregate amount so certified. The amount of such special tax, which shall be assessed to each taxpayer of such district, shall be placed in a separate column of the tax book, which shall be headed 'Special School Tax,' provided, in the case of districts of the third class no higher rate than twenty mills per dollar shall be levied. * * *"

Section 51, referred to, is section 5925, R. S. 1908, which enumerates the powers of school boards, who are required, among other things, to employ and pay teachers, to provide school furniture and equipment, and to provide books for indigent children, to repair school buildings, and, when necessary, to rent, build, or remove schoolhouses. To use the language of the court in the case of Assurance Co. v. Clayton, 54 Colo. 256, 130 Pac. 330, does the foregoing statute have for its object "the levying of taxes in the strict sense of the words"? Or, in the language of the opinion in Geer v. Board, supra, is the levy provided for "defraying the expenses of the government"? The case of Commonwealth v. Bailey, 81 Ky. 395, 399, contains the following in the opinion:

> "The principle underlying this provision of the Constitution is founded on the ground that the people are bound to pay the taxes to support the government in consideration of protection to their lives, liberty, and property; hence the power of taxation was placed in the hands of the popular branch of the Legislature as a means of security to the people, from whom its members

are selected, against exactions by taxation for other than strictly governmental purposes. This view excludes from the comprehension of this constitutional clause such bills as appropriate money to or from the treasury, raised from the people in consideration of other benefits and services than protection in their lives, liberty, and property."

The act of 1911, in controversy, does not provide for any levy or taxation for paying any public officers, or for aiding in or securing protection of life, liberty, and property.

[3] The levy and collection of taxes for the maintenance of a school system is not taxation for "defraying the expenses of the government" as that expression is used in the opinion in Geer v. Board, supra, or "for the service of the government," as the same idea is expressed in U. S. v. Mayo, supra. The making of a tax levy for school purposes is not "levying of taxes in the strict sense of the words," as these words are used in the case of Assurance Co. v. Clayton, 54 Colo. 256, 120 Pac. 330, and other cases.

[4] The meaning of the term "government" is so commonly understood that to define the same does not appear to be necessary, yet the term, as used in the cases cited, may be defined as:

> "The exercise of authority in the administration of the affairs of a state, community, or society; the authoritative direction and restraint, exercised over the actions of men in communities, societies, or states." People v. Pierce, 18 Misc. Rep. 83, 41 N. Y. Supp. 858; 4 Words and Phrases, 3138.

[5] If it were conceded that reasons could be adduced for holding the act of 1911 a revenue measure within the meaning of section 31, art. 5, of the state Constitution, yet since it is possible, right, and proper to uphold the act under the authorities cited, the latter is clearly the duty of this court.

> "It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it." 6 Ruling Case Law, 78, § 77.

[6] We are required to uphold legislation, unless its unconstitutionality appears beyond all reasonable doubt. Farmers' Independent Ditch Co. v. Agr. Ditch Co., 22 Colo. 513, 528, 45 Pac. 444, 55 Am. St. Rep. 149; Denver City v. Knowles, 17 Colo. 204, 211, 30 Pac. 1041, 17 L. R. A. 135. An act is to be overthrown only when it is clear and unquestioned that it violates the fundamental law. People v. Rucker, 5 Colo. 455, 458; People v. Goddard, 8 Colo. 432, 437, 7 Pac. 301; Munn v. People of the State of Illinois, 94 U. S. 113, 24 L. Ed. 77. These cases are quoted from, with approval, in Consumers' League v. C. & S. Ry. Co., 53 Colo. 54, 58, 125 Pac. 577, Ann. Cas. 1914A, 1158. This court in People v. Commissioners, 12 Colo. 89, 93, 19 Pac. 892, 894, having for determination the constitutionality of the act of 1887, of which the act of 1911 in controversy is amendatory, used the following language:

> "The doctrine is elementary that no act of the General Assembly should be declared unconstitutional unless it is clearly and palpably so. * * * In a matter so important as the maintenance of public schools, the courts should incline to uphold, rather than to defeat, the action of the officers charged with the execution of the laws."

Upon the grounds hereinbefore stated, we hold that the act of 1911 in controversy, the same being chapter 206 of the Session Laws of 1911, is not an act "for raising revenue" within the meaning of section 31, art. 5, of the state Constitution, and is therefore constitutional and valid.

The complaint was based upon the statute of 1887, or section 5895, R. S. 1908, as it stood prior to the act of 1911 amending the same, and was framed upon the theory that the act of 1911 was unconstitutional and void as being a revenue measure which originated in the Senate. The statute of 1911 being constitutional and valid, the demurrer to the complaint was properly sustained. The judgment is affirmed.

Affirmed.

WHITE, C. J., and BAILEY, J., concur.

EMERSON-BRANTINGHAM IMPLEMENT CO. v. WOOD. (No. 8574.)

(Supreme Court of Colorado. March 5, 1917. Rehearing Denied June 4, 1917.)

SALES ⚷38(7) — BUYER'S ACTION FOR RESCISSION—MISREPRESENTATIONS.

Where a tractor was purchased under a written agreement making no representations regarding the fuel it could use, and the buyer made a part payment and signed a receipt reiterating the original contract terms after the use of distillate as fuel had proved unsatisfactory, he cannot rescind because the seller's agent stated the tractor could use such fuel before the contract was signed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 74, 75.]

Error to District Court, Denver County; John H. Denison, Judge.

Action by Nicholas A. Wood against the Emerson-Brantingham Implement Company. Judgment for plaintiff, and defendant brings error. Reversed.

Frank L. Grant, of Denver, for plaintiff in error. W. G. Temple and E. M. Sabin, both of Denver, for defendant in error.

SCOTT, J. The plaintiff in error sold to the defendant in error under a written contract, a Big Four gas traction engine for the sum of $3,100, with freight to be added from Minneapolis, Minn., to Briggsdale, Colo. Five hundred dollars was to be paid in cash, and the remainder in three promissory notes —one for $200, due June 15, 1913; one for $1,200, due November 1, 1913; and one for $1,200, due November 1, 1914. This action is by the defendant in error for a recission of the contract. The agreement was dated March 29, 1913, and, in so far as it seems necessary to consider, recites:

> "That as soon as reasonably possible after notice from the purchaser [N. A. Wood] of the arrival of said engine at said station [Briggsdale, Colo.] to send an operator at its own expense to start said engine and instruct the purchaser in its proper operation, and direct and supervise the trial hereinafter provided for. The purchaser further agrees that he will purchase said engine for the price and settle for it upon the terms hereinafter set forth: If after three days' trial of the engine under the direction and supervision of said operator in such field work as the purchaser may elect (and he agrees immediately upon arrival of the engine to furnish the place and designate the kind of work for such trial, weather conditions being favorable), it shall be demonstrated that the engine will and does fulfill the following conditions: (a) That the engine will develop its rated horse power at the drawbar. (b) That the engine, if rated at 30 or more horse power, will furnish ample and steady power to drive any 40-inch cylinder threshing machine, complete with self-feeder, weigher, and blower. * * * If said engine, fixtures, and equipment are not so purchased, the purchaser agrees within two days after the expiration of such three days' trial to return same to said railway station, and said purchaser further agrees that his failure to so return said engine, fixtures, and equipment within two days after said three days' trial shall be proof conclusive that said engine and equipment fulfilled the warranty in every respect, and shall constitute an acceptance and purchase of said engine, fixtures, and equipment by the undersigned at the price and upon the terms and conditions hereinbefore stated.
>
> "Sixth. It is mutually agreed that said engine, fixtures, and equipment are purchased upon the following warranty only, viz.: (a) Should any parts (except electrical parts) prove defective within one year from the date of purchase of said engine, on account of inferior material or workmanship, and such parts be returned to the Big Four Tractor Works, Minneapolis, Minn., transportation prepaid thereon, and be found by the company to be defective on account of inferior material or workmanship, said company will furnish new parts in lieu of such defective parts on board cars, Big Four Tractor Works, Minneapolis, Minn. * * *
>
> "Seventh. It is expressly agreed that settlement for or the retention of said engine beyond the time specified in clause fifth thereof shall be a waiver of all other representations, warranties, terms, or contentions upon which said engine is ordered or purchased, except those in clause sixth hereof.
>
> "Eighth. It is further agreed that this order and agreement is given and accepted, and the sale and purchase of said engine, fixtures, and equipment are made, upon the express condition that this order and agreement contains all the terms and conditions of the sale and purchase of said engine, fixtures, and equipment, and cannot in any manner be changed, altered, or modified without the written consent of the officers of said company, and that the sending of any person by the company to repair or operate said engine or the remaining of the person sent to start said engine, after the expiration of said three days' trial, shall in no manner waive, modify, or annul any of the terms or conditions hereof."

At the foot of the agreement appears the following, signed by the plaintiff:

> "I acknowledge that I fully understand all the terms and conditions of the above agreement, and that I have this day received a copy of the same."

The specific allegations of fraud upon which the purchaser relies are:

> "(3) That the defendant, with intent to deceive and defraud the plaintiff, and to induce him to purchase such engine, falsely and fraudulently represented to the plaintiff, at and prior to the time of said sale, that the said engine would develop full thirty (30) horse power, and would burn kerosene, distillate, and other low-grade fuel of that character successfully and with much greater economy than any of the so-called 'kerosene engines,' and that the plaintiff relied upon said representations and was thereby induced to purchase and pay for said engine as aforesaid.
>
> "(4) That in truth, and as the defendant then well knew, the said representations made by the defendant to the plaintiff regarding said engine as aforesaid were false and untrue, and that the said engine did not and could not be made to develop a capacity of thirty (30) horse power, and will not successfully burn kerosene, distillate, or other low-grade fuel of that character, and cannot be successfully operated with such fuel, and can only be operated with gasoline or naphtha, the cost of which fuel prohibits the use of said engine, makes the same impracticable for farming purposes, and renders the said engine absolutely worthless to this plaintiff."

Verdict was rendered in favor of the plaintiff below in the following words:

> "We, the jury, find the issues herein joined for the plaintiff, and assess his damages at the sum of $980.23."

The record does not recite the formal decree, if such was entered, but we are advised only that it was:

> "Ordered that judgment be entered in favor of the plaintiff and against the defendant in accordance with the verdict herein."

We are not advised by the record as to whether the court ordered the contract to be rescinded, the notes to be canceled, or that any equitable relief was otherwise granted. Just how the court could have rendered the money judgment for damages, without a finding as to fraud, and the prerequisite order for rescission of the contract, is not suggested by counsel for either party, but in order to avoid further litigation we will determine the matter on the issues raised by the pleadings.

It will be observed that the only allegation upon which the plaintiff relied was that the defendant represented, at a time preceding the signing of the contract, that the engine would burn kerosene, distillate, and other low-grade fuel of that character successfully, and with greater economy than any of the so-called kerosene engines, and that in fact it cannot be successfully operated with such oils, and can only be operated with gasoline or naphtha, the cost of which is impracticable and prohibitive for farming purposes. There is no other complaint, either in the pleadings or testimony. Nothing is said in the agreement as to the character of fuel the engine will burn. The agreement describes the machine as a gas traction engine, not an engine to be operated by the use of oil.

The plaintiff testifies that the representation made to him was by the agent of the company prior to the agreement. The record discloses that the plaintiff is a physician and a man of business. There is no contention but that he did not read and sign the agreement knowingly and without the slightest misunderstanding as to its contents, including his own statement therein that he fully understood its terms and conditions. Yet his only contention is for a condition which he well knew was not contained in the agreement when he signed it. He does not pretend to attack, either by pleading or proof, the good faith of the company in any other respect. The machine was delivered at his premises, on its own power, from the railroad station, some eight miles distant. It was subjected to the test provided in the agreement. The plaintiff employed for such purpose his brother, who was an experienced engineer and machine man, and who made the test in conjunction with the company's expert. It was after this test that he made the cash payment and signed the notes, and at which time he executed the following receipt:

> "Receipt for Machinery Delivered. Dated at Denver, Colo., 4—23—1913. Received of Emerson-Brantingham Implement Company (an incorporated company), of Rockford, Illinois, the following described machinery: One Big Four '30' tractor, No. 1347, under and pursuant to the conditions of a written order signed by N. A. Wood, dated on the 29th day of March, 1913, which order contains a written warranty from said company on said machinery; a copy thereof of being received by us. It is expressly understood and agreed that the above-described machinery is received by the undersigned under and pursuant to the terms and conditions of the said written warranty and not otherwise (any changes in the machinery ordered or terms of payment notwithstanding), and that said written order and warranty contains all the agseements between us on account of said purchase; that the notes given by the undersigned to the company for said goods and the mortgage securing said notes were examined and read before they were executed, and the same are delivered in fulfillment of said written agreement.
>
> "[Signed] N. A. Wood."

The test began on or about April 15th. The plaintiff had shipped distillate to the farm, and it was tried and did not work successfully. Indeed, distillate was used for a part of the distance from the station to the farm, and did not prove satisfactory, all this with the knowledge of plaintiff, and before he made his payments and signed the receipt, in which it was reiterated that the written agreement and warranty contains all the agreements between the parties. It is plain that the plaintiff had full opportunity to learn from his own observation and examination as to the truth or falsity of the alleged misrepresentations, before he paid for and gave his receipt for the machine. The law in such case is well settled and no longer admits of argument:

> "If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained, had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled." Pomeroy's Equity Jurisprudence, § 893.

Courts may not destroy the stability and certainty of written contracts upon such a frivolous showing as is here presented. It was said by this court in St. Vrain Co. v. Denver U. P. Ry. Co., 18 Colo. 211, 32 Pac. 827:

> "By the oral evidence proposed it is attempted to show that the cañon location was certainly and definitely agreed upon, to the exclusion of the route outside of the cañon. This is in direct contradiction of the terms of the written agreement. If such proof is admissible under the claim of fraud, then any oral agreement would be admissible to vary and contradict the terms of a written contract. This cannot be permitted. The rule contended for would, if adopted, introduce an element of uncertainty into written contracts that could only be productive of strife between the parties. After a written contract has been executed, oral negotiations leading up to such a contract cannot be shown, for the purpose of changing or contradicting its terms."

There are other errors presented, which would seem to justify a reversal of the judgment, but are not considered, in view of what has been said.

Judgment reversed.

WHITE, C. J., and GARRIGUES, J., concur.

STELSON v. HAIGLER. (No. 8778.)

(Supreme Court of Colorado. May 7, 1917.)

1. Brokers 🔑64(1) — Realty Broker—Right to Commission.

Though a purchaser of realty secured by a broker was ready and willing to make the first payment called for by the contract of sale at the time it became due, his readiness and willingness was not sufficient, he not having made the payment nor offered to do so, to entitle the broker to commission, which was to be paid from such first payment.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97.]

2. Vendor and Purchaser 🔑144(2)—Justification for Refusing Payment—Defects in Title.

Where a contract for the sale of realty provided that, should there be any defects in the title of the lands and water rights, the buyer gave the seller reasonable time to have such defects set aright, and the irregularities complained of were not suggested to the seller until after the first payment under the contract was to be made, and such defects were cured with all reasonable diligence in about three months, the buyer was not justified in refusing or neglecting to make tender of payment, or payment, as provided in the contract of sale, because of defective title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 272–274.]

3. Vendor and Purchaser 🔑3(4)—"Option"—"Contract of Sale."

Where the owner of land executed a memorandum agreement providing that he sold and agreed to convey by warranty deed, etc., the full purchase price for the land being $131,000, to be paid as follows: $1,000 to be placed in escrow with a bank to be turned over to the seller on the finding of marketable titles by the buyer, and $30,000 on or before December 1, 1912, and $100,000 March 1, 1918—the buyer nowhere in the agreement agreeing to purchase or to make any payment or to bind himself in any other respect, aside from forfeiture of the amount paid at the time the contract was made, the agreement was an "option" to purchase, and not a "contract of sale," since, unless a contract contains language which may be reasonably construed as an agreement on the part of the buyer to purchase the property, or to assume some obligation thereunder, it is an option contract, and not an agreement of sale and purchase, which creates mutual obligations, while an option gives a right to purchase without imposing any obligations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3.

For other definitions, see Words and Phrases, First and Second Series, Contract of Sale; Option.]

4. Brokers 🔑49(2)—Realty Broker—Negotiation of Option Contract—Right to Commission.

An agent employed to sell or find a purchaser has not performed his contract by negotiating a mere option contract, and therefore is not entitled to recover the agreed, or indeed any, compensation for such services.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 71.]

Error to District Court, El Paso County; John E. Little, Judge.

Action by Arthur W. Haigler, doing business under the firm name and style of the Haigler Realty Company, against D. C. Stelson. To review a judgment for plaintiff, defendant brings error. Reversed.

R. L. Chambers and Robert Kerr, both of Colorado Springs, for plaintiff in error. Harris & Price, of Colorado Springs, for defendant in error.

SCOTT, J. The action is by the Haigler Realty Company to recover from Stelson the sum of $5,000 alleged to be due as a real estate broker's commission for the sale of Stelson's ranch. The commission is claimed both under a written contract and as the value of the services rendered. The record discloses that Stelson gave the Haigler Realty Company a written agreement which both agree was intended as a contract of employment to sell the ranch of Stelson. Later the Haigler Realty Company presented R. F. Kloke, a real estate broker of Omaha, Neb., who received from Stelson the following memoranda of agreement, omitting so much thereof as is immaterial in this proceeding:

"The party of the first part sells and agrees to convey to the party of the second part by warranty deed and abstract brought down to date of transfer, the same to show marketable title, the following described lands and water rights: [Here follows description.]

"The full purchase price for the above-described lands and water rights being $131,000, to be paid as follows: One thousand dollars to be placed in escrow with the Exchange National Bank of Colorado Springs, to be turned over to the party of the first part upon the finding of marketable titles by party of the second part; $30,000 on or before December 1, 1912; $100,000 March 1, 1918, the same to be evidenced by promissory note bearing interest at the rate of 6 per cent. per annum, payable semiannually, to be secured by first mortgage covering the aforesaid lands and water rights. * * *

"Tenth. That he will execute warranty deed showing marketable titles free and clear of all liens and incumbrances as above set forth covering the above-described land, conveying the said lands and water rights to the party of the second part, his heirs or assigns, or to any one whom said party of the second part may direct upon the payment of the said $30,000 and the execution of note and mortgage as above set forth, the same to be paid and executed on or before December 1, 1912.

"It is further agreed between the parties hereto that should there be any defects in the title covering above-described lands and water rights that the party of the second part gives the party of the first part reasonable time through the courts to have such defects set aright.

"It is mutually agreed that the time of payment shall be an essential part of this contract, and in case of failure of the said party of the second part to make either of the payments above mentioned this contract shall be forfeited and determined, at the election of the said party of the first part, and the said party of the second part shall forfeit all payments made on this contract, as liquidation of all damages to party of the first part. * * *

"Colo. Springs, Colo., Sept. 2, 1912.

"Received of R. F. Kloke, Omaha, Neb.—$1,000 to apply as part payment on the land mentioned in contract between myself and R. F. Kloke, copy of which is attached hereto.

"Should the said R. F. Kloke not find the abstracts covering the lands and water rights marketable as mentioned in the said contract, I do hereby agree to return to said R. F. Kloke the $1,000 paid to me on this date; the said $1,000 being paid to me in lieu of the $1,000 which is to be placed in escrow in the Exchange National Bank, Colorado Springs, Colo., as recited in said contract.

"[Signed] D. C. Stelson."

Haigler testifies that the receipt above set forth was a modification of the preceding agreement. Verdict and judgment were rendered against the plaintiff in error in the full sum of $5,000.

It is contended by the defendant that the agreement between Stelson and Kloke was a mere option, and not an agreement of sale and purchase; that the option did not ripen into a sale, and therefore the plaintiff did not produce a purchaser ready, able, and willing to purchase the lands, and for such reason is not entitled to a commission. The contention of the plaintiff is that this agreement was an absolute contract of purchase and sale.

[1] There were no further payments made by Kloke, nor was there any tender of payment. It is true that Kloke testified that he was ready and willing to make the first pay-

ment at the time it became due, but if this be true, it was not sufficient, in view of the fact that he did not make the payment nor offer to do so. He further says that he came to Colorado Springs and saw Haigler and told him that he was ready to pay, but he did not see Stelson, nor seek to see him, and immediately returned to Omaha.

We said in Bailey v. Lay, 18 Colo. 405, 33 Pac. 407:

> "The averment that Cummins and Olcott and the Iron Mask Company were ready and willing to accept the premises and make payment is not equivalent to an averment of payment or of an offer to pay. In a case of this kind, when the time for payment has actually arrived, mere readiness and willingness to pay are immaterial; such readiness and willingness, without more, will not discharge contract obligations. An averment of readiness and willingness to pay presents nothing tangible or substantial; it involves little more than the state of mind of the party presenting the plea; and the determination of an issue taken thereon would not decide the rights of the parties. On the other hand, an averment of payment or of an offer to pay is an averment of an overt act, an important and substantial fact; and the determination of an issue taken thereon would, subject to other issues in the case, be decisive of the controversy."

Kloke was a real estate broker, and it is plain from the record that he did not intend to make a purchase of the premises, but rather to secure an option that he might have opportunity to sell the lands. It is also made clear that Kloke did not come to Colorado Springs on December 2, 1912, for the purpose of making the payment, or any tender of the same. This appears from a night letter telegram from Haigler to Kloke sent on the evening of November 29th, with but one intervening day before time for payment. This telegram was as follows:

> "To R. F. Kloke, Omaha National Bank Bldg., Omaha, Neb.
>
> "Letter received. Stelson demands $1,000.00 for extension of contract for 20 days to apply on purchase price, but according to terms of contract we think if you get abstracts here with your requirements on title by Dec. 2d that it would continue in force until he furnished marketable title therefor. Do not fail to get abstracts here with your requirements by Dec. 2d. Answer."

Kloke appears to have come to Colorado Springs in response to this telegram, bringing the abstracts with him and returned to Omaha without even advising Stelson of his presence. It is palpable that the purpose was to secure time, and not to make either payment or tender. The plaintiff's agreement specifically recites:

> "The title is to be marketable and good and sufficient warranty deed to be executed and delivered by the said D. C. Stelson to the Haigler Realty Company, their heirs or assigns, on or before the 1st day of December, 1912, together with abstract showing marketable title, provided the $1,000 is tendered or paid on or before the 3d day of September, 1912, and $30,000 is tendered or paid on or before the 1st day of December, 1912. If the said payment as above mentioned is not paid or tendered on or before the dates mentioned above, then this contract is to be void and of no effect, and both parties are released from all obligations therein, and in that event the said $1 paid on this date is to be held by D. C. Stelson as liquidated damages."

And:

> "If sale is made as above stated, I agree to pay Geo. W. Morse $1,000 and the Haigler Realty Company $5,000 out of the $30,000 payment above mentioned."

It will be seen from this that the $30,000 payment must be either tendered or paid on or before the 1st day of December, 1912, and that such tender or payment was a condition precedent to the execution of the deed and its delivery with the abstracts, and that, if not so tendered or paid, the agreement was to be void, and both parties to stand released therefrom; again, that the compensation to the Haigler Realty Company in any event was to be made from the first or $30,000 payment.

It is agreed that this sum was not paid nor tendered, nor any part thereof, as stipulated, nor at all. It is clear, therefore, that unless such first payment or tender was excused, or made unnecessary by the acts and conduct of Stelson, the plaintiff cannot recover; for this was the result which the Haigler Company agreed to produce in consideration of the commission. But, independent of this express provision, it was the duty of Kloke to make the first payment provided in his agreement. It was held in the case of Bailey v. Lay, supra, that:

> "The gravamen of the complaint is that defendants Lay, Mallory, and Brown refused to make and deliver a deed of conveyance of their certain mining property to the Iron Mask Mining & Smelting Company, as by said agreement in writing they had contracted to do. According to the terms of the written agreement, the defendants were to deliver the deed to the mining property at the time of the first payment of $250,000. * * *
>
> "The agreement in regard to the first payment and the agreement to deliver the deed were to be performed at the same time; they were mutual and dependent agreements; and performance or an offer to perform in respect to first payment was necessary to make it incumbent upon the defendants to deliver the deed. Englander v. Rogers, 41 Cal. 420; Bakeman v. Pooler, 15 Wend. [N. Y.] 637; 2 Parsons on Contracts, 528; Chitty on Contracts (11th Ed.) 1082."

The record does not disclose that Stelson at any time refused to comply with this written agreement, but, on the contrary, and for a long time after December 2, 1912, when the first payment became due, and even up to the commencement of this action, he still offered to make the sale upon the terms stated in the agreement.

Stelson, after December 1, 1912, wrote letters both to the Haigler Realty Company and to Kloke urging that the matter be closed up as it was important to prepare for the approaching season's work on the ranch. As late as March, 1913, more than four months after the first payment became due, Kloke wrote Stelson asking for an extension of time, and declared that "the chances are that nothing can be done for some little time in the way of closing it up."

[2] The plaintiff below undertakes to ex-

cuse the payment of the $30,000 and the completion of the contract by Kloke, upon the ground that the title to the premises was defective, and was not a marketable title. Very soon after, or perhaps at the time of, the signing of the Kloke agreement, Stelson turned over the abstracts of title to Haigler, who in turn delivered them to Kloke for examination. These were not returned to Stelson until after December 1, 1912, and after the first payment was due, whereupon Stelson delivered them to H. W. Wing, an attorney of Colorado Springs, with experience in titles and abstracts, together with certain objections of Kloke's attorney, for the purpose of having irregularities in the title corrected so as to meet these objections. The plaintiff below offered the testimony of Wing to support its contention as to defective or nonmarketable title.

Wing testified that he proceeded at once to, and did, have the defects remedied. He says that the objections were by Ramsey, the Omaha attorney of Kloke, and were about 150 in number; that in great part they dated back from 40 to 50 years, and were technical in character, many being matters of identification where names appeared by initials and with the full Christian name; that there were some apparent defects in case of tax titles, some of which he proceeded to have cleared through court action; that there were no legal or valid defects in the titles or any of them; that Stelson and his grantors had been in open and actual ownership and possession of the premises for about 26 years to his personal knowledge; that he caused all the objections to be satisfied; and that in his opinion the title to the premises and to all water rights connected therewith was a marketable title at the time the abstracts were placed in his hands.

It appears from this testimony that about 3 months were required to clear up all of the irregularities complained of. It does not appear that Kloke made any objection to the abstracts thereafter, though he asked for an extension of time to make the payment.

No other testimony was offered concerning the question of title, and there is no testimony in the case which tends to show any valid defect therein to any of the lands or water rights involved. The irregularities complained of were not suggested to Stelson until after the date when the first payment was to be made, and these appear to have been cured with all reasonable diligence.

It was expressly agreed in the contract given to Kloke that:

> "It is further agreed between the parties hereto that should there be any defects in the titles covering above-described lands and water rights that the party of the second part gives the party of the first part reasonable time through the courts to have such defects set aright."

Under the facts thus disclosed and in view of this express agreement, there was no sufficient justification for Kloke to refuse or neglect to make the tender or payment as provided in the agreement, because of defective title. Indeed, he made no such objection until after the expiration of the time for payment.

[3] Neither Kloke nor Stelson claim any rights under the agreement as between themselves. But under all settled rules of construction the agreement between Stelson and Kloke was an option to purchase, and not a contract of sale. Nowhere in the agreement does Kloke agree to purchase, nor to make any payment, or to bind himself in any other respect, aside from the forfeiture of the amount paid at the time the contract was made. Both Stelson and Kloke treated and construed the agreement as an option at the time, and at all times since. In letters of both each refers to and speaks of the agreement as an option, and Kloke in his deposition testified as follows:

> "Q. But was it a sale, or was it an option, from your point of view? A. I consider it a contract to purchase and with a forfeiture clause, without any liability in case I did not come across or he did not come across."

Again he says:

> "Of course I will admit, as purchaser, that I took this precaution, that in case any unforeseen accident should happen I was not bound, but he was. I did not have to comply with my part of the contract if I did not want to, and he did."

And he further testified:

> "My understanding, so far as I was concerned, was that in case I did not want to take the property, did not want to fulfill my contract, naturally I would have to lose what I put up."

So that upon the face of the agreement it was unilateral in character, and fully intended by the parties as an option only.

It may be laid down as an established rule of law that, unless the contract contains language which may reasonably be construed as an agreement on the part of the vendee to purchase the property, or to assume some obligation thereunder, it will be an option contract and not an agreement of sale and purchase. It is impossible to conceive of an agreement of sale and purchase without obligation on the part of the vendee to purchase. On the other hand, the absence of such obligation is the distinctive characteristic of an option contract. A contract of sale creates mutual obligations on the part of the seller to sell, and on the part of the purchaser to buy, while an option gives the right to purchase, within a limited time, without imposing any obligations to purchase. James on Option Contracts, § 105, and authorities cited; Hessell v. Neal, 25 Colo. App. 300, 137 Pac. 72.

[4] An agent employed to sell or find a purchaser has not performed the contract by negotiating a mere option contract and therefore is not entitled to recover the agreed or any compensation for such services. Fox v. Denargo Land Co., 37 Colo. 203, 86 Pac. 344; Brown v. Keegan, 32 Colo. 463, 76 Pac. 1056. See, also, James on Option Contracts, § 205, and authorities cited. We must hold, therefore, that under the facts and circumstances

of this case the Haigler Realty Company is not entitled to recover.

The questions here considered were properly raised by demurrer, by instructions tendered and refused, and by instructions given and objected to. There are other assignments of error which we do not deem important to consider.

The judgment is reversed.

WHITE, C. J., and GARRIGUES, J., concur.

JOTTER v. MARVIN. (No. 9007.)

(Supreme Court of Colorado. May 7, 1917.)

1. JUDGMENT 🔑149—MOTION TO VACATE—QUIETING TITLE.

The defendant in a suit to quiet title and for relief related thereto may, by motion to vacate, attack a judgment on the ground that he was not served with summons, though plaintiff, after securing a judgment, has conveyed the land in controversy to another, who in turn has conveyed it to an innocent purchaser; such motion being in effect a direct attack on a judgment which takes the place of a suit in equity and stands upon the same plane.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 260.]

2. APPEAL AND ERROR 🔑1111—SCOPE OF DECISION — JUDGMENT QUIETING TITLE — MOTION TO VACATE—INNOCENT PURCHASER.

In such case the question whether, if ultimately successful in sustaining his title, the defendant can secure the land from the alleged innocent purchaser in view of the fact that it was transferred to him when no stay of judgment was pending and before a writ of error was sued out, will not be determined where such purchaser was not a party to the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4411–4420.]

En Banc. Error to District Court, Yuma County; H. P. Burke, Judge.

Action by Charles B. Marvin against George W. Jotter. A motion to vacate judgment for plaintiff was denied, and defendant brought error, and plaintiff files plea in abatement, to which defendant demurs. Demurrer to plea in abatement sustained.

M. M. Bulkeley, of Wray, and Allen & Webster and Louis H. Drath, all of Denver, for plaintiff in error. John F. Mail, of Denver, for defendant in error.

HILL, J. This hearing is upon a demurrer to a plea in abatement in this court. The action was instituted in the district court by the defendant in error against the plaintiff in error wherein judgment was entered decreeing that the defendant in error was the owner of a certain 160 acres of land in Yuma county; that the plaintiff in error had no right, title, or interest therein. The decree also cancels a tax deed as well as certain judgments and decrees and quiets the title to said land in the defendant in error. Thereafter the plaintiff in error, defendant below, appeared in said cause and moved that said judgment be vacated and set aside. This motion was upon the ground that the defendant had never been served with summons, and for that reason that the judgment was absolutely void, etc. Thereafter, and on April 27, 1916, the court denied said motion. The defendant reserved the necessary exceptions asked, and was given 60 days within which to prepare a record on error, which was thereafter duly approved and has been lodged in this court, etc., all within proper time. The plea in abatement filed here alleges that after the trial court's refusal to sustain this motion to vacate and set aside said judgment, and on, to wit, the 15th of May, 1916, the defendant in error's grantee sold and conveyed said land by deed to one Hartjoy, which deed was on June 19th following recorded, etc.; that said Hartjoy paid to the grantee of the defendant in error, to wit, the Charles B. Marvin Investment Company, for said land, full value in the sum of $2,000; that Hartjoy bought said land without knowledge of this proceeding on error or any contemplated proceeding looking to the reversal or modification of the judgment hereinabove mentioned. It is further alleged that upon the denying of the motion to vacate said judgment made by plaintiff in error in the district court no stay of execution was sought nor anything done relative to staying the operation of said judgment, and not until the 23d of June, 1916, was any record on error presented to the trial judge, nor was the same filed with the clerk of the district court until July 12th following, and after said land had been conveyed to Hartjoy; that the cause was not filed in this court until July 18th following, and that no supersedeas was sought or issued; that the plaintiff in said action (the defendant in error here) hath not now, nor has he had since May 15, 1916, any title or interest in said land. For the foregoing reasons it is urged that the plea in abatement should be sustained and the action dismissed.

It may properly be conceded that if, after the rendition of a judgment and before its review, any event happens which would make a different result useless, the action will be dismissed. Such is not the case here.

The plaintiff in error contends that there was no service upon him in the original action, for which reason the judgment is void. If such be the case, he, no doubt, could have brought a separate suit for the purpose of having it set aside. Likewise he could litigate with the grantee of the grantee of defendant in error concerning their respective titles to the land. In such case, if this judgment was sought to be used against him, if the record in that case fails to show service, he could be successful in a collateral attack upon it for want of service, etc. He did not do this, but saw fit before the land was transferred to Hartjoy to go into that case with a motion to vacate the judgment. To all intents and purposes this constituted a direct attack upon it, which takes the place of a suit in equity and stands exactly on the same plane. By thus doing he gave jurisdiction to that court of his person, and when his motion was denied, it has precisely the same force and effect as if he had brought an independent suit in equity for that purpose, as was said in Kavanagh v. Hamilton, 53 Colo. 157, at page 163, 125 Pac. 512, at page 515, Ann. Cas. 1914B, 76:

> "Direct attack on the judgment of a court of record may be by motion, as in Du Bois v. Clark, 12 Colo. App. 220, 55 Pac. 750, or by answer and cross-complaint, as in Wilson v. Hawthorne, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290, or by an equitable action to cancel or enjoin its enforcement, as in Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824, or by writ of error, or possibly by a bill of review."

Du Bois v. Clark, 12 Colo. App. 221, 55 Pac. 750, recognizes the right to make a direct attack by a motion to vacate for want of jurisdiction, and that in such cases the same is not by virtue of the Code provision allowing six months for the same. In making the distinction the court (12 Colo. App. at page 229, 55 Pac. at page 753) says:

> "But, because equity will not decline jurisdiction, it does not follow that the same purpose may not be accomplished by motion. Our Code provision restricting a party to six months within which to make application to be relieved from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect has no relevancy here. The privilege is granted to parties, but a person who was never served with process, and who never appeared, is not a party within the meaning of that provision. It is from his failure to do something which he might have done that a court, by virtue of that provision, grants a party relief, when he is able to give a good reason for his failure. But where a person has no knowledge that anything is required of him, his quiescence is not a failure to do something which he might have done, and the terms, mistake, inadvertence, surprise, and neglect are not properly applicable to it. It was not the intention of the law to require a man, at his peril, to move within a specified time, who is utterly ignorant of the necessity of motion, or of the existence of anything which calls for motion. But the authority of a court to set aside its judgment, when the action is demanded by justice, is not dependent upon statute. The power is inherent, and may, in a proper case, and upon a proper showing, be exercised at any time. See Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748. And there is no reason in sight why the questions of fact involved in a proceeding to set aside a judgment may not be tried and determined as well and as satisfactorily upon motion as upon bill."

[1] The plaintiff in error, having gone into the original suit with his motion to vacate, gave the court jurisdiction of his person the same as if he had been plaintiff by a bill in equity. Even though the court had no jurisdiction in the original proceeding, it then acquired jurisdiction to determine the question of its jurisdiction in the original action, and if it has erroneously held that it had jurisdiction and that the judgment is valid, unless that ruling is reviewed and set aside, it constitutes a complete bar against the plaintiff in error, not only in the present case in favor of the defendant in error, Marvin, but those in privity with him, which position is occupied by Mr. Hartjoy. It follows that, if no review can be had of this motion to vacate the judgment, because the defendant in error has conveyed the land to another, who has in turn conveyed it to Hartjoy, the plaintiff in error can have no relief or recourse against any one upon account of its existence, even though right in his contention that he had never been served. We cannot agree with this line of reasoning. Defendant in error was the alleged owner of the land when he brought his suit against the plaintiff in error in which he sought to try the title of the plaintiff in error, and to have judgment decreeing that he had no interest therein. He alleges that he never has had and seeks to have his day in court concerning it. If he has not had it, then a judgment that he has ought not to be allowed to stand against him simply because the defendant in error, after securing the judgment, has conveyed the land to another who, in turn, has conveyed it to an innocent purchaser.

[2] Whether, if ultimately successful in sustaining his title, the plaintiff in error can secure the land from Mr. Hartjoy because transferred to him as an innocent purchaser when no stay of the judgment was pending and before a writ of error was sued out, will not now be determined. Mr. Hartjoy is not a party to this action. In certain cases this court has held that an innocent purchaser, etc., during this period, relying upon the judgment, gets a good title. Cheever v. Minton, 12 Colo. 557, 21 Pac. 710, 13 Am. St. Rep. 258; Stout v. Gully, 13 Colo. 604, 22 Pac. 954; Pipe v. Jordan, 22 Colo. 392, 45 Pac. 371, 55 Am. St. Rep. 138.

If the rule announced in these decisions is applicable, it does not follow that the plaintiff in error is not entitled to his review of this judgment. In case he is successful in securing its reversal and is right in his contention that he was the owner of the land, we cannot agree that he is without remedy for the wrong against him, which was the occasion of his loss.

Volume 2, Freeman on Judgments (4th Ed.) § 484, recognizes the rights of innocent purchasers to be protected in certain cases when relying upon decrees which are subject to reversal by writs of error not then pending, but it does not concede to the plaintiff in such cases this protection, but, to the contrary upon reversal where the plaintiff is a purchaser, at page 843 it states:

> "The title of plaintiff is held to be liable to be divested by a reversal, because his purchase is paid for by a judgment which he ought not to have had, and because it is neither just to the defendant nor conducive to a good public policy that the advantages secured by an erroneous adjudication should be longer retained."

While this declaration applies to the plaintiff's purchase of real estate, we think the principle is applicable to a case of this kind, and that, if the judgment is wrong and the plaintiff in error is right and was the owner of the land, even though he has lost it, it would neither be just to the plaintiff in error nor conducive to a good public policy to hold that he did not have a cause of action against the party who was the cause of his loss.

The dismissal of this writ of error would forever bar him of this right.

The demurrer will be sustained.

(50 Utah, 44)

KENT v. KENT et al. (No. 3000.)

(Supreme Court of Utah. April 26, 1917. Rehearing Denied May 21, 1917.)

1. TRUSTS ⇨358(1)—CONSTRUCTIVE TRUSTS—FOLLOWING TRUST PROPERTY.

A trust will not be impressed upon funds or property in the hands of the alleged trustee where the original trust property or trust fund cannot be traced or identified either in its original or substituted form.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 558.]

2. TRUSTS ⇨371(1)—CONSTRUCTIVE TRUSTS—PLEADING.

A complaint, setting up the receipt of funds by alleged trustee for investment, the investment of such money, the mingling and confusion thereof with private funds of the trustee, and that such trust property cannot be traced or segregated, *held* to preclude plaintiff from establishing trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588, 599.]

Appeal from District Court, Cache County; J. D. Call, Judge.

Action by Emeline H. Kent against John D. Kent and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John A. Bagley, of Montpelier, Idaho, for appellant. Richards, Hart & Van Dam, of Salt Lake City, for respondents.

FRICK, C. J. The plaintiff commenced this action in equity to impress certain property with a trust and to recover the trust fund. In her complaint she alleged that:

> The defendants are the executors of the estate of one Sidney B. Kent, deceased; "that in 1881 the plaintiff was the owner of certain real property in Davis county, Utah; that at that time it was agreed by and between the plaintiff and Sidney B. Kent, deceased, that said property should be sold by Sidney B. Kent, and that he should invest the proceeds thereof in real estate and personal property in Cache county, Utah, and hold the same in trust for the use and benefit of the plaintiff; that pursuant to the said agreement between the plaintiff and Sidney B. Kent the said Davis county property was sold by Sidney B. Kent for the sum of $4,500 in cash, which said amount was received by Sidney B. Kent as trustee, pursuant to said agreement to be invested in property in Cache county, Utah, for the use and benefit of the plaintiff; that afterwards and during the lifetime of the said Sidney B. Kent, deceased, but the real dates are unknown to the plaintiff, the said Sidney B. Kent, deceased, used the said $4,500 in purchasing, acquiring, and improving real property and in purchasing personal property in Cache county, but the said Sidney B. Kent, deceased, in purchasing and improving said property, mingled the said $4,500, which he held in trust for the plaintiff, with his own private funds, and so used and invested said trust fund that it cannot now be traced and cannot be segregated from the private property of the said Sidney B. Kent, deceased; that by reason of the said agreement between plaintiff and the said Sidney B. Kent, deceased, a trust was created in favor of the plaintiff with Sidney B. Kent, deceased, trustee, and the said $4,500, thereby became a trust fund; that Sidney B. Kent died on or about the 8th day of December, 1914, and at the time of his death was a resident of Cache county, state of Utah, and at the time of his death he held the said $4,500 in trust for the use and benefit of the plaintiff; that the said Sidney B. Kent never, at any time, denied or repudiated said trust; that the said Sidney B. Kent, during his lifetime did not, and the defendants have not, paid to the plaintiff the said $4,500 or any part thereof."

Plaintiff also alleged that she had duly presented her claim to said executors for allowance, and that they had rejected the same. She prayed judgment that the trust be established, and that she recover judgment for said $4,500 with legal interest. The defendant, M. E. Kent, demurred to the complaint: (1) That it "does not state facts sufficient to constitute a cause of action"; (2) that the action is barred; and (3) that the complaint is uncertain and ambiguous in certain particulars. The two other defendants filed an answer to the complaint, which, however, has no bearing upon the case. The district court sustained the general demurrer, and, the plaintiff electing to stand on her complaint, judgment dismissing the same was duly entered, from which she appeals.

The only error assigned is that the district court erred in sustaining the demurrer. The only matter, therefore, that concerns us on this appeal is the correctness of the ruling of the district court in sustaining the general demurrer. It will be observed that the plaintiff in her complaint, among other things, alleges that:

> "Deceased, in purchasing and improving said property, mingled the said $4,500 which he held in trust for the plaintiff *with his own private funds, and so used and invested said trust fund that it cannot now be traced and cannot be segregated from the private property of the said Sidney B. Kent, deceased.*" (Italics ours.)

Suppose, after a trial of a case in which it is sought to impress a certain fund or property with a trust, the court should find from the undisputed evidence that the facts were precisely as they are alleged to be in the foregoing statement, Would not such a finding completely dispose of the claim that there was any property or fund upon which a trust could be impressed? Such a finding would conclusively show that the claimant had no better right to any specific property of the deceased's estate than any general creditor would have.

[1] The courts have frequently considered and passed upon claims like the one before us, but we know of no case where it has

been held that a trust could be impressed on property or funds where it is conceded to be impossible to trace or identify the property or fund, either in its original or substituted form. The law upon that subject is well stated in an early California case, entitled Lathrop v. Bampton, 31 Cal. 22, 89 Am. Dec. 141, in the following words:

> "Before a cestui que trust can claim specific real or personal property he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereof in a new form. The rule upon this subject is well and concisely stated by Mr. Justice Lewis in Thompson's Appeal, 22 Pa. 17: 'Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the cestui que trust. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case where the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description.' Story Eq. §§ 1257, 1259; Tiffany and Bullard on Trusts and Trustees, 33, 34."

In Orcutt v. Gould, 117 Cal. 315, 49 Pac. 188, and in Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861, the case of Lathrop v. Bampton, supra, is approved and followed. In Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, the law upon the subject now under discussion is stated thus:

> "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails."

The foregoing case is followed in Lowe v. Jones, 192 Mass. 94, 78 N. E. 42, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551. To the same effect is Pryor v. Davis, 109 Ala. 117, 19 South. 440. Many more cases could be cited, but it is unnecessary to do so.

[2] The doctrine announced in the foregoing cases is followed by this court in the case of Waddell v. Waddell, 36 Utah, 435, 104 Pac. 743. In that case this court did just what is said in Little v. Chadwick, supra, a court of equity should do, namely, we went just as far as we could in "tracing and following the trust money." In the Waddell Case we applied as liberal a rule as, with reasonable safety, can be applied in following trust funds and in enforcing the trust. It was, however, not held in the Waddell Case, nor in any other, so far as we are aware, that a court has ever impressed, or has attempted to impress, a trust upon certain property or upon a certain fund where the original trust property or trust fund can no longer be traced or identified, either in its original or substituted form. That is just what, under the allegations of the complaint, we would be required to do if we overruled the demurrer and permitted the plaintiff to prevail upon the allegations of her complaint.

In view of the foregoing conclusion it becomes unnecessary for us to discuss or pass on the other questions raised by the demurrer. The judgment is therefore affirmed. Respondent to recover costs.

McCARTY and CORFMAN, JJ., concur.

(50 Utah, 48)

KENT et al. v. KENT et al. (No. 2999.)

(Supreme Court of Utah. April 26, 1917.)

Appeal from District Court, Cache County; J. D. Call, Judge.

Action by S. W. Kent and others against John D. Kent and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

John A. Bagley, of Montpelier, Idaho, for appellants. Richards, Hart & Van Dam, of Salt Lake City, for respondents.

FRICK, C. J. In this action the same kind of relief is sought as in the case of Kent v. Kent, 165 Pac. 271, immediately preceding this case. The only difference between this and the preceding case is that the plaintiffs are different. The same property that was sought to be impressed with a trust in the preceding case is also sought to be impressed with a like trust in this, and for the same reasons. With the exception of the parties plaintiff, and the allegations relating to formal matters, the allegations of the complaint in this case are the same as in the preceding one. A general demurrer was interposed to the complaint which was sustained by the district court, and, the plaintiffs electing to stand upon the allegations of their complaint, judgment dismissing the same was duly entered, from which they appeal.

For the reasons stated, and upon the authority of the preceding case, the judgment in this case must be, and it accordingly is, affirmed. Respondent to recover costs.

McCARTY and CORFMAN, JJ., concur.

(100 Kan. 588)

STATE v. SHIVES. (No. 21035.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS 🔑236(13) — UNLAWFUL SALE—SUFFICIENCY OF EVIDENCE.

In a prosecution for the sale of intoxicating liquor, the evidence *held* sufficient to sustain a conviction, although the witnesses who drank it professed not to be certain as to the character of the beverage sold.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 316.]

2. CRIMINAL LAW 🔑784(2)—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.

The omission to give an instruction regarding circumstantial evidence *held* not to have constituted error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883, 1960.]

3. CRIMINAL LAW 🔑448(2)—OPINION EVIDENCE—WITNESS' BELIEF.

Testimony regarding a fact is not to be characterized as opinion evidence because the witness undertakes to give only his belief in the matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1036.]

4. CRIMINAL LAW 🔑656(5)—TRIAL—REMARK OF TRIAL JUDGE.

A remark by the trial judge, suggesting a doubt of the candor of a witness, *held* to have had a sufficient basis to prevent its constituting error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1530.]

Appeal from District Court, Reno County.

Roy Shives was convicted of selling intoxicating liquor, made a felony by prior convictions, and he appeals. Affirmed.

Carr W. Taylor, of Hutchinson, for appellant. S. M. Brewster, Atty. Gen., and H. E. Ramsey, of Hutchinson, for the State.

MASON, J. Roy Shives appeals from a conviction upon a charge of selling intoxicating liquor, made a felony by prior convictions.

[1] 1. The principal contention of the defendant is that the evidence did not warrant the verdict. There was abundant proof of his having sold four bottles of some kind of beverage, which the jury obviously found to have been beer, and the sole question involved in this assignment of error is whether there was any substantial evidence to support that finding. The person who bought it testified that he asked for beer and paid the defendant $1 for the four bottles, but that he did not know whether it was beer or not; that he could not tell for sure. Another witness who helped drink it said that at the time he thought it was beer, but that he did not know; that he could not swear what it was. Another said that he did not know what it was; that he did not know beer when he drank it; that it might have been "two per cent., or something like that." There was also evidence that it was in Schlitz beer bottles. The jury doubtless concluded, and were warranted in the conclusion, that the witnesses entertained no real doubt that the beverage was just what they bought and drank it for, but undertook to find justification in their own minds for their uncandid avowal of ignorance by reflecting that, not having exact scientific knowledge on the subject, they could not be absolutely certain about it, a form of perjury formerly quite common in such prosecutions, but happily less frequent in later years. The statement of a witness that he thought at the time that what he drank was beer was some evidence of the fact, and its weight was for the jury.

[2] 2. Complaint is made of the omission of the court to give an instruction concerning the effect of circumstantial evidence. No instruction was asked on that subject, but it is urged that one should have been included in the general charge, as it was incumbent upon the court to instruct on all material matters. The state relied on direct evidence of the offense charged. So far as circumstantial evidence was involved it was merely corroborative. In that situation it has been held not to be error to refuse to give a special instruction on the subject, even where it is asked. State v. Gereke, 74 Kan. 196, 86 Pac. 160, 87 Pac. 759. If such an instruction would have been appropriate in the present case, it was not so material as to render the omission to give it without a request a ground of reversal.

[3] 3. A motion was made in behalf of the defendant to strike out the testimony, already referred to, that when the witness drank the beverage in question he thought it was beer, on the ground that this was a mere opinion. The overruling of the motion is complained of. As already indicated, the statement was direct evidence as to a fact, the character of the liquor, the form in which it was given not affecting its competence, although having perhaps some tendency to impair its weight by suggesting a want of certainty on the part of the witness. 17 Cyc. 27, note 40.

[4] 4. In passing upon the motion referred to the trial judge added: "I want his opinion, a man who can drink beer and not know it." The remark is criticized as assuming that what the witness drank was beer. That was not the assumption. The witness testified that while he thought what he drank was beer he did not know it; in other words, that it might have been beer, although he was unaware of it, necessarily implying that he could drink beer without knowing it. If the judge betrayed a want of confidence in the candor of the witness, there was a sufficient basis for it to prevent its forming a ground for reversal.

The judgment is affirmed. All the Justices concurring.

(100 Kan. 448)

BALL v. COLLINS et al. (No. 20452.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. NEW TRIAL 🔑72—GROUNDS—UNSATISFACTORY VERDICT.

Rule followed that if, upon weighing the evidence, the trial court is dissatisfied with the verdict of the jury, it is his duty to set aside the verdict and grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148.]

2. APPEAL AND ERROR 🔑867(2) — ORDER GRANTING NEW TRIAL—REVERSAL.

Error in overruling a demurrer to evidence will not cause the reversal of an order granting a new trial, where the appeal is specifically from that order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3477, 3478, 3480, 3486.]

Appeal from District Court, Bourbon County.

Action by J. E. Ball against Charles Collins and another. Verdict for defendants, and on plaintiff's motion a new trial was granted, and defendants appeal. Affirmed.

A. M. Keene, of Ft. Scott, for appellants. John L. Connolly and James B. Connolly, both of Ft. Scott, for appellee.

MARSHALL, J. The defendants appeal from an order granting a new trial.

The plaintiff sought to recover on a promissory note and to foreclose a chattel mortgage given to secure the payment of the note. The defendants answered that the note was altered by increasing the amount thereof without their consent or authority, after it had been signed by them; that it was given in part payment for the purchase of a certain business in Ft. Scott; that the plaintiff agreed to perform certain services in connection with the sale of the business; that he failed, neglected, and refused to render these services; and that there was $70 due the defendants from the plaintiff. The evidence was conflicting. The jury returned a verdict in favor of the defendants for $70, and found that the plaintiff had changed the note innocently. On the plaintiff's motion, a new trial was granted "on the sole ground that the verdict of the jury did not meet with the approval of the court."

[1] 1. The defendants insist that the court erred in sustaining the plaintiff's motion for a new trial, and argue that the reason given by the court for granting a new trial was arbitrary, unwarranted, and insufficient. The motion for a new trial named all the statutory grounds. The defendants cite Bourquin v. Railway Co., 88 Kan. 183, 127 Pac. 770, to support their contention that, upon a motion for a new trial on several grounds, the trial court, in sustaining the motion, should state the specifications which are upheld and those which are overruled. In that case this court said:

> "Where a motion for a new trial on all the statutory grounds has been sustained generally this court on appeal will assume, in support of the ruling, that the trial judge was not able to reconcile the verdict with what he regarded as the true weight of the reliable testimony." Syl. par. 1.

The defendants also cite Sovereign Camp v. Thiebaud, 65 Kan. 332, 337, 69 Pac. 348, 349. In that case the court said:

> "The discretion of district courts in the matter of granting or refusing new trials is a legal, not a capricious, one. It must be warranted by law and guided by established precedent. It may not be exercised simply because the judge might wish the verdict to be otherwise. The applicant therefore must show a legal reason for its exercise. The saying that it takes 13 to render a verdict has passed to an adage, but can mean nothing more than that, in cases where conflicting evidence raises a substantial and serious doubt in the mind of the trial judge of the correctness of the conclusion reached by the jury, he may interfere."

Other decisions of this court are cited by the defendants, but they do not break down the rule that:

> "If, upon weighing the evidence presented, the trial court was dissatisfied with the verdict of the jury, it was his duty to set aside the verdict and grant a new trial." Walsh v. Railway Co., 164 Pac. 184.

See, also, Richolson v. Freeman, 56 Kan. 463, 43 Pac. 772; Railway Co. v. McClure, 58 Kan. 109, 112, 48 Pac. 566; Railroad Co. v. Matthews, 58 Kan. 447, 452, 49 Pac. 602; Bank v. Goodrich, 96 Kan. 719, 153 Pac. 541.

The verdict did not meet with the approval of the trial court; it was his duty to grant a new trial.

[2] 2. Each of the defendants, at the close of the plaintiff's evidence, filed a demurrer thereto. These demurrers were overruled. The defendant Collins argues that it was error to overrule his demurrer. In his brief the plaintiff says:

> "Appellants [evidently meaning appellee] frankly admit that the testimony on the part of appellee shows that at the time that appellee altered said note and mortgage that appellee did not get the consent of said appellant, Chas. Collins, to said alteration; neither does the evidence show that said alteration was made in appellant, Chas. Collins', presence. The evidence does show, however, that shortly after said alteration that the appellant, Chas. Collins, learned that appellee had altered said note and mortgage, and that he remained silent and made no protest until appellee spoke to him regarding the same. Appellee contends that his conduct was such that he ratified the same, and that the trial court was correct in overruling said demurrer."

Section 6652 of the General Statutes of 1915 in part reads:

> "Where a negotiable instrument is materially altered without the assent of all parties liable thereon it is avoided, except as against a party who has himself made, authorized or assented to the alteration."

Authority or assent requires some affirmative action or statement. No such action or statement on the part of Collins was shown. He did not, within the meaning of the statute quoted, ratify the alteration. His demurrer to the plaintiff's evidence should have been sustained. However, the error committed by the court in refusing to sustain that demurrer is not now available to Collins, for the reason that his appeal is specifically from the order granting a new trial.

The judgment of the court granting a new trial will not be set aside as to either of the defendants, and is therefore affirmed. All the Justices concurring, except WEST, J., who did not sit.

(100 Kan. 529)

HAWKS v. ATCHISON, T. & S. F. RY. CO.

(No. 20839.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ⚷867(2)—GRANTING OF NEW TRIAL AFTER VERDICT—REVIEW.

Where a new trial is granted after a verdict for the defendant, this court will not ordinarily undertake upon an appeal from such order to determine whether the plaintiff failed to make a prima facie case, inasmuch as the trial court may have thought a new trial advisable even if that were true, regarding the failure as excusable and remediable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3477, 3478, 3480, 3486.]

Appeal from District Court, Sedgwick County.

Action by S. S. Hawks against the Atchison, Topeka & Santa Fé Railway Company. Verdict for defendant, and from an order setting it aside and granting a new trial, it appeals. Order affirmed.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, for appellant. George W. Adams, S. S. Hawks, and T. V. McCluggage, all of Wichita, for appellee.

MASON, J. S. S. Hawks brought an action against the Atchison, Topeka & Santa Fé Railway Company for damages for the obstruction of an alley back of his residence in which it had laid its track. A verdict was returned in favor of the defendant, but the court set it aside and granted a new trial. An appeal is taken from such order.

The trial judge was requested by the defendant to state the grounds upon which the ruling was based, and responded by enumerating practically all the reasons set out in the motion, which embraced most of those recognized by the statute, and added: "The court may possibly think of some others, but not at the present time." The situation is therefore substantially the same as though no reason whatever had been assigned for the decision. The appellant recognizes the rule that the trial court has a wide discretion in the matter of granting a new trial, but insists that here the ruling should be reversed because as a matter of law a verdict in its favor was required in any view of the evidence. A reversal of such an order has sometimes been had on that ground. Sovereign Camp v. Thiebaud, 65 Kan. 332, 69 Pac. 348. Here the substance of the appellant's claim is that the plaintiff's evidence had no tendency to make out a case. A demurrer to his evidence was filed and overruled, but no appeal was attempted from that order. A ruling which would in itself support an independent appeal may sometimes be inquired into a proceeding brought to reverse the final judgment (White v. Railway Co., 74 Kan. 778, 782, 88 Pac. 54, 11 Ann. Cas. 550); but an appeal from an order granting a new trial does not involve a review of the overruling of a demurrer to the evidence (Ball v. Collins, 165 Pac. 273, decided at this sitting). Even if this court upon an examination into the matter should be of the opinion that the plaintiff had failed to make out a prima facie case, the granting of the new trial might be permitted to stand on the ground that the trial court may have believed that "the failure, even if not due to any erroneous ruling against him, was for some reason excusable, and that justice would be promoted by allowing him another opportunity to introduce evidence." Bank v. Goodrich, 96 Kan. 719, 721, 153 Pac. 541. It is true that questions of law, which will have to be settled before the rights of the parties can be finally determined, have been argued in this proceeding, but in order for this court to pass upon them they must be presented upon an appeal by which they are directly raised. The present appeal is merely an effort by the defendant to retain the benefit of the verdict that was rendered; but if its theory of the law is correct, there was no issue to be submitted to the jury, and its legal rights cannot be seriously prejudiced by the setting aside of a verdict returned under such circumstances.

The order granting a new trial is affirmed. All the Justices concurring.

(100 Kan. 450)

JOHNSON v. MENNONITE MUT. FIRE INS. CO.

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by Editorial Staff.)

INSURANCE ⚷665(3)—FIRE INSURANCE—OCCUPANCY..

In an action on a fire insurance policy, findings and evidence construed to show that the property was occupied during the 30 days preceding the fire within a 30-day vacancy clause.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711–1716.]

On petition for rehearing. The former decision, that part touching vacancy when the loss occurred being withdrawn, adhered to.

For former opinion, see 100 Kan. 53, 163 Pac. 1074.

WEST, J. In his petition for rehearing counsel for the plaintiff insists that the former decision was wrong in holding that the minds of the parties did not meet. From plaintiff's abstract, however, it appears that:

> "The agreement between Mr. Young was that Mr. Young would give me a policy without any vacant permit."
>
> "I told him that if he would make it as he agreed to, then it would be all right, but under those terms I did not want it. I understood if I was blown away after the vacant permit was out that the policy was no good."

The secretary testified:

> That after the loss when the plaintiff came to the office and introduced himself "he admitted that he never had paid anything, and that he did not want the policy under those condi-

tions, on account of the vacant permit; that he wanted a policy that would be in force even if the building was vacant, and of course we had told him before in a letter, and told him at that time that we could not issue such a policy, but that we could issue vacancy permits for a certain time."

The clerk testified:

That the plaintiff said he did not pay the first cash payment, and that the reason was "that he did not want that kind of a policy, and that he did not want to bother with vacant permits."

The plaintiff testified:

"When you and Mr. Young were talking over at the livery barn did you make any request then for a vacant permit on this policy? A. He told me that he would write me a policy without any vacancy permit. Q. You did not ask him for a vacancy permit at that time to be placed on this policy? A. No, sir; I asked him to insure my house without any vacant permit; that is when he told me."

While the plaintiff was a little inaccurate in his references to the matter of vacancy clause, it is clear that he wanted a policy without one in it, and that the company refused to issue the kind he wanted; hence it follows as the night the day that the minds of the parties did not meet.

We thank counsel for calling our attention to the question of vacancy at the time the property was destroyed. It seems that the plaintiff had two sons-in-law, and an examination of his testimony in relation to when each was in the property had led to the conclusion that the jury meant by their answer that it had been occupied at a time thirty days before the fire, but counsel seems to be right that they meant it was occupied during the 30 days preceding the fire. This would have simplified the matter had the policy been in force even without resort to section 5362 of the General Statutes of 1915, rendering the vacancy clause void if the property were occupied at the time of the loss.

The former decision, that portion touching vacancy when the loss occurred being withdrawn, is adhered to. All the Justices concurring.

(100 Kan. 430)

FEIGHLEY v. C. HOFFMAN & SON MILLING CO. et al.

WIDLER v. SAME.

(Nos. 20023, 20175.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. RELEASE 🔑29(1)—JOINT WRONGDOERS—EFFECT.

The doctrine of Edens v. Fletcher, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618, to the effect that an acknowledgment by the plaintiff of satisfaction against one of several defendants sued as joint wrongdoers which constitutes only partial payment of the damages and in which the plaintiff expressly reserves the right to proceed against the other wrongdoers does not operate to release the others, where it appears that the parties to the arrangement did not intend such a result, reaffirmed and applied.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64, 67, 70.]

2. TRIAL 🔑156(2)—DEMURRER TO EVIDENCE—QUESTION FOR JURY.

The rule applied that upon a demurrer to the plaintiff's evidence the court cannot weigh the evidence nor settle conflicts in it, but that if the evidence most favorable to plaintiff tends to support the issues in the case, the demurrer must be overruled, and the case submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 355.]

Appeal from District Court, Dickinson County.

Actions by J. E. Feighley and by John J. Widler against the C. Hoffman & Son Milling Company, the Chicago, Rock Island & Pacific Railway Company, and others. Actions dismissed as to the railway company, and demurrers to each plaintiff's evidence sustained, and they appeal. Reversed and remanded for new trial.

E. C. Little, of Kansas City, and C. E. Rugh, of Abilene, for appellants. G. W. Hurd, Arthur Hurd, Bruce C. Hurd, and C. S. Crawford, all of Abilene, for appellees.

JOHNSTON, C. J. Two actions were brought against the C. Hoffman & Son Milling Company, the Hoffman Elevator Company, C. Hoffman, C. B. Hoffman, and the Chicago, Rock Island & Pacific Railway Company, one by J. H. Feighley and the other by John J. Widler, to recover damages for injuries resulting from an overflow of the Smoky Hill river, alleged to have been caused by the joint action and wrong of the defendants. It appears that a number of actions were commenced by other plaintiffs, all growing out of the same circumstances, of which one has already been appealed to and determined by this court. Arnold v. Milling Co., 93 Kan. 54, 143 Pac. 413. The situation along the river, the location of the Hoffman dam, and the obstruction at the railroad bridge are described in the opinion in that case. Upon the evidence produced in that case it was decided among other things, that the overflow on the Arnold land was caused by the obstruction at the railroad bridge, and not by the Hoffman dam. After that decision, and before these cases were tried, the railway company and the respective plaintiffs settled their differences, and through their attorneys entered into stipulations which were practically the same in each case, one of which was in the following terms:

"It is hereby stipulated and agreed by and between J. E. Feighley and the Chicago, Rock Island & Pacific Railway Company that the above-entitled action shall be and is dismissed as to the defendant the Chicago, Rock Island & Pacific Railway Company, with prejudice. The plaintiff hereby reserves any and all rights or causes of action against any of the other defendants. It is the intention of the plaintiff herein to preserve his rights to continue his suit and claim against all of the other defendants and to proceed against them."

The stipulation in each case was filed in court, and thereafter the actions were dismissed as to the railway company. At the trials the court sustained demurrers to the evidence of each plaintiff, who appeals.

[1] The question is presented whether or not under the stipulation the plaintiffs could still proceed against the other defendants. It is contended that, the plaintiff having sued the defendants as joint tort-feasors, each wrongdoer must be considered as approving the acts of the others and to have made their acts his own. The plaintiffs might have elected to sue them separately, but it is argued that, having sued them jointly and the act of each being the act of all, the discharge of one amounts to a satisfaction of the injuries done by all. It is therefore insisted that the release given by the plaintiff to the railroad company of a joint liability operates to extinguish the entire damages and as a release of the codefendants of the railway company. The question presented by the defendants was before the court in Edens v. Fletcher, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618, and every phase of it was carefully considered. It was not the intention of the parties that the payment made by the railway company and the release given to it should operate as a release of the others, and ordinarily the law gives effect to the intention and agreements of the parties which are based upon adequate consideration and are not contrary to good morals or public policy. All understood that only a partial compensation of the damages was made by the railway company, as it settled with plaintiffs by paying about 30 per cent. of the amount of their claims, and to leave no doubt there was a specific reservation of all rights and causes of action against the other defendants and an express statement of an intention to continue the suit against them for the remaining liability. In the Edens-Fletcher Case, supra, it was recognized that the authorities were in conflict on the question, but it was decided that the better rule, and one which is well sustained by modern authority, is that the intention of the parties between whom the agreement of release is made shall control. It was held that:

> "An acknowledgment by the plaintiff of satisfaction against two of several defendants, who are sued as joint wrongdoers, will not release the others, where the instrument offered to show such release shows that it was not intended to have such effect. Where such acknowledgment of satisfaction contains an express reservation of the right to proceed against the other joint wrongdoers, who are codefendants with those released, and other expressions in the instrument are not inconsistent with the retention of such right, the intention of the parties that the instrument should not operate as a release of such codefendants sufficiently appears." Syl.

In the opinion written by Mr. Justice Benson it was made too clear for doubt that the view taken was not in conflict with earlier Kansas decisions, and all of the objections were so completely answered and the governing rules so clearly stated as to leave no room for doubt or further contention as to the position of this court, or any occasion for a reconsideration of the question. The rule there announced was followed in the recent case of City of Topeka v. Brooks, 99 Kan. 643, 164 Pac. 285.

[2] Some contention is made that the evidence failed to establish a cause of action against the defendants. The question arises on a ruling sustaining a demurrer to the plaintiff's evidence, and if the evidence fairly tended to show that the dam and obstructions placed in the river contributed to throw back or hold the water upon the plaintiff's land, the demurrer should have been overruled. Some of the testimony does not support the plaintiff's contention, and there is confusion and conflict in it as to the injurious effect of the dam, but evidence was introduced fairly tending to show that the dam placed in the river by the defendants obstructed the flow, eliminated the channel, filled the bed with silt and other deposits, and all together operated to flood plaintiff's lands, causing injury and loss. Some of the testimony shows that the plane of high water was lower below than above the dam during the flood. The conflicting testimony and claims that the water was so high that the obstruction of the dam was without serious effect is one to be tried out by the jury, and not by the court. Authorities are not needed to show that upon a demurrer to evidence the court cannot accept some and disregard other testimony produced by plaintiff. It may not settle conflicts in the evidence nor draw inferences which conflict with any supporting evidence offered by the plaintiff. Putting aside the testimony unfavorable to plaintiff, the court must accept every fact and conclusion which the evidence most favorable to the plaintiff tends to prove, and if after allowing all inferences favorable to him the testimony on his behalf tends to support the issues presented, the demurrer must be overruled and the case sent to the jury. On that basis this was clearly a case for the jury.

It is said that a different result was reached in the Arnold Case, where the facts must have been substantially the same as in these cases. Evidence in that case, unless reproduced in this one, can be given no effect here. Rules of law determined in other cases may be applied, but every case is governed by its own facts, and we cannot consider facts in a former appeal which are not in evidence here, not even if it had been brought to review former judgments in these cases. C. B. U. P. R. Co. v. Andrews, Adm'r, 34 Kan. 563, 9 Pac. 213; Sanford v. Weeks, 50 Kan. 339, 31 Pac. 1088; Parkhurst v. National Bank, 55 Kan. 100, 39 Pac. 1027; Railway Co. v. Mosher, 76 Kan. 599, 92 Pac. 554.

Something is said to the effect that the dam was built in a manner and to a height authorized by statute, but if it be granted that the dam is no higher than the statute provides, that would not relieve defendants from liability for damages to those injured by its construction. The acts granting the right to construct the dam and increase its height expressly provided that it should not overflow the farm or lands outside of the natural banks of the river, nor was the owner of the dam relieved from liability for damages resulting from the building or raising of the dam. Laws 1869, c. 46; Laws 1870, c. 64.

The demurrer to the evidence should have been overruled, and therefore the judgment is reversed, and the cause remanded for a new trial. All the Justices concurring except DAWSON, J., who did not sit.

(100 Kan. 463)

SECKMAN v. MONARCH CEMENT CO.

(No. 20577.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT 🔑405(6)—WORKMEN'S COMPENSATION ACT — PERMANENT PARTIAL INCAPACITY—EVIDENCE.

The evidence in an action under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896–5942) *held* to warrant a finding that permanent partial incapacity resulted from the loss of the ends of the second and third fingers of the left hand of a workman who had already lost a part of the thumb and first finger of the same hand.

2. MASTER AND SERVANT 🔑385(1)—WORKMEN'S COMPENSATION ACT—PARTIAL INCAPACITY—COMPENSATION—STATUTE.

The provision of the statute (Gen. St. 1915, § 5905) that in case of partial incapacity periodical payments shall not be less than $3 a week relates to the amount of recovery, and not merely to the manner of its payment; it means that the workman shall be entitled to receive at least that amount for every week that the incapacity continues until the statutory limit of 8 years is reached.

Appeal from District Court, Allen County.

Action under the Workmen's Compensation Act by A. A. Seckman against the Monarch Cement Company. Judgment for plaintiff in a certain sum, and defendant appeals. Affirmed.

Cullison, Forrest & Clifford, of Iola, for appellant. Ross B. Smith and Claude M. Brobst, both of Chanute, and John W. Brown, of Iola, for appellee.

MASON, J. A. A. Seckman, while in the employ of the Monarch Cement Company, sustained an injury from machinery requiring the amputation of two fingers of his left hand—the second finger at the first joint, and the third a little higher up. Under the Workmen's Compensation Law he was allowed and paid $136.80 on account of total disability for substantially 18 weeks, and recovered a lump sum judgment for $1,195.80, being an allowance at $3 a week for the remainder of the 8-year period. The defendant appeals.

[1] 1. The defendant maintains that the evidence did not warrant a finding that the injury referred to resulted in any permanent impairment of his earning capacity. He had already lost a part of the thumb and first finger of the same hand. Some testimony was given to the effect that in course of time the plaintiff could grasp and hold objects with his left hand as well as before his injury—with as strong a grip; that there would be some loss of convenience, but none of power. But there was also testimony that the extension of his grip was lessened; that while he would have practically the same intensity of power he could not apply it; that in swinging on a rope, for instance, his hand would slip more easily; that he could not make a full hand in many lines of work; that he could not handle small objects nor grasp large ones securely—could not use a sledge with accuracy. It is not unreasonable to suppose that the loss of the ends of two of his fingers caused some substantial lessening of his effectiveness as a workman and of his usefulness to an employer. The evidence left the extent of impairment in some doubt, and the decision of the trial court must be regarded as final.

[2] 2. There was evidence that after the accident the plaintiff lost the sight of an eye, and that he had refused employment offered him. Complaint is made of the refusal of the court to make findings based thereon. If it had been necessary to estimate the degree of disability that resulted from the loss of the ends of the two fingers these matters might have been important. But they are rendered immaterial by the fact that the plaintiff was allowed (after his total disability ceased) only $3 a week. The statute reads:

> "The amount of compensation under this act shall be: * * * (*b*) Where total incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, equal to fifty per cent. of his average weekly earnings computed as provided in section 12 but in no case less than six dollars per week or more than fifteen dollars per week. (*c*) When partial incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, shall not be less than twenty-five per cent., nor exceed fifty per cent., based upon the average weekly earnings computed as provided in section 12, but in no case less than three dollars per week or more than twelve dollars per week. * * * No such payment for total or partial disability shall extend over a period exceeding eight years."
>
> "* * * In the case of partial incapacity the payments shall be computed to equal, as closely as possible, fifty per cent. of the difference between the amount of the 'average earnings' of the workman before the accident, to be computed as herein provided, and the average amount which he is most probably able to earn in some suitable employment or business after the accident, subject however, to the limitations hereinbefore provided." Gen. Stat. 1915, §§ 5905, 5906.

This has been interpreted to mean that if a workman suffers a permanent injury which substantially reduces his earning capacity, he is entitled to receive at least $3 a week until the end of the 8-year period, regardless of what he could earn or what he did earn during that time. Cain v. Zinc Co., 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251; Odrowski v. Swift & Co., 99 Kan. 163, 162 Pac. 268; Dennis v. Cafferty, 99 Kan. 810, 163 Pac. 461. The defendant, however, insists that it means, not that the injured workman shall be compensated at the rate of at least $3 a week for that period, but that after the total amount of his compensation has been fixed according to the extent to which his earning capacity has been diminished, it shall be paid to him in weekly installments of between $3 and $6; that the $3 a week minimum has no connection with the amount he is ultimately to receive, but relates only to the manner of its payment. We adhere to the construction previously adopted. The maximum and minimum weekly allowances are inserted in the section which relates to the amount of compensation. In the sentence regarding total incapacity they obviously form a part of the standard by which the amount of recovery is determined, for that matter is not elsewhere treated. In the sentence regarding partial incapacity they are used in precisely the same connection, and should be given the same force, although in the next section a rule is stated for computing compensation in case of partial incapacity which except for the limitations referred to would be complete in itself.

It is true that cases may be imagined in which $3 a week will more than compensate the actual loss of a workman who has suffered some permanent diminution of his earning power. The likelihood of the frequent occurrence of such cases would constitute a reason for a change of the law by the Legislature, but not for a refusal by the courts to give effect to its obvious meaning. The statute here construed has already been amended. The present law allows (in addition to compensation for the period of total disability) for the loss of the first phalange of the second finger, 25 per cent. of the average weekly wages during 30 weeks, and for the loss of the first phalange of the third finger 25 per cent. of such wages for 20 weeks. Here the plaintiff was earning $10.50 a week, and his allowance for partial incapacity would therefore upon that basis amount to $131.25. Laws 1917, c. 226, § 3.

The judgment is affirmed. All the Justices concurring.

(100 Kan. 597)

ELDER MERCANTILE CO. v. OTTAWA INV. CO. et al. (No. 21091.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. MECHANICS' LIENS 🔑110—SUSPENSION OF WORK—ABANDONMENT.

When the owner of real estate begins the construction of a building thereon and for want of funds to continue its construction or for other reason suspends the work, but with an intention and desire to complete it as soon as possible, and later contracts with a building firm for such completion which is begun, *held*, that as to such owner such suspension does not constitute an abandonment of the work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 143.]

2. MECHANICS' LIENS 🔑110—ABANDONMENT OF WORK—FILING OF LIEN.

When the materialmen are not advised and do not know of such intention and desire to complete the building, they may treat the work as abandoned and file liens.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 143.]

3. MECHANICS' LIENS 🔑111(1)—FILING OF LIENS—SUBSEQUENT CONTRACT—EFFECT.

When, after so treating it and so filing their liens, they contract with a building firm, which contracts with the owner to complete the building, and agree with such firm, with the knowledge and co-operation of the owner, to furnish labor and material to complete the building, their former liens being recognized by such firm and owner, then upon abandonment of the work by such firm such materialmen may have liens for all the labor and material furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 144.]

4. MECHANICS' LIENS 🔑207 — FAILURE TO FILE BONDS—WAIVER—LIEN.

When in such contract to furnish labor and material for the completion of the building the materialmen agree not to file liens on the assumption that a certain bond will be given by such firm as required by its contract with the owner, they are not required to take notice of the failure to give such bond, but on ascertaining such failure may file their liens; their waiver so to do being contingent on the fulfillment of the contract to give such bond.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 381.]

5. MECHANICS' LIENS 🔑198—MATERIALMEN—OTHER LIENS—PRIORITIES.

The company which began the construction of the building agreed with the firm which contracted for its completion to pay therefor certain bonds which were to be a first lien on the property, and agreed to see that an existing mortgage thereon should be released. When the materialmen contracted with reference to the completion of the building they knew of this provision. The owner and the holders of the first bonds were aware and had visual knowledge of the work of completion, and that the materialmen were putting their labor and material into the building, but failed to have such first mortgage released. *Held*, that the trial court did not err in giving the holders of such first lien a second lien, the building firm the third, and the materialmen concurrent first liens for their respective claims.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348-355.]

6. MECHANICS' LIENS 🔑97—TERMS OF CONTRACT—SUBCONTRACTOR.

While a subcontractor must take notice of the contract between his principal and the owner of the property, he is not bound by all of its terms, neither is he bound to know of its nonfulfillment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 129.]

7. MECHANICS' LIENS 🔑246—FORECLOSURE—EQUITY.

While mechanics' liens and the rights thereunder are statutory, their foreclosure and adjustment are not governed exclusively by the rigid rules of law, but to them are also applied the familiar principles of equity.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 431.]

8. Mechanics' Liens ⊂⇒161(1)—Materialman's Lien—Adding Profit to Cost.

A claim for material which adds to its actual cost a profit of 20 per cent. thereof is not, in the absence of proof, to be deemed unfair or unreasonable.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 280.]

9. Mechanics' Liens ⊂⇒161(1) — Subcontractor—Profit on Material Not Furnished.

A profit of 20 per cent. on that portion of the material not furnished because of abandonment of the work by the contractor cannot legally be allowed the subcontractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 280.]

Appeal from District Court, Franklin County.

Action by the Elder Mercantile Company against the Ottawa Investment Company and the Commerce Trust Company, and others. From a judgment enforcing mechanics' liens and determining their priorities, defendants Dobson Investment Company, State Bank of Ottawa, and F. C. Dobson appeal. Modified and affirmed.

W. S. Jenks, of Ottawa, A. E. Crane, of Atchison, Oscar Raines, of Oskaloosa, R. F. Hayden, of Topeka, and Robert S. Heizer, of Osage City, for appellants. F. M. Harris, W. B. Pleasant, Page & Oakes, and J. L. Shelden, all of Ottawa, and Charles Carroll, of Louisville, Ky., for appellee.

WEST, J. Of the numerous defendants the Dobson Investment Company, State Bank of Ottawa, and F. C. Dobson appeal from certain judgments in favor of a number of materialmen in litigation arising out of the construction of a building on ground formerly owned by the bank. The assignments of error chiefly relied on have reference to the priority of liens and to the amount of judgment rendered in favor of the Elder Mercantile Company. The parties and issues were so numerous that the court made 38 findings of fact and 19 conclusions of law.

The State Bank of Ottawa owned a certain lot. The Ottawa Investment Company was organized with substantially the same membership as that of the bank, with a capital stock of $10,000, the lot being purchased for $7,500 in money and constituting the assets of the Investment Company. The latter company, desiring to build on the lot, had plans made, and executed a trust deed to secure the payment of $50,000, which deed was placed of record. The work began, and before any money was secured the State Bank paid the bills as they came in for the labor and material going into the building. The Investment Company deposited $10,000 of the bonds as security for the advances, borrowed $5,000 from a Kansas City bank; the company and its president, F. C. Dobson, indorsed the note individually, and caused the company to deposit $5,000 of the bonds with the Kansas City bank, and the money so borrowed was placed in the State Bank to cover an overdraft. Soon the overdraft grew to $10,000, and, the note for $5,000 having become due, it was paid by Dobson, who took it up, and also the $5,000 bonds, the Investment Company consenting that he should hold these as security, and later by agreement with Dobson, the bank, and the Investment Company, the bank became the owner of the $10,000 bonds which had been deposited with it, and Dobson became owner of the $5,000 bonds held by him as security and the indebtedness of the Investment Company to Dobson and the bank was canceled. On June 1, 1914, the work on the building ceased. The materialmen had made agreements with the Investment Company to furnish material, and liens therefor were filed. Late in September the investment company contracted with Peacock & Son with the consent of Dobson and the State Bank to complete the building according to the original plans, unless thereafter modified. In payment the investment company was to issue bonds in the sum of $65,000 secured by a first mortgage lien on the real estate, building, and contents, and issue its preferred stock to the amount of $35,000. The contract contained a stipulation that all bonds of the existing issue then outstanding and the mortgage securing the same should be canceled. Dobson was to accept in lieu of his $5,000 of the old bonds a promissory note of the Investment Company for that amount. The Investment Company was to secure the consent and agreement of the State Bank to accept $10,000 of the new bonds for $10,000 of the old bonds held by it. The obligation of the contractors to proceed with the construction of the building was conditioned upon the retirement and cancellation of the other bonds and upon the contractor's being able to make satisfactory settlement of the obligations and debts of the Investment Company. The contract contained a warranty that the title was clear save the mortgage for the $50,000 bond issue, only $17,500 of which was outstanding. The contract also contained this provision:

> "All materials now in said building or on the ground or in the street or otherwise furnished or delivered to said company for the purpose of constructing or erecting said building shall be and become the property of said contractors as part of the consideration of this contract, and said company agrees to put said contractors in possession of the said building for the purpose of said construction and in possession of the said property and warrants the title of said property to said contractors subject to the aforesaid claims."

Shortly after the signing of this contract it was suggested that the investment company did not have legal authority to issue the bonds and stock provided for, and thereupon at the suggestion of the Peacock firm the Dobson Investment Company was organized out of the same personnel as had constituted the Ottawa Investment Company, capitalized at $65,000. At this time Dobson was vice president of the bank and Finley, a member of the Dobson Company and the Investment Company, was its cashier. The bank had been consolidated with another, and in February, 1915, was transacting business across the street from the incompleted building involved herein, and the bank officials at all times knew that Peacock & Son were proceeding with its completion and Dobson and Finley and the bank knew that Peacock & Son had not furnished the surety bond for the faithful handling of the stock and bonds and for the completion of the building mentioned in the contract between them and the Investment Company. The Dobson Investment Company issued a trust deed upon the real estate in question, signed by Dobson as president and Finley as secretary, which trust deed recited that it was a first lien upon the real estate. It was executed June 25, 1915, and recorded August 18th following. The assets of the Investment Company were transferred to the Dobson Company in April, 1915. October 31, 1914, the Elder Mercantile Company contracted with Peacock & Son for the completion of the heating, plumbing, gasfitting, and compressed air vacuum lines, having heretofore perfected a lien for the work done before the construction of the building ceased June 1, 1914. Under this contract of October 31, 1914, the bond which under the former contract Peacock & Son were to furnish, assuring the early completion of the building, was waived and the agreement that if Peacock & Son were paid in bonds they need not pay the Elder Mercantile Company until they realized on such bonds, was stricken out of the original contract, and it was agreed, among other things, that payment for work, material, and labor should be made as otherwise provided in such original contract. Under the contract thus modified the Elder Mercantile Company furnished labor and material to a large amount. Peacock & Son abandoned the work about December 15, 1915. They failed to give the Dobson Investment Company or the Ottawa Investment Company the bond provided for in the contract of September 24, 1914, and the bank and investment company and Dobson refused to surrender the bonds of the Ottawa Investment Company and to have the mortgage securing such bonds released of record. In August, 1915, the Dobson Investment Company delivered to Peacock & Son $40,000 of the bonds of the Dobson Company on condition that such delivery should not operate as a waiver of the right to the bond already mentioned. The court found that the work done by Peacock & Son on the building and the work and material furnished by the lien claimants added to its value $15,000, and that to complete the building as it stood at the time of the trial according to the plans would cost about $32,000. The court concluded that by the contract of September 24, 1914, Peacock & Son assumed the obligations of the Ottawa Investment Company for labor and material that had theretofore gone into the building. Judgments were rendered for the various lienholders. The bank of Ottawa, F. C. Dobson, and the Ottawa Investment Company were given judgments for the amounts due them, such judgments to be second liens upon the property in question. Peacock & Son's judgment was decreed to be the third lien, and the materialmen were decreed to have concurrent liens prior to both.

It is claimed that the contractors and subcontractors abandoned the work on June 1, 1914. But the court found that no steps were taken to resume the work until the 24th of September, when the Investment Company entered into a written contract with Peacock & Son; that the time intervening between this and the date of actual resumption of work "was consumed by the organization of the new company, the preparation of the bonds and trust deeds, a vast amount of correspondence between the Peacocks and their attorney in Cincinnati, Ohio, * * * and many other details in connection with the transaction carried on almost exclusively by correspondence." It was the Ottawa Investment Company which was constructing the building, and while the work ceased, it was not from any purpose or intention on its part to abandon it, for the contract with the Peacock firm provided for the completion of the work according to the original plans, and also recognized the claims of the materialmen whose liens had been filed after the work had ceased. The contract recited that the investment company was indebted to certain persons for labor and material furnished for the building in the sum of $5,433.16, that the title to the real estate was clear save for the mortgage of $50,000, and that "any other debts or liabilities of said company, or any amount for which liens of either head of subcontractors or materialmen or others can be claimed or taken or otherwise asserted on said real estate or building or any part thereof, do not exceed in the aggregate the sum of fifty-four hundred thirty-three and 16/100 ($5,433.16) dollars. * * *" The contract between the Peacock firm and the Elder Company recited:

> "There having already been furnished labor and material on above contracts to the amount of fourteen hundred fifty-three dollars and sixty-six cents ($1,453.66) with 6% interest from July 16, 1914, that the said Elder Mercantile Co., agrees to cancel their lien upon the filing of a sufficient bond assuring the early completion of the building, with the understanding that they will be paid that amount on the completion of the building and will continue the above-mentioned contracts."

[1, 2] Thus it appears that both the Peacock firm and the company with which it

contracted recognized the claims and liens of the Elder Mercantile Company when arrangements were made for resuming the work and completing the building. The investment companies and the Peacock firm having by their contracts and by their actions recognized and treated the province of the Peacock firm as one to complete and not to begin the construction of the building, and, having recognized the rights of the materialmen to the amounts for which they had filed liens, such materialmen, upon furnishing more labor and material, would plainly have the right, when the work was finally abandoned by the Peacock firm, to file liens for such additional labor and material as they had furnished. While in a technical sense it might be said that the liens filed before the Peacock firm came into the matter were premature, this, even if so, would make no substantial difference, owing to the recognition of their claims and liens by all concerned. In other words, when the work ceased on June 1, 1914, if the materialmen had no knowledge or notice of any intention of the Ottawa Investment Company to proceed further with the building, or any reason to think that the work had been abandoned, they were justified in filing the liens. Davis v. Bullard, 32 Kan. 234, 4 Pac. 75; Shaw v. Stewart, 43 Kan. 572, 23 Pac. 616; Lumber Co. v. Savings Bank, 52 Kan. 410, 34 Pac. 1045; Hotel Co. v. Hardware Co., 56 Kan. 448, 43 Pac. 769.

[3-6] On the other hand, if, as the fact appears, the Ottawa Investment Company had no intention or purpose of abandoning the work, but intended to provide for its completion as soon as possible, and did not so advise the materialmen, it could not complain because they filed liens on the theory of abandonment. But, however this may be, having in fact proceeded to contract for the completion of the building, and then having recognized the claims and liens of the materialmen, and the firm with which they contracted having likewise recognized them, it would certainly be harsh and unfair to hold that on the mere question of time of their filing such claims or liens should be avoided or impaired.

It is forcibly contended that as the mortgage securing the original bonds held by the appealing defendants was of record, the lien claimants were bound to take notice thereof and have no right to priority thereover. It is quite true that the lien of a materialman may not ordinarily supersede an existing mortgage upon property for the improvement of which he furnishes labor or material, but this is not an iron-clad rule which under no circumstances can have an exception. In this case the officers of the bank, and of the investment companies, and Mr. Dobson himself were largely the projectors and managers of the entire building scheme. Practically the same men who constituted the bank constituted in turn the two investment companies, Mr. Dobson and Mr. Finley being prominent in all three, all having actual and visual knowledge of the progress of the work; and when the contract with the Peacock firm provided that the bonds of the Dobson Investment Company should be a first lien on the property, then certainly as between the complaining parties and that firm the Dobson Investment Company bonds would take precedence over the Ottawa Investment Company bonds. It is urged, however, that all the lien claimants knew of the contract between the Ottawa Investment Company and the Peacock firm, and referred to it in their contracts, and by their admissions therein are estopped to deny the validity of the original mortgage. It is argued that as the labor and material to finish the building were to be paid for in stock and bonds of the Dobson Investment Company the subcontractors were bound to take notice of this agreement, and had no right to file liens against the property. It is further contended that in all but three of the contracts with Peacock & Son the subcontractors waived the right to file mechanics' liens, and that, having done this, they could not afterwards change their minds and file liens which could be recognized by law. Bloom, in his supplement to the Law of Mechanics' Liens, page 223, says:

> "An agreement to waive the lien of one who performs labor upon or furnishes material for a building must be certain and clearly and unequivocally established; and if such agreement is subject to conditions subsequent which are not performed by the other party, the claimant does not waive his lien." Concord Apartment House Co. v. O'Brien, 128 Ill. App. 437; Nice v. Walker, 153 Pa. 123, 25 Atl. 1065, 34 Am. St. Rep. 688; Holm v. Chicago, Milwaukee & P. S. R. Co., 59 Wash. 293, 109 Pac. 799; Pacific Lumber & Timber Company v. Dailey, 60 Wash. 566, 111 Pac. 869.

As Peacock & Son failed to carry out their part of the contract to furnish bond, it is argued that in effect the subcontractors failed to carry out their agreement; that it was their duty to see that the original contract was fully performed, that if it had been fully performed they would not have been entitled to a lien, and that by failure to carry it out they should have no greater rights. This provision to pay in bonds was stricken out of the second contract between the Peacock firm and the Elder Company. The court found that Peacock & Son wholly failed to give the Dobson Investment Company or the Ottawa Investment Company the bond provided for, and by reason of such failure the State Bank, the Ottawa Investment Company, and Dobson refused to surrender their bonds and to have the mortgage securing them released. The court further found that the Dobson Investment Company delivered $40,000 of its bonds, although without waiving the right to the bond agreed to be furnished by the Peacock firm. Also that in each of the contracts between Peacock & Son and the lien claimants the latter agreed that they would not take or assert any lien, but that they made these contracts relying on the terms and conditions of the contract between the Peacock firm and the Ottawa Investment Company, and did not waive their right to liens except upon condition that such contract be complied with. The court expressly found that none of the lien claimants except the Elder Company had any knowledge while performing labor and furnishing material that Peacock & Son had failed to furnish the bond provided for in their contract with the Investment Company, or that the Bank and Dobson had failed to have the mortgage of the Ottawa Investment Company canceled. The court concluded as matters of law that the Peacock firm assumed the obligations of the Ottawa Investment Company for labor and material already furnished, that the appealing defendants should have judgment for the amount of their bonds and a second lien therefor upon the property, and that the Dobson Investment Company bonds should be canceled. It would seem, therefore, that the lien claimants proceeded on the theory that the contract between the Investment Company and the Peacock firm would be or had been complied with. While doubtless it was their duty to take knowledge of the contract, we know of no rule which requires them to take notice of its violation or nonfulfillment.

> "A person making a subcontract is presumed to make it knowing the agreement of the principal contractor, but no subsequent agreement of the principal contractor can be set up to the subcontractor's disadvantage." Shaw v. Stewart, 43 Kan. 579, 23 Pac. 619.

A subcontractor's rights will not be affected by any subsequent agreement between the owner and contractor to which they have been assigned or by any act of waiver of the original contractor. Nixon v. Cydon Lodge, 56 Kan. 298, 43 Pac. 236.

> "His subcontract is subordinate to the principal contract with the owner, and is presumed to be made with knowledge of its existence, although he is not bound by all of its terms." Lang v. Adams, 71 Kan. 309, 311, 80 Pac. 593, 594.

The parties most interested in the construction and completion of the building were the ones who best knew of this noncompliance, and also knew that these claimants were putting their labor and material into the building and would naturally expect to be paid therefor. Having permitted this situation to continue, having without advising them of the failure of the Peacock firm to furnish the bond permitted the materialmen to add their property to the betterment of the building, it would seem most inequitable to permit these parties now, by reason of the failure of the Peacock firm to give the bond which they contracted to give, to step in ahead of the lien claimants with the mortgage which was retained after having expressly contracted that the Dobson Investment Company mortgage should be a first lien.

The mortgagee may safely witness the construction of building upon the property mortgaged and the use of material therefor furnished subsequent to the date of his mortgage, but if instead of merely resting on the priority of his security he agree with the contractor that his mortgage is to be a second lien, and knowingly permit the materialman to act on the strength of his agreement that the contractor is to have the first lien, it certainly cannot lie in the mouth of the mortgagee thereafter to claim a lien superior to that of the materialman.

[7] While mechanics' liens and the rights thereunder are statutory, their foreclosure and adjustment are not governed exclusively by the rigid rules of law, but to them also apply the familiar principles of equity. In the cited case of Shaw v. Stewart, this language was used:

> "The foreclosure of a mechanics' lien under the statute is an equitable proceeding, in which the powers of the court are evoked to mold the remedy, within the provisions of the statute, to suit the circumstances of the case. In this action the equities are with the plaintiffs." 43 Kan. 578, 23 Pac. 618.

In Lumber Co. v. Arnold, 88 Kan. 465, 471, 129 Pac. 178, 181, it was said:

> "It is true, as suggested, that a lien for labor or materials can only attach by virtue of the statute as applied to the facts, and that no lien of this kind can be created by force of equitable rules. At the same time courts are established for the purpose of doing justice, and not to assist a party to obtain an unconscionable advantage; and in a case like this slight circumstances might be considered sufficient evidence that the holder of the legal title acquiesced in the purchaser taking possession of the lots and in contracting for the material. If he permitted the purchaser to take possession under the oral contract and to make the improvements, he ought to be estopped to deny that the purchaser obtained the equitable title."

Within the spirit of these declarations the lien claimants are entitled to priority.

[8, 9] In the claim of the Elder Mercantile Company the actual cost constituted one item to which was added 20 per cent. profit. Some criticism is made of this, but certainly it cannot be expected that materialmen are to furnish their goods without any profit whatever, and there is no showing that 20 per cent. is an unfair or unreasonable charge in this respect, and therefore it was not error to allow it. However, an additional charge of $860.85 was made for 20 per cent. profit on the balance of the uncompleted contract, that is to say, if the Elder Company had been permitted to go ahead and furnish $4,304.29 worth more of material it would then have been entitled to a profit thereon of 20 per cent., or $860.85. As this amount was not furnished, and as the material which otherwise would have gone into this building was still the property of the company, no ground exists for charging this 20 per cent. profit on something which never was furnished or used.

Various other points are argued, but under the circumstances do not need to be considered.

No error appears in the record touching the matters complained of save the excess claim just referred to.

The judgment, modified by deducting from the lien of the Elder Mercantile Company $860.85, is affirmed. All the Justices concurring.

(100 Kan. 441)

ELY v. WICHITA NATURAL GAS CO.
BELL BROS. & McDONALD v. SAME.

(Nos. 20350, 20351.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. Mines and Minerals ⟹83—Contract to Purchase Gas—Authority to Dispose of it Elsewhere.

The rights of one who had contracted to purchase certain gas, but refused to accept that which was tendered on the ground that it did not conform to the requirements, *held* not to be affected by his refusal to sign a writing authorizing the seller to dispose of it elsewhere.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 212, 214, 215.]

2. Constitutional Law ⟹249, 315 — Due Process of Law — Equal Protection of the Laws—Decision.

A decision that gas tendered under a contract was not merchantable within the meaning of that term as there employed *held* not to involve a violation of the Fourteenth Amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 710, 935, 937, 941, 947.]

Appeal from District Court, Neosho County.

On rehearing. Former judgment of reversal adhered to.

For former opinion, see 99 Kan. 236, 161 Pac. 649.

J. J. Jones, of Chanute, J. H. Brennan, of Bartlesville, Okl., A. C. Malloy, of Hutchinson, and O. C. Massey, of Bartlesville, Okl., for appellant. Hugh P. Farrelly and Thomas R. Evans, both of Chanute, for appellees.

MASON, J. On the original hearing of this case a reversal was ordered on the ground that under the facts found by the trial court the defendant was justified in refusing to accept and pay for the gas which was tendered it; that the detailed findings made the question whether the gas was merchantable, within the meaning of the contract, one of law, requiring an answer in the negative. Ely v. Gas Co., 99 Kan. 236, 161 Pac. 649. After a rehearing, and a full consideration of the additional arguments and briefs, the court adheres to that conclusion, upon the grounds stated in the former opinion. This decision renders the matter of procedure unimportant, but to make clearer what was said in the original opinion on that subject it may be added that the court did not mean to indicate that by reason of the form in which it was brought the action was not maintainable, but merely that if the plaintiffs had been entitled to recover at all the measure of their damages would have been the amount of actual loss they could prove, which would not necessarily be the full contract price of the gas.

[1] 1. A contention of the plaintiffs to which we have made no previous reference, although it was urged at the first as well as at the second hearing, is that the defendant was not acting in good faith, and that this is shown by the fact that it refused to consent to the plaintiffs' selling the gas elsewhere. A short time before the trial the defendant's general manager refused a request, made in behalf of the plaintiffs, that he sign a writing in these words:

> "The Wichita Natural Gas Company hereby consents and agrees that Seth Ely and Bell Bros. and McDonald may sell of this natural gas product in Chautauqua county, Kansas, any amount that they may have an opportunity to sell, and they are hereby released from the existing contracts by and between said parties, to the extent of such sales so made to other parties. Sales thus made to other parties shall be credited on the minimum provided in said existing contracts, but in no other way shall said existing contracts be modified hereby."

The explanation given of this refusal is that the manager feared that the writing might be construed as a recognition of the defendant's liability under the contract. Whether the provision that sales made to other parties should be credited on the minimum stated in the contracts was open to such construction need not be determined. There was some room for a more or less plausible argument to that effect, and the unwillingness of the officer to commit his company by signing a document, the legal force of which was debatable, cannot be considered as a denial of the plaintiffs' right to sell the gas to some one else. A letter from the defendant to one of the plaintiffs, dated April 14, 1914, was introduced in evidence, which concluded with the words:

> "I have * * * advised you that as far as we were concerned, * * * you were at liberty to sell any part of this gas that you could sell elsewhere, as its quality prevented us from taking it in any large quantity."

The person addressed testified that while the first part of the letter looked familiar, that he did not remember the part just quoted. However that may be, the defendant had taken such a position in its pleading that it could not be heard to object to the plaintiffs selling their gas to other persons. In its answers it alleged that the gas was unmerchantable, and that it could not use it, and added that the provision of the contract forbidding the plaintiffs to sell gas to other persons was contrary to public policy and void.

[2] 2. The plaintiffs also contend that the decision results in a violation of the provisions of the Fourteenth Amendment to the federal Constitution relating to due process of law and the equal protection of the laws,

inasmuch as it deprives them of their property rights in the gas in controversy, without the police power of the state being involved. The contention is timely made, so as to preserve any rights the plaintiffs may have in that regard, but we regard it as not well founded.

The former judgment of reversal is adhered to. All the Justices concurring.

(100 Kan. 585)

McCORMICK v. McCORMICK. (No. 20940.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. DIVORCE 🔑249(1) — EQUITABLE DIVISION OF PROPERTY—POWER OF COURT—STATUTE.

If the court refuses to grant a divorce to parties, it may, under section 668 of the Civil Code (Gen. St. 1915, § 7576), make an equitable division and disposition of their property, although no demand for such division and disposition had been made by either of the parties in the pleadings originally filed by them.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701–703.]

2. DIVORCE 🔑249(1)—DIVISION OF PROPERTY — ADDITIONAL PLEADINGS — POWER OF COURT.

After refusing a divorce in such a case the court may, in its discretion, direct the parties to set forth their claims as to property rights, and what each would regard to be an equitable division of their property; but as such a division is incidental to the divorce proceeding, such written statements or additional pleadings are not essential to the authority of the court to make a division.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701–703.]

3. DIVORCE 🔑130—EXTREME CRUELTY—SUFFICIENCY OF EVIDENCE.

The evidence examined, and *held* to be sufficient to sustain the findings and judgment of the trial court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442–445.]

Appeal from District Court, Riley County.

Action for divorce by George W. McCormick against Theodora B. McCormick. Judgment for defendant, making an equitable division of the property, and awarding her a certain amount, and requiring plaintiff to pay the costs of the action and defendant's attorney's fee, and plaintiff appeals. Affirmed.

Williams & Johnston and Sam Kimble, all of Manhattan, for appellant. Hal E. Harlan, of Manhattan, and J. V. Humphrey, of Junction City, for appellee.

JOHNSTON, C. J. This was an action brought by George W. McCormick to obtain a divorce from Theodora B. McCormick. The divorce was refused, and the court proceeded to make an equitable division of the property awarding the defendant the sum of $1,200, and requiring the plaintiff to pay the costs of the action and an attorney's fee for the defendant. The plaintiff appeals.

[3] The grounds for divorce stated in the petition were gross neglect of duty and extreme cruelty. The defendant denied the averments of the petition, and further alleged condonation of the wrongs alleged by plaintiff. There was much conflict in the testimony, and the main contention is that it does not sustain the findings and judgment of the court. Plaintiff offered evidence tending to show that the defendant was of a jealous disposition, was unjustly suspicious of him, and had charged him with dishonesty and infidelity. There was testimony that she was quarrelsome, and had nagged and harassed him as to his property, going so far as to attempt to obtain a portion of it. Defendant offered testimony to the effect that she was required to live in a single room in a hotel when she very much desired and had been promised a home; that plaintiff had left her alone, and had spent a great part of his time in a village in Missouri, where he entered into some kind of a business relation with a woman of that place. The testimony is that defendant reproached him for leaving her and his regular place of business, and in view of the testimony in the case it is not surprising that she was jealous, nor that she should use strong language in complaining of his conduct. According to some of the testimony, things were said and done by each of the parties that were far from creditable. After reviewing the testimony at length, the court concluded that the plaintiff was not entitled to a divorce, and the decision appears to have sufficient support in the evidence. The complaint that the statements and findings of the court betrayed a prejudice against the plaintiff is not sustained. The court found, and apparently upon sufficient testimony, that after plaintiff had filed his petition asking for a divorce the plaintiff and defendant resumed marital relations, having on divers occasions lived and cohabited together as man and wife. Under the circumstances the court was warranted in refusing the divorce.

[1, 2] It is contended that the court was not warranted in ordering a division of the property between the parties, as no demand was made in the pleadings for such division. The Code does not require an allegation as to property rights, nor that a demand for a division of the property shall be included in the pleading before an order of that kind may be made. In an action to obtain a divorce where the parties are in equal wrong the court may refuse a divorce, or in any other case where a divorce is refused the court may make an equitable division of the property. Civ. Code, § 668 (Gen. St. 1915, § 7576). The matter of a division is not an essential part of the application for a divorce, but it is a mere incident of it. The right to make a division does not arise until a divorce has been refused, and it is then a matter within the discretion of the court.

Parties contending as to the granting of a divorce are hardly required to anticipate in their original pleadings the refusal of the divorce. A defendant would hardly be consistent if he insisted that there was no ground for a divorce and no reason why the marital relations should not be continued, and at the same time and in the same pleading should ask for a division of the property. Upon refusing a divorce it would be competent for the court to indicate that it had under consideration a division of the property, and to direct the parties to file written statements of their claims as to what would constitute an equitable division, but the practice has generally been to make the inquiry without written statements or formal pleadings of any kind.

In Bowers v. Bowers, 70 Kan. 164, 78 Pac. 430, there was an application for a division of property in connection with a demand for a divorce, but in the cases of Van Brunt v. Van Brunt, 52 Kan. 380, 34 Pac. 1117, Rullman v. Rullman, 80 Kan. 691, 102 Pac. 1102, and Danielson v. Danielson, 99 Kan. 222, 161 Pac. 623, it does not appear that a division of the property was mentioned in the pleadings, and in the view of the court a demand in the pleadings for a division is not essential to the making of an order when a divorce is refused.

We find no substantial error in the record, and the judgment of the court is affirmed. All the Justices concurring.

(100 Kan. 487)

GEHLENBERG v. HARTLEY et al.

(No. 20677.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. COURTS 🔑33—JURISDICTION OF INFERIOR TRIBUNAL—SILENCE OF RECORD—COLLATERAL ATTACK.

The general rule that silence of the record of a tribunal of inferior jurisdiction on a jurisdictional point is fatal applies in cases of collateral attack to those jurisdictional facts only which the law directs the tribunal to enter upon its record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 135, 136, 138.]

2. HIGHWAYS 🔑54—ESTABLISHMENT—RECORDS—COLLATERAL ATTACK.

To be sufficient against collateral attack, the recitals of records relating to the establishment of a road need not exhibit technical precision. They should be liberally construed, and however informal, should be upheld whenever enough appears to show with reasonable certainty that the requirements of the law were complied with.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108, 169–172.]

3. HIGHWAYS 🔑54 — ESTABLISHMENT OF ROAD — NOTICE OF VIEWERS' MEETING — EVIDENCE.

Recitals of the journal of the proceedings of the board of county commissioners in establishing a road, and of the road record, considered, and *held* to show valid service of notice of the meeting of viewers.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108, 169–172.]

4. HIGHWAYS 🔑63—ESTABLISHMENT—PRESUMPTION AND BURDEN OF PROOF—STATUTE.

Under the provisions of section 6, c. 108, Laws 1874, providing that when the viewers' report, the survey, and the plat of a road have been recorded pursuant to order of the board of county commissioners, "from thenceforth said road shall be considered a public highway," the record indicated is prima facie evidence that the road was legally established, and a landowner attacking collaterally the existence of the road has the burden of establishing the nonexistence of jurisdictional facts.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 168.]

5. HIGHWAYS 🔑54 — ESTABLISHMENT OF ROAD—VALIDITY OF PROCEEDINGS.

Discrepancies in the road record regarding the time and place of the meeting of the viewers considered, and *held* insufficient to impair the prima facie validity of the proceedings.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108, 169–172.]

6. HIGHWAYS 🔑17—OPENING FOR TRAVEL—EVIDENCE.

The evidence considered, and *held* sufficient to sustain the finding that a road was opened in fact by travel within seven years from the time it was established.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24.]

Appeal from District Court, Saline County.

Action for injunction by Ben Gehlenberg against J. O. Hartley and others, as the Board of County Commissioners of the County of Saline, and M. D. Ross, as trustee, etc. Judgment for defendants, and plaintiff appeals. Affirmed.

David Ritchie, of Salina, for appellant. L. W. Hamner, F. B. Bristow, and W. B. Crowther, all of Salina, for appellees.

BURCH, J. The action was one by a landowner to enjoin the board of county commissioners from opening a road. An injunction was denied, and the plaintiff appeals.

The road was established in October, 1888. The road record recites in regular order all the statutory steps for the location of a road. The statute then in force contained the following provision relating to notice of the meeting of the viewers:

> "It shall be the duty of at least one of the petitioners to cause six days' notice to be given in writing to the owner or owners, or their agents, if residing in the county, or if such owner be a minor, idiot or insane person, then to the guardian of such person, if a resident of the county, through whose land such road is proposed to be laid out and established, and also six days' notice to the county surveyor, of the time and place of meeting, as specified in the notice of the commissioners. Copies of said notice to owners of lands, with affidavits of service attached, shall be filed in the county clerk's office before said road shall be established." Laws 1874, c. 108, § 4; Gen. Stat. 1889, par. 5477.

The original affidavit of service of this notice is not abstracted. The journal of the board of county commissioners contains the following recital:

> "And whereas it further appears to the satisfaction of the board that H. C. Davis, one of the petitioners, did cause six days' notice in writing to be given to each of the owners of the land through and over which said road is proposed to be located, and that a copy of said notice with affidavit of service attached is now on file in the office of county clerk. Upon due consideration no legal objection having been offered against the establishment of said road and believing the same to be of public utility, it is ordered that the viewers' report of view be approved, and that said road be located as a public highway in accordance therewith, full record thereof to be made in the county road record and plat as road No. 553, and the trustees of Greely and Smoky Hill townships to be notified to cause the same to be opened to public travel."

The road record contains the following recital:

> "Also, upon said 10th day of October, 1888, there was presented to said county board the affidavit of H. C. Davis, one of the petitioners aforesaid, setting forth that due notice of the location of said proposed road, together with date of meeting of the viewers, as per published notice of county clerk, had been served upon each of the persons noted below, who as owners, agents or guardians were all the persons through whose premises said road is proposed to be located, to wit: Wm. E. Grier, owner; [description of land.] Mrs. A. T. Grier, owner; [description of land.] James Sharp, owner; [description of land.] A. M. Claflin, agent; [description of land.]"

The plaintiff's land is that for which the road record shows A. M. Claflin was agent, and was owned at the time by W. C. Glidden. The plaintiff argues that the order establishing the road was void for want of jurisdiction, because the record contains no finding by the board of county commissioners that Glidden was a nonresident of the county and no finding that Claflin was his agent.

[1] The attack on the proceeding is collateral. The general rule is that silence of the record of a tribunal of inferior or limited jurisdiction on a jurisdictional point is fatal. But this rule applies, in cases of collateral attack, to those jurisdictional facts only which the law directs the tribunal to enter upon its record. There is nothing in the statute of 1874 requiring the board to make or to enter of record either of the findings which the plaintiff suggests, before jurisdiction to act on the viewers' report attaches.

[2, 3] One of the petitioners must cause notice of the view to be given to the persons whose land will be affected, and must make affidavit of service of the notice. Proof of service may be filed at any time before the road is established. When filed, it is filed with the county clerk. When the report of the viewers comes in, the course to be pursued is prescribed by the statute:

> "It shall be the duty of the commissioners, on receiving the report aforesaid, to cause the same to be read before their meeting; and if said report is favorable, and no legal objections appear against said report, and they are satisfied that such road will be of public utility, they shall order said road [report], survey and plat to be recorded, and from thenceforth said road shall be considered a public highway, and the commissioners shall issue their order to the trustees of the respective townships in which such road is located, directing them to cause the same to be opened for the public travel." Laws 1874, c. 108, § 6.

It is plain that jurisdiction to act on the viewers' report depends on valid service and not on a finding made after service that due service was made. A copy of the notice with the affidavit of service lies in the county clerk's files, as a summons with the sheriff's return lies in the files of the clerk of the district court in an ordinary action. The commissioners will of course satisfy themselves that proper notice has been given before establishing the road. They may do this, however, in any way they choose. They may accept the affidavit of service. Whatever they do in this regard is confirmatory only and adds nothing to the service. Should the commissioners neglect to review the action of the petitioner in giving notice, and proceed to establish the road, their jurisdiction would depend on the character of the service. If that were valid, the road would be legal.

The plaintiff says the record as it stands does not show notice served on Glidden or any one for him. The court disagrees with the plaintiff. The journal contains a finding that notice was served on each of the owners of land affected by the proceeding, and that proof of service was on file with the county clerk. This finding covers every material fact essential to valid service. The road record recites that the affidavit of service set forth that due notice had been served on named persons, who, as owners or agents, were all the persons whose premises were affected. One of the persons named was A. M. Claflin, agent, with a description of Glidden's property appended. The recital fairly states that notice was served on A. M. Claflin as agent for the described property, which is sufficiently specific.

> "In determining the sufficiency of the records of inferior tribunals and public boards, to express their purposes or to preserve a memorial of their transactions respecting matters within their jurisdiction, technical precision should not be required; on the contrary, they should be liberally construed. They are not usually drawn by persons possessed of professional knowledge or skill in such matters; the law does not contemplate that such tribunals or boards shall be constantly attended by persons having such knowledge or skill, but, rather, that their duties will be performed, at least, generally, without such assistance. To subject them to the test of technical precision, would, in most instances at least, defeat the object sought to be attained by the Legislature in creating inferior tribunals and public boards; and, therefore, however informal their records may be, if enough appears to show with reasonable certainty that the requirements of the law have been substantially complied with, their proceedings should, upon grounds of public policy, if for no other reason, be sustained." Lewis et al. v. Laylin et al., 46 Ohio St. 663, 666, 23 N. E. 288, 289.

[4] Besides what has been said, the record in the present case would be sufficient to oblige the plaintiff to prove nonexistence of jurisdictional facts, if there were no reference in the record to service of notice on anybody. Section 6 of the statute quoted above provides that the commissioners shall order the viewers' report, the survey, and the plat to be recorded, and that "from thenceforth said road shall be considered a public highway." This is a legislative declaration, that upon the recording of the report, survey, and plat, the road shall be regarded, prima facie, as legally established. The declaration is unqualified, binds, landowners, public officials, and the courts, and casts upon any person contesting the road proceedings the burden of establishing their invalidity.

The provision of the statute under consideration was copied from a statute of the state of Ohio enacted in 1831, which received judicial interpretation by the Supreme Court of Ohio at least as early as 1861. In the case of Anderson and wife v. Commissioners of Hamilton County, 12 Ohio St. 635, the court said:

> "The objections to the record are based on the assumption that to give such a record validity, it should show on its face, or be supported by proof, that there was a petition signed by it at least twelve freeholders of the county, and notice, as prescribed by the statute. That there are cases in which the proceedings of tribunals or bodies of special and limited jurisdiction should show on their face, or be sustained by proof, that the prescribed requisites to the exercise of the power conferred upon them have been complied with is certainly very true. But, looking to the subject-matter and the provisions of the statute, we think that the record which the statute directs must be regarded in any collateral proceeding as evidence of the establishment of the road. If the report, survey and plat be recorded, as directed by the statute, the presumption that it has been properly and regularly done will arise, and the record will, in the language of the statute, show that the road is to be considered a public highway." 12 Ohio St. 642.

In the case of McClelland v. Miller, 28 Ohio St. 488, decided in 1876, the court referred to the Anderson Case and said:

> "The same class of objections were made to the admission of the record that are made in the case at bar, the law being that of 14th March, 1831, the same we are now considering. It was there claimed that the record must show on its face, or be supported by proof, that there was a proper petition and notice duly given; but the court say that the record which the statute directs must be regarded, in any collateral proceeding, as evidence of the establishment of the road. * * * What is to constitute the record of the road appears to be this: When the viewers have reported if the commissioners are satisfied that the road will be of public utility, 'they shall cause said report, survey, and plat to be recorded, and from thenceforth said road shall be considered a public highway, and the commissioners shall issue their order directing said road to be opened.' Swan (Ed. 1841) p. 798, § 4. Hence, as Gholson says in 12 Ohio St. 642: 'If the report, plat, and survey be recorded, as the statute directs, the presumption that it has been properly and regularly done will arise.'" 28 Ohio St. 498, 500.

These decisions are manifestly sound.

In the early case of Willis v. Sproule, 13 Kan. 257, this court said:

> "After a careful consideration of the question we have come to the conclusion that whenever the records and files of the board of county commissioners purporting to establish a county road are regular in form, and contain everything which the statutes require to be preserved and kept in such cases, such records and files will prove, prima facie at least, that such road has been legally established and has a legal existence, and therefore that there is no necessity in the first instance to resort to evidence aliunde to prove the legal existence of the road. Such ought to be the law, and especially so where the existence of the road is attacked collaterally, as in this case. The strongest reasons, and some very high authority, sustain this view of the law. Anderson v. Com'rs of Hamilton Co., 12 Ohio St. 635, 642; Beebe v. Scheidt, 13 Ohio St. 406, 418." 13 Kan. 264.

If the court had examined more closely the Ohio decisions cited, it would have discovered that they were based upon and were interpretive of a statute, and of a statute which the Legislature of this state had adopted verbatim.

It is true that section 4 provides that a road shall not be established until a copy of the notice to landowners with proof of service has been filed in the county clerk's office. The requirement is jurisdictional. But files in the county clerk's office, and particularly files a third of a century or half a century old, may be misplaced or lost or destroyed. The rule is that absence of documents from the files is not conclusive evidence that they were never filed. State ex rel. v. Railway Co., 95 Kan. 22, 147 Pac. 801, L. R. A. 1915E, 751. Section 6 anticipated the rule, and when the viewers' report, the survey, and the plat have been recorded, everything essential to legal establishment of the road shall be considered as having been done. The statute is a wholesome one, and is still the law of this state. Gen. Stat. 1915, § 8760. It does not appear to have occupied the attention of the court in any of its previous decisions.

The plaintiff relies on the case of Com'rs of Chase Co. v. Cartter, 30 Kan. 581, 1 Pac. 814. In that case a direct attack was made on the road proceedings. A petition in error was filed in the district court to reverse the action of the commissioners in establishing the road. The question was whether or not that which was brought up to the district court was sufficient to authorize the commissioners to act. The soundness of the decision from that standpoint need not be discussed. The plaintiff also cites the case of Com'rs of Wabaunsee Co. v. Muhlenbacker, 18 Kan. 129. In that case the action of the commissioners was directly attacked by proceeding in error in the district court. The syllabus expressly limited the rule announced respecting what the record should affirmatively show, to cases of direct attack. In this case the attack is collateral, and the record of the report, survey, and plat is regular. The plaintiff did not offer to prove that Claflin was not in fact

Glidden's resident agent, or that the circumstances were such that Glidden should have been served personally with notice. The plaintiff stood on the record, and the presumption from the record is that all the steps necessary to establish the highway were taken.

[5] The record shows the viewers were instructed to meet at the post office in Salina on Friday, the 17th day of September, 1888, and proceed to view the road, and the record shows notice to that effect. The viewers' report shows that they met, pursuant to notice, at the lands of James Sharp, in Smoky Hill township, on the 7th day of September, 1888, and proceeded to view the road. It is said the proceedings were void because of these variances.

The date in the viewers' report is evidently correct, and the date in the road record is evidently a clerical error of the deputy who made up the record. There was no such day as Friday, September 17, 1888. The 17th of September was Monday. The 7th of September was Friday, and no doubt the viewers met on that date, pursuant to notice. If this were not true, the record shows that the agent Claflin, on whom notice was served, was present when the road was viewed.

A common meeting place is appointed to bring the viewers and their assistants together, and thus facilitate the view. Meeting at the designated place is not jurisdictional, and no landowner can complain unless he has actually been misled and deprived of an opportunity to present his claim. In this instance, the viewers met on land forming part of the site of the road, and the agent for the owner of the plaintiff's land was present.

[6] Finally, it is said the road lapsed because it was not opened for public use within seven years after the time the order establishing it was made.

The road extends east and west, and forms an extension of Crawford avenue in the city of Salina. It is 1½ miles long and crosses the Smoky Hill river. Approximately a mile of the road is west of the river. The river was not bridged or fordable. If local history were carefully written, it would probably disclose that the promoters of the road had in mind securing a bridge across the river, but none was ever erected. The result was, the road was little used. About one-quarter of a mile east of the river a gate was maintained across the road, but the landowner on one side set his fence over and the road was opened and was traveled down to the gate, and was used somewhat down to the river. West of the river a fence beginning near the river and one-half mile long was never removed from the center of the road, which was 60 feet wide. There was positive proof, however, that the owner of land lying next to the river and one-quarter of a mile north of the road used the road in 1894 for the purpose of hauling corn from his field, and did so for the express purpose of "trying to hold the road."

Whenever a road has been established, it is opened in fact when it is traveled. Webb v. Com'rs of Butler Co., 52 Kan. 375, 34 Pac. 973. After the lapse of so many years, neither very much nor very definite proof of use is to be expected, and the court regards that which was produced as sufficient. The road having been opened within seven years, subsequent nonuser is not destructive of the public right. Eble v. State, 77 Kan. 179, 93 Pac. 803, 127 Am. St. Rep. 412.

The judgment of the district court is affirmed. All the Justices concurring.

(100 Kan. 562)

MINNEAPOLIS STEEL & MACHINERY CO. v. SCHALANSKY. (No. 20859.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. EVIDENCE 🔑433(6)—WRITTEN CONTRACT—MUTUAL MISTAKE.

Where a mutual mistake in a written contract is alleged and reformation is asked, oral evidence may be introduced to prove the mistake and the contract as it should have been.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1909.]

2. CONTRACTS 🔑100—MISTAKE IN CONTRACT—DEMURRER TO EVIDENCE.

Where a mutual mistake in a written contract is alleged and reformation is asked, and where the evidence is sufficient to show the mistake and the contract, a demurrer to the evidence should not be sustained.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 454.]

3. NEW TRIAL 🔑70 — FINDING OF JURY — SETTING ASIDE.

A motion to set aside a finding of the jury should not be allowed, where the evidence fairly tends to prove the fact found.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143.]

4. REFORMATION OF INSTRUMENTS 🔑46 — CONTRACT—MUTUAL MISTAKE.

The law of mutual mistake, as applied to the issues and the evidence in this case, was correctly set out in the instructions.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 194.]

5. TRIAL 🔑250—INSTRUCTIONS—IMMATERIAL MATTER.

It is not error to refuse to give an instruction on a matter that is immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586.]

Porter, J., dissenting.

Appeal from District Court, Smith County.

Action by the Minneapolis Steel & Machinery Company against Henry Schalansky. Judgment for defendant, and plaintiff appeals. Affirmed.

Relihan & Relihan, of Smith Center, for appellant. Mahin & Mahin, of Smith Center, for appellee.

MARSHALL, J. Judgment was rendered in favor of the defendant in an action brought by the plaintiff for the recovery of a tractor engine.

The defendant contracted for an oil tractor engine, and agreed to pay $2,700 therefor. The contract contained these provisions:

> "I agree to accept said machinery on arrival and pay freight and charges thereon from Wichita, Kansas. * * * It is expressly agreed that this order shall not become binding until accepted and approved by an officer of the Minneapolis Steel & Machinery Company."

The printed warranty on the contract contained this provision:

> "This instrument comprises the entire contract between the parties hereto, and any verbal representations and agreements outside of or contradictory to the foregoing terms and warranty are hereby agreed to be void for all purposes whatsoever."

The contract provided that the engine should be shipped to the plaintiff at Claudell or Kensington, Kan., and that the defendant would pay $900 in cash and $1,800 in promissory notes, due at different times. These notes were to be secured by a chattel mortgage on the engine. The contract also contained this provision:

> "This settlement to be held by the Kirwin State Bank ten (10) days, at which time Mr. Schalansky can take up the notes and mortgage by paying $1,500.00 cash."

By an arrangement made, not shown in the contract, the defendant was to turn over, as part payment, an old tractor engine then owned by him. The new engine was shipped to the plaintiff at Claudell. A representative of the plaintiff went to Claudell to receive and load the old tractor engine, which had been sold by the plaintiff to other parties. A bill of lading for the new engine was sent to the defendant at the Kirwin State Bank. He went to the bank, paid the $900 in cash, executed notes to the amount of $1,800, gave a chattel mortgage on the new engine to secure the payment of the notes, took the bill of lading to Claudell, and paid $66 freight charges. A difference then arose over the unloading of the engine. After some communication by telegraph, the defendant and the plaintiff's representative, Mr. Quick, unloaded the engine. The defendant purchased oil to be used in transporting the engine to his father's farm in Dorr township. Mr. Quick drove the tractor, while the defendant rode in an automobile. On the way to the farm, the engine broke through a bridge and fell into the Solomon river. The defendant refused to remove the engine from the river. After some delay, the plaintiff took possession of that engine under the chattel mortgage, and sold it for $1,835. The plaintiff sought to obtain possession of the old engine. This was refused, and to recover the possession of the old engine this action was brought.

The defendant pleaded that the words "accept said engine on arrival and" were, by mutual mistake, left in the order instead of being erased as they should have been, and pleaded that the engine was to be delivered to the defendant at his home in Dorr township, in Smith county. The defendant asked for a reformation of the contract and for judgment for $900, the amount paid on the purchase price of the engine by the defendant, $66 paid for freights, and for $1,500 damages.

[1] 1. The plaintiff's first complaint is that the court committed error in the admission of evidence. This evidence was that which tended to show that the engine purchased from the plaintiff was to be delivered to the defendant at his father's farm in Dorr township, in Smith county. The defendant stayed at his father's farm. A mistake in the contract was alleged. The evidence complained of tended to prove that mistake and was therefore competent. In 11 Encyc. of Evidence, the author uses this language:

> "The very nature of an action for the reformation of a written instrument renders necessary a departure from the ordinary rule forbidding the admission of parol testimony to vary the terms of a written instrument, and it is therefore held that a plaintiff alleging a mistake in a written instrument and asking for a decree reforming the same may produce parol evidence to support his contention." Page 74.

See, also, Conaway v. Gore, 24 Kan. 389; Bush v. T. G. Bush & Co., 33 Kan. 556, 6 Pac. 794; Huber v. Claudel, 71 Kan. 441, 80 Pac. 960; Griesa v. Thomas, 99 Kan. 335, 339, 161 Pac. 670; Moore v. Railway Co., 7 Kan. App. 242, 248, 53 Pac. 775; 3 Jones on Evidence, 164; 1 Greenleaf on Evidence (16th Ed.) 426; and 34 Cyc. 982.

[2] 2. The plaintiff demurred to the defendant's evidence, and asked that the jury be directed to return a verdict in favor of the plaintiff, and also requested an instruction to that effect. The defendant's evidence tended to prove that, before the contract was signed, it was agreed between the defendant and the plaintiff's general agent at Wichita that the engine should be delivered to the defendant at his home in Dorr township. The defendant is a Bohemian by birth and could not read the English language. The plaintiff's general agent, Mr. Howard, read a portion of the contract to the defendant, and then stated that the contract was as they had agreed it should be. This evidence, if true, was sufficient to establish the defendant's contention. The evidence was sufficient to compel the court to submit the question of a mistake to the jury. For this reason, the demurrer to the evidence was properly overruled; and the request for a directed verdict and the submission of the instruction telling the jury to return a verdict in favor of the plaintiff were rightly refused.

[3] 3. The plaintiff insists that the court erred in denying its motion to set aside find-

ing of fact No. 8. This finding reads as follows:

> "Do you find that the person who wrote the contract of September 3, 1914, made a mistake by failing to erase a provision of the contract that should not have been included in the contract? A. Yes."

The plaintiff contends that there was no evidence to support this finding. The defendant's evidence on the mistake did not exactly correspond with the allegation of his answer. That allegation was that the words, "accept said machinery on arrival and," were by mistake left in the contract, instead of being erased as they should have been. The defendant's evidence tended to prove that the engine was to have been delivered at the farm in Dorr township. If the engine was to have been delivered at the farm, the quoted words should not have been left in the contract; they should have been erased, and probably the exact place of delivery should have been inserted in their place. The difference between the allegation and the proof was not sufficient to justify this court in saying that there was no proof to support the finding.

[4] 4. The plaintiff insists that the court erred in giving the following instruction:

> "You are instructed that if you should find from the evidence that the words, 'accept said machinery on arrival and,' should have been by agreement of the parties left out of the contract and were left in the contract by mistake of the defendant, and that he thought that they had been stricken out and that they were left in the contract, either purposely or by the mistake of the plaintiff's manager, when they should have been stricken out, this in law would be equivalent to a mutual mistake and should be so considered by you."

If the defendant had been the only party mistaken as to the contents of the written contract, and if the plaintiff had made the representations which the defendant testified were made to him, reformation of the contract was a proper remedy for the defendant the same as though the mistake had been mutual. Cox v. Beard, 75 Kan. 369, 89 Pac. 671.

The evidence that supported finding No. 8, and that compelled the court to overrule the plaintiff's demurrer to the defendant's evidence and to refuse to give an instruction directing the jury to return a verdict in favor of the plaintiff, warranted the court in giving the instruction quoted.

[5] 5. The plaintiff requested the following instruction:

> "You are instructed that if the witness Quick, who testified in this case, was acting outside the scope of his employment and without authority at the time he assisted in driving the engine in question, the defendant cannot recover in this action, and your verdict must be for the plaintiff."

This was refused, and its refusal is assigned as error. What Quick did in unloading and driving the engine was wholly immaterial, so far as the issues in this action were concerned; and it was, for that reason, not error to refuse to give the instruction requested.

This disposes of all the matters argued in the plaintiff's brief, although the plaintiff argues some of the propositions under other heads.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, WEST, and DAWSON, JJ., concurring. PORTER, J., dissenting.

(100 Kan. 582)

HAMMOND et al. v. WESTERN CASUALTY & GUARANTY INS. CO. et al.

(No. 20882.)

(Supreme Court of Kansas. May 12, 1917.)

(Syllabus by the Court.)

1. INSURANCE 🔑133(1)—LIMITATION OF ACTIONS 🔑100(1)—POLICY NOT CONFORMING TO APPLICATION—RELIANCE—LIMITATION.

Where a policy of insurance different from that applied for has been fraudulently issued, the recipient of the policy may, without reading it, assume that it conforms to the application; and an action thereon is not barred until two years after the fraud is discovered.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 203, 211; Limitation of Actions, Cent. Dig. §§ 480, 493.]

2. INSURANCE 🔑143(7)—FRAUD IN ISSUING POLICY—REFORMATION—JUDGMENT.

Where fraud in issuing a policy of insurance, and a mistake in the policy, are alleged, and reformation is asked, and where the evidence supports the allegations, the court is justified in reforming the policy and in rendering judgment thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 271.]

Appeal from District Court, Sedgwick County.

Action by J. K. Hammond and R. B. Hammond, partners, etc., against the Western Casualty & Guaranty Insurance Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Edgar Bennett, of Washington, for appellants. J. N. Haymaker, W. D. Jochems, A. V. Roberts, and Carl H. Davis, all of Wichita, for appellees.

MARSHALL, J. The plaintiffs obtained judgment against the defendants on a policy of insurance against liability for damages sustained by workmen injured while in the plaintiffs' employ. The defendants appeal.

The plaintiffs, building contractors, purchased from the Western Casualty & Guaranty Insurance Company a policy of insurance to protect them against liability on account of injury to workmen while in the employ of the plaintiffs. The policy was purchased from Tanner, Cook & Co., agents of the Western Casualty & Guaranty Insurance Company, an Oklahoma corporation. When the policy was purchased, the plaintiffs asked for insurance against liability to workmen injured in their employ. The agent agreed to furnish such a policy, and, after a few days, delivered a policy which he stated was the kind the plaintiffs had asked for, and which the agent had agreed to furnish. The policy contained this provision:

> "No action shall lie against the company to recover for any loss or expense under this policy, unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment for trial of the issue, nor unless such action is brought within two years after final judgment against him has been satisfied."

G. L. Horine was injured while in the employ of the plaintiffs, and recovered judgment against them for $1,200. That judgment has not been paid. The Western Casualty & Guaranty Insurance Company defended in that action for the present plaintiffs, and prosecuted an appeal to the Supreme Court. That judgment was affirmed, and execution thereon was issued and was served on the plaintiffs in this action in April, 1915. The policy was dated the 13th day of May, 1912. The present action was not commenced until the 2d day of December, 1915. When the policy was received by the plaintiffs, it was placed in a desk and was not read by either of them until after the execution had been served. They did not discover the mistake in the policy until they read it. The petition alleged both fraud and mistake, and asked for a reformation of the policy so as to make it correspond with the agreement made with the agent of the Western Casualty & Guaranty Insurance Company. The plaintiffs recovered judgment for $1,200, with interest, and the costs in the two actions. By contract between the defendants, the Western Indemnity Company has become liable under the policy.

[1] 1. The defendants insist that the plaintiffs' action is one for relief on the ground of fraud, and was, for that reason, barred by the two-year statute of limitations at the time it was commenced. The difficulty with the defendants' contention is that the plaintiffs did not discover the mistake in the policy until within two years prior to the commencement of this action. To meet this difficulty, the defendants say that the plaintiffs should have read the policy immediately after its receipt, and that, if the policy had been read, the mistake would have been discovered. In Insurance Co. v. Darrin, 80 Kan. 578, 103 Pac. 87, this court said:

> "The recipient of a policy issued in response to an application of the character described may assume that the company has discharged its duty and has written the policy on the basis of the application, and he is not obliged to read the policy to see if it conforms to the application." (Syl. par. 3.)

The action was not barred by the statute of limitations at the time it was commenced.

[2] 2. The defendants contend that the court erred in denying their motion for judgment on the pleadings, in overruling their objection to the introduction of evidence under the petition, in overruling their demurrer to the plaintiff's evidence, and in rendering judgment for the plaintiffs. These contentions are based on the proposition that the action was barred by the statute of limitations. That question has been disposed of. The petition stated a cause of action. The evidence of the plaintiffs tended to prove the allegations of the petition. The several contentions of the defendants are without substantial merit. The plaintiffs alleged fraud on the part of the defendants and a mistake in the policy of insurance issued. Both the fraud and the mistake were established by the evidence, and the court was justified in rendering judgment reforming the policy. Conaway v. Gore, 24 Kan. 389; Bush v. T. G. Bush & Co., 33 Kan. 556, 6 Pac. 794; Hornick v. U. P. Railroad Co., 85 Kan. 568, 572, 118 Pac. 60, 38 L. R. A. (N. S.) 826, Ann. Cas. 1913A, 208; Machinery Co. v. Schalansky, 165 Pac. 289.

When the policy was reformed, judgment was rightly rendered against the defendants. Miller v. Davis, 10 Kan. 541; Huber v. Claudel, 71 Kan. 441, 80 Pac. 960.

The judgment is affirmed. All the Justices concurring.

(53 Mont. 490)

WILCOX v. TOSTON STATE BANK et al.

(No. 3766.)

(Supreme Court of Montana. May 10, 1917.)

1. JUSTICES OF THE PEACE 🔑72 — VENUE — RESIDENCE OF DEFENDANT.

Under Rev. Codes, § 6986, providing that an action brought in a justice of the peace court shall be tried in the county where defendant resides, if he can be found and served with summons therein, but if he cannot be found and served in that county, the action may be commenced in any county where he may be found and served, a justice of the peace acquired no jurisdiction over the person of defendants by service of summons in a county in which they did not reside, where it did not appear that defendants could not be found and served in the county of their residence.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 56, 143–145, 235.]

2. JUSTICES OF THE PEACE 🔑60 — JURISDICTION—WAIVER OF OBJECTION.

In view of the fact that under Rev. Codes, § 7007, a copy of an account serves the purpose of a complaint in a justice of the peace court, and section 7005, providing that the answer may be oral, and section 7010, providing that, if defendant has a counterclaim not exceeding $300 it must be set up or is waived, defendant, in an action in a justice of the peace court, did not waive objection to want of jurisdiction over his person, by presenting an answer containing a counterclaim, where they insisted at every stage of the proceedings that the justice of the peace did not have jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 217–221.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by Ida J. Wilcox against the Toston State Bank and another. From judgment for defendants, plaintiff appeals. Affirmed.

Carleton & Carleton, of Helena, for appellant. Walter Aitken, of Bozeman, for respondents.

HOLLOWAY, J. This action was commenced in a justice of the peace court of Lewis and Clark county by filing a copy of an account as follows:

Shelby, Mont., June 28, 1915.
John C. Clarke and Toston State Bank to
Mrs. Ida J. Wilcox, Dr.

April 27, 1914.	To money deposited with you on my acct.	$200 00
	To interest.........	2 65
	Total	$202 65

Service of summons was made in Lewis and Clark county upon Clarke personally and as cashier of the bank. The defendants appeared specially and moved for a dismissal upon the ground that the court had no jurisdiction of the person of either defendant. The motion was supported by affidavits to the effect that the defendants are residents of Broadwater county; that the contract upon which plaintiff sues was made and was to be performed in Broadwater county, and that service of summons was made while defendant Clarke was temporarily in Helena. The motion was denied, and defendants then demurred, but the demurrer was overruled. The bank answered by way of a general denial, and Clarke interposed a separate answer containing denials of all the material allegations of the complaint and a counterclaim for $71.85. Upon the trial it appeared from the testimony of the plaintiff that her cause of action accrued in Broadwater county, and defendants again moved for a dismissal. The motion was denied and defendants, declining to introduce any evidence, suffered judgment to be taken against them and appealed to the district court. Upon motion of defendants the district court reversed the judgment of the justice of the peace and entered judgment dismissing the action without prejudice, and for defendants' costs. From that judgment plaintiff prosecuted this appeal.

[1] 1. Did the justice of the peace court acquire jurisdiction over the person of defendants by virtue of the service of summons upon them in Lewis and Clark county? The place of trial of an action in a justice of the peace court is governed by section 6986, Revised Codes. Each of the first three subdivisions of that section in terms deals with a specific cause of action which accrues in a county other than the county of defendant's residence. Subdivision 4 is vague, but, when considered in the light of former statutes dealing with the same subject, we think it clear that this subdivision was intended to cover all other cases than those enumerated in the first three subdivisions wherein the cause of action accrues in a county other than the county of defendant's residence. It cannot refer to a cause of action which accrues in the county of defendant's residence. Section 1480, Code of Civil Procedure 1895 (Rev. Codes, § 6986), regulated the place of trial of actions in justice of the peace courts from 1895 to 1899. The place of trial of an action which accrued in the township of defendant's residence was in the place of his residence. Subdivision 9. Section 1480 was amended in 1899. A slight amendment was made to subdivision 5, and it was renumbered 4. Subdivision 9 was amended and renumbered 7. As under the former statute the only provision governing the place of trial of a cause which accrued in the same township as defendant's residence was the last subdivision of section 1480, so the only statute now governing the place of trial of a cause of action which accrues in the same county as defendant's residence is the last subdivision of section 6986. Such action shall be tried in the county where defendant resides, if he can be found and served with summons therein; but if he cannot be found and served in that county, then the action may be commenced and prosecuted in any county where he may be found and served. In the absence of a showing that these defendants could not be found and served in Broadwater county, the justice of the peace of Lewis and Clark county acquired no jurisdiction of the person of either defendant by virtue of the service of summons.

[2] 2. Did defendant Clarke waive objection to the want of jurisdiction over his person by presenting an answer containing a counterclaim? At every stage of the proceedings, defendants insisted upon their objection to the jurisdiction of the justice of the peace of Lewis and Clark county. If that court were one of general jurisdiction wherein formal pleadings are required, there might be merit to the contention that defendant Clarke submitted to the jurisdiction by filing his counterclaim; but a copy of an account serves the purpose of a complaint in a justice of the peace court (section 7007, Rev. Codes), and the answer may be oral (section 7005, Rev. Codes). If the defendant has a counterclaim not exceeding $300, it must be set up or it is waived. Section 7010, Rev. Codes. The complaint in this instance gave no intimation that defendants reside in Broadwater county or that plaintiff's cause of action accrued in that county. It was not until the trial that the latter fact was made to appear, and when it did appear the counterclaim had already been filed.

It was not necessary for defendants to appear specially and challenge the jurisdiction of the inferior court. They were authorized to present whatever defenses they had, and upon trial for the first time raise the question of want of jurisdiction. Section 7047, subd. 4, recognizes such right. Holbrook, Merrill & Stetson v. Superior Court, 106 Cal. 592, 39 Pac. 936. So long as defendant Clarke did not voluntarily submit to the jurisdiction of the inferior court, he did not waive his right to object that it was without jurisdiction over him.

The judgment of the district court is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(53 Mont. 350)

STATE ex rel. PAYNE v. DISTRICT COURT OF FIFTH JUDICIAL DIST. IN AND FOR MADISON COUNTY et al. (No. 3921.)

(Supreme Court of Montana. March 7, 1917.)

1. Counties 🔑67 — Officers — Removal — Misconduct—Statutes.

Rev. Codes, § 9006, providing for the removal of public officers by summary proceedings where such officers have charged and collected illegal fees for services rendered or have refused or neglected to perform official duties, does not include misconduct by a county commissioner consisting of selling property, in which he is personally and financially interested, to the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 100–103.]

2. Counties 🔑67 — Officers — Removal — "Fees."

An accusation under Rev. Codes, § 9006, authorizing the removal of public officers by summary proceedings, where they have been guilty of collecting illegal fees for services rendered, charging a county commissioner with collecting both per diem and expenses for the same service, is not defective; expenses being fees within the section.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 100–103.

For other definitions, see Words and Phrases, First and Second Series, Fees.]

3. Officers 🔑74—Removal—Grounds.

To constitute the offense denounced by Rev. Codes, § 9006, providing for the removal of public officers by summary proceedings for collection of illegal fees by virtue of official position, it must be made to appear that accused was a public officer, that acting by virtue of his office he collected certain fees, and that such fees were illegal.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 101–103, 105, 106.]

4. Officers 🔑74—Removal—Pleading.

Under Rev. Codes, § 9006, providing that public officers may be removed by summary proceedings when guilty of charging and collecting illegal fees, an accusation is sufficient if it clearly and distinctly sets forth the facts constituting the offense in ordinary and concise language, and in such manner that a person of common understanding may know what was intended.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 101–103, 105, 106.]

5. Counties 🔑67 — Officers — Removal — Pleading.

Under Rev. Codes, § 9006, providing a mode of procedure for the removal of public officers guilty of collecting illegal fees, an accusation, alleging that accused acting in his official capacity as county commissioner spent one day seeing about a right of way for which he charged and collected a per diem and also an amount additional for expenses, was sufficient; the item not being authorized expressly by law, and therefore prima facie illegal.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 100–103.]

6. Officers 🔑61 — Removal — Statutes — "Criminal Prosecutions."

Under Rev. Codes, § 9006, providing for the removal of public officers guilty of collecting illegal fees by summary proceedings, is not unconstitutional within Const. art. 3, § 8, providing that all criminal actions in the district court except those on appeal shall be prosecuted by information and indictment, Bill of Rights, § 16, providing that in all criminal prosecutions accused shall have the right to a speedy trial by an impartial jury, or Const. art. 8, § 27, providing that all prosecutions shall be conducted in the name of the state, since the proceeding authorized by section 9006, Revised Codes, is not a criminal one; "criminal prosecutions," as employed in the constitutional provisions, referring to prosecutions for offenses which were crimes at common law and to statutory offenses.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90.

For other definitions, see Words and Phrases, First and Second Series, Criminal Prosecutions.]

7. Officers 🔑61—Removal—Statutes.

Rev. Codes, § 9006, relating to removal of public officers guilty of collecting illegal fees by summary proceedings, is a valid enactment under Const. art. 5, § 18, declaring that officers not liable to impeachment are subject to removal for misconduct or malfeasance in office in such manner as may be provided by law; section 17, providing for removal by impeachment, not being exclusive.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90.]

8. Mandamus 🔑60—Grounds—Removal of Officers.

Mandamus is a proper remedy to compel a district court to act upon an accusation charging a county commissioner with collecting illegal fees, brought under Rev. Codes, § 9006, relating to removal of public officers by summary proceedings.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 70, 71.]

Proceedings for mandamus by the State of Montana, on the relation of W. W. Payne, against the District Court of the Fifth Judicial District in and for Madison County and Jos. C. Smith, Judge. Writ issued.

James T. Shea, of Twin Bridges, for relator. M. M. Duncan, of Virginia City, for respondents.

HOLLOWAY, J. In June, 1916, an accusation in writing verified by W. W. Payne was presented to the district court of the Fifth judicial district charging Bert G. Paige, a county commissioner of Madison county, with official misconduct. The accusation is in three counts. By the first it was intended to charge the collection of illegal fees, and by the second and third that Paige was personally and financially interested in certain property which he caused to be purchased by the county. A citation was issued, and the accused appeared and denied the material allegations of the accusation. When the proceeding was brought to trial, the court declined to try in a summary manner the issues framed upon the second or third count, and, when it was sought to prove the allegations of the first count, an objection to the introduction of any evidence was sustained and the proceeding dismissed. The accusing party then secured from this court an alternative writ of mandate directed to the lower court requiring it to proceed with the hearing or show cause why it refused to do so. Upon the return a motion to quash was interposed and the matter submitted.

[1] The proceeding was instituted under section 9006, Revised Codes. That section does not comprehend such official misconduct as is charged in either the second or third count of the accusation, and for this reason the court correctly refused to try the issues presented upon either of those two counts.

The first count charges that the accused collected illegal fees from Madison county for alleged services rendered by him in his office as county commissioner, in that he presented to and collected from the county his bill for $249 for items among which are a large number every one of which it is alleged is illegal. Copied in the accusation is a list of these alleged illegal items. A part of that list, sufficient to illustrate the whole, is as follows:

1915.		
June 13.	1 day with Grant, Waterloo..........	$8 00
	Expense on same day................	4 00
" 15.	1 day Big Hole road, French Ranch	8 00
"	And ex.	3 50
" 17.	½ day Wisconsin Creek lower road..	4 00
"	Ex.	2 00
" 18.	½ day to road crew, with extras.....	4 00
"	Ex.	2 50
" 21.	1 day, see about right of way Cox et al.	8 00
"	Ex.	5 00
" 24.	¾ day Point Rocks, Malley road....	6 00
"	Ex.	4 00
July 2.	½ day to road crew, with extras....	4 00
"	Ex.	2 00
" 7.	¾ day exchange help road crew.....	6 00
"	Ex.	3 00

There is a separate charge relating to an item of $12 which it is alleged was collected by the accused as and for expenses incurred by him in connection with his attendance upon a meeting of the board.

1. It is contended that this first count does not state facts sufficient to constitute an offense cognizable under section 9006:

[2] (a) Because the items of expense are not fees within the meaning of the word as used in that section. The term "fees," used in the Codes, is somewhat elastic. Section 3172, Revised Codes, provides that:

> "The county surveyor is entitled to receive and collect for his own use the following fees: * * * Expenses of chainman and markers," etc.
>
> Section 3173: "The coroner is entitled to receive and collect for his own use the following fees: * * * For each mile actually traveled in the performance of any duty, ten cents."

We think the term "fees," used in section 9006, is sufficiently broad to comprehend both per diem and expenses. Burrows v. Balfour, 39 Or. 488, 65 Pac. 1062; 19 Cyc. 462.

[3] (b) Because it is not alleged that the services for which the charges were made were not rendered, or, if rendered, that the fees received are not authorized by law. Section 9006 is directed against the incumbent of an office who makes use of his official position as a medium for securing fees to which he is not entitled. Smith v. Ling, 68 Cal. 324, 9 Pac. 171. The gist of the offense condemned is the collection of illegal fees by virtue of official position. To constitute the offense, therefore, it must be made to appear: (a) That the accused is the incumbent of a public office; (b) that, acting by virtue of his office, he collected certain fees; and (c) that the fees collected were illegal, that is, not authorized by law under the circumstances of the particular case. If the fees were collected for services never rendered, or never intended to be rendered, they would be illegal. Rankin v. Jauman, 4 Idaho, 53, 36 Pac. 502. If they were collected for services rendered but for which no compensation is allowed, they would be illegal. State ex rel. Rowe v. District Court, 44 Mont. 318, 119 Pac. 1103, Ann. Cas. 1913B, 396. If the accused collected for services rendered more than the law allows for such services, he collected illegal fees within the meaning of section 9006. Leggatt v. Prideaux, 16 Mont. 205, 40 Pac. 377, 50 Am. St. Rep. 498.

We agree with counsel for the accused that it does not aid the accusation to say that every item in the list above is illegal. These fees are legal or illegal, depending upon whether they are, or are not, authorized by law. A county commissioner can lawfully collect for services performed in virtue of his office, only such fees or other compensation as the law specifically authorizes. The law authorizes per diem and mileage for attending the meetings of the board (section 2893, Rev. Codes), and per diem and expenses while inspecting contract construction work on a highway or bridge under a proper order of the board (Laws 1915, p. 319).

[4] The statute does not prescribe rules of pleading. It does contemplate that the accusation may be prepared by a layman. In any event, it is sufficient if it clearly and distinctly sets forth the facts constituting the offense, in ordinary and concise language and in such manner that a person of common understanding may know what was intended. Woods v. Varnum, 85 Cal. 639, 24 Pac. 843.

[5] If the items for which the accused charged these fees show on the face of them that they are not authorized by law, there is no necessity to characterize them or to attempt to show wherein they are illegal. They show for themselves. We think the accusation, in the first count, is sufficient to charge the collection of illegal fees. In effect, it alleges that the accused, acting in his official capacity as county commissioner of Madison county, spent one day seeing about a right of way for which he charged and collected from the county $8 and $5 additional for expenses, etc. This item particularly is

not comprehended within any provisions of the law authorizing fees or other compensation to a member of the board of county commissioners for services rendered in his office, and is therefore prima facie illegal. There are others of the same general character, and still others which are not prima facie illegal but may be illegal, or not, depending upon circumstances which are not disclosed by the accusation. Since this first count charges the collection of certain fees which on the face of them appear illegal, it is sufficient to withstand an objection to the introduction of any evidence.

[6] 2. It is next contended that section 9006 is unconstitutional, in that it attempts to authorize a prosecution for crime by a private individual and the trial and conviction of the accused upon a summary hearing without a jury. Section 8, art. 3, of the Constitution, provides that all criminal actions in the district court, except those on appeal, shall be prosecuted by information or indictment. Section 16 of the Bill of Rights provides:

> "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury."

Section 27, art. 8, of the Constitution, provides that all prosecutions shall be conducted in the name of the state. If the proceeding authorized by section 9006 is a criminal prosecution, within the meaning of those terms as they are used in the Constitution, then it follows as of course that this section is invalid.

"Criminal prosecutions," as those words are employed in the Constitution, refer to prosecutions for offenses which were crimes at common law and doubtless to statutory offenses. McInerney v. Denver, 17 Colo 302, 29 Pac. 516; 6 Am. & Eng. Ency. Law (2d Ed.) p. 974; 6 L. C. L. p. 458.

[7] Section 17, art. 5, of the Constitution, provides for the removal of certain officers by impeachment, and section 18 of the same article declares that officers not liable to impeachment are subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law. Recalling that our Constitution is a limitation and not a grant of power, it will be seen at once that the provisions of section 18, above, added nothing to the power which the Legislature would have had in the absence of such provisions. In other words, the Legislature was left entirely free to enact such statutes as it might see fit providing for the removal of officers other than those enumerated in section 17.

Proceedings for the removal of a public officer do not necessarily partake of the nature of a criminal prosecution. Indeed, the power to remove an unfaithful or negligent public official is not essentially a judicial power. Under our Constitution, its exercise is left to the Legislature itself or to such other authority as the Legislature may designate. This is the plain import of section 18, above, and is the general rule in the absence of any constitutional declaration upon the subject. 29 Cyc. 1370; State v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; Territory v. Cox, 6 Dak. 501. The power may be conferred upon the Governor (Cameron v. Parker, 2 Okl. 277, 38 Pac. 14), or upon a board (Donahue v. Will Co., 100 Ill. 94). It may be conferred upon a court of general or limited jurisdiction to be exercised in the mode provided by law, and consequently, if the Legislature sees fit to require a jury trial, a jury trial must be had; but, if it sees fit to provide for a summary hearing without a jury, no constitutional right of the accused is infringed. Rankin v. Jauman, above.

Many of the states have statutes similar to our section 9006, and they have been upheld uniformly. The proceeding need not be in the name of the state, and an accusation in the form of an affidavit meets all the requirements of the statute. Wood v. Varnum, above. In State ex rel. Rowe v. District Court, above, this court held that the proceeding authorized by section 9006 is quasi criminal in character, but that the accused is not entitled to a jury trial. 44 Mont. page 327, 119 Pac. 1103, Ann. Cas. 1913B, 396. Doubtless, it would be more nearly accurate to say that the proceeding is a special statutory one and avoid any attempt at arbitrary classification. It is one clearly authorized by law in the exercise by the Legislature of its plenary power. It is initiated by a private individual. It need not be in the name of the state. The accused is not entitled to a trial by jury, and it is not a criminal action in the sense that the public prosecutor must conduct the proceeding.

There are expressions by way of dicta to be found in State ex rel. McGrade v. District Court, 52 Mont. 371, 157 Pac. 1157, which indicate a contrary view; but on examination it will be found that the particular questions to which such expressions are directed were not necessarily involved in the decision of that case. The only question there presented was whether an attorney called upon to conduct such a proceeding is entitled as of right to compensation from the county for his services, and it was held that he is not, because the statutes do not provide for such compensation.

[8] 3. Is mandamus an available remedy? Section 9006 makes no provision for an appeal or other means of review. The trial court refused to proceed because of an erroneous view of a preliminary question of law, and in such case mandamus will lie to get the machinery of the law in motion. State ex rel. Arthurs v. Board, 44 Mont. 51, 118 Pac. 804.

It is ordered that a peremptory writ of mandate issue directed to the district court requiring it to reinstate the proceeding and try the issue presented upon the first count of the accusation.

Writ issued.

BRANTLY, C. J., and SANNER, J., concur.

(53 Mont. 359)

EDWARDS v. LEWIS AND CLARK COUNTY. (No. 3805.)

(Supreme Court of Montana. March 13, 1917. On Rehearing, June 4, 1917.)

1. Constitutional Law ⟹26—Constitution—Construction.

Our Constitution is not a grant but a limitation upon legislative powers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30.]

2. Constitutional Law ⟹30 — Construction—Self-Executing Provisions.

Const. art. 12, § 8, providing that "private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, including all funded debts and obligations, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority," is addressed to the Legislature, and not to the board of county commissioners, which has no power to retire a warrant indebtedness by issuing and selling coupon bonds without statutory authority.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32.]

3. Counties ⟹21½ — County Commissioners—Source of Powers—"County."

The statutes constitute the charter of a county's power, and to them it must look for the evidence of its authority, as a county is but a political subdivision of the state for governmental purposes, and as such is at all times subject to legislative regulation and control.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County.]

4. Statutes ⟹230 — Amendment — Parts Not Changed—Construction.

Under direct provisions of Rev. Codes, § 119, where a statute is amended, the portions not altered are to be considered as having been the law from the time when they were enacted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 311.]

5. Statutes ⟹225—Construing Sections Together.

Where two sections are part of the same legislative enactment and treat of the same subject-matter, they are to be construed together.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303.]

6. Counties ⟹178 — Issuing Refunding Bonds—Powers of Board—Statute—"Borrow Money."

Rev. Codes, § 2905, as amended by Laws 1915, c. 32, § 1, giving the county commissioners power and authority to issue and negotiate on the credit of the county coupon bonds to an amount sufficient to enable the county to redeem all legal outstanding bonds, etc., does not authorize the county commissioners to issue and sell coupon bonds to retire a warrant indebtedness exceeding $10,000, without submitting the question to a vote of electors, in view of section 2933, providing that the county commissioners must not "borrow money" for any of the purposes mentioned in this title or for any single purpose to an amount exceeding $10,000 without approval of electors; issuing such bonds being to borrow money within the meaning of the act.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273.

For other definitions, see Words and Phrases, First and Second Series, Borrow.]

7. Statutes ⟹230—Construction—Changes After Judicial Construction—Intent.

Where, after a statute has been interpreted, the Legislature makes radical changes in phraseology, an intention is thereby shown to establish a rule different from the one announced by the court.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 311.]

8. Counties ⟹153 — Incurring Indebtedness—Extent—Inhibition to Legislature.

Const. art. 13, § 5, declaring that no county shall incur any indebtedness for any single purpose in excess of $10,000 without approval of electors, did not prevent enactment of Rev. Codes, § 2933, regulating borrowing money.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 214.]

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Proceedings by Frank J. Edwards against Lewis and Clark County. From a judgment denying him relief, plaintiff appeals. Reversed and remanded, with directions.

Edward Horsky, of Helena, for appellant. S. C. Ford, of Helena, and Frank Woody, of Missoula, for respondent.

HOLLOWAY, J. In October, 1915, Lewis and Clark county had outstanding registered warrants against its several funds, aggregating in amount $100,000. Of this amount, $32,077.82 represented road warrants issued for work done during 1914 and 1915 prior to June 14, 1915, on the public highways outside of the corporate limits of the city of Helena—the only incorporated city in the county. The board of county commissioners proposed to retire all of this warrant indebtedness by issuing and selling coupon bonds of the county to the like amount without having submitted the question to a vote of the electors, and plaintiff, a resident taxpayer within the city of Helena, instituted this proceeding to enjoin the issue of bonds to the extent of the $32,077.82 represented by the road warrants. The cause was submitted upon an agreed statement of facts. The trial court found for the defendant, and plaintiff appealed from the judgment which denied him any relief.

It is claimed by appellant, and conceded by respondent, that the property of appellant situated within the corporate limits of the city of Helena is not liable to taxation to pay the road warrants. It is conceded by both parties, as it must be, that, if county bonds are issued to retire these warrants, such bonds will evidence an indebtedness of the entire county, and all taxable property of the county, including plaintiff's property situated within the city of Helena, will be liable to taxation to pay these bonds and the interest thereon. It is the contention of appellant that his property cannot be subjected to taxation to discharge this indebtedness, by the mere subterfuge of changing the form of the evidence of the indebtedness without his consent, and that the county cannot issue refunding bonds without having the question submitted to and approved by a vote of the electors affected.

To justify the board in seeking to issue these bonds without consulting the electors affected, recourse is had to section 8, art. 12. of the Constitution, and section 2905, Revised Codes, as amended by an act approved February 26, 1915 (Laws 1915, p. 47). The section of the Constitution referred to provides:

> "Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, including all funded debts and obligations, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority."

[1, 2] Our Constitution is not a grant but a limitation of power. Section 8, art. 12, above, means nothing more than that the Legislature is prohibited from enacting any statute under which private property may be taken to pay the debts of a public corporation, such as a county or city. Aside from this limitation, the Legislature was left free to enact such measures as it deemed best touching the subject-matter under consideration. If it failed to act at all, there is no power other than public opinion which can coerce it into activity. The provision of the Constitution is addressed to the Legislature, not to the board of county commissioners, and justification for the board's action must be found in the statutes, if such action can be justified at all.

[3] A county is but a political subdivision of the state for governmental purposes, and as such is at all times subject to legislative regulation and control, except in so far as the Constitution has placed limitations upon the lawmaking power. Hersey v. Neilson, 47 Mont. 132, 131 Pac. 30, Ann. Cas. 1914C, 963. Within those limitations, the Legislature may circumscribe or extend the powers to be exercised by a county, as it sees fit. The statutes constitute the charter of a county's power, and to them it must look for the evidence of any authority sought to be exercised. 7 R. C. L. 936. The only statute upon which respondent relies, and the only one which furnishes even a semblance of justification, is section 2905, Revised Codes, as amended, above. That section provides:

> "The board of county commissioners of any county is hereby vested with the power and authority to issue and negotiate on the credit of the county, coupon bonds to an amount sufficient to enable the county to redeem all legal outstanding bonds, warrants or orders; or for the purchase of necessary public building sites, and for the construction of necessary public buildings, public highways," etc.

In the days of the territory, many general and special statutes were enacted to enable counties to borrow money, and to refund their outstanding indebtedness. A limit to the amount of indebtedness which might be incurred was always set, and before bonds could be issued for certain specified purposes the consent of the electors was necessary. Section 786, div. 5, Compiled Statutes 1887, authorized the county commissioners of any county to issue county bonds to redeem outstanding warrants or orders. Subdivision 4 of section 756 clothed the board with authority to borrow money upon the credit of the county in a sum sufficient to erect county buildings or to supply a deficit in the county revenues; but section 795 required that the question of borrowing money for either purpose mentioned in subdivision 4, above, must first be submitted to a vote of the electors of the county. By an act approved March 4, 1891, section 795 was amended to read as follows:

> "The board of county commissioners of any county may, when in its judgment it is advisable for the county to incur indebtedness or liability for any single purpose in an amount exceeding ten thousand dollars ($10,000), submit the question to the qualified electors of the county."

And section 808 was amended so as to authorize the issuance of refunding bonds and, upon a favorable vote of the electors, bonds for other purposes. Laws 1891, p. 226. In Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 823, it was held that under those statutes the question of issuing refunding bonds need not be submitted to a vote of the electors. This was the law when the Codes were adopted in 1895.

[4] Title 2, pt. 4, of the Political Code, dealt with the subject "The Government of Counties." Section 4240 of that title gave to the board of county commissioners authority to issue, on the credit of the county, coupon bonds to an amount sufficient to enable it to redeem all legal outstanding bonds, warrants, or orders, etc. Section 4270 of the same title declared that the board of county commissioners must not borrow money for any of the purposes mentioned in this title or for any single purpose, to an amount exceeding $10,000, without an approval of a majority of the electors of the county. By an act approved February 27, 1905, section 4240, above, was amended to include other purposes for which bonds might be issued, and as thus amended that section became section 2905, Revised Codes, and section 4270, without amendment, became section 2933, Revised Codes. By the act of February 26, 1915, section 2905 was amended to further extend the scope of the purposes for which bonds may be issued. Section 2933 has not been changed since it was enacted in 1895 or re-enacted in 1907. The amendment to section 2905 did not alter in any respect

the provision authorizing the county commissioners to issue bonds for refunding or retiring outstanding indebtedness, and, under the rule of construction provided by the Codes (section 119, Rev. Codes), the portion of section 2905 relating to that subject is to be considered as having been the law from the time when it was first enacted.

[5, 6] We are, then, to determine the authority of the board to issue refunding bonds, by reference to sections 2905 and 2933, Revised Codes. The two sections are parts of the same legislative enactment, treat of the same subject-matter, and are to be construed together. The first contains a general grant of power—the power to issue county bonds for refunding and other enumerated purposes. The latter specifies the conditions under which the power granted may be exercised if the amount of the loan is to exceed $10,000.

[7] The language of section 2933 cannot be misunderstood:

> "The board of county commissioners must not borrow money for any of the purposes mentioned in this title, or for any single purpose to an amount exceeding ten thousand dollars without the approval of a majority of the electors of the county, and without first having submitted the question of a loan to a vote of such electors."

"The purposes mentioned in this title" include all the purposes enumerated in section 2905, for both sections are part of the same title. But we are asked to construe this phrase in the light of its historical antecedents; in other words, to declare that the language quoted above does not mean what it says, but was intended to comprehend only the limited number of subjects mentioned in subdivision 4 of section 756, div. 5, Compiled Statutes of 1887. This we cannot do. The language is altogether different from that employed in the territorial statute, and in reviewing the history of the act we cannot close our eyes to the fact that after this court had interpreted the former provisions, in Hotchkiss v. Marion, the Legislature deliberately saw fit to make the radical change in phraseology, thereby furnishing the very best evidence that it was the intention to establish a rule different from the one announced in that case. The language, "for any of the purposes mentioned in this title," is as comprehensive as it can be made. The commissioners cannot borrow money to refund outstanding indebtedness exceeding $10,000, by the issuance of bonds or otherwise, without having first obtained the approval of the electors of the county.

[8] If the commissioners issue and sell these bonds, will they thereby borrow money within the meaning of section 2933, above? We think counsel for respondent have confused the ideas expressed in section 5, art. 13, of the Constitution, and section 2933. The Constitution declares:

> "No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

In Hotchkiss v. Marion, above, and in Palmer v. City of Helena, 19 Mont. 61, 47 Pac. 209, it was held that the issuance of refunding bonds merely changed the form of the evidence of pre-existing indebtedness, and did not involve the creation of any new indebtedness within the meaning of the constitutional provision above. That inhibition of the Constitution is directed to the Legislature. Our Legislature is one of inherent, not of delegated, powers, and the restraint laid upon the lawmakers in that instance does not operate to prevent them from imposing upon the counties further limitations in the management of county finances. Acting upon the authority reserved to it, the Legislature has provided that a county shall not borrow money for any of the purposes mentioned in section 2905, to an amount exceeding $10,000, without the consent of the electors who must bear the burden of providing the funds for repaying the loan.

The terms, "incur indebtedness or liability," as used in the Constitution, are not synonymous with the term "borrow money," used in section 2933. 7 R. C. L. 944–951. It is apparent to any one that the indebtedness represented by the road warrants will not be discharged by issuing bonds and from the proceeds paying off the warrants, and that no new indebtedness will be incurred. The indebtedness will remain, but the evidence of it will be changed from the warrants to the bonds. The transaction is not unlike that of the individual who gives his note for an indebtedness represented by a due bill or open account, or who borrows from A. to pay B. The indebtedness still exists, though it may be evidenced by a different instrument, payable to a different creditor or more effectively secured.

Section 5, art. 13, above, has to do with the creation of new indebtedness or liability. The provision for funding an existing indebtedness is found in section 8, art. 12, where the entire subject is referred to the Legislature. While it is true that, by issuing and selling these bonds to take up the warrants, no new indebtedness will be incurred, it is equally true that, when the bonds are sold and the money received, the transaction has amounted to nothing more nor less than borrowing money from the purchaser of the bonds. Com. v. Select and Common Council of Pittsburg, 34 Pa. 496; Legal Tender Case, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204; Scipio v. Wright, 101 U. S. 665, 25 L. Ed. 1037. This is the sense in which the term "borrowing money" is used throughout our Codes. Indeed, a county cannot borrow money in any other manner than by issuing its bonds or other evidence of indebtedness, and in our opinion it was to prevent just such a transaction as the one contemplated by respondent that section 2933 was enacted. Whether the legislation is wise or otherwise is not a matter of our concern. Section 5, article 13, has to do only with the creation of new indebtedness, while section 2933 relates to borrowing money, whether the money borrowed is to be used to refund existing indebtedness or for any other purpose mentioned in the title of which that section forms a part.

If the commissioners were permitted to complete the issue and sale of these bonds, they would borrow $100,000 on the credit of the county without the consent of the electors and without having submitted the question of a loan to a vote of the electors, and all in violation of the express prohibition of section 2933.

Appellant also invokes the provisions of chapter 141, Laws of 1915; but, in view of the conclusion already reached, we deem it unnecessary to consider that act. Under the facts agreed upon, the plaintiff is entitled to the relief sought.

The judgment is reversed, and the cause is remanded, with directions to enter a decree in favor of the plaintiff.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

On Rehearing.

SANNER, J. We have carefully considered the arguments and additional authorities submitted on the rehearing of this cause, and we have reconsidered the foundations of the opinion heretofore filed herein. We see no escape from the conclusions there announced, and, accordingly, adhere to our decision.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(19 Ariz. 12)

HALL et al. v. STATE. (Cr. 397.)

(Supreme Court of Arizona. May 19, 1917.)

1. CRIMINAL LAW 🔑686(1) — RESTING ON STATE'S EVIDENCE—EFFECT.

Defendant cannot, by resting his case on the state's evidence in chief, limit the court's or jury's consideration thereto; but further evidence may be offered, and, if received, considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1619, 1625, 1626.]

2. INTOXICATING LIQUORS 🔑236(4)—ILLEGAL SALE—JOINT SALE—EVIDENCE.

Evidence on prosecution for sale in violation of prohibition, *held* sufficient to connect a defendant with sale made by the other, as jointly conducting with him the business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 305, 306.]

3. CRIMINAL LAW 🔑475—EXPERT TESTIMONY —EVIDENCE OF ALCOHOL.

Testimony of experts as to amount of alcohol in liquor sold by defendants, as shown by chemical tests, is admissible on prosecution for violation of prohibition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1063.]

4. CRIMINAL LAW 🔑396(1)—EVIDENCE—ADMISSIBILITY BY REASON OF DEFENDANT'S EVIDENCE.

Defendant, prosecuted for violation of prohibition, showing that the beer sold by him was the same as that sold by another, samples of which were tested and found not to require an internal revenue license, the state may show samples of the beer of the other were tested by chemists and found intoxicating.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 861.]

5. INTOXICATING LIQUORS 🔑134 — PROHIBITION—AMOUNT OF ALCOHOL.

Beer, though not containing sufficient alcohol to require an internal revenue license for its sale, may be intoxicating within the prohibition amendment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142–144.]

6. INTOXICATING LIQUORS 🔑176—VIOLATION OF PROHIBITION—GOOD FAITH.

It is no defense to sale in violation of prohibition that defendants relied on a guaranty of the brewers that the beer was nonintoxicating, and investigation showing it did not contain enough alcohol to require an internal revenue license.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

The appellants O. B. Hall and another were convicted of violating the prohibition amendment to the state Constitution by selling to one William H. Woolf certain intoxicating liquor, the particular name and kind of which said intoxicating liquor is to the county attorney unknown. The sale complained of is alleged to have been made on the 24th day of September, 1915. From a judgment of conviction, the defendants have appealed. Affirmed.

W. L. Barnum, of Phœnix, for appellants. Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and Geo. W. Harben, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The uncontroverted facts appearing in this record are that J. J. Elliott, one of these appellants, sold to William H. Woolf on September 24, 1915, two bottles filled with a liquor called "Frio beer," one of which bottles was filled by the manufacturer, and was the original package, and the other bottle filled from a keg or barrel through a faucet; that the place at which the sale was made was known as the Anheuser bar in the city of Phœnix, Maricopa county, Ariz., and the stated purpose of the purchaser at the time he made the purchase was to analyze the liquid to determine its alcoholic contents and intoxicating qualities; that at the time of the said sale and for two or three days previous thereto, and for about the same length of time subsequent thereto, the business of selling this liquid was carried on at said bar. Appellant Elliott testified in answer to the question:

"Q. * * * What business was carried on there? A. We was selling this Frio; this stuff we got from the Copper City Brewing Company. Q. Who was selling it? * * * A. Why me and Mr. Hall. * * * Q. How long had you been engaged in selling Frio? A. From the 22d to the 25th."

The undisputed evidence is that during that period of time, and particularly on the 23d and 24th of September, the place was doing a rushing business selling "Frio." The information charged the appellants, Elliott and Hall, with the unlawful sale of intoxicating liquor. Therefore I find in the record, aside from the undisputed facts above referred to, the controverted fact of the intoxicating character of the liquor sold, and Hall's connection with the sale in question.

The appellant Hall rested his case at the time the state rested its case in chief. This defendant thereupon moved "that he be discharged for the reason that there is no evidence to connect him with this alleged offense." The motion was denied. Thereupon the defendant Hall moved the court to direct the jury to return a verdict of not guilty, and demurred "to the evidence for the reason that it is not sufficient to sustain the allegations in this case against the defendant O. B. Hall." The court denied this motion. The counsel for both defendants made the following announcement:

"By Mr. Barnum: The defense will proceed only as to the defendant Elliott."

At the close of the evidence in the case the motion to direct a verdict as to defendant Hall was renewed and denied. The motion was based upon the grounds that the evidence does not connect the defendant Hall with the sale, and shows that he was not present at the time of the sale; and upon the further grounds that a variance between the allegations of the information and the proof is shown in the particular that the information charges the defendants with having jointly made the sale, and the proof shows that defendant O. B. Hall was not present or took any part in the alleged sale; and for the further reason that there is no evidence showing that said O. B. Hall is interested in the sale of said liquor, nor that he participated therein.

[1] The defendant Hall made an attempt to close the case against himself at the time the state rested. Such efforts as defendant Hall made at the close of the state's case in chief to shut out all further evidence against him by resting his defense on the state's evidence was ineffective for that purpose, and so recognized by said defendant when at the close of the evidence the defendant renewed his motion. Of course the trial court could not intelligently pass on the motion made at the close of all of the evidence, unless he considered all of the evidence produced on the trial bearing upon the matter of defendant Hall's connection with the alleged sale. In so considering the motion the duty of the court was plain to disregard the ruling on the motion as formally made, and give exact regard to all of the evidence bearing on the matter, whether the evidence was produced before or after the former ruling was made. A defendant cannot rest his case on the evidence produced by the prosecution in chief and limit the court's or jury's consideration to only such evidence as had been produced up to the time the defendant announced that his case is rested. Further evidence may be offered by the prosecution either in chief or as rebuttal, which materially affects the defendant who has rested his case. Such evidence may be offered, and when it is offered, if received by the trial court at any stage of the trial before the cause is submitted to the jury, such evidence is as important in the consideration by the court of a motion to direct a verdict or by the jury in arriving at a verdict as if it had been offered and received in the due order of the trial. Because evidence is received in the course of the trial out of its due, regular order is no reason why the evidence should not be considered and given due force.

[2] The evidence in the record which tends to connect the defendant Hall with the sale of the "Frio beer" is that at the time of Hall's arrest in the presence of Elliott both Hall and Elliott spoke about who were running the place.

"He said that they had a contract with the management of the concern that manufactured the goods. * * * Q. Did he (meaning Hall) say 'they' or 'we'? A. I took it he was speaking of the two. Q. Did he say 'they' or 'we'? A. 'We.' Q. Who was there when he was saying that? A. Mr. Elliott and Mr. Hall and myself (William H. Woolf)."

This is the state of the evidence connecting Hall with the transaction at the time he first moved for his discharge and for a directed verdict. The defendant Elliott testified as a witness in his own behalf, and admits that he sold Woolf "the stuff we was selling; Frio."

"Q. How long had you been selling this Frio beer? A. We sold it altogether about four days. Q. Where did you obtain this Frio? A. We got it from the Douglas Copper City Brewing Company."

On cross-examination this witness was asked:

"Q. * * * What business was carried on there? A. We was selling this Frio; this stuff we got from the Copper City Brewing Company. Q. Who was selling it? (Objected to. Objection overruled.) A. Why me and Mr. Hall. * * * Q. How long have you and Mr. Hall been engaged there in this selling of Frio? (Objected to, and objection sustained as to Mr. Hall.) * * * He may answer for himself, and not for Mr. Hall. Q. How long had you been engaged in selling Frio? A. From the 22d to the 25th."

This evidence tends to prove the fact that O. B. Hall and J. J. Elliott jointly conducted the business carried on at the Anheuser bar from September 22, to September 25, 1915, and that the nature of the business so carried on by said parties was that of selling Frio beer to all parties offering to purchase the said liquor. From such facts, if believed by the jury beyond a reasonable doubt, they were justified in drawing the inevitable inference that O. B. Hall, although not present, did advise and encourage every sale made, and impliedly gave his full consent to each sale made to each person who purchased the same during said period of time, including the sale to William H. Woolf by J. J. Elliott. As a consequence, the defendant Hall is shown to be a principal in the commission of the offense charged. His connection with the commission of the offense is sustained by the evidence.

[3] The appellants contend that error was committed in receiving evidence of expert chemists of the alcoholic contents of the liquor bought by witness William H. Woolf. The samples furnished the expert witness were tested for the presence of alcohol. They testified to the results obtained by them. Witness Woolf gave them the samples that they tested, and the samples were identified as the liquor bought by this witness at the sale in question. The liquor was shown by the test to contain alcohol in intoxicating quantities. The evidence was relevant to the issue and competent to establish such issue. No error was committed in admitting such evidence.

[4, 5] Objection was made, and the objection overruled, to witness Jim Murphy's testimony in chief. The admission of this testimony is assigned as error. This witness was introduced by the state in rebuttal to meet a situation injected into the case by the defendant Elliott's testimony. He had testified that a Mr. Parsons, a deputy internal revenue collector, came to the Anheuser bar for samples of the Frio beer they were selling at that place. The purpose for which the samples were sought was to determine whether an internal revenue license was required for its sale. Elliott stated:

> "Why he (meaning Parsons) came down and wanted to get some draught beer and some bottled beer, and I didn't have any draught beer at the time, and I takes him up to Thalheimer's, and he gives him some of the same shipment that came from the same place; bought from the same people."

The state objected to this evidence, and moved to strike it out of the record. The objection was overruled. Thereupon the matter of the taking of the sample at Thalheimer's place, the testing of the sample so taken for alcohol, and the results of the test made were gone into by the defense. The witness Jim Murphy was placed on the stand in rebuttal, and testified that he as deputy sheriff arrested Thalheimer for selling intoxicating liquor, and that he searched under a warrant Thalheimer's place of business for intoxicating liquor, and took samples therefrom of Frio beer on draught. The samples so taken were delivered to Dr. Watkins and Professor Jones, chemists, for testing. The bottles were marked. This is the substance of the evidence of this witness to which the appellants have objected and the admission of which is assigned as error.

A separate assignment of error complains of the admission in evidence of testimony of Claude Jones given in chief in said trial. W. W. Watkins' testimony is also assigned as error, and it is not plain from the assignments of error whether the appellants intend to attack the admissibility of the testimony given by these witnesses on their first introduction by the state, or their testimony given when called in rebuttal, but I think and will so treat the objections as if directed to their testimony given in rebuttal, as their testimony first given has already been decided to be relevant and competent.

The nature of the rebuttal testimony given by these expert witnesses had relation to the tests made by each of them of the samples of Frio beer taken from Thalheimer's place of business by J. T. Murphy, and the results of such tests. Such inquiry was made pertinent to the trial by the evidence given by Elliott with regard to having taken a sample of beer from the same place and from the same shipment from which Woolf bought. The sample which Elliott caused to be taken from Thalheimer's place was taken by Elliott for the internal revenue department's test for alcohol. The purpose in view for which such evidence was intended was clearly to show that Frio beer was not intoxicating. The fact that the United States laws do not impose a license tax for the privilege of selling liquors containing alcohol in quantities less than a specified percentage is absolutely no evidence that the sale of such liquors is not a violation of our prohibition amendment. The matter of privilege license is quite another thing from the matter of the offense of the sale of intoxicating liquors in violation of said amendment. Yet the defendant was permitted to go into that matter of requirement for United States privilege license to sell, and in all fairness the state should have been allowed to show that the very liquor which defendant had produced evidence tending to show required no revenue license was in fact an intoxicating liquor. The evidence was pertinent to the matter being inquired into, and the defendant brought about the situation making the evidence admissible. No error was committed by admitting the evidence.

[6] The defendant offered to prove by witness Elliott that the beverage alleged to have been sold by the defendants was sold to them by the Copper City Brewing Company under the guarantee that the same was a nonintoxicating liquor and that before receiving the same or disposing of any thereof the said defendants had taken the necessary precautions to ascertain the truthfulness of that statement, and from their investigation had learned that the same was not an intoxicant, that said investigation was made by the defendants in good faith by consulting the office of the internal revenue collector for the

district of Arizona and New Mexico, and from said office the said defendants received information that the same was not an intoxicant, and that the defendants could rely upon the representations as made by the seller of said beverage. The state objected to the offer made, and the objection was sustained. The appellants assign this ruling as error.

The following additional offer of proof was made and rejected in part, to wit:

> "And I will offer to prove further by this witness that he (defendant Elliott) believed all of said representations and relied upon the same, and had no knowledge that the beverage called 'Frio' was an intoxicant or contained any alcohol until after the same had been analyzed from samples furnished by him to the sheriff of Maricopa county, and when so informed he immediately desisted from the sale of the same and has sold none since."

The theory of the defense offered by the defendants seems to be in effect that they relied upon the written guarantee given by the manufacturer that the liquor was nonintoxicating, and that upon investigation by the government internal revenue collector's office it was found to contain insufficient alcohol to require a revenue tax or privilege sale license.

The brewer's guarantee was a civil contract between private parties, to which the public was not a party, and therefore was not bound by its terms and conditions. If the brewer guaranteed that the liquor sold to the appellants was nonintoxicating, while in fact it was intoxicating, the person who made the sale violated the law. If in fact the goods sold were not of the quality they were guaranteed to be—that is, the liquor sold under the guaranty was in fact intoxicating liquor—then the purchaser had a cause of action against the seller for damages suffered for breach of warranty. The public had no such cause of action. The test of the intoxicating character of liquors which the prohibition amendment punishes for disposing of is not the contract by which the seller came into the possession of the liquor, nor the fact that no United States revenue license tax is levied against its sale, but the test is whether in fact the liquor sold was intoxicating liquor. One who sells liquors must know at his peril that the liquor sold is not in fact intoxicating in character. It is not enough to have an honest belief that the liquor is nonintoxicating. The act of selling joined with the intention to sell, and the fact existing that the thing sold is an intoxicating liquor completes the crime, whether the seller knew its intoxicating qualities or not, or whatever was his honest belief in respect to the intoxicating qualities of the liquor sold. The defendants' belief that the liquor sold was nonintoxicating is wholly immaterial and unimportant. The defendant's guilt is established when it is made to appear that the seller knowingly made the sale intending to sell the exact liquor which he transferred to the buyer, and that the liquor transferred was in fact intoxicating liquor. These facts shown, and the place of the sale within the jurisdiction of the court, are sufficient proof of the commission of the crime. The defendants controverted none of these facts. The defense offered to be shown is no defense whatever. It is in the nature of a civil defense of confession and avoidance, and not recognized in a criminal action.

Upon the whole case I am of the opinion that the defendants have been awarded a fair and impartial trial, and that substantial evidence sustains the judgment of conviction against both defendants. Therefore the judgment must be affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(19 Ariz. 20)

SOUTHERN PAC. CO. v. STATE.

(No. 1529.)

(Supreme Court of Arizona. May 19, 1917.)

1. CARRIERS ⇨18(2) — CONTROL — PROCEEDINGS BEFORE CORPORATION COMMISSION—REVIEW.

That a formal complaint was not filed before the Corporation Commission, nor the witnesses sworn, will not be considered on appeal from a decision of the superior court allowing recovery of a fine assessed by commission where the irregularity was not urged before the commission on motion for rehearing, in view of Civ. Code 1913, par. 2342, providing that no corporation or person or the state shall in any court urge or rely on any ground not set forth in the application for rehearing, and paragraph 2329, providing that informality in proceedings or taking testimony shall not invalidate any order, decision, or rule approved by the commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24.]

2. COMMERCE ⇨33—"INTRASTATE COMMERCE" — TRANSPORTATION OF CIRCUS BETWEEN POINTS WITHIN THE STATE.

In a proceeding before the Arizona Corporation Commission to compel defendant railroad to transport the Campbell's United Shows from Tucson to Phœnix, *held*, that movement between named points was intrastate subject to jurisdiction of commission, although shows were engaged in a journey beginning in Texas and ending in California; the movement of the circus being a mere incident to the object of its existence.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81.

For other definitions, see Words and Phrases, Intrastate Commerce.]

3. CARRIERS ⇨39—TRANSPORTATION OF PRIVATELY OWNED EQUIPMENT OF CIRCUS—COMMON-LAW DUTY.

The Southern Pacific Company was under no common-law obligation to accept and transport privately owned equipment of Campbell's United Shows from Tucson to Phœnix.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 98.]

4. CARRIERS ⇨39 — CONTROL — POWERS OF CORPORATION COMMISSION.

Under Const. art. 15, §§ 2, 3, and Civ. Code 1913, c. 11, tit. 9, it is obligatory upon common carriers to accept and transport between points within the state privately owned equipment of circuses under the rules, regulations, and rates, when reasonable and just, prescribed by the Corporation Commission, although carrier has not filed with commission rates therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 98.]

5. APPEAL AND ERROR ⚷170(2)—CONSTITUTIONALITY OF STATUTE—PARTIES WHO MAY QUESTION.

Where the order of Corporation Commission could be violated but once, and daily accumulation of penalties or fines could not arise, appellant was not affected by that feature of Civ. Code 1913, par. 2357, making each day's continuance of a continuing violation a separate and distinct offense, and could not urge for the first time on appeal that such statute is unconstitutional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1037, 1038.]

Cunningham, J., dissenting.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by the State against the Southern Pacific Company. Judgment for the State, and defendant appeals. Affirmed.

C. W. Durbrow and F. B. Austin, both of San Francisco, Cal., and J. C. Forest, of Phœnix, for appellant. Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and G. W. Harben, Asst. Attys. Gen., for the State.

ROSS, J. This is an action to recover a fine assessed against appellant by the Corporation Commission for contempt in refusing to obey an order of the Corporation Commission directing it to transport Campbell's United Shows from Tucson to Phœnix, Ariz. Authority for the action is found in paragraph 2356, c. 11, tit. 9, Civil Code 1913.

In the complaint were set forth all the proceedings before the commission, including its findings of fact, conclusions of law, orders and judgments, both in the original hearing and the hearing in contempt. The answer of the appellant consists of: (1) Demurrers, general and special, the special being that the court had no jurisdiction of either the person or subject-matter; (2) averments that the order made and entered was not supported or sustained by any competent evidence or by any evidence whatsoever, or that any lawful proceeding was held by said commission in the matter of fixing rates; (3) that the Corporation Commission was without jurisdiction to fix rates for transporting Campbell's United Shows from Tucson to Phœnix for the reason, among others, that the movement of said shows between the named points was interstate in character, the said shows being engaged in a journey beginning at El Paso, Tex., and extending through the states of New Mexico and Arizona into California, the destination of said Campbell's United Shows having been fixed at the city of San Bernardino, Cal., at the time said shows began their journey at said city of El Paso; and (4) that the commission had no jurisdiction to make or enter said order for the further reason that there were no intrastate tariffs then on file with said commission showing the rate for the movement of privately owned equipment in circus trains or otherwise or obliging defendant to transport privately owned equipment in circus trains.

The court's findings of fact and conclusions of law are as follows:

"II. That on the 20th day of March, 1914, there was promulgated under the authority and seal of the Arizona Corporation Commission, in docket No. 165 of that commission an order to show cause, on or before the 23d day of March, 1914, why the Arizona Corporation Commission should not issue a special rate authority compelling the defendant to publish on one day's notice a rate for the transportation of Campbell's United Shows, consisting of 18 cars, from Tucson, Ariz., to Maricopa, Ariz., at the rate of $3 per mile, and further requiring the defendant to furnish such equipment as was necessary to move Campbell's United Shows within the state of Arizona.

"III. That pursuant to said order to show cause, the defendant appeared before the Arizona Corporation Commission on the 25th day of March, 1914, and after a full and fair hearing the Arizona Corporation Commission entered the following order: 'That the Southern Pacific Company and Arizona Eastern Railroad Company transport the cars, property, employés and attendants of Campbell's United Shows from Tucson, Ariz., via Maricopa, to Phœnix, Ariz., and to extend to the said Campbell's United Shows the usual privileges in the movement of advance agents, for a total amount not to exceed $3 per train mile for the entire service. It is understood that the shipment will consist of not to exceed four coaches, four large box cars and ten flat cars, and it is further understood that the Southern Pacific Company and Arizona Eastern Railroad Company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona Eastern Railroad Company and Sells-Floto Shows Company, with respect to details as to responsibility, service and conditions, copy of said contract being on file with the commission, and made on March 4, 1914, by and between the Arizona Eastern Railroad Company and Sells-Floto Shows Company. It is further ordered that, upon submission of evidence that any charge or charges have been exacted by respondent companies for transportation of advance agents or employés, at variance with contract herein referred to, made by respondent Arizona Eastern Railroad Company with Sells-Floto Company, that the amount or amounts so collected shall be refunded to Campbell's United Shows.'

"IV. That on the 28th day of March, 1914, the Arizona Corporation Commission denied the defendant's application for a rehearing of said order recited in paragraph III hereof.

"V. That said order entered by the Arizona Corporation Commission on the 25th day of March, 1914, as recited in paragraph III hereof, was not complied with by defendant, but wholly ignored.

"VI. That on the 31st day of March, 1914, the state of Arizona, at the relation of George P. Bullard, Attorney General, filed a petition addressed to the Arizona Corporation Commission, praying that an order be entered, directed to the defendant, requiring it to show cause why it should not be punished for contempt of the order of the Arizona Corporation Commission, as recited in paragraph III hereof, and that pursuant to the said petition, the Arizona

Corporation Commission, on the 1st day of April, 1914, entered an order, directed to the defendant, requiring it to show cause on the 13th day of April, 1914, at 10 o'clock a. m., why it should not be punished for contempt, as alleged in the said petition of the state of Arizona, at the relation of George P. Bullard, its Attorney General, as aforesaid.

"VII. That pursuant to said petition of the state of Arizona, at the relation of George P. Bullard, Attorney General, a hearing was had, and the defendant was adjudged guilty of a contempt of the order of the Arizona Corporation Commission, recited in paragraph III hereof, whereupon the Arizona Corporation Commission, upon the 16th day of May, 1914, entered the following order: 'It is therefore ordered that the Southern Pacific Company be and it is hereby declared in contempt of this commission's order, in docket No. 165, and the said company be and it is hereby fined the sum of $1,500. It is further ordered that Arizona Eastern Railroad Company be and it is hereby declared in contempt of this commission's order, in docket No. 165, and that the said company be and it is hereby fined the sum of $500. It is further ordered that copies of this order be served upon Southern Pacific Company and Arizona Eastern Railroad Company, and the Attorney General of the state of Arizona, and unless the fines, as herein imposed, be paid and satisfied on or before June 1, 1914, that the Attorney General shall proceed to the collection of same as provided by law.'

"VIII. That the defendant refused to pay and satisfy the fine imposed by said order of the commission, as recited in paragraph VII herein, on or before June 1, 1914, and thereupon, to wit: Upon the 20th day of June, 1914, the state of Arizona filed with the above-entitled court its complaint against the defendant, which prayed for the recovery of the sum of $1,500, the fine assessed against the defendant by the Arizona Corporation Commission for a contempt of the order of said Arizona Corporation Commission, as recited in paragraph III hereof.

"IX. That the defendant engaged itself to transport for hire circuses and other institutions similar to that conducted by Campbell's United Shows, which the defendant was required to transport, as provided by the order recited in paragraph III hereof.

"Conclusions of Law.

"The court from the above special findings of fact concludes as a matter of law therefrom as follows:

"I. That the Arizona Corporation Commission had jurisdiction of the person of the defendant and the subject-matter of the action, and was authorized and empowered by the Constitution and laws of the state of Arizona to enter the order as recited in paragraph III of the special findings of fact, and to adjudge the defendant in contempt for a refusal to obey said order.

"II. That the above-entitled court has jurisdiction of the person of the defendant, and the subject-matter of the above-entitled cause of action, and is empowered by the Constitution and laws of the state of Arizona to enforce and collect the fine imposed upon the defendant by the Arizona Corporation Commission for a violation of the order of that commission, as recited in paragraph III of the special findings of fact herein.

"III. That the order of said Arizona Corporation Commission, as recited in paragraph III of the special findings of fact, in no way imposed a burden upon interstate commerce, in contravention of section 8 of article 1 of the Constitution of the United States.

"IV. That it was the duty of the defendant, under the Constitution and laws of the state of Arizona, to transport Campbell's United Shows, as provided by the order of the Arizona Corporation Commission, as recited in paragraph III of the special findings of fact, even though it acted in such capacity as a private carrier, for the reason that it had held itself out and engaged to transport circuses and other institutions similar to Campbell's United Shows.

"V. That even though the defendant, in the transportation of Campbell's United Shows, engaged itself as a private carrier, it so engaged itself as a carrier for hire, and was, under the Constitution and laws of the state of Arizona, subject to regulation by the Arizona Corporation Commission.

"VI. That the order of the Arizona Corporation Commission as recited in paragraph III of the special findings of fact did not impair the liability of the defendant as a private carrier.

"VII. That the plaintiff is entitled to judgment against the defendant for the sum of $1,500."

The questions raised on this appeal by the appellant in its assignments of error are whether the original proceeding by the Corporation Commission fixing the rate to be charged Campbell's United Shows for transportation from Tucson to Phœnix was null and void for the reason: (1) That there was no formal complaint filed against the appellant with the Corporation Commission either on its own motion or on the motion of any third party; that at the hearing the witnesses who made statements to the commission in the nature of evidence were not sworn; and (2) if these statutory requirements and formalities were waived by the appellant, whether the movement of Campbell's United Shows was an interstate transaction, and therefore not within the jurisdiction of the State Corporation Commission; also (3) whether the Corporation Commission had jurisdiction to make its order requiring the appellant to enter into a special contract as a private carrier for the transportation of the privately owned equipment of Campbell's United Shows; and (4) whether the statute authorizing the assessment of a fine for disobedience of its order is constitutional.

[1] We do not think that the appellant is in a position to complain of the informal and irregular manner in which the proceeding was instituted before the commission, nor because the witnesses were not sworn. A formal complaint setting forth a grievance against the appellant should have been filed and, of course, the testimony should have had the sanctity of an oath. These things seem to be required by the statute and by the rules of the Corporation Commission—paragraph 2336, Civil Code 1913, and rule 5 of Practice and Procedure, A. C. C. The omission to follow the statute and the rules of the commission, when concurred in by the appellant, as was done in this case, no prejudice being apparent, ought not now to be permitted to upset the whole proceeding. Although this question could have been presented to the Corporation Commission by appellant on its motion for a rehearing, it was not done. Paragraph 2342, Id., among other things, provides:

"No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person, or the state, unless such corporation or person, or the state, shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person, or the state, shall in any court urge or rely on any ground not set forth in said application."

Again it is provided (paragraph 2329, Id.) that the commission shall not be bound by the technical rules of evidence, and that informality in proceedings or in taking testimony shall not invalidate any order, decision or rule approved by the commission.

[2] Of course if the movement of Campbell's United Shows from Tucson to Phœnix was an interstate movement, the order of the commission was void for want of jurisdiction over the subject-matter. The evidence shows that this show was traveling around over the country giving exhibitions; that early in February, 1914, it was at El Paso, Tex.; that at that time its agent inquired of the appellant for rates from that place through New Mexico into Arizona with a probable destination into California. No arrangement was effected between the appellant and Campbell's United Shows for transportation over appellant's line of railway. The shows, in fact, under a special contract with the El Paso & Southwestern Railroad Company, were transported from El Paso to Tucson with stop-overs at Douglas and Bisbee. When the show people made application to the appellant at Tucson for a contract to transport their equipment and entourage from Tucson to Phœnix appellant stated to them that it could not make a contract as a common carrier; that it had already entered into a contract with Sells-Floto Shows to transport them from Tucson to Phœnix; and that under the rules it could not transport Campbell's United Shows for a space of 30 days after the Sells-Floto Shows had been transported.

In the hearing before the Corporation Commission in the matter of fixing a rate the attorney for the appellant gave two reasons for not entering into a contract with Campbell's United Shows: First, he said:

"We wish to take the position we are not common carriers for circuses and carnivals; we want that in the record."

And, second:

"I am not acquainted with this special 30-day contract, but I understand there is an agreement between all show people as well as railroads to keep the shows spaced. This show coming in before Sells-Floto and with which the company has a contract, if he tenders the money —the freight at the regular rate, we have to carry him."

These were the only reasons suggested by the appellant at the hearing before the commission for not entering into a contract to transport Campbell's United Shows from Tucson to Phœnix. There was no suggestion or intimation at that time that the movement was an interstate movement, although the evidence discloses that the agent for Campbell's United Shows stated that the show would go from Phœnix to Prescott, Clarkdale, and Kingman, and from Kingman to Needles, Cal.

It developed that appellant and other railroads of this section of the country had been accustomed to enter into contracts of transportation with circuses and carnival shows at rates very much less than the regular tariffs and containing terms of exemption from the liability of common carriers; that Campbell's United Shows had such a contract in 1913 with appellant and other roads in this and contiguous states. It was in this action that appellant raised the question of the interstate character of the movement from Tucson to Phœnix, claiming it as an integral part of a continuous transportation from El Paso, Tex., through New Mexico and Arizona to San Bernardino, Cal., and in support thereof introduced evidence of a contract with the Santa Fé to move Campbell's United Shows from Phœnix to Prescott, Clarkdale, Kingman, and thence into California.

It is evident that when Campbell's United Shows started from El Paso, Tex., on the peregrinations of a traveling show, it had mapped out a route traversing several states, and one familiar with the wanderings of such institutions would not undertake to place limitations upon its rovings by fixing its ultimate destination or many digressions from original plans. Its movements may be likened to that of a sightseer in going from one state into another on a common carrier, and, like the common carrier, both are subject to the rules, regulations, and laws applicable to interstate commerce. Each is entitled to and must pay the tariff rates as promulgated or approved by the Interstate Commerce Commission, but where the movement is wholly intrastate, and to be consummated under a separate and independent contract of transportation, even though it be an advance step along the general route outlined at the beginning of the trip, we think it is the subject of state control and regulation. Having arrived in a state the show or traveler in "doing" the state could not claim or demand the schedule rate for interstate transportation, but must pay at the local or intrastate rate as long as the movement is from one stop in the state to another stop in the state.

We think the decision reached by the Supreme Court of the United States in Gulf, Colorado & Santa Fé Railway Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, is decisive of this case. The salient facts in the above case were: Two carloads of corn were shipped from Hudson, S. D., with ultimate destination Goldthwaite, Tex.: the first lap of the movement was from Hudson to Texarkana, Tex.; at this place a change of ownership was effected and a bill of lading issued to the new owner, calling for the transportation of the two identical cars and contents from Texarkana, Tex., over the lines of the Texas & Pacific Railway Company and the Gulf, Colorado & Santa Fé Railway Company to Goldthwaite, to be delivered there to Saylor & Burnett, the last consignees and for whom the two carloads of grain were intended when first started on their journey from Hudson, S. D. The Gulf, Colorado & Santa Fé Railway Company refused to accept the charges from Texarkana to Goldthwaite as prescribed by the State Railroad Commission, and demanded and collected a larger sum, based upon the interstate rate. The state of Texas, in a statutory action for extortion, recovered judgment in the Texas courts; the railroad company appealed to the Supreme Court of the United States, contending that the movement from Texarkana, Tex., to Goldthwaite, Tex., was but an integral part of the movement from Hudson, S. D., to Goldthwaite, Tex., and interstate in character. The Supreme Court, speaking through Justice Brewer, said:

> "The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment."

Further on he said:

> "It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. * * * The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier."

And the court further said that the "thought or purpose" of the shipper of the corn as to its further disposition "was a matter immaterial so far as the completed transportation was concerned," and illustrated his meaning in the following language:

> "In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made."

Gulf, Colorado & Santa Fé Railway Co. v. Texas has been followed and approved by the following: Chicago, Milwaukee & St. Paul Railway Co. v. State of Iowa, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988; s. c., 152 Iowa, 317, 130 N. W. 802; Penna. R. R. Co. v. Mitchell, 238 U. S. 251, 35 Sup. Ct. 787, 59 L. Ed. 1293; United States v. Philadelphia & R. Ry. Co. (D. C.) 232 Fed. 946; Acme Cement Plaster Co. v. Chicago & Alton Railroad Co., 17 Interest. Com. Com'n R. 220. In Chicago, Milwaukee & St. Paul Railway Co. v. Iowa, supra, it is said:

> "But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same state from having an independent and intrastate character. Gulf, Colorado & Santa Fé Ry. Co. v. Texas, 204 U. S. 403 [27 Sup. Ct. 360, 51 L. Ed. 540]; Ohio Railroad Commission v. Worthington, 225 U. S. 101, 109 [32 Sup. Ct. 653, 56 L. Ed. 1004]; Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 129, 130 [33 Sup. Ct. 229, 57 L. Ed. 442]. The question is with respect to the nature of the actual movement in the particular case."

In Campbell's United Shows, including entertainers, attendants, and employés, there were about 110 "passengers" not distinguished in the application of the law from ordinary passengers when seeking transportation from a common carrier. The rest of the show consisted of baggage, animals, and some railroad equipment, the movements of which were necessarily coincident with the movement of the troop of entertainers, attendants, and employés.

The three principal cases relied upon by the appellant to sustain his contention that the carriage of the Campbell's Shows from Tucson to Phœnix was an integral part of a continuous movement from El Paso, Tex., through New Mexico and Arizona to California, and therefore interstate in character, are Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Ohio Railroad Commission v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; Texas & New Orleans Railroad Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442. These cases all pertained to foreign commerce originating in the interior of the United States, and at the time the shipments were started on their journey they were definitely destined to some foreign port. The very nature and character of the movements required different carriers and changes of billing at the point of exportation and some times before reaching the point of exportation; hence it is said in those cases that the mere "accident" of bills of lading and forms of contract of transportation does not change the movement from an interstate or foreign to an intrastate movement. Commenting upon those cases in Louisiana Railroad Commission v. Texas & Pacific Railway Co., 229 U. S. 336, reading at page 341, 33 Sup. Ct. 837, at page 839, 57 L. Ed. 1215, the court said:

> "In those cases there was necessarily a local movement of freight, and it necessarily terminat-

ed at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country." Penna. R. R. Co. v. Clark Coal Co., 238 U. S. 456, 35 Sup. Ct. 896, 59 L. Ed. 1406.

The articles involved in those cases, to wit, cotton seed cake and cotton seed meal, coal and lumber, were all articles of merchandise, the subjects of barter and sale. The stoppage of them occasioned by the necessities of transportation during the course of their movement from the initial to the terminal points of shipment on a continuous movement to another state or foreign country may truthfully be said to be mere "accidents" of the movement. It is not so with a circus or carnival show where the stops are not "incidents" or "accidents" of the movement, but are the only means by which the purposes of a circus or show may be accomplished; the movement of a circus and show being a mere accident to the object of its existence —the giving of exhibitions.

[3] It is next contended that the Corporation Commission was without jurisdiction to make its order requiring appellant to transport Campbell's United Shows from Tucson to Phœnix, because no intrastate tariffs had been filed with the commission showing the rates for movement of privately owned equipment in circus trains or otherwise, or obliging appellant to transport privately owned equipment in circus trains. That the appellant was under no common-law obligation to accept the privately owned equipment of Campbell's United Shows we think is well settled. It could entirely refuse to accept such transportation, or if it should accept it the law permitted the common carrier to dictate the terms upon which the privately owned equipment of such a concern was transported. Clough v. Grand Trunk Western Railway Co., 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446, and cases there cited.

[4] The rule of the common law prevails in this jurisdiction, unless it has been changed and modified by statute. Looking to our statutes and to our Constitution, we are satisfied that the common-law rule has been abrogated in this state so as to make it obligatory upon common carriers to accept and transport the privately owned equipment of circuses and other show outfits under the rules, regulations, and rates, when reasonable and just, prescribed by the Corporation Commission. Article 15, § 2, of our Constitution provides that:

> "All corporations other than municipal engaged in carrying persons or property for hire * * * shall be deemed public service corporations."

Section 3 provides that:

> "The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business."

Chapter 11, tit. 9, Civil Code 1913, known as the "Public Service Corporation Act," provides for the organization, powers, and jurisdiction of the Corporation Commission. In section 2278 thereof, subdivisions E and F, the term "transportation of persons" is defined to include every service in connection with or incidental to the safety, comfort, or convenience of the person transported, and the receipt, carriage, and delivery of such person and his baggage; and the term "transportation of property" is defined to include every service in connection with or incidental to the transportation of the property. In subdivision Z, the term "public service corporation" is defined to include every common carrier, and further declares it to be subject to the jurisdiction, control, and regulation of the commission under the provisions of this chapter. Section 2289 provides that:

> "All charges made, demanded or received by any public service corporation * * * for * * * any service rendered or to be rendered, shall be just and reasonable,"

—and prohibits unjust or unreasonable charges or demands for any service. Section 2290 requires every common carrier to file with the commission schedules showing the rates, fares, charges, and classifications for transportation between termini, within this state, of persons and property from each point upon its route to all other points thereon. It also requires every public service corporation, other than a common carrier, to file with the commission, under such rules and regulations as may be prescribed, like schedules. Section 2295 reads as follows:

> "No public service corporation shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public service corporation shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section."

Section 2307 vests the Corporation Commission with power and jurisdiction to supervise and regulate every public service corporation in the state, and to do all things convenient and necessary in the exercise of such power and jurisdiction. Section 2308 empowers the Commission, after a hearing, if it shall find any contract affecting rates, fares, charges, or classification to be unjust, unreasonable, discriminatory, or preferential, to determine the just, reasonable, or sufficient rates, fares, charges, and classifications for contracts to be thereafter observed; and further authorizes this action of the commission upon a single rate, fare, charge, or contract.

We think it was the intention of the law, both constitutional and statutory, that the Corporation Commission should have plenary power over every public service corporation transacting business in this state of a local nature. That this power of supervision extends to contracts for the transportation of both persons and property, whether effected in the capacity of private carrier or common or public carrier. Nor do we think that appellant can complain because it had neglected to file with the commission tariffs showing the rates for the movement of privately owned equipment of circuses and like organizations. These omissions may be excused, as stated by the Interstate Commerce Commission in its rules concerning circuses and other show outfits, owing to "the peculiar nature of this traffic and the difficulties of establishing rates thereon in advance of shipper's request describing the character and volume of the traffic offered," but it cannot justify a refusal upon application to fix just and reasonable rates or to enter into just and reasonable contracts.

[6] For the first time the appellant raises the question in this court that the statute (section 2357) under which the Corporation Commission assessed the fine in question is unconstitutional and void. The attorney for the appellant in the trial court during the course of the trial entered into the following oral stipulation:

> "I am going further * * * and stipulate that if the Arizona Corporation Commission had power and authority and proceeded regularly as required by the statutes of the state of Arizona to enter the original order compelling us to promulgate and apply this original rate that they ordered, that then they have taken sufficient proceedings to adjudge us in contempt. That narrows the issues to determine whether or not the commission in first instant entered a valid order, their original order."

Notwithstanding this stipulation it is now urged that the law is unconstitutional because of the excessive fines and penalties provided, and we are referred to the cases of Bonbright v. Geary (D. C.) 210 Fed. 44, and Van Dyke v. Geary (D. C.) 218 Fed. 111, as authority for this contention. The question involved in those cases is not the one involved here. Those cases involved the danger of the public utility incurring a liability for every day the order of the commission was not observed or obeyed pending an appeal to determine the validity of the order issued by the commission—the statute (section 2352) making every violation of any order, etc., a separate and distinct offense, and in case of a continuing violation each day's continuance thereof a separate and distinct offense.

We think it is clear from a reading of those decisions that it was not so much the severity of the penalty as the daily cumulation of penalties while testing the legality of the commission's action that influenced the decisions against the validity of the law. In the Van Dyke Case, Sawtelle, District Judge, quoted from Ex parte Young, 209 U. S. 123-144, 28 Sup. Ct. 441, 447 (52 L. Ed. 714, 13 L. R. A. [N. S.] 932, 14 Ann. Cas. 764), the contention of the complainants as follows:

> "The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws, and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation. * * * Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties."

Further quoting from the Young Case:

> "We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The decision in the Van Dyke Case was limited in this language:

> "On the authority of these cases and on principle we are of the opinion, and so decide, that said Act 90 of the First Legislature of the state of Arizona imposes such penalties and imprisonment as to practically deprive the complainant of the right to appeal to the court to determine the validity of the law and the orders of the Corporation Commission, and is therefore unconstitutional in that particular."

The order here applies to a single rate for one trip only. It was not a permanent order, and could not be violated but once; no daily accumulation of penalties or fines could result from its disobedience; the appellant took no chances of incurring accumulated fines and penalties in prosecuting this appeal, and, not being affected by the feature of the law held unconstitutional in the Van Dyke and Bonbright Cases, is not in a position to raise the question.

The judgment of the lower court is affirmed.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. (dissenting). The essential question in this case is whether the movement of the Campbell's United Shows from Tucson to Phœnix via Maricopa, a movement wholly within the state of Arizona, is a movement of interstate commerce and under the protection of section 8, art. 1, of the United States Constitution. If in fact such movement was interstate commerce, the Arizona Corporation Commission, by its order made and entered on March 25, 1914, exceeded its jurisdiction by fixing a transportation rate chargeable for the movement, and the order so made was void and incapable of initiating a duty on the railroad company.

The trial court made special findings of fact and stated its conclusions of law therefrom. The court in its findings of fact does not find any fact nor refer to any testimony which shows or tends to show the points from and to which the shows moved on the journey. The findings are limited to the movement from Tucson to Phœnix within the state of Arizona. The conclusions of law on this issue are equally unsatisfactory. In the third paragraph of the conclusions of law the court finds as a fact, not as a matter of law, that the order of the Corporation Commission made and entered on March 25, 1914, "in no way imposed a burden upon interstate commerce." Inferentially the trial court must have believed that the movement of the said shows between the points in question was not in fact a movement of interstate commerce; but the fact was not found by the court.

A careful examination of the opinion of the Arizona Corporation Commission annexed to the complaint in this case, the basis for the order of March 25, 1914, will disclose that the Corporation Commission did not consider the matter of the beginning and termination of the journey laid out by the Campbell's United Shows, but only took into its consideration the matter of the reasonableness of rates charged by railroad companies for transportation between points in Arizona. The issue of fact whether the movement was interstate commerce is squarely presented in this case, and is the controlling issue joined and incapable of determination in the absence of evidence of the entire journey.

The defense introduced substantial evidence tending to show that it moved the Campbell's United Shows from Tucson to Phœnix under a rate prescribed by the federal Interstate Commerce Commission; that said shows were moved from Phœnix to a point within the state of California stopping at a number of points along the course of the journey, but the movement was made pursuant to special rate contracts. The defendant introduced evidence tending to show that about March 6, 1914, the Campbell's United Shows opened negotiations with defendant, Southern Pacific Company, for transportation "between Tucson and Phœnix, with a probable movement to other points in Arizona and in California, at that time explaining that they were coming from Deming, N. M., into Tucson over the El Paso & Southwestern."

The reporter's notes of the hearing before the Corporation Commission resulting in the order of March 25, 1914, and introduced as a portion of plaintiff's Exhibit B in this cause, disclose that the representative of Campbell's United Shows, Mr. E. L. Williams, being examined before the commission, was asked:

> "Where do you propose to go from here?
> "Mr. Williams: From here to Prescott, Clarkdale, and Kingman, and from Kingman to Needles, and then into California."

The evidence is therefore without conflict that the starting place of this organization of shows was Deming, in the state of New Mexico, and its stopping place was within the state of California, the exact point in contemplation is left in doubt by the evidence, but that the route for the journey determined upon in advance of starting from Deming, N. M., was through Arizona to Needles in the state of California, with the expectation of frequent stops incidentally along the course of the proposed journey, is clearly shown. The transportation companies were informed of the proposed route of travel from the place of beginning to its termination at Needles, Cal., at least. The proposed incidental stopping places were not disclosed, nor, perhaps, fully determined upon. That the shows would stop at Tucson and at Phœnix, however, was definitely determined, of which stops the transportation companies involved had information. These facts were shown before the Corporation Commission before its order was made on March 25, 1914, and upon the trial of this cause the facts are undisputed. Notwithstanding these very vital and controlling facts before the court, directly bearing on and prima facie establishing the defendant's alleged defense, no special finding or any finding with regard thereto was made by the court.

Passengers, baggage, and freight move in interstate commerce, and are therefore subject to the exclusive regulation of the laws of Congress under section 8 of article 1 of the United States Constitution when the movement is commenced in one of the states with the intention that such movement shall continue and ultimately terminate within another state, and that intention is consummated. It is not the contract for the rate of transportation which controls the character of the movement. The incidental interruption of the movement along its course, either voluntarily or involuntarily, is not the controlling factor. It is the commencement and ending of the continuous journey in contemplation with which the movement begins which fixes the character of interstate commerce upon the thing moved. The several contracts of transportation of the interstate commerce pursuant to which the movement is commenced and continued to its terminus does not fix the character of the thing moved. The fact that the movement is not intended to proceed without incidental stop-overs, or under one contract, or that any of the transportation companies handling the movement acts for itself and not in conjunction with the other connecting companies in the movement of the thing, do not impair the interstate commerce character of the thing moved, nor the movement participated in by the several transporting companies. Hence the evidence establishes the fact that the movement of the Campbell's United Shows from Tucson to Phœnix was a movement along a connecting link of the journey contemplated and commenced at Deming, in the state of New Mexico, and intended to terminate within the state of California, in the course of which journey the intention of the shipper was to pass over the Southern Pacific Company's road from Tucson to Phœnix in the state of Arizona, as a definite portion and continuation of such journey, of which intention the Southern Pacific Company had full notice.

As a conclusion of law from these facts, the said shows, when they commenced the journey, and continuing on the journey from Tucson to Phœnix, were in character moved in interstate commerce. The attempt of the Arizona Corporation Commission to prescribe rates chargeable for such movement of such interstate commerce is an interference with a matter with which the said Corporation Commission has no jurisdiction, and as a consequence the order violated by the Southern Pacific Company was void, and its violation did not subject the Southern Pacific Company to punishment.

When goods have been delivered to a carrier for transportation to a destination in another state, and when they have actually started in the course of transportation to another state, such goods are in interstate commerce. Southern Pac. Terminal Co. v. Interstate Commerce Commission and Young, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; Railroad Commission v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; United States v. Union Stockyard, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; Easdale v. A., T. & S. F. Ry. Co. (Kan.) 164 Pac. 164—citing Louisiana R. R. Com'n v. T. & P. Ry. 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215, and A., T. & S. F. Ry. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050. Hence if the movement from Deming, N. M., to Tucson, Ariz., is considered as a completed transaction, certainly the movement from Tucson was commenced to terminate ultimately in the state of California, and the movement on the journey commenced, the object moved became impressed with the character of interstate commerce and the regulation of such movement as to rates of transportation remained exclusively with the Interstate Commerce Commission, because that authority had acted in the matter and prescribed the rate chargeable for the transportation of such class of commerce.

The judgment in this case is not sustained by the evidence nor by the law. I am of the opinion that the judgment should be vacated and the cause dismissed for the reason the Arizona Corporation Commission did not have power to make and enter the order of March 25, 1914, and therefore such order was a nullity, and the appellant's failure to obey the order created no liability to punishment.

(19 Ariz. 40)

FUQUA v. STATE. (Cr. 420.)

(Supreme Court of Arizona. May 19, 1917.)

1. CRIMINAL LAW 🔑112(1)—VENUE—PLACE OF OFFENSE.

In a prosecution for introducing intoxicating liquor into the state, the contention that the court did not have jurisdiction for the reason that the liquors, before being brought into venue county, were actually introduced into the state in another county, and hence that the offense was committed in that county, was without merit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220, 221, 230.]

2. CRIMINAL LAW 🔑823(1)—PROSECUTIONS—INSTRUCTIONS.

In a prosecution for introducing intoxicating liquors into the state, the principle of law, stated in a refused requested instruction, that "you are instructed that, before you are justified in finding the defendant guilty, you must be satisfied by the evidence beyond a reasonable doubt that the defendant introduced the whisky in question into this state for an unlawful purpose, that is, to sell, give, barter or dispose of to another, he is not guilty if he introduced it for his own personal use or consumption," was fairly stated in a given instruction that: "The court instructs the jury that a person may lawfully introduce whisky into this state for his own personal use or consumption. That is no crime, and, if you believe from the evidence that the defendant introduced the whisky in question into the state for his own personal use or consumption, it is your duty to acquit him."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158.]

3. CRIMINAL LAW 🔑823(1) — APPEAL — INSTRUCTION.

In a prosecution for introducing intoxicating liquor into the state, where the court gave an instruction which fairly stated the law, no error was committed in refusing to give another which sets forth the same principle of law, but by a different arrangement of the language used to express the idea involved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158.]

4. WITNESSES 🔑337(4) — EVIDENCE — IMPEACHMENT OF ACCUSED.

In a prosecution for introducing intoxicating liquor into the state, where the defense was that the liquor which the defendant admits he introduced from California was for his own personal use, and not for illegal disposition, and he testified to that effect, the state had the right to test the matter of defendant's purpose in introducing the liquors by cross-examination into that issue, and to ask the questions whether it was the first time he had brought liquors into the state and if he had not made regular trips for such purpose.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1131.]

5. WITNESSES 🔑380(2) — EVIDENCE — IMPEACHMENT OF ACCUSED.

In a prosecution for introducing intoxicating liquors into the state, where the defendant on direct examination and in support of his defense stated that he introduced the liquors for personal use, and on cross-examination denied that he had brought in other lots, evidence offered by the state in rebuttal, tending to show that defendant had made other and different statements of the intended use of the liquors he had brought in, was relevant and competent as bearing on the defense offered.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1211, 1219.]

6. CRIMINAL LAW 🔑371(10) — EVIDENCE — ADMISSIBILITY.

Evidence of trips made by defendant to the same place and of loads of whisky brought back by him other than the load in question was also admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831.]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

R. H. Fuqua was convicted of the offense of introducing intoxicating liquor into the state, in violation of law, and he appeals. Affirmed.

Baker & Baker, of Phœnix, for appellant. Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and Geo. W. Harben, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The appellant bought a large quantity of whisky, wine, and beer, at Imperial, in the state of California. He loaded the liquor in an automobile in cases and suit cases, and placed tags on the cases indicating their contents. A quilt used for bedding was thrown over the load in the automobile, and the suit cases were placed on the outside attachments of the machine. No attempt was made to conceal the character of the load carried.

The appellant testified as follows:

"We crossed the Colorado river at Yuma over the new state bridge, and came into Arizona at Yuma, in Yuma county, Ariz. We stopped in Yuma for a little while on the public street, and then came on towards Phœnix to a place near Buckeye, in Maricopa county, where we were arrested. I intended to drink myself this liquor I brought in, and never intended to sell it, * * * nor dispose of it to any one else."

On cross-examination, the county attorney was permitted, over the objection of appellant, to inquire of the appellant whether he had made a number of trips to the same place, other than the trip he admitted he did make. The purpose for which the county attorney asked the questions was to cross-examine the appellant "relative to his use of whisky, as a person who drinks that you inquired into." The objections raised were that the matter was not proper cross-examination, that the questions tend to show the commission of another offense, and that it is immaterial and irrelevant. The witness denied that he made frequent trips and returned with intoxicating liquors. The witness was asked whether witness had not made statements, at the time of his making a second trip, to another named person to the effect that witness was bringing the liquors in for a certain named person. This was objected to on the grounds that it is improper examination, that it is immaterial, irrelevant, incompetent, and improper cross-examination, and offered for the purpose of prejudicing the jury against the defendant. These objections were overruled. The appellant, in answer to all of the questions, answered in the negative. The matters to which these objections were raised were gone into in detail. At all times the defendant answered, when required to answer, in the negative.

When the defendant had rested his case, the state in rebuttal introduced testimony tending to contradict the denials made by the appellant on his cross-examination. The charge against a codefendant was dismissed by the prosecution, and the codefendant testified as a witness for the state. The jury returned a verdict of guilty. The court pronounced a judgment of conviction accordingly. From the judgment and from the order refusing a new trial, the defendant appeals.

[1] The appellant contends that the superior court of Maricopa county has no jurisdiction of the offense, for the reason the offense was committed in Yuma county, and not in Maricopa county, as the intoxicating liquors were actually introduced into the state within Yuma county. Consequently, he argues that the offense was committed wholly in Yuma county. This court, in Reynolds v. State, 18 Ariz. —, 161 Pac. 885, considered the question here presented, and a majority of the court resolved the question against the appellant's contention. I adhere to the ruling there made.

The defendant requested the court in writing to give the following instruction:

"You are instructed that, before you are justified in finding the defendant guilty, you must be satisfied by the evidence beyond a reasonable doubt that the defendant introduced the whisky in question into this state for an unlawful purpose; that is, to sell, give, barter, or dispose of to another. He is not guilty if he introduced it for his own personal use or consumption."

The court refused to give this instruction, of which order the appellant complains.

At the written request of the defendant, the court gave the following instruction:

"The court instructs the jury that a person may lawfully introduce whisky into this state for his own personal use or consumption. That is no crime, and, if you believe from the evidence that the defendant introduced the whisky in question into the state for his own personal use or consumption, it is your duty to acquit him."

[2, 3] Before the recent amendment of the prohibition laws of the state, these instructions, the one given and the one refused, fair-

ly stated the law. Having given one, no error was committed by the court in refusing to give another which sets forth the same principle of law but by a different arrangement of the language used to express the idea involved.

[4] The appellant complains of the inquiry, on cross-examination, over his objection "if this was the first time he had ever brought any load of whisky into the state, and if he had not made regular trips to Imperial, bringing in whisky each time. The objection was made on the ground that it was not proper cross-examination of the defendant, and for the further reason that it tended to show the commission of another offense."

The sole defense offered by the defendant was that the liquors, he admits that he introduced from the state of California, were introduced by him for purposes of his own personal use, and not for illegal disposition by him. The appellant on his direct examination so testified. Thereupon the state had the right to test the matter of the defendant's purpose for introducing the liquors, by a cross-examination into that issue injected into the trial for the first time by the defendant's evidence in chief. The inquiry made was both relevant and material to the issue raised.

[5, 6] The evidence offered by the state in rebuttal, of which complaint is made, that is, evidence tending to show that defendant made other and different statements of the use to which the liquors which he brought in were intended for, was relevant and competent as bearing on the defense offered. The evidence of trips made by the defendant to the same place and loads of whisky brought back by him other than the load in question in this case was also pertinent to the issue raised on the part of the defendant.

The trial court did not err in admitting the testimony of which appellant has complained. I am of the opinion the record is free from reversible error. Consequently, the judgment must be affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(19 Ariz. 44)

MARSHALL v. STATE. (No. 421.)

(Supreme Court of Arizona. May 19, 1917.)

1. CRIMINAL LAW 🔑1186(4)—NAMING DEFENDANTS IN STATEMENT CHARGING ACTS.

Where the names of defendants were given in the title of the information, and the charging part referred thereto by the use of the words "said defendants," the information was sufficient, although defendants were not named in the statement charging the offense, in view of Pen. Code, 1913, § 944, providing that no information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits.

2. CRIMINAL LAW 🔑1186(4)—ALLEGATION OF FILING.

The information was sufficient, although it did not allege the date of filing.

3. INTOXICATING LIQUORS 🔑236(4) — IMPORTATION INTO STATE—EVIDENCE—SUFFICIENCY.

In a prosecution for illegal transportation of whisky over state line, evidence *held* sufficient to justify jury in drawing inference that accused advised and encouraged the unlawful introduction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 305, 306.]

Appeal from Superior Court, Graham County; A. G. McAlister, Judge.

William Henry Marshall was convicted of the unlawful introduction of intoxicating liquors into the state, and he appeals. Affirmed.

W. K. Dial, of Safford, for appellant. Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and Geo. W. Harben, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The appellant demurred to the information filed. The demurrer is upon the grounds that the information does not substantially conform to the requirements of paragraph 935, Penal Code of Arizona 1913, in the particular that it does not name the party charged with the commission of the offense in the body of the information, and that it is not direct and certain as it regards the party charged, as required by paragraph 936, Penal Code 1913. The demurrer was overruled.

[1, 2] The information, omitting the title of the court, is as follows:

"The State of Arizona, Plaintiff, v. Ed Knight, James Bozelli, William Marshall, Tom Williams, Jose Garcia, C. B. (John) Hellings, Defendants. Information. In the name and by the authority of the state of Arizona, said defendants are accused by the county attorney of Graham county, state of Arizona, by this information, of the crime of misdemeanor, committed as follows: That said defendants, on or about the 13th day of April, 1916, and before the filing of this information, at and in the county of Graham, state of Arizona, willfully, knowingly, unlawfully, did introduce into the state of Arizona, and into the county of Graham in said state, intoxicating liquors, to wit, whisky, contrary," etc.

Paragraph 934, Penal Code of Arizona 1913, requires that the information must contain: (1) The title of the action, specifying the name of the court to which the same is presented and the names of the parties. (2) A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Paragraph 935, Id., sets forth a form for informations, and declares that if the form suggested and set forth is substantially followed the information is sufficient. The information filed does not allege the date of the filing. The names of the defendants are given in the title of the action, but not specified in the statement charging the acts constituting the offense. The title of the action is referred to for the names of the parties charged by the use of the words "said defendants." Paragraph 936, Id., requires that the information must be direct and certain as it regards: (1) The party charged; (2) the offense charged; (3) the particular circumstances of the offense charged, when necessary.

> "The * * * information is sufficient, if it can be understood therefrom: * * * (3) That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name. * * *" Paragraph 943, Penal Code 1913.
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> "No * * * information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." Paragraph 944, Penal Code 1913.

The appellant is named in the title of the action, and that name is clearly referred to in the commencement of the information by the words "said defendants." The defendants named in the title of the action and so referred to are certainly the parties directly charged. Can this be misunderstood? This defendant is most certainly named within the four corners of the information, and as certainly the information charges this defendant with the commission of the alleged offense. If we should hold otherwise, we would disregard paragraph 944 of the Penal Code of Arizona of 1913, and hold that the information is imperfect and defective in form, but has no tendency to the prejudice of a substantial right of the defendant upon the merits. The omission of the date on which the accusation is made by the county attorney, and the reference to the title of the cause for the name of the party charged is a practice to be discouraged in the most positive terms, but after all these matters as they occur in this particular information are nothing more important than defects and imperfections in the form of the information, and do not seem to prejudice the rights of this appellant upon a consideration of a demurrer. The demurrer was overruled without the commission of reversible error.

[3] The fact in issue at the trial was whether the defendant Marshall was concerned in the act of transporting the whisky over the state line. The appellant conceded that he left Globe and went to Lordsburg, N. M., for the purpose of buying whisky and bringing the whisky back to Globe; that he went to Lordsburg, arriving there about 11 o'clock in the morning; that he met a man, who stated his name was Harris; that Harris informed defendant that defendant could get all the whisky wanted at Duncan, Ariz., from a man driving a wagon; and that, if defendant would return by the way of Duncan, he would meet the said driver of the wagon, from whom defendant could get the spirits wanted, and evade the penalty of the law for introducing the whisky into the state. Defendant followed the instructions given him by the man calling himself Harris, and met the "booze" wagon at the time and place Harris informed defendant he would meet it, and, after defendant informed the driver of the "booze" wagon that he (defendant) had seen Harris in Lordsburg, then no trouble was encountered in having 17 cases of whisky transferred from the "booze" wagon into defendant's possession, but this transfer took place in Arizona.

Courts have never applied the admiralty rules which recognizes the vessel of one nation within the waters of another nation as within the jurisdiction of its home to "booze ships" cruising about the Southwestern desert stretches and unconsciously crossing a state line. The "booze" wagon mentioned in the testimony in this case, from the description given of its contents, was a tramp vessel of the desert launched in the wet state of New Mexico, and cruising along under the radio orders of Harris. It was a matter for the jury to determine whether the appellant, Marshall, as a fact received the possession of the whisky within the state of New Mexico, and caused it to be introduced into Arizona for the purposes of sale, or whether he went to Lordsburg, N. M., for information as to where he could get the whisky closer home, and there found this "Desert Spiritual Admiral" Harris, and from him did get the information sought, and succeeded in evading the laws of the state of Arizona. No rational, fair jury would believe that Marshall was not concerned in introducing the whisky into Arizona. Because Marshall conveniently met a man driving a wagon loaded with whisky, all within Arizona, and got the whisky from the wagon and paid for it, all within Arizona, is evidence that the whisky was delivered to Marshall within Arizona; but the fact remains that the whisky in the wagon belonged in Lordsburg, N. M., that it was under the control of a man calling himself Harris, and that it was sent into Arizona from New Mexico for the purpose of being delivered in Arizona to the persons designated by Harris, including Marshall, and to be paid for on delivery.

Did Marshall aid and abet the introduction of the whisky into Arizona, or, not being present, did he advise and encourage such unlawful introduction? If the jury believed all of Marshall's and Hellings' testimony, they must therefrom believe that Marshall and Hellings did not directly commit the act of passing the whisky over the state line. So believing, the jury are justified in drawing the inference, from all the facts and circumstances in evidence, that Marshall did advise and encourage the introduction of such whisky into the state by Harris and the man in charge of the "booze" wagon.

Without the least doubt the "booze" wagon was on the road "this side of Duncan" by previous arrangement made by Marshall with the man calling himself Harris. It is not reasonable to believe that a man will load a wagon with whisky and drive along the public traveled highways of Arizona, accosting all the strangers he may meet traveling the road, and offering to sell whisky in wholesale lots, without some knowledge that the person met is in search of whisky, more particularly when the highway is one leading directly into a state where whisky is sold lawfully, and the travelers are coming from the direction of the licensed sale places. The jury are justified in drawing the inference of fact, from all of the circumstances in evidence surrounding the transaction, that Marshall advised and encouraged the unlawful introduction of the whisky in question from the state of New Mexico into the state of Arizona.

Upon the whole case I am satisfied that the appellant has been awarded a fair and impartial trial, and has been justly convicted of the offense charged. Consequently the judgment must be affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(19 Ariz. 49)

MURRAY et al. v. STATE. (No. 419.)

(Supreme Court of Arizona. May 19, 1917.)

1. Criminal Law 🔑633(1)—Criminal Prosecution—Conduct of Trial.

The exhibition, during a trial for introducing intoxicating liquors into the state, of a blackboard showing two other similar indictments against defendant, and collecting in the courtroom large quantities of whisky involved in such other cases, was improper, where the sole defense was that accused received the whisky inside the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1450, 1451, 1453, 1459.]

2. Intoxicating Liquors 🔑239(2)—Criminal Prosecution—Instructions.

In a prosecution for bringing intoxicating liquors into the state, evidence that accused, when arrested while driving from the state line with intoxicating liquors, stated that it cost him an additional amount to have such liquors brought and delivered to him within the state, warrants an instruction that persons aiding, etc., in the introduction of liquor into the state are guilty as principals.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 332.]

3. Intoxicating Liquors 🔑236(4)—Sufficiency of Evidence—Introduction Into State.

Such evidence sustains a conviction for unlawfully introducing liquors in the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 305, 306.]

4. Intoxicating Liquors 🔑231—Criminal Prosecution—Admissibility of Evidence.

In a prosecution for introducing liquors into the state, where the sole defense was that accused received it within the state, labels and internal revenue stamps showing the liquor was whisky and time and place of bottling are inadmissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291.]

5. Criminal Law 🔑1169(1)—Appeal and Error—Harmless Error.

The error in admitting such evidence is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3130, 3137.]

6. Intoxicating Liquors 🔑236(4)—Criminal Prosecution—Sufficiency of Evidence.

In a prosecution for introducing intoxicating liquor into the state, evidence sufficient to sustain conviction of one defendant does not sustain a conviction of his companion, who was not shown to have been interested either in the liquor, its purchase, or in the automobile used to convey it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 305, 306.]

7. Criminal Law 🔑1166½(1)—Appeal and Error—Harmless Error.

A conviction for introducing intoxicating liquors into the state based upon the admissions of accused and attendant circumstances, the sole defense being that the liquor was received inside the state, will not be reversed because the jury was erroneously informed that other similar charges were pending against accused and the liquor involved in such cases was shown them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3119-3122, 3128.]

Appeal from Superior Court, Cochise County; O. J. Baughn, Judge.

James Murray and Andy Johnson were convicted of introducing intoxicating liquor into Cochise county, Arizona, and appeal. Reversed and remanded with directions to dismiss as to defendant Murray, and affirmed as to defendant Johnson.

Alexander Murry and S. K. Williams, both of Bisbee, for appellants. Wiley E. Jones, Atty. Gen., and Geo. W. Harben and R. W. Kramer, Asst. Attys. Gen., for the State.

ROSS, J. The appellants were tried and convicted on the charge of introducing whisky into Cochise county, Ariz., from the state of New Mexico, in violation of the prohibition amendment. From the judgment of conviction, they appealed.

[1] Appellants complain of certain stagings or settings of the courtroom, which they claim were calculated to prejudice their rights in the eyes of the jury. It was the custom of the trial court to cause to be placed upon a blackboard in the trial court room in the morning before opening court the title of each case to be tried during the day. On the day this case was called for trial, there appeared on the blackboard in plain view of the jury the following calendar for the day:

"No. 712: State v. Andy B. Johnson.

"No. 835: State v. Andy B. Johnson and James Murray.

"No. 844: State v. Andy B. Johnson and James Kilcoyne."

The prosecution had also brought into the courtroom and placed in view of the jury panel as they assembled in the courtroom the following: Twenty cases of whisky admittedly the whisky the defendants were charged with introducing into the state in the present case; eight cases of whisky identified with cause No. 844; and twelve cases of whisky identified with cause No. 712.

Upon the opening of court, and before the jury was drawn and impaneled, appellants moved the court to strike from the blackboard the number and title of all cases against appellant Johnson, excepting the one then to be tried, and also to order removed from the courtroom the 20 cases of whisky identified with causes Nos. 712 and 844. The court's denial of this motion is assigned as error.

It must be admitted that the case was well and attractively staged and the settings admirably placed for the performance about to take place. Indeed, it was staged with as little regard to the forms of law as the average scenario trial in a moving picture show. The appellant Johnson was placarded upon the blackboard not once, but thrice; he had fractured the majesty of the law as many times as the cock had crowed before Peter forsook his Master. The jury was warned that he was at least adept, if not an expert, in the art of bootlegging; they were thus notified that he was a habitual lawbreaker and a bad man generally.

The more to impress them of his criminal tendencies and the certainty of his guilt, booties galore of his prowess in his particular field of operation were displayed in the courtroom. In addition to the 20 cases of wet goods involved in the case on trial, 20 more cases, presumably the fruits of his exploits at other times and occasions, were present in the courtroom for the purpose of letting the jury have an insight into all other charges then pending against appellant Johnson. While professedly trying one case against appellant Johnson, adroitly and cunningly, with the sanction of the court, the stage of action was so arranged and set as to throw upon the canvas in plain view of the jury a multiplicity of crimes in which he was accused of participating.

Every one charged with crime is entitled to a fair and impartial trial, and this is true whatever the character or grade of the offense. The scales of justice should always be adjusted for all alike. Neither many nor flagrant violations of the law, nor public clamor for convictions, should have any place or influence in a court of justice. The same rules of evidence and the same orderly and dignified conduct should be observed in the trial of all cases.

While the custom of the court in placing upon the blackboard the trial calendar of the day is commendable, in that it advises litigants and lawyers alike to be ready on the call of their cases, yet in this case it was likely to prejudice the rights of appellant Johnson, and therefore should not have been exposed to the jury at all. The court should have cleared the blackboard of the other two cases on his own motion and without being requested to do so by appellant Johnson.

The fruits of crime and the means and instruments with which crimes are committed are frequently introduced in evidence, and may generally be said to be competent when there is any controversy as to the manner in which the crime was committed or the means used in its commission. In the present case, the crime charged was the introduction of whisky into the state from without the state. The corpus delicti, therefore, was the introduction of the liquor. There was no question as to the character of the liquor or as to its quality or as to the ownership or its possession—all of these were conceded. That being true, we are unable to see why any of the whisky should have been paraded before the jury, unless it was to arouse prejudice and bias in the minds of the jury against the appellants. But, had the issue been so framed as to admit in evidence the 20 cases charged to have been introduced in this case, surely that was all and enough. Indeed, the other 20 cases were not offered in evidence, but they stood as mute witnesses of other devious and oblique conduct of at least one of the appellants.

As above indicated, the only issue between the state and appellants was as to whether the appellants had introduced the 20 cases of liquor from New Mexico into Arizona; as to whether the appellants had themselves brought the liquor into the state, or had caused it to be brought into the state. The fact in dispute, then, was the manual transference of the liquor across the state line. On this issue it was not necessary to have the liquor on exhibition. An inspection of it would have no tendency to prove it of New Mexico origin, or that it had crossed the line from New Mexico into Arizona. If they brought it or caused it to be brought from New Mexico into Arizona, it was a fact to be proved, as any other fact, by direct and by circumstantial testimony and by admissions and confessions of appellants.

The evidence upon this issue is, succinctly: The sheriff and the deputy sheriff of Cochise county on the 29th day of January, 1916, on the Borderland Route, which leads through Douglas, Ariz., to Rodeo, N. M., about 20 miles west of the New Mexico line, met the appellants, who were headed from the direction of Rodeo toward Douglas with an automobile containing 20 cases of whisky. The deputy sheriff said Johnson told him that they got the whisky three-quarters of a mile inside Arizona; that he paid $284 for it, and that it cost him $10 more to get it on this side of the line; that he had the whisky delivered to him on this side of the line; that he got it on this side of the line. The sheriff relates what Johnson said to him as follows:

"I asked where he got the whisky, and he told me he had gotten it this side of the line; and then I tried to find out where and how he had gotten it, but he did not tell me that."

Murray said to the sheriff:

> "Well, we did not go across the line to get it. It cost us $10 (more) to have it brought on this side of the line than it would have cost us if we had gone over and got it ourselves."

Johnson, testifying in his own behalf, said that he met a man by the name of Simpson about 3½ miles west of the New Mexico line with whom he bargained for 20 cases of whisky; that Simpson left him for about an hour and returned with the whisky when the trade was made, he paying Simpson $284 and receiving 20 cases of whisky; that Simpson told him that $284 was $10 more than it would have cost on the other side. Murray's testimony corroborated Johnson's, except that he disclaimed any interest in the liquor and explained his presence with Johnson as the latter's guest and traveling companion. They both said that Simpson, when they first met him, was driving a light spring wagon drawn by a pair of mules; that at that time he had no liquor with him; that after Johnson had bargained for the liquor he went away, remaining about one hour, when he returned with the liquor drawn by the same team and in the same vehicle. The appellants were residents of Lowell, Cochise county, Ariz. They claimed that their intended destination was Globe, Ariz., via Lordsburg over the Borderland Route; that they got within 3½ miles of the New Mexico line, and, owing to the heavy rain that was falling at the time, the roads had become impassable, and they had been compelled to retrace their steps back to Douglas.

There is no material conflict of evidence, no complexity of controverted facts to be reconciled. The only issue in dispute, the corpus delicti, if established at all, is made out from the mouths of the appellants and the circumstances hereinafter adverted to. The circumstance of finding the appellants on the public highway with 20 cases of whisky, 20, or 3½ miles, or three-quarters of a mile from the New Mexico line headed in the direction of Douglas, Ariz., unaided by any explanation, would not establish the fact that they had brought the liquor or caused it to be brought from New Mexico. It would afford grounds of suspicion or conjecture, but nothing more.

Does the explanation of appellants as to where and how they obtained the liquor supply the lack of proof on the question of introduction? It is undisputed that they bargained for the whisky in Arizona and that it was delivered to them in Arizona. The question is, then: Where did Simpson, the seller, obtain the whisky? Did he, when he left the appellants, with their knowledge go into New Mexico and there obtain the whisky and return with it into Arizona where appellants were and deliver it to them?

In view of the law in Arizona at the time, it is not likely that Simpson had a stock of liquors in this state; the saloon as an institution had been abolished, and the traffic in liquors prohibited. Just across the line in New Mexico there were licensed saloons and, in view of the admissions of appellants, wherein they say, "The whisky was delivered on this side of the line," "We did not go across the line to get it," and, "it cost us $10 more to have it brought on this side of the line than it would have cost us if we had gone over and got it ourselves," we think it reasonably inferable that at the time the bargain for the liquor was made in Arizona it was understood that Simpson would go across the line and return with it.

[2, 3] It is contended by the appellants that the state of facts above detailed did not authorize an instruction given to the jury as follows:

> "That all persons who aid and abet or, not being present, advise and encourage the introduction of said liquor, * * * are guilty as principals in the act."

It is said that Simpson is not shown to have brought the liquor from New Mexico into Arizona; that the instruction assumes as proven this necessary fact, and that, even if Simpson did in fact introduce the liquor into Arizona, it has not been proved that the appellants had knowledge thereof before they received and paid for it. We think, in view of the admissions of the appellants and the attendant circumstances, the instruction was justified and properly given. We also are convinced that there was sufficient evidence of the corpus delicti to sustain the verdict of the jury. Reynolds v. State, 18 Ariz. —, 161 Pac. 885.

[4, 5] The appellants complain of error in the admission of the label and internal revenue stamp taken from one of the bottles of liquor found in their possession. These were introduced over the objection of appellants for the purposes, as stated by the county attorney:

> "First, that it shows upon the face of it that it is marked whisky plainly. Second, it shows where it was made and the brand of the label and when it was bottled. It shows the place and when it was bottled."

As above stated, the character of the liquor was not questioned; it was admitted to be whisky. Therefore whatever it might have been labeled was immaterial. The legends on the stamp and label were that the whisky was made in Athertonville, Ky., and also when the whisky was bottled there. Of course, these things were immaterial under the issue; they did not show, or tend to show, an unlawful introduction of the liquor into Arizona. It was error to admit in evidence the stamp and label for the reasons above given. but we do not think that the error could have prejudiced the rights of the appellants. The purpose for which they were offered, as stated by the county attorney, showed that they did not prove, or tend to prove, any introduction of liquor into the state, or have any bearing upon that issue.

[6] As heretofore indicated in this opinion, the appellant Murray was only a guest or traveling companion of Johnson. It is not shown that he was interested in any way in the automobile used to move the liquor, or in the liquor itself; it was all bought and paid for by appellant Johnson; he did all the negotiating with Simpson, the seller; and everywhere the evidence discloses that he only was interested in securing the liquor. For these reasons, we are of the opinion that the judgment should be reversed as to Murray and remanded, with directions to dismiss as to him.

[7] Notwithstanding the many palpable errors that were committed in the course of the trial, we do not believe that the case should be reversed as to appellant Johnson. If the case had been tried upon the admissions and the statements of the appellants and the circumstances connected therewith, and the errors to which we have alluded had not crept into the trial, still we are satisfied that the verdict of the jury should have been one of guilty as to Johnson. We do not see how a common-sense jury, if the case were remanded for a new trial and the evidence in this record free from legal objection was submitted to it, could return a different verdict. If the facts bearing upon the issue of introduction were in dispute, or if it was made to appear that upon another trial free from error a different verdict might be had, because of the many flagrant and egregious errors in this record, we would be compelled to remand the case for a new trial.

Under the circumstances, we believe that the judgment of conviction should stand as to appellant Johnson, and it is so ordered.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(19 Ariz. 56)

GRISWOLD et al. v. HORNE. (No. 1521.)

(Supreme Court of Arizona. May 19, 1917.)

1. Malicious Prosecution 🔑72(4)—Malice—Instructions.

In an action for malicious prosecution, an instruction that the jury might infer malice from want of probable cause was erroneous as authorizing the jury to find malice from want of probable cause alone.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 171, 172.]

2. Malicious Prosecution 🔑27—"Malice."

Malice in law may be defined as a wrongful act done intentionally without just cause or excuse, and it may exist along with malice in fact or where there is an entire absence of true malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 60.

For other definitions, see Words and Phrases, First and Second Series, Malice.]

3. Trial 🔑193(1)—Instructions—Invasion of Province of Jury.

In an action for malicious prosecution, an instruction containing the tacit intimation that in the opinion of the judge defendants ought to "smart" for the prosecution was erroneous as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 436.]

4. Trial 🔑244(2)—Instructions—Emphasis of Testimony.

It is error for the court in giving instructions to single out and group certain portions of the testimony favorable to plaintiff to the disparagement of other relevant and material facts favorable to defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 578.]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Rebecca Horne against H. S. Griswold and another for malicious prosecution. From judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed, and new trial granted.

Baker & Baker, of Phœnix, for appellants. Robert S. Fisher, and Robert A. Jarrott, both of Phœnix, for appellee.

FRANKLIN, C. J. This is an action for malicious prosecution. The jury found a verdict for the plaintiff, upon which judgment was entered. The defendants moved for a new trial, which was denied. From the judgment and the order overruling the motion for a new trial this appeal is prosecuted.

The appellants, Mr. and Mrs. Griswold, who were defendants in the court below, are an elderly couple advanced in years beyond the threescore and ten. For a period of four or five years Miss Rebecca Horne, the appellee, who was plaintiff below, lived in the home of appellants in Phœnix, Ariz., her occupation being that of a nurse and companion, and her reputation for honesty and integrity excellent. Miss Horne and the Griswolds grew to be very fond of each other, and lived together on the most amicable terms. Indeed, Miss Horne was regarded more as a member of the Griswold family than otherwise. She called Mr. and Mrs. Griswold "Daddy" and "Mother," and they in turn affectionately addressed her as "Dear Bess." In the summer of 1914 the Griswolds went on a summer's vacation to California, and before leaving Mrs. Griswold placed some jewelry in a small box and secreted it in a large box containing some bed linen located in the lower part of the house as a place not likely to be found by any one entering the house with intent to steal. The jewelry is not of any considerable value in money, but is highly prized by Mrs. Griswold. Some of its pieces are heirlooms of her family and dear to her as a matter of sentiment. During the absence of the Griswolds their house was occupied by Miss Horne and a Mr. and Mrs. McDole, but for a brief period of this time Miss Horne was away on a visit to Prescott. Two men, friends of Mr. McDole, also occupied a sleeping porch for two or three nights.

The Griswolds returned home on the 15th of September, and several days thereafter Mrs. Griswold, in looking for the jewelry, discovered that the small box containing it had been removed from the large box containing the bed linen and the contents of the large box containing the linen had been disarranged. Mrs. Griswold questioned Miss Horne about it, but the later denied any knowledge whatever about the jewelry or its hiding place. Mrs. Griswold thought that Miss Horne was hiding the jewelry from her as a practical joke, because, so she states, Miss Horne saw her secrete the jewelry and was asked to rescue it in case of fire. Some of the jewelry was found in the bottom of a trunk belonging to Miss Horne and a few pieces of silverware in a chiffonier drawer located in a room occupied by her. The testimony as to the circumstances attending these matters and the conduct and attitude of Miss Horne and the Griswolds thereabouts present sharp conflicts. Eventually, however, the Griswolds claim to have become convinced that Miss Horne had stolen the jewelry, and, at the suggestion of Mrs. Griswold, Mr. Griswold swore to a complaint before a committing magistrate charging Miss Horne with the crime of grand larceny. At the preliminary examination the magistrate discharged Miss Horne, and this ended the prosecution. In the above statement we purpose merely to give a general outline of the case so that some adequate knowledge of the matter before us may be had. As the case must go back for a new trial we do not consider it proper to go over the case and recite the testimony nor express any opinion about it.

[1] The heat of the controversy in the superior court centered about the good faith of the Griswolds in instituting the prosecution. The court gave the following instructions which serve as a basis for our conclusions to reverse the case:

"Envy, hatred, and malice are separate and distinct passions, and the worst of these is malice, because it is a deliberate purpose to do an injury to some person without just cause or excuse. Malice in law is the deliberate purpose to injure another without just cause or excuse. It means the willing act of an evil mind; the intention to wrong another unjustly. It implies the making up of the mind to do evil to some one. Therefore any indirect motive of wrong is a malicious motive. For example, if one sets the criminal law in motion against another, not for the purpose of bringing that other to justice for the violation of some law, but for the purpose, for instance, of aiding the prosecutor to recover property, a jury might well consider that was evidence of a malicious motive, because the criminal law was not designed to aid persons in the restoration of property; and they who set the criminal law in motion for such a purpose should smart for it, and in a proper case would be made to smart for it. I trust you clearly understand now what is meant by the malice which must be present as the motive in a malicious prosecution. That malice or malicious motive must be proved to the satisfaction of the jury by the greater weight of the testimony. It is not necessary that malice be expressly shown—for instance, by proof of threats or the like. Malice may be implied. It may be inferred from circumstances. For example, malice may be inferred in a prosecution, if the prosecution is one without probable cause. If the jury are satisfied from the testimony that the prosecution was wholly without cause or without probable cause, that they may infer, and justly infer that it was prompted by malice.

"The court instructs the jury that, if they believe from the facts and circumstances proved on the trial that defendant had not probable cause for prosecuting the plaintiff, and that they did prosecute her, as charged in the complaint, then the jury may infer malice from such want of probable cause."

These instructions make it clear that the jury were misdirected in the essential matter of malice, so that the case must go back in order that this feature may be fairly and accurately outlined and correctly presented for the determination of another jury.

The principles by which the rights of parties are to be measured in actions of this sort are well settled. It is frequently said that actions for malicious prosecutions have never been favored in law. The idea may, perhaps, better be expressed by saying that such actions are to be properly guarded and their true principles strictly adhered to. When this is done and the proper elements to support the action have been presented it will be readily upheld. The reasons for this must at once be obvious. The purpose of the law is to protect individuals in their just rights.

"In most instances," quoting from Modern American Law, vol. 2, p. 287, "in determining whether or not such a right has been violated, the law looks only to the conduct of the alleged wrongdoer, without regard to the motive actuating the conduct. In some instances, however, from considerations of public policy, this rule is disregarded, and conduct is declared tortious and actionable only when prompted by evil motive. In these exceptional cases the improper intent is as much an essential part of the tort as the conduct induced by it. Malicious prosecution falls into this exceptional class. The public policy requiring this is easily found. Society cannot be protected without courts, which are the great conservative agencies in and through which the disputes and controversies of men are adjusted. It is essential that these tribunals shall be open to all persons who in good faith believe they have grievances against their neighbors, or who in good faith believe the criminal law has been violated. To adopt a policy which would make every unsuccessful plaintiff in a civil case, or every witness for the state in a criminal case, liable in damages to the defendant therein, whenever the plaintiff in the case failed to obtain judgment, would make litigation so hazardous that men would fear to resort to it."

Though public prosecutors do their part in the detection and punishment of public offenses, still it is common knowledge that the public justice is largely vindicated through the knowledge of crime possessed by private individuals, and to treat that as a legal wrong which consists merely in an unwarranted prosecution would be plainly impolitic and unjust. Such proceedings to the one charged with crime may be serious, but whatever of inconvenience and damage that may thus be suffered by the individual is overcome by that public policy of the state which protects every man who in good faith and for the purpose of vindicating the public justice institutes or sets on foot criminal proceedings. The law has therefore taken hold of the matter and established certain rules by which to fix liability for the improper institution and maintenance of actions in the courts. But, says Mr. Cooley:

> "Nevertheless it is a duty which every man owes to every other not to institute proceedings maliciously which he has no good reason to believe are justified by the facts and the law. Therefore an action as for tort will lie when there is a concurrence of the following circumstances:
>
> "(1) A suit or proceeding has been instituted without any probable cause therefor.
>
> "(2) The motive in instituting it was malicious.
>
> "(3) The prosecution has terminated in the acquittal or discharge of the accused."
>
> Cooley on Torts, vol. 1, pp. 320, 321.

It will be observed that malicious motive is so important an element of this tort that it has been incorporated in its name. The action is called "malicious prosecution," and in discussing this most important element we must have some understanding of the meaning to be given to the words "malicious motive." In these instructions the jury are told in effect, in one by direct statement, and in the other emphasized by illustration, that:

> "Malice may be inferred from the want ot probable cause."

This is a phrase often found in legal textbooks and in the opinions of judges. We shall admit the declaration to be true as a general proposition of law, and it is not necessary, nor is it our purpose here, to qualify or weaken it at all. Still we shall have but a superficial notice of its meaning unless we examine its foundations and find the reason for it, and, understanding somewhat of this, we must then properly limit the influence of such declaration to the concrete case.

A statement of the law by an appellate court addressed to the trained legal mind is a far different thing from the trial court's instruction to a jury of laymen which latter ought to be a plain, accurate, and direct charge to their understanding and give to them a better knowledge as an aid to the performance of their duty. The giving of an instruction to the jury which has received express judicial sanction must not be confused with a statement of the law made by an appellate court. And here we must notice the danger in submitting requests as emphasized by taking words from opinions of judges in the appellate courts severed and disconnected from their texts and attempting to have them applied to another and different state of facts. We insert a few expressions from the authorities on this matter:

> "It often happens that judges in writing opinions and authors of legal text-books in discussing or defining propositions of law express themselves in language wholly unsuited for the purposes of instructions to juries." McGee v. State, 117 Ala. 229, 231, 23 South. 797, 798.
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> "It is not always safe to take an excerpt from an opinion and embody it in an instruction, because the opinion is addressed to lawyers, while the instruction is addressed to laymen." Magrane v. St. Louis & Suburban R. Co., 183 Mo. 119, 128, 81 S. W. 1158, 1159.
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> "There are many things said in opinions that are sound law, but which nevertheless would be improper instructions to a jury." 38 Cyc. 1595.
>
> "The language of an opinion should never be framed into an instruction without fitting it to the case and leaving the jury to decide the questions of fact." Shannon v. Swanson, 109 Ill. App. 274, 277.

The Constitution forbids trial courts from instructing juries with respect to matters of fact or commenting thereon:

> "Judges shall not charge juries with respect to matters of facts nor comment thereon, but shall declare the law." Const. art. 6, § 12.

We shall first notice the support which is given to this statement of the law as a correct instruction to the jury. In the brief of appellee it is said:

> "It is contended by this evidence, much of which was elicited on cross-examination from the defendants and their witnesses, plaintiff raised a question for the jury as to probable cause, and that the court was warranted in instructing the jury that they might infer malice from the want of probable cause. This is a principle so elementary as to scarcely justify argument. Wheeler v. Nesbitt, 24 How. 544 [16 L. Ed. 765]; Ray v. Goings, 112 Ill. 658; Carson v. Edgeworth, 43 Mich. 241 [5 N. W. 282]; Cooley on Torts (3d Ed.) 337; Cunningham v. Moreno, 9 Ariz. 300 [80 Pac. 327]."

Reading these authorities must convince one that the breadth of appellee's statement is unjustified and any support for it in the cases cited entirely lacking.

In Wheeler v. Nesbitt, 24 How. 544, 16 L. Ed. 765, there was no attempt on the part of plaintiff to prove express malice. The jury returned their verdict in favor of the defendants, and the plaintiff excepted to the charge of the court. It was made clear in that case that in actions of this kind the plaintiff must show that the defendant acted from malicious motives in prosecuting him, and that he had no sufficient reason to believe him to be guilty. If either of these be wanting the action must fail. Said the court:

> "Undoubtedly every person who puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute the proper foundation of an action to recover compensation. Malice alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation; and though the averment is a negative one in its form and character, it is nevertheless a material element of the action, and must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge. Morris v. Corson, 7 Cow. [N. Y.] 281. Either of these allegations may be proved by circumstances, and it is unquestionably true

that want of probable cause is evidence of malice, *but it is not the same thing;* and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description." (Italics supplied.)

The court held that whether the prosecution was or was not commenced from malicious motives was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts in that case. This case makes it very clear, as do the authorities from a very early time, that malicious motives and a want of probable cause must both concur before a recovery may be allowed; that these two very essential elements are not one and the same thing; that, while the facts and circumstances tending to show want of probable cause may also tend to show malicious motives underlying the prosecution, they also may not tend in that direction; that the jury may so find, but that they also may not so find, according as the facts and circumstances of the concrete case might persuade. In that case the lower court, in charging the jury, said that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence showing that the party acted bona fide and in the honest discharge of what he believed to be his duty, and then said:

> "If, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable, dispassionate man to believe that the defendant was guilty of having stolen the horses he had in his possession, then the jury ought to infer malice."

While this instruction is less objectionable than those at bar, it was more favorable to the plaintiff than he had the right to expect, and the court concluded it furnished no ground for his exception.

In Carson v. Edgeworth, 43 Mich. 241, 5 N. W. 282, the charge as given required the jury to find the existence of malice as a fact. Said the court:

> "But the jury in this case had abundant evidence before them from which actual malice might be inferred."

In Cooley on Torts and Cunningham v. Moreno, supra, are found merely the language of legal abstractions, giving no instruction on the point under consideration.

Looking into the Illinois cases, that of Roy v. Goings, cited by appellee, while apparently in point, may be readily distinguished from the case at bar. In that case the court gave substantially the instruction here complained of. There was strong evidence of actual malice actuating the prosecution. Said the court:

> "Instructions are given in view of the evidence in the case, and not as mere legal abstractions. An instruction may be proper or not, in view of the evidence before the jury. If the trial court was satisfied that the evidence strongly tended to prove malice, then the instruction could, even if erroneous in that respect, have done no harm, *and when considered in this case, it tends, in the strongest manner, not only to prove the want of probable cause, but malice on the part of appellant.*" (Italics supplied.)

Malice may be inferred from a want of probable cause where, as in Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373, a powerful house possessed of extensive means made an infamous charge which they knew was unfounded and wrongfully prosecuted a poor and friendless young man, or, as in Reno v. Wilson, 49 Ill. 95, where "there was no semblance of criminal conduct, and no act done which could be tortured into crime" and where the defendant's conduct "from the commencement to the termination of the prosecution seems to have been prompted by no reverence for the law, by no desire to bring one of its violators to punishment, but to gratify bad passions, which, causelessly excited, appellant had not the firmness and discretion to restrain," and the "arrest was attended with the most degrading and humiliating circumstances," or where, as in Chapman v. Cawrey, 50 Ill. 512, 517, "no crime was committed and no just suspicion of one" existed, and "malice on the part of appellant crops out in every part of this transaction," or, as in Krug v. Ward, 77 Ill. 603, 610, where the Criminal Code was resorted to for the gratification of personal malice and the attainment of dishonorable personal ends. It may be so inferred in such like cases because in the facts and circumstances strong evidence of actual malice actuating the prosecution is present. The foregoing are fair illustrations of the cases in which such an instruction might be condoned as harmless, even if erroneous, not because it is a proper instruction to be given to the jury, but because under the facts actual malice is present independent of the mere fact of the want of probable cause. In other words, it depends upon the facts and circumstances of the particular case whether or not the inference be a proper one. Said the Illinois court:

> "Malice may be inferred from want of probable cause where the circumstances are inconsistent with good faith on the part of the prosecutor and where such want of probable cause has been clearly proven." Frank Parmelee Co. v. Griffin, 136 Ill. App. 307, 319.

And in the case of Barker v. Ronk, 134 Ill. App. 499, it is said:

> "When *all* the facts and circumstances proven show a want of probable cause for the arrest and imprisonment of the plaintiff on a charge of crime, the jury may take this fact into consideration, and from it infer malice, *not as a matter of law, but as a conclusion of fact.*" (Italics supplied.)

Green, J., in Morrell v. Martin, 17 Ill. App. 336, said:

> "A person may entertain malice against another, and, moved by that feeling, institute a prosecution for a crime against the object of his hatred; and if the latter is guilty of such crime, or if the one instituting such prosecution has probable cause for believing him guilty thereof, an action for malicious prosecution will not lie. To maintain such action there must be no probable cause and malice concurring."

To justify a recovery for malicious prosecution said the court in Wilmerton v. Sample, 39 Ill. App. 60:

> "The proof must show both malice and want of probable cause. Whether either of these necessary elements existed in this case was hotly contested on both sides, and it was earnestly denied by appellant. *It was therefore important that the law should have been accurately declared to the jury.*" (Italics supplied.)

In commenting upon the three necessary elements that must always exist in order to maintain this sort of action—that is to say, first, want of probable cause, second, the malicious motive in instituting the proceeding, and third, the termination of the prosecution in plaintiff's favor—Mr. Justice Pillsbury, in the case of Comisky v. Breen, 7 Ill. App. 369, 372, puts the matter of malice so clearly that we quote it at length:

> "The plaintiff must show that the motive of the prosecutor in instituting the proceeding was malicious, and the question of malice is one for the jury under all the facts in evidence. It must be found to exist as a material fact in the case, and while it is said in some of the cases that malice may be inferred from a want of probable cause, it is not intended to hold that this inference is in all cases necessarily to be deduced from the existence of the fact that there was no probable cause for the arrest. Justice Sheldon in Harpham v. Whitney, supra [77 Ill. 32], says: 'It is often said the jury may infer malice from the want of probable cause. They may do so under certain circumstances, but not in all cases. Malice is in no case a legal presumption from the want of probable cause, it being for the jury to find from the facts proved, when there was no probable cause, whether there was malice or not.' Therefore it is seen that it depends upon the facts and circumstances in the case going to prove the want of probable cause whether the jury should or should not infer malice from the want of probable cause. While it would be difficult to announce a rule applicable to every case as it may arise, perhaps it may be said that the jury would be authorized to infer malice from the want of probable cause alone, where the facts and circumstances in evidence which establish the principal fact are inconsistent with good faith upon the part of the prosecutor, but in cases where the proof may show a want of probable cause, yet if the evidence upon this point is consistent with good faith, the jury ought not to infer malice, simply because the principal fact is proved, but in such case the plaintiff should go further and introduce independent evidence of malice in the prosecutor. Malice therefore, not being a legal presumption in any case, is to be proved like any other fact, and so long as all the evidence in the case is consistent with good faith on the part of the defendant, it cannot be fairly said that malice is established. If the accompanying circumstances, however, show that the defendant in instituting the prosecution was actuated by an improper or wrongful motive, this will be sufficient proof of malice."

It will be seen, therefore, that the Illinois court is in accord on this question with the authorities elsewhere to the effect that malice is not a legal presumption, but is a question of fact; that want of probable cause and malice are not the same thing; that one element may exist without the presence of the other; that, while malice may be inferred in some cases from a want of probable cause according as the facts and circumstances disclose it, nevertheless it is a deduction that cannot be made merely from the existence of the fact that there was no probable cause for the prosecution; that the verdict of a jury will not be set aside simply because they have been told that malice may be inferred from a want of probable cause when the facts and circumstances in evidence clearly establish malice and the jury could not have found otherwise had such instruction not been given; in a word, when upon the whole case substantial justice has been done.

In sustaining an assignment of error to an instruction almost identical with the second one above, the Supreme Court of Arkansas, in the case of L. B. Price Mercantile Co. v. Cuilla, 100 Ark. 316, 141 S. W. 194, observed:

> "This instruction was erroneous in telling the jury, as a matter of law, that they might infer malice from want of probable cause. This amounted to an instruction on the weight of the evidence; for it was equivalent to saying to the jury that a finding of want of probable cause was sufficient to justify a finding of malice. Now, a trial jury in a case of this sort may or may not, according to the circumstances of the case, draw an inference of malice from a want of probable cause. It is a mere inference of fact, and not presumption of law; and, as the jury are not bound to draw such an inference as a matter of law, it amounts to an instruction on the weight of the evidence to tell them what facts are of sufficient weight to warrant the inference. * * * A trial jury, in determining whether a prosecution was maliciously instituted, may consider the fact that there was a probable cause for the prosecution along with other facts and circumstances proved in the case, including the conduct of the parties who instituted the prosecution; but they should not be told that the want of probable cause, any more than any other fact or circumstance proved in the case, was sufficient to justify an inference of malice. The giving of this instruction was therefore erroneous and prejudicial, and calls for the reversal of the case."

A less erroneous instruction of this kind was given in Kellogg v. Ford, 70 Or. 213, 139 Pac. 751, and held to be error. The Supreme Court of that state in reviewing it said:

> "The instruction as to the inference that might be drawn from evidence showing want of probable cause was misleading, and therefore erroneous. While it is true that malice may be inferred from want of probable cause, it is not a necessary inference and is never an inference of law. Want of probable cause is a fact to be considered by the jury with other facts in determining the presence or absence of malice."

This principle is recognized by the Texas courts:

> "Malice may be inferred from the want of probable cause, where there are no circumstances to rebut the presumption that malice alone could have suggested the prosecution; and it may be inferred where the defendant's conduct will admit of no other interpretation, except by presuming gross ignorance. 3 Phill. Ev. 257. In the language of Chief Justice Shaw in a case before cited, 'the groundlessness of the prosecution may in many instances be so obvious and palpable that the existence of malice may be inferred from it.' [Wills v. Noyes] 12 Pick. [Mass.] 326. But malice is in no case a legal presumption, or to be inferred as a necessary consequence of the want of probable cause."

Griffin v. Chubb, 7 Tex. 603, 608, 58 Am. Dec. 85.

In Willis & Bro. v. McNeill, 57 Tex. 465, quoting the syllabus, the rule is adhered to that:

> "Malice is not an inference of law from the want of probable cause, but is a mere inference of fact, which the jury may or may not draw, according to the facts and circumstances of the case."

It is necessary then, in every instance, in order to maintain an action for malicious prosecution, that malice must be shown. The statement that malice may be inferred from the want of probable cause is not the statement of a legal presumption, but merely an expression of what the triers of fact are privileged to do if they see fit, and the facts and circumstances of the concrete case warrant the inference. There are different kinds and degrees of malice as well as the nature of the evidence going to prove its existence. Many definitions of the term have been attempted, and courts and text-writers are continually struggling with its meanings and definitions. For instance, says Gaynor, J.:

> "The jumble in some modern text-books on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice, and express malice (all derived from judicial utterances, it is true) is a striking testimony of the limitations of the human mind." Ullrich v. N. Y. Press Co., 23 Misc. Rep. 168, 50 N. Y. Supp. 788.

[2] This confusion with its meanings is not entirely lacking in the cases on malicious prosecution. For the purposes of this case it is sufficient to say that the law recognizes a difference in two kinds or descriptions of malice, namely, malice in fact and malice in law, in actions for malicious prosecution; and in this sort of action it is absolutely essential to its existence that malice in fact as distinguished from malice in law be present. "Malice in law" may be defined as a wrongful act done intentionally without just cause or excuse, and it may exist along with malice in fact or where there is an entire absence of true malice. Said Henshaw, J., in Davis v. Hearst, 160 Cal. 143, 116 Pac. 530:

> "We shall define 'malice in law' as being that malice which the law presumes (either conclusively or disputably) to exist upon the production of certain designated evidence, which malice may be fictional and constructive merely, and which, arising, as it usually does, from what is conceived to be the necessity of proof following a pleading, which in turn follows a definition, is to be always distinguished from true malice or malice in fact."

And in Modern American Law, vol. 2, p. 299, the text reads:

> "Malicious motive is absolutely essential to the existence of this tort. Ordinarily evil motive is not necessary to make wrongful and injurious conduct a tort. The cases in which evil motive is essential are usually, if not always, those in which the act complained of as wrongful is primarily unlawful in its nature, but from considerations of public policy is licensed when committed with lawful motive. When evil motive actuates the conduct, the license is withdrawn, and the act goes back to its original state of unlawfulness.
>
> "Applying these general doctrines to malicious prosecution, we find that every time a plaintiff in a civil suit, or the state in a criminal action, fails to maintain the case, and final judgment goes for the defendant, this is an authoritative adjudication that the suit was wrongfully brought. Such conduct, strictly considered, should be unlawful. But, from considerations of public policy, this unlawful interference with the rights of the defendant, occasioned by an honest, though mistaken, belief that the action was well founded, is excused, or licensed, by law, and the successful defendant can maintain no further action on account of it. To allow such action would lead to endless litigation. Each time a plaintiff should be unsuccessful the defendant could sue him for damages, and each time a criminal prosecution failed the prosecuting witness would be subject to a like suit. This the law cannot tolerate. To avoid such conditions, it licenses the wrong of the unsuccessful suit unless it be prompted by evil motive. Hence the rule is universal that to maintain an action for malicious prosecution in every instance malice must be shown."

Whatever it is called, therefore, the element necessary here is malice of the one kind—the malice of the evil motive. Says Pollock in his Law of Torts (9th Ed.) p. 328:

> "The explanation of malice as 'improper and indirect motive' appears to have been introduced by the judges of the King's Bench about 70 years ago. But 'motive' is perhaps not a much clearer term. 'A wish to injure the party rather than to vindicate the law' would be more intelligible."

Bearing in mind, as Justice Henshaw says in the case quoted supra, "that it may be established either by direct proof of the state of mind of the person, or by indirect evidence so satisfying to the jury that they may infer and find the existence of this malice in fact," let us give an illustration or two that may indicate the distinction between malice in law and malice in fact. If one gives a perfect stranger unaware a blow with a deadly weapon likely to produce death, he does it of malice, because he does it intentionally without just cause or legal excuse. If he maims cattle without knowing whose they are, if he poisons a well of drinking water without knowing who is likely to drink of it, he does it of malice, because it is a wrongful act and done intentionally without any legal justification or excuse. This is the malice of the law—a malice of pleading and proof made necessary by definitions of offenses against the law or the exigencies of the case. It is established by a conclusive legal presumption, and proof of malice in fact is not required. If one publishes false words of another, and the occasion is not privileged, he does so at his peril, and he must answer for the consequences. The law will not protect him, because libel and slander in such a case are against public policy, and rarely, if ever, spring from other than malicious motives. It is a wrongful act done intentionally without justification or excuse. This also is the malice of the law. But if the occasion for the publication of the false words be privileged, this repels the legal presumption that slander springs from malicious motives. It is then prima facie excusable on account of the cause of the publication, and actual malice or malice as an independent fact must be proved to make out a case, as, for instance, that the publisher used the occasion to traduce or injure another. Speaking hereof in Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440, the court says:

> "This kind of malice which overcomes and destroys the privilege is, of course, quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive."

In a case where a person in order to gratify feelings of revenge at the expense of female character persisted in prosecuting a woman for larceny after being advised by able and learned counsel to desist, the Maine court said:

> "There is no doubt that malice in fact, as distinguished from malice in law, is essential to the maintenance of an action for malicious prosecution. Actions of slander are sometimes maintainable without proof of actual malice, constructive malice being sufficient. The reason for the distinction is this: Slander is always against public policy, and very rarely, if ever, springs from other than malicious motives; but the prosecution of alleged criminals is not against public policy, and it is only occasionally that such a prosecution is commenced without probable cause. Hence, in actions of slander, the falsity of the charge being shown, malice is established by a legal presumption, and proof of actual malice is not required; but in actions for malicious prosecution the law allows of no such presumption, and requires proof of actual malice to sustain them. Actual malice may be inferred by the jury from the want of probable cause, or be proved by other circumstantial evidence, like any other fact; but it is a fact to be found by the jury, and not a fact to be established by a legal presumption." Humphries v. Parker, 52 Me. 503.
>
> "It is well established," says the Minnesota court, "that in the action of malicious prosecution both malice and want of probable cause must be proven by the plaintiff as distinct issues. The malice which is the essential element of malicious prosecution is not, like the malice essential in libel, slander, and false imprisonment, a mere fiction of the law; it is a state of mind to be proved as a fact. Want of probable cause may exist without malice. The reason is plain. The information on which a defendant acted may have induced him to act in the utmost good faith, so that his mind is entirely free from malice, and yet it may not be sufficient to constitute probable cause, for the test of probable cause is not the belief induced in him, but the belief induced in the mind of a reasonably prudent man. The jury may in a proper case infer malice from want of probable cause, but they are not bound to infer malice in every case where want of probable cause is proven. The inference which they may draw is one of fact, and not of law." Hanowitz v. Great Northern Ry. Co., 122 Minn. 241, 142 N. W. 196.

To constitute malice there must be malus animus, denoting that the party who instituted the original proceeding was actuated by wrong motives. 26 Cyc. p. 48.

The principle is announced in the English cases. It is said in Hicks v. Faulkner, 8 Q. B. Div. 167:

> "It is true as a general proposition that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one, of fact purely, and altogether for the consideration of the jury, and not at all for the judge. The malice necessary to be established is not even malice in law, such as may be assumed from the intentional doing of the wrongful act, but malice in fact, malus animus, indicating the party was actuated either by spite or ill will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody."

See, also, Bromage v. Prosser, 4 B. & C. 247, per Bayley, J.

> "I have always understood," said Parke, J., in Mitchell v. Jenkins, 5 Barn. & Adol. 588, 594, "that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious and without probable cause; if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration."

It was ruled in another English case not to be enough to show the prosecutor was in the wrong because there was no probable cause for the prosecution, but that it must appear that he was maliciously so, that is, obstinately and improperly in the wrong, through anger, ill feeling, or any bad motive or feeling differing from a sincere desire to put the law in force. Darling v. Cooper, 11 Cox C. C. 533.

The "malus animus," the "improper and indirect motive," is sometimes shown very clearly, as, for instance, where the prosecution is made use of to extort money, or to obtain a title to the property alleged to have been stolen, or to gain some personal advantage over the one charged with crime, or where there is a wish in some way to injure the party prosecuted rather than an honest effort to vindicate the law. Still it would be for the jury to find whether such was the motive for the prosecution, and, while the absence of probable cause is sometimes evidence of malice, yet it is not evidence of malice when the prosecutor honestly believes in the charge, and has no motive but a sincere and honest desire to vindicate the public justice. A person who on the strength of circumstances of grave suspicion, which are sufficient to convince him of the probable guilt of the person concerned, institutes an unsuccessful prosecution under a sense of public duty, would have a defense to an action for malicious prosecution, not because there was probable cause for it; for the state of circumstances which moved him to act, assuming them to be true, might not reasonably lead an ordinarily prudent person placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed, but because he could negative malice by reason of his honest belief in the guilt of the accused and his effort in good faith to vindicate the public justice. Here there would be an utter absence of evil motive, though, strictly considered, such conduct should be unlawful. Because the party acted with honest motives and for justifiable purposes, however, the law, from reasons of public policy, excuses him.

So it must be admitted that the imperative necessity for a clear and accurate direction to the jury in actions for malicious prosecutions is apparent, and the reason for the rule that such actions are to be properly guarded and their true principle strictly adhered to obvious.

Said Lord Bramwell in Abrath v. Northeastern Railway Company, 11 App. Cas. 252, 253:

> "A man brings an action for malicious prosecution; he gives evidence which shows or goes to show that he is innocent. You may tell the jury over and over again that that is not the question, but they never or very rarely can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it. It is therefore all-important that these actions should not be permitted to be brought against persons or bodies or others who are not properly liable in respect of them."

Chief Justice Breese, in Collins v. Hayte, 50 Ill. 353, observed:

> "Our experience teaches us there are few questions of law more difficult of comprehension by a jury than those which govern trials for malicious prosecutions. It seems difficult for them to appreciate, if the plaintiff was really innocent of the charge for which he was prosecuted, that he still ought not to recover. They do not readily comprehend why an innocent man may be prosecuted for a supposed crime or offense, and yet have no recourse against the prosecutor who caused his arrest and imprisonment, and yet the preservation of the peace and the good order of society require, that even innocent men may be compelled to submit to great inconvenience and hardship, rather than citizens should be deterred from instituting prosecutions where there is reasonable or probable grounds to believe in the existence of guilt. Good faith on the part of the prosecution is always an important, if not a vital, element of inquiry, and is always a sufficient justification, except where an unreasonable credulity is manifested, inducing the prosecutor to draw conclusions of guilt, when it would have been wanting in the perception of a person of ordinary prudence and judgment."

For, said the same learned judge in Israel v. Brooks, 23 Ill. 526:

> "Few men could be found who would be willing to originate a criminal prosecution if, on failure to establish the guilt of the accused, he himself was to be subjected to an onerous and expensive suit."

A learned author to the same purpose says:

> "Actions for malicious prosecution are regarded by law with jealousy. Lord Holt said more than 200 years ago that they 'ought not to be favored, but managed with great caution.' Their tendency is to discourage prosecution for crime, as they expose the prosecutors to civil suits, and the love of justice may not always be strong enough to induce individuals to commence prosecutions, when, if they fail, they may be subjected to the expense of litigation, if they be not mulcted in damages." Newell on Malicious Prosecutions, § 13.

It must not be overlooked that the element of malice in this action is as important as the fact of a want of probable cause. Want of probable cause may exist without malice. Malice may exist with probable cause. If there is no probable cause for the prosecution, but no malice, a recovery cannot be had. If there be probable cause, no malice, however distinctly proved, will avail. In a certain sense to prosecute another without probable cause therefor is wrongful, but in the true legal sense the wrong is not actionable unless it is done maliciously, because in this sort of action to prevail in it both malice and a want of probable cause must concur; and if either element be wanting, the damage, if any, caused by the prosecution, is within the maxim, "Damnum absque injuria esse potest." By the true principle then guarding this sort of action the mere prosecution of another without probable cause is not the doing of a "wrongful act intentionally without justification or excuse" from which the law imputes malice with respect to it irrespective of motive. Malice and the want of probable cause are independent facts to be proved like any other fact, and both must concur. Neither is a legal presumption. If this were not true, it would be necessary for the plaintiff only to prove his discharge at a preliminary examination by a committing magistrate. His case would then be complete; for the other necessary elements would be supplied by legal presumptions. The essential element of malice may or may not be inferred from all the facts and circumstances of a given case. The jury are not to be told, however, that it may be inferred from the mere fact alone that there is a want of probable cause for the prosecution. This generality of statement is scarcely justified in an instruction, and it must be held to be prejudicial error under the facts and circumstances of this case.

In literary aptitude and acquirement the instruction in the present case first quoted is somewhat embellished. It may not lack a proper taste and sentiment, nor in exploring the scenes of philosophical research is it, perhaps, found wanting. In all this it is an aspiring effort. The words "envy, hatred, and malice," with which it begins, are found in the litany of the Church of England, and there they are appropriate to the teaching of a splendid Christian lesson, but comparing one passion with others and emphasizing that of malice as being the worst of all has no place in a direct, simple statement of the law to be embodied in an accurate and dispassionate charge to the jury. A correct instruction on the malice here essential is "* * * the thing wherein I'll catch the conscience of the king." The thing that the jury is about calls for the exercise of a more practical duty than is concerned in a mere moral speculation. And right here it may be also observed that there is not entire accord among moral philosophers as to which is the worst of passions. Indeed, by some Envy is considered the name of the Prince of Hades, a very Pandora's box in which hatred and malice are nested, and whence fly a multitude of evils to afflict us. We are cited to no case authoritatively foreclosing speculation thereabouts. A little analysis of this instruction would demonstrate a number of imperfections in it.

[3] We are content to say that it is wholly bad, and the giving of the instruction is disapproved because it is highly argumentative, and in its very nature calculated to confuse, mislead, and prejudice the jury. There is a tacit intimation from the bench that in the opinion of the judge the defendants ought to "smart" for the prosecution. Instructions should be limited to a plain, simple, and direct statement of the law in order that the jury might intelligently apply the evidence that has been adduced before them.

An author says:

> "The judge should hold the scales of justice evenly, and not assume the character of the advocate. Argumentative instructions trench upon the province of the jury, and therefore should not be given and the giving of them is error." Thompson on Trials, vol. 2, par. 2301.

See, also, 38 Cyc. 1600.

[4] Assignments of error numbered 2, 3, and 4 take exceptions to instructions which in succession single out and group certain portions of the testimony favorable to the plaintiff and give them undue prominence to the disparagement of other relevant and material facts favorable to the defendant. Without prolonging the opinion to discuss these instructions separately, we quite agree with counsel for appellant in saying that:

> "By means of these several instructions all the facts supposed to be favorable to the plaintiff's case were paraded before the jury in succession and a profound silence was kept as to all facts favorable to the defendant's case. In other words, facts favorable to the plaintiff were emphasized and made prominent. No better way could be devised to control the verdict of a jury."

This method of instructing juries is disapproved.

Other assignments are predicated on erroneous procedure, but, in view of a new trial, error, if any here, may not occur again.

For misdirection to the jury to the prejudice of appellants, the judgment must be reversed, and a new trial granted.

It is so ordered.

CUNNINGHAM and ROSS, JJ., concur.

(19 Ariz. 78)

HILL et al. v. STATE. (Cr. 400.)

(Supreme Court of Arizona. May 19, 1917.)

1. INTOXICATING LIQUORS 🔑167 — SALES — PERSONS LIABLE.

In a prosecution for selling intoxicating liquors brought against the president of a corporation and its manager, where the president actually sold the liquor and the manager, although not present at the sale, prepared the invoice therefor in the usual course of business on information received from the buyer, and left the invoice on the desk of the shipping clerk for his attention, such acts did not constitute advising or encouraging the commission of the offense within Pen. Code 1913, § 27.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 182, 183.]

2. INTOXICATING LIQUORS 🔑131—PROSECUTIONS—INTENT.

Where defendant, prosecuted for selling intoxicating liquors, knew that he was selling the identical cider in question, made a price therefor, and received payment accordingly, and caused the identical cider to be delivered, he cannot claim that he did not know that such liquor was intoxicating under Pen. Code 1913, § 24, subdiv. 4, excepting from punishment persons who committed the act or made the omission charged under an ignorance or mistake of fact disproving criminal intent.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 140, 161.]

3. CRIMINAL LAW 🔑371(10)—SIMILAR SALES OF LIQUOR—EVIDENCE.

In a prosecution for selling cider found to be intoxicating, evidence that defendant had, at prior times, made similar sales was properly admissible to show intent, and that the cider was sold in the usual course of business.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831.]

4. CRIMINAL LAW 🔑1036(1) — REVIEW — PRESERVATION OF EXCEPTIONS.

Appellants, in a criminal prosecution cannot complain of testimony to which no objection is interposed, either at the time it is given or by motion to strike.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639.]

5. CRIMINAL LAW 🔑1169(2) — REVIEW — HARMLESS ERROR.

In a prosecution for selling cider which was subsequently found to be intoxicating, the admission of evidence that a purchaser thereof was convicted and fined for selling intoxicating liquor *held* harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138.]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Walter Hill and Peter W. Duncan were convicted of selling intoxicating liquors, and they appeal. Reversed as to defendant Duncan, with directions, and affirmed as to defendant Hill.

Armstrong & Lewis and Charles B. Ward, all of Phœnix, for appellants. Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and Geo. W. Harben, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The appellants are charged with having sold intoxicating cider to I. E. Troutner, at Phœnix, Ariz., on July 16, 1915.

The appellant Walter Hill, as a witness in behalf of the defendants, according to the abstract of record, testified with regard to his connection with the alleged sale of intoxicating liquor as follows:

"I am president of the Walter Hill Company. It is engaged in the wholesale business, produce, fruits, candies, fountain supplies, and summer drinks; by fountain supplies I mean cocoa, chocolate, cider, grape juice, Coca-Cola—soft drinks. I have distributing houses at Ray, Mesa, and Prescott and Phœnix, Ariz., and Los Angeles, Cal. I am general manager of all branches, and have direct control of the affairs of the corporation. I know I. E. Troutner. I first saw him the latter part of June, about the 20th, in my office. He came in to inquire about cider. I told him we had two kinds of cider; one made by Barrett & Barrett of Chicago, and another by Lewis & Leech of Denver. I made him prices, Denver cider 70 or 75 cents. I had some cider in stock at that time; I think it was in 28-gallon barrels. He made no purchase at that time. According to the records he made his first purchase June 26th. I can't say just how much he purchased then; I think he talked with me three different occasions about cider. The first shipment I received from Lewis & Leech came the middle of June; I think he bought two kegs on June 26th. His next purchase was on July 1st, three 28-gallon barrels. On July 2d he purchased some more. On June 27th we held up his order on account we read in the papers about bulldog cider. I didn't know what bulldog cider was until I talked to Mr. Brisbois, and then went back to the store and got a bottle of Lewis & Leech cider and took it over to Mr. Gandy. I gave it to Mr. Gandy (the county attorney). * * * About four days after going to the district attorney's office I made a test of the cider by drinking some of it. In the meantime I didn't sell any. Mr. Troutner, Mr. Hill (an employé of the same company), and the bookkeeper were present. Mr. Troutner poured it out of one of the kegs purchased from Lewis & Leech, being the same brand of cider sold to Troutner on July 16th. I have dealt in cider here in Phœnix only about a year; I made cider in Canada. This cider that I drank was sweet cider. After making this test I made a second sale to Troutner on July 1st. I next had a talk with Mr. Troutner in the afternoon of July 7th. He came in the store while I was getting ready to leave for California. I was in a hurry to get up home. He said he was selling lots of cider, and he wanted me to make him a better price on the Denver cider. I told him I would make it 70 cents in 50-gallon kegs. He ordered five barrels, and said he was in a hurry for them. I told him I would wire, which we did. I didn't tell him we were receiving weekly shipments. I went to California the next morning and returned on September 13th. This was the same cider we drank and tested on the 7th. Between the 7th day of July and the 13th day of September I personally had nothing to do with the sales, deliveries, or collections of money for sales of cider, but of the Walter Hill Company House. I received no money for cider on July 7th, and I made no entries in the books of any sale. * * * The cider which I sold Mr. Troutner was pure apple cider and nonintoxicating beverage. I never sold any alcoholic liquor of any kind to any person to my knowledge."

On cross-examination the witness explained that the test made by drinking the cider, was that he drank a cupful, that would hold a big wineglass.

Defendant Duncan testified that he was employed by the Walter Hill Company during June and July as manager.

"I oversee the business and do the buying and selling. We handled cider shipped from Denver. * * * The Lewis & Leech cider was branded 'Pure Apple Cider'; I knew Troutner. I had a business transaction with him on June 26th. He purchased some cider at that time and paid me for it. On July 10th he got some more cider. He didn't buy any cider from me on the 16th. The first I learned there had been cider ordered from Denver was on July 12th. Mr. Troutner came in and wanted to know if his cider had come. Hill went away on July 7th. Troutner came in the store most every morning inquiring about his cider; he said Mr. Hill had ordered five barrels of cider for him. I was not present when Troutner got the cider on the 16th. * * *"

Witness went to California on July 16th and returned July 21st. On cross-examination witness stated that his initials are on the invoice as the salesman.

"I put them there; on the 16th he asked me if it was in; I had talked with him the day before."

P. L. Simpson, the shipping clerk for the Walter Hill Company, testified in behalf of the state that:

"I believe Mr. Hill is proprietor. Mr. Duncan is manager; Mr. Duncan has charge of the place during Hill's absence; * * * I know I. E. Troutner; I know he made purchases from the Walter Hill Company. He was buying cider from the company. The system or method used when purchases were made like Troutner's were made in the regular manner, were made on one of our bills, Walter Hill Company's bills; whoever takes an order makes out those bills; I have a distinct recollection of one particular time when Troutner made purchase. There was a check made in payment. I made out the check I think at the shipping clerk's desk. * * *"

Witness was here shown four invoices, which he recognized, and identified two of them as having been receipted by Duncan; one he did not know whose receipt it was, and one, receipted by himself. Witness receipted the invoice of July 16th. Said invoice is in the handwriting of Duncan and receipted by witness, and was first seen by witness lying on his desk. On cross-examination witness stated in explanation of the occasion of his having receipted the bill of invoice, as follows:

"I happened to be the only one in the sales department at that time of the day, and I was collecting the money there just the same as I would for anything else that happened to be left there. When Mr. Troutner came up he said he wanted to pay this bill I have here. Then I wrote the check. I am not sure whether he gave it to me or whether it came from the office. The check is in my handwriting and he paid the bill to me; the bill for this cider was on the desk. If it was put there for me to collect the desk was the proper place. I find other bills there as shipping clerk for me to collect, not all of them, but in the ordinary course of business. There was nothing out of the way at all in this bill being laid there. Mr. Duncan was not there when I wrote the check for Mr. Troutner. He was not present when I was paid the money."

Here we have the story of the transaction as told by the employés of the Walter Hill Company from the incipiency of the transaction to the point of the actual delivery of the cider to Troutner's possession. The fact of delivery actually made to Troutner is not contested.

Walter Hill, the general manager of the Walter Hill Company, opened negotiations with Troutner to furnish him five barrels of Denver cider at 70 cents per gallon, for which Troutner agreed to pay upon delivery. Walter Hill wired to Denver for the cider, ordering its immediate shipment. This occurred on July 7th. Walter Hill left the state for the benefit of his health on the 8th of July. On the 12th of July, Troutner inquired of Mr. Duncan about the cider Mr. Hill had wired to Denver for, at Troutner's request. Duncan knew nothing of that occurrence before Troutner's inquiry. Having been informed of it by Troutner, and after Troutner had made daily inquiries of whether the cider had arrived, on July 16th Duncan made out the usual bill of invoice for the five barrels of cider to Troutner, at the price Hill had made to Troutner, placed the invoice on the shipping clerk's desk as a memorandum, and he, Duncan, on the same day left the state and did not return until July 21st. The system followed by the Walter Hill Company in making sales of cider was the same system followed in making sales of all other goods handled by it. When a sale had been made, a bill or invoice of the thing sold was usually, but not always, made out and furnished the shipping clerk. In this instance, Peter W. Duncan made out the bill or invoice of the Troutner transaction and placed it on the shipping clerk's desk. He did this relying on the statements made to him by Troutner of Troutner's prior transaction with Walter Hill. Simpson, the shipping clerk, found the invoice on his desk, and Troutner offered to pay for the cider. Simpson's duty was to collect such bills, and he did receive the money offered by Troutner.

The relation of Hill and Duncan to the transaction in question is important to an understanding of the issues involved with regard to the liability of the parties.

> "All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present have advised and encouraged its commission, * * * are principals in any crime so committed." Section 27, Penal Code 1913.

Mr. Hill arranged with Troutner all of the details of the transaction which finally resulted in transferring the five barrels of cider to him. Neither Duncan nor Simpson was present at this transaction. Mr. Simpson collected from Troutner the price Hill arranged for Troutner to pay for the cider. Neither Hill nor Duncan was present at the time of payment. Troutner received the cider, but from whom does not appear from the evidence. That neither Hill nor Duncan was present at the time of the delivery is clear. Simpson is not charged with the commission of the offense. He may have delivered the cider.

[1] The part Mr. Hill took in the transaction was an essential step in the commission of the offense. The collection of the price and the delivery of the liquor are also essential to the completion of the transaction. That the transaction should be made in accordance with the plan and system adopted by the Walter Hill Company in making sales of goods handled by it was not essential to this transaction. Duncan was not present at the time any essential act of the transaction was committed by either Hill or Simpson. Duncan did not directly commit any act essential to the transaction constituting the offense. Not being present, did Duncan advise and encourage its commission, by simply preparing an invoice in the usual course of the business on information received from Troutner as to the terms and conditions prescribed by Mr. Hill, and by leaving the invoice on the desk of the shipping clerk for that employé's attention? I think he did not as a matter of law advise and encourage the commission of the offense by the mere act of preparing a business record of a prior transaction had in his absence. Mr. Hill was the responsible person about the business of the Walter Hill Company. The witnesses who were employés of the company, including Walter Hill, in their testimony clearly indicate that Walter Hill was in fact and to all intents and purposes the dominant person, and the whole Walter Hill Company corporation. His orders in the business were final. They were executed by the other employés as orders of the corporation. Hill was president, general manager, and controlling director of the corporation, and holding such a powerful control over the business of the corporation the employés under him were simply engaged in executing his orders. Of course, Mr. Hill's orders to employés under him requiring such employés to sell or dispose of intoxicating liquors or do any other criminal act would not relieve the employé executing such orders from criminal liability. But Hill did not order Duncan to prepare the invoice of the Troutner purchase. Hill had evidently ordered the plan or system of making invoices of all sales made in the course of business by the employés making sales; but Hill made this sale in question and did not himself prepare the invoice of the transaction, nor directly order Duncan to prepare such invoice; whatever Duncan did in the matter, he did at the urgent insistence of Troutner. He had no opportunity to advise and encourage Hill in making the arrangement Hill did make with Troutner, and Simpson executed Hill's orders when the money was collected from Troutner. These facts and others in the evidence conclusively show that Duncan was not concerned in the commis-

sion of the offense charged either directly aiding and abetting or as one not being present advising and encouraging its commission. Consequently he was as a right entitled to a directed verdict of acquittal.

[2] The appellants contend that they had no knowledge whatever that the cider involved was intoxicating, and as a consequence they cannot be held criminally liable for the act of selling it. That the sale was made under a mistake of fact, and that a lack of knowledge of the intoxicating character of the cider which was sold relieved from criminal liability. They argue that in the absence of such knowledge the union or joint operation of act and intent requisite to every crime or public offense is likewise absent; also that the absence of such knowledge disproves any criminal intent within subdivision (4) of section 24, Penal Code 1913. Said statute is as follows:

> "All persons are capable of committing crimes except those belonging to the following classes: * * * (4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent."

The act here complained of as criminal was the transfer of the property right in and the possession of five barrels of cider of a designated name for a consideration paid therefor. No possible mistake of fact accompanied such transaction. Every circumstance in evidence surrounding the transaction excludes the idea of mistake or ignorance affecting the transaction. Every person concerned in the sale knew that the thing sold and intended to be sold and purchased and delivered was nothing other than five barrels of cider produced by Lewis & Leech of Denver, Colo., and bearing the trade-name of "Apple Queen Pure Cider." Every person concerned in the transaction, except the employé who delivered the goods to Troutner knew that the price fixed required to be paid, and which was paid, for the goods was 70 cents per gallon. Neither Hill nor Troutner intimate that they were ignorant or mistaken with regard to any of these facts. When a party sells a thing knowing that he is selling that identical thing, and makes a price therefor and receives payment accordingly, and causes the identical thing he intended to sell and nothing else to be delivered, he cannot claim that he did not know the nature of the article sold and delivered by him in excuse of a criminal charge for selling a prohibited article.

The questions here referred to have been heretofore considered by this court in Troutner v. State, 17 Ariz. 506, 154 Pac. 1048, L. R. A. 1916D, 262, and there decided against appellants' contention. The appellants concede the force of that decision, but they request that we re-examine the questions here, and present many arguments why that decision was wrong. I am entirely satisfied with the correctness of the Troutner decision, and adhere to the same. The contentions made on this appeal now under discussion are disallowed on the authority of the Troutner Case, supra.

[3] The state was permitted to give evidence of sales of cider made by the Walter Hill Company, by Walter Hill as salesman, to Troutner, at times prior to the 16th day of July, 1915. These sales are not relied upon for a conviction in this case, but the appellants complain of the ruling of the court admitting evidence of such prior sales. I think the evidence of such sales was admissible to show that the intention of the parties was to sell cider, and that the cider sold on the 16th day of July, 1915, was sold in the usual course of business and as an article of commerce handled by the Walter Hill Company; that the employés of the company who participated in such sales knew what they were doing, and that they knew that they were selling cider, carrying out the plan of the business concern. No one connected with this cause denies the fact that the prior sales were made in the ordinary course of the business, but, on the other hand, the appellants admit the sales were made and in the ordinary course of the business. No criminal responsibility is based upon any of such prior sales, and this is made clear during the course of the trial. The evidence was admissible for the purpose of showing the course or plan pursued by the Walter Hill Company's employés in the matter of selling cider. Such evidence would seem to be of advantage to the defendant's cause, rather than of a disadvantage. It tended to show that the sale in question was one made in the ordinary manner of making sales of cider, and was not made in suspicious circumstances. At least it tends to remove the moral sting from the transaction, if it does not remove the legal liability to punishment.

The court, over the objection of the appellants, admitted evidence to the effect that certain persons who bought the cider which the Walter Hill Company sold to Troutner on the 16th day of July, 1915, were charged and convicted of selling intoxicating liquor. Troutner was also permitted to testify that he was convicted of selling the same cider he bought July 16th from the Walter Hill Company. Such evidence was received for the purpose of showing that the cider bought by Troutner from the Walter Hill Company through the appellants was intoxicating in character.

An expert witness on July 21st took a sample of the cider in question handled on July 16th and made a chemical analysis of it. He found it contained alcohol in volume of 7¼ per cent. The evidence of the intoxicating character of the cider in question was not conflicting. Mr. Hill testified that he drank a cup full of the same brand of cider as a test, and gave as his opinion from his knowledge of cider that it was sweet cider. The cider he tasted was cider other than the cider Troutner bought on July 16th. There is no evidence in the record conflicting with the evidence produced by the prosecution tending to show that the cider bought by Troutner on the 16th day of July contained alcohol to the amount sufficient to intoxicate. The appellants produced some testimony other than that of Mr. Hill tending to show that the same brand of cider handled before the 16th of July was not intoxicating. As I understand the record of the testimony and the contention of the appellants as to the intoxicating character of the cider contained in the five barrels bought by Troutner on July 16th is that the cider was intoxicating. The appellants do not seriously contend on the trial nor on this appeal that such cider was not intoxicating, but their serious contention is that they had no knowledge of its intoxicating character when they sold it.

The testimony given by Troutner, Jack Gibson, and Byrd is attacked as having been erroneously admitted. Troutner, without objection, testified that his place of residence was at the county jail for selling cider the latter part of June and the first part of July, 1915. At the close of his examination in chief, in the absence of objection, he testified, according to the abstract of the record, as follows:

> "Got into difficulty over this cider on account of intoxicating character of it; was arrested, tried and sentenced."

At the close of the cross-examination he states:

> "* * * On the trial that I was convicted for selling cider did not go on the stand or offer any evidence at all."

Jack Gibson was called as a witness following Troutner. On his direct examination he testified, without objection, that he "handled cider bought from Troutner; do not remember date; was arrested for selling cider bought from Troutner; think purchase was two barrels." The examination then turned upon another matter of taking samples of cider. A cross-examination followed and closed. The prosecution thereupon asked the witness the following:

> "Q. Did you get into any difficulties by selling this cider?"

Objected to as not redirect. Then offered as a question omitted on direct examination. To which the following objection was made:

> "Mr. Armstrong: We don't care whether it is direct, or what it is. It is immaterial and irrelevant. We object on that ground. (Objection overruled.) A. Yes, sir; I got into trouble for selling this cider. Q. Were you arrested? A. Yes, sir. (Objected to for the same reason, and objection overruled.) Q. And was there any sentence passed upon you in any court for selling that cider? Mr. Armstrong: The same objection. A. I got fined $150 for selling it."

On cross-examination the witness testified that he pleaded guilty to the charge.

Then other witnesses were introduced by the state and examined and cross-examined after Jack Gibson retired from the witness stand. Thereupon L. M. Byrd was introduced by the state. He testified without objection that he bought one 50-gallon barrel of cider from Troutner five days before witness was arrested and when witness was arrested he had a quantity of the cider on hand; "got into difficulty for selling that cider; got arrested for it; was sentenced by the court and paid $250." On cross-examination he testified that he "did not go on the stand or testify to a jury; plead guilty."

No objection was raised to the testimony of either of these witnesses upon the matters of their arrest. The only objection raised was to the testimony of Jack Gibson, and the only portion of Jack Gibson's testimony not already before the jury without objection was the answer to the question, to wit:

> "Q. And was there any sentence passed upon you in any court for selling that cider?
>
> "Mr. Armstrong: The same objection. A. I got fined $150 for selling it."

[4] This answer is the only new testimony brought out by this witness. No motion was made to strike this answer, nor to strike the testimony of this witness theretofore given. The appellants cannot complain of the testimony given by Troutner, Gibson, and Byrd, to which they interposed no objection, either at the time it was given, or thereafter by moving to strike. The testimony given by Jack Gibson on his redirect examination to which appellants objected is the only matter in this respect open to inquiry on this appeal. Had the court sustained the objections to the questions asked on redirect examination concerning witness' difficulties for selling the cider, the statement that he had been arrested for selling the cider was still in the record, to which there was no objection. The objection to the new matter with regard to the fact that witness was fined for selling the cider is the question for consideration. Had this answer been excluded, leaving the former testimony of this witness and the testimony of witness Troutner with the subsequent testimony of witness Byrd in the record and before the jury, to which no objection was interposed would the result have been any different? Had all of this class of testimony been objected to and excluded, could the jury have reasonably reached a verdict any different from that which they have reached? It seems quite clear to me that, if the court had excluded Jack Gibson's answer to the questions, "Did you get into any difficulties by selling this cider?" and "* * * Was there any sentence passed upon you in any court for selling that cider?" the answer to the first question was that he did get into trouble, and the answer to the second question was, "I got fined $150 for selling it," leaving the other testi-

mony in the case, to which no objection was made, no different verdict would have resulted. This class of evidence bears upon the intoxicating character of the cider, and could have no bearing upon any other feature of the case. All of the evidence other than the class of evidence now considered, before the jury without material conflict, is to the effect that the cider in question was an intoxicating liquor.

Without any doubt the matters of Gibson's arrest and fine for selling this cider had no place in the evidence in this case against Hill and Duncan, charged with selling the identical cider to Troutner. The same may be said of the testimony of Troutner and Byrd bearing upon the same matters. At the request of these appellants the court gave the jury the following instruction, to wit:

> "The court instructs the jury that there has been evidence admitted in this cause of sales other than the one herein being inquired into, and that you are not to render any verdict against the defendants, or either of them, by reason of any such other sales. The only sale that is material in this case is the sale alleged to have been made on July 16, 1915."

The appellants must have considered this instruction all-sufficient to meet the matter of sales made by Troutner, Gibson, and Byrd; if not, they would have requested other instructions more directly meeting their testimony. In the absence of a request for an instruction specially dealing with the sales made of the cider by the said three witnesses, the instruction given as requested must be deemed broad enough to sufficiently inform the jury of the law applicable to such and all sales mentioned in the testimony other than the sale of July 16, 1915.

[6] The admission of the answers of Gibson as testimony against Hill and Duncan was a clear technical error in the proceedings. But upon a consideration of the whole case I am of the opinion that no prejudice could or did result therefrom, for the reason no fair conclusion can be reached from the evidence remaining in the case, excluding the objectionable testimony, other than that the cider sold to Troutner on July 16, 1915, was intoxicating liquor.

I have considered all of the questions raised by the appellants on this appeal, and deem the foregoing discussion sufficient to set forth the reasons for my decision without a further discussion of the other questions. I am therefore of the opinion that the appellant Hill has been awarded a fair and impartial trial, and that this record presents no reversible error as to said appellant.

I am of the further opinion that the evidence fails to connect Peter W. Duncan with the commission of the act constituting the offense. Consequently the judgment is reversed as to Peter W. Duncan, and remanded, with instructions to discharge this defendant.

The judgment as against Walter Hill is ordered affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(19 Ariz. 91)

QUAYLE v. STATE. (Cr. 410.)

(Supreme Court of Arizona. May 19, 1917.)

1. CRIMINAL LAW 🔑1144(15)—APPEAL AND ERROR—PRESUMPTIONS.
Where the record is silent, it will be presumed the trial court properly admonished the jury in a criminal case upon retiring.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2761–2764, 2901, 3033.]

2. CRIMINAL LAW 🔑1039 — RESERVING GROUNDS FOR REVIEW—NECESSITY OF OBJECTIONS.
In a criminal case, accused cannot complain for the first time upon appeal that the court failed to admonish the jury when it retired.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2647, 2648.]

3. INDICTMENT AND INFORMATION 🔑41(1)—COMMITMENT—SUFFICIENCY.
Where a defendant was charged with rape, a commitment reciting that he appeared guilty "as charged," and ordering him held to answer "the same," is sufficient basis for an information charging violent rape.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 152.]

4. CRIMINAL LAW 🔑917(1) — NEW TRIAL—POSTPONEMENT.
Under Pen. Code 1913, § 1105, subd. 4, authorizing the court to grant a new trial for material errors, and section 1012, authorizing postponements, the trial court's refusal to grant a postponement may be asserted as ground for new trial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2161.]

5. CRIMINAL LAW 🔑1151 — POSTPONEMENT—DISCRETION OF COURT.
Postponement of a criminal trial rests largely in the trial court's discretion, and his action will not be reversed unless such discretion has been abused to accused's prejudice.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045–3049.]

6. CRIMINAL LAW 🔑594(2)—POSTPONEMENT—DISCRETION OF COURT.
A trial court *held* not to have abused its discretion in refusing to postpone the trial of a rape case because a witness desired by defendant was absent, where such proposed witness' affidavit disclosed that he had no intention of venturing within the court's jurisdiction.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1322.]

7. RAPE 🔑51(4)—SUFFICIENCY OF EVIDENCE.
Evidence, consisting largely of prosecutrix's story and physical facts, *held* to sustain a conviction for rape against the defense that the prosecutrix did not forcibly resist.
[Ed. Note.—For other cases, see Rape, Cent. Dig. § 74.]

8. CRIMINAL LAW 🔑938(1) — NEW TRIAL—NEWLY DISCOVERED EVIDENCE.
There is no abuse of discretion in refusing a new trial motion in a rape case for newly discovered evidence, where one of the proposed witnesses testified fully at the former trial and the other two did not offer to testify in the

future, and the evidence if given, would be cumulative or impeaching.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312, 2313, 2315, 2317.]

9. CRIMINAL LAW ⚿564(3)—VENUE—SUFFICIENCY OF EVIDENCE.

The venue in a prosecution for rape *held* sufficiently established by indirect evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1283.]

Appeal from Superior Court, Navajo County; John A. Ellis, Judge.

Charles F. Quayle was convicted of rape, and appeals. Affirmed.

The appellant was charged with the commission of the crime of rape upon one Eva Dick, alleged to have been consummated on September 12, 1915, was tried therefor, and convicted, from which judgment of conviction he appeals.

Jones & Jones, of Flagstaff, and Louis Kleindients, of Los Angeles, Cal., for appellant. Wiley E. Jones, Atty. Gen., and R. W. Kramer and Geo. W. Harben, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The appellant was charged with the commission of the crime of rape, on September 12, 1915, by a sworn complaint filed with a justice of the peace on the 14th day of September, 1915. On September 27, 1915, the defendant appeared for the preliminary examination of the charge. Having examined the witnesses produced by the parties, the magistrate entered the following order, to wit:

> "After listening to the evidence adduced, it appearing to the court that there is sufficient evidence to believe the defendant guilty as charged, I hereby order that he be held to answer the same and that his bond be fixed at three thousand dollars."

On October 7, 1915, the county attorney of Navajo county filed an information in the superior court charging the defendant with the commission of the crime of violent rape on Eva Dick, on or about the 12th day of September, 1915. The defendant, having been formally arraigned on the charge, entered his plea of not guilty.

On February 29, 1916, the defendant presented his motion to withdraw his plea of not guilty for the purpose of presenting a motion to set aside the information upon the grounds "that before the filing of said information he had not been legally committed by a magistrate for the crime of rape, or for any other crime." The motion was denied. The appellant urges as error the order of the court refusing to permit him to withdraw his said plea for said purpose.

The defendant thereupon moved for a postponement of the trial until the next jury term of the court, upon the ground and for the reason of the absence of a witness, Len Taylor. The motion is accompanied by an affidavit of the defendant setting forth that this party is a resident of the town of Winslow, and has been for many years last past; that a subpœna was issued for him on February 24th and placed in the hands of the sheriff of the county for service. The facts he expects to be able to prove by this witness are thereupon set forth in detail. He continues:

> "That he (defendant) cannot prove said facts by any other witness. That he can procure the attendance of said witness, Len Taylor, at the next jury session of this court. That said testimony is material to defendant's defense. That the said witness is not absent by the consent or procurement of the defendant."

The county attorney in behalf of the state opposed the granting of the postponement of the trial on account of the absence of the witness Len Taylor, and in support of his opposition to such postponement filed an affidavit setting forth the diligence used by the county attorney to locate the said absent witness. A number of subpœnas were caused to be issued and placed in the hands of the sheriff of Navajo county and in the hands of the sheriffs of other counties of the state, and all of which have been returned not served because the witness could not be found. The county attorney in his affidavit denies that the witness would testify as contended by the defendant, and sets forth the substance of the facts the state alleges it can prove by the said witness in support of the charge, and alleges that the witness is not absent by the consent or procurement of the prosecution. Upon due consideration, the court denied the defendant's motion for a postponement of the trial. Such order is urged on this appeal as error.

[1, 2] The appellant in his brief complains that the court failed to admonish the jury as required by law upon a number of occasions when the jury retired from the court in charge of the bailiffs. The minutes of the court are silent upon this matter, but the question is raised for the first time on this appeal. This court must presume, the record being silent, that the trial court performed its duty, and will not inquire for the first time on appeal whether that duty has been violated; the record being silent with regard to the matter. The defendant was present at the trial and may have objected, and should have objected to any failure of the trial court to follow the prescribed procedure. We presume if defendant deemed his rights jeopardized by the alleged omission he would have timely objected, and if he saw and did not object, or failed to see any irregularity in the matter, he waived it, and cannot be heard to complain for the first time on appeal.

[3] The appellant depends upon Fertig v. State, 14 Ariz. 540, 133 Pac. 99, as supporting his proposed motion to set aside the information. In that case we had before us for consideration the sufficiency of a commitment to justify the county attorney filing an information based thereon. The commitment in

question ordered the defendant held to answer a charge of "felony," and the information filed charged the commission by the defendant of rape. There we said:

> "The order of commitment may be for an entirely different offense from that charged in the complaint. The magistrate may hold defendant for 'any public offense' of which he has no jurisdiction to try and determine."

The commitment having recited that the defendant was held to answer the crime of felony, which was made to appear to the magistrate from the evidence adduced had been committed. The crime to answer which the accused is held must be determinable from the order committing the accused to answer. If, by an examination of the magistrate's order committing the accused to answer, the prosecuting attorney is able to definitely determine and exactly know the particular crime the accused has been held to answer, then it is the plain, simple duty of the prosecutor to prepare the information charging the accused with the commission of the offense for which the accused has been held to answer. In this case the magistrate examined the accused on a charge of rape, and from the evidence he became satisfied that the defendant is guilty "as charged" and held him to answer the "same." Could the prosecuting officer be mistaken as to what crime the magistrate believed had been committed for the commission of which the accused was held to answer? I think not. The crime for the commission of which the accused was held to answer was that charged in the complaint, and no other. Had the order of commitment declared that the magistrate believed from the evidence produced that a felony had been committed and thereupon ordered the accused held to answer the same, we would have then a parallel case with the Fertig Case. The prosecuting attorney must be credited with having some degree of understanding, and so credited when he took up the order of commitment and found that this accused was held to answer a charge proven to the satisfaction of the magistrate. He could not be mistaken as to the nature of the charge proven, because a casual reference to the complaint by which the charge is set forth, and which was the matter examined into, reveals certainly, definitely, and exactly that the charge was one of rape alleged to have been committed by the accused upon Eva Dick. Had the prosecuting attorney, by the information filed, charged the defendant with the commission of a felony other than violent rape, the information would have been subject to dismissal under the principle laid down in the Fertig Case.

The court correctly refused to permit the defendant to withdraw his plea of not guilty for the purpose of moving to set aside the information for the reasons and on the grounds urged.

[4-6] The refusal of the trial court to grant the defendant's application to postpone the trial of the cause until the next jury term of the court, because of the absence of Len Taylor, a witness, was asserted as a ground for a new trial, and properly so, under subdivision 4 of section 1105, Penal Code of Arizona 1913, to wit:

> "When a verdict has been rendered against the defendant the court shall, upon his application, grant a new trial, in the following cases: * * * (4) When the court has committed any material error, calculated or tending to injure the rights of the defendant."
>
> "When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day." Section 1012, Penal Code 1913.

The cause shown by the affidavit of the defendant for a postponement of the trial consisted of the showing that the defendant expected to prove by Len Taylor, the absent witness, the following circumstances, briefly stated, to wit: He expected Len Taylor to testify that defendant was introduced to Eva Dick as Charles Quayle, his true name; that Eva Dick, and two other persons, rode with the defendant in defendant's one-seated Ford automobile immediately following the first meeting and the introduction of the defendant to Eva Dick; that thereafter other rides with the like number of persons were had in the same automobile, and on each said occasion the time was at night after 8 o'clock, and on each of said occasions and rides the defendant drove the machine; that Eva Dick sat next to defendant, and another woman sat next to Eva Dick, and Len Taylor stood behind the seat; that on each of said occasions Eva Dick kissed and caressed the defendant a number of times while riding; that on the night of the 11th of September, 1915, the defendant, Eva Dick, Miss Shank, and Len Taylor started for a ride in the same machine, occupying about the same relative positions in the machine as above described; that after riding a little while some member of the party suggested going to a dance; this suggestion was acceptable, and they proceeded to the dance, and the party danced for a short time; that Eva Dick wore white stockings on that night at the dance. This is the substance of the testimony the defendant expected to prove by Len Taylor. He alleges that Len Taylor is a material witness, and that he is unable to prove the foregoing matters by any other witness, and that defendant will be able to have Len Taylor present at the next jury term of the court.

The court determined the issues raised by the motion and opposition thereto against the defendant's contention. The granting of a postponement of the trial is a matter within the sound legal discretion of the trial court, and, when the action of the court is brought into question on appeal, the ruling made will not be disturbed by an appellate court unless it is made to appear that such discretion has been abused, to the defendant's prejudice. The trial court reviewed its order refusing to postpone the trial of the cause, passing on the twelfth paragraph of defendant's motion for a new trial, and reaffirmed the former ruling made, "both upon the showing made at the time of the motion for the continuance, and the showing made at this time"—the time of ruling on the motion for a new trial.

In support of the motion for a new trial upon the ground of error in refusing a postponement of the trial, the defendant reasserted the materiality of Len Taylor's testimony, and excused his absence from the trial, as a further reason why the trial should have been postponed, that witness Len Taylor was absent because of threats made against him by Eva Dick at a conversation had on September 13, 1915, which fact was unknown to defendant until after the trial was finished. The affidavit of Len Taylor is presented in support of the motion, and bears date of April 1, 1916. The verdict was returned and recorded March 3, 1916. The motion for a new trial was filed April 3, 1916, and on the same day was denied. In his affidavit made before a notary public at Winslow, Navajo county, on said 1st day of April, Len Taylor states that he absented himself from the jurisdiction of the court for the reason of a conversation had with Eva Dick in the city of Winslow on the 13th day of September, 1916.

> "* * * And as a result of said conversation affiant left his home and the process of this court for the reason that affiant was threatened by the said Eva Dick during this last-mentioned conversation, and in order to protect himself from, and in order not to have himself implicated, as a defendant, in any wrongful criminal prosecution, he left the jurisdiction of this court in order that he could not be subpœnaed as a witness on behalf of the defendant in the above-entitled cause."

From this fact alone the court would have permitted the court's process abused by granting a postponement, and the fact is evident that the witness would have been absent at the next jury term of the court, and all future terms of the court until this cause was disposed of. He shows most clearly and unequivocally that his purpose was, and still is, to avoid the process of the court to the end that he will not be required to give testimony on the trial of this charge. Neither the state nor the accused can have the benefit of his testimony in this case at any time, is the matter made definite by this portion of his affidavit. The matter of the correctness of the order refusing to postpone the trial is cleared of all doubt by Len Taylor's purported affidavit in support of the motion for a new trial urged on that ground.

[7] The appellant contends that the evidence fails to sustain the conviction in the particular that the evidence fails to show resistance on the part of the prosecutrix which was overcome by the accused. The appellant does not contend that all evidence of resistance is wanting in the record, but seems to contend that the evidence is insufficient in this class of criminal cases to justify a conviction. He refers to Sowers v. Territory, 6 Okl. 436, 50 Pac. 257, as a portion of his argument.

The authorities treating criminal law subjects have for a long period of time treated rape as exceptional in the particulars of an examination into the sufficiency of the evidence to support a conviction, and in matters of procedure differing from the rules of procedure in ordinary criminal cases. As said in Sowers v. Territory, supra:

> "Sir Matthew Hale, in 1 Pleas of the Crown (Ed. 1778) p. 363, distinguishes this character of case and the procedure from other criminal cases, and lays down certain rules and admonitory advice that have been approved by the courts of every jurisdiction since that day. He says: 'It is true that rape is a most detestable crime, and therefore severely to be punished, with death; but it must be remembered that it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent.'"

He mentions some instances, and comments on them, and continues:

> "I only mention these instances that we may be more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance, the heinousness of the offense many times transporting the judge and the jury with so much indignation that they are hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes of malicious and false witnesses."

The information charges rape as defined by section 231, subd. 3, Penal Code 1913, as follows:

> "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: * * * (3) Where she resists, but her resistance is overcome by force or violence."

Section 233, Penal Code 1913, provides that:

> "The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration however slight, is sufficient to complete the crime."

The accused testified on the trial in his own behalf, and from his testimony and from all of the testimony in the case, the only circumstance urged as tending to contradict the claim made by the prosecutrix that she resisted the accused's assault, and that her resistance was maintained until overcome by force, is the circumstance that the prosecutrix persisted in her wish that the accused would marry her after the crime was committed and until she was informed that the accused was already married. The accused insisted on the trial, and yet insists on this appeal, that this prosecution is prompted by a motive for revenge for the broken promise of marriage and his inability to keep such promise because of his having a wife and family of two small children of which prosecutrix was not informed by him when she agreed to marry him.

The record contains no evidence of physical facts corroborating the story of the accused bearing on the matters of the alleged consent and nonresistance, but the story told by the prosecutrix of the force used by the accused to overcome, and which did overcome her resistance, is corroborated by the physical facts in evidence, and if such facts are true, and the jury's verdict brands them true, they are silent witnesses, which testify in such terms as may carry belief to a moral certainty and to the exclusion of any hypothesis other than the guilt of the accused. The very fact appearing that this girl was found trying to hide her shame, trying to get away from the publicity brought about by the prosecution of the accused on this charge, would not be proof or evidence tending to disprove her story of the outrage. While the evidence discloses that the prosecutrix said and did inconsistent things after the occurrence was past, she at no time told any person a different story of the manner and means used by the accused in accomplishing the outrage—from the story she told in the beginning of the prosecution and on the stand while testifying as a witness. The jury saw all of the witnesses, heard them testify, and had the opportunity to observe their manner while testifying and to observe many things which were or may have been convincing to a juror, but impossible of recording for the consideration of an appellate court. In the absence from the record of many of the things which a juror would have the opportunity to observe during the course of the trial, the testimony is yet convincing that the jury had ample evidence upon which to base a verdict of guilty.

The character of the evidence is such that a due regard for decency justifies us in omitting a review in detail from this opinion. Suffice it to say that the evidence amply sustains the verdict rendered.

[8] The appellant moved for a new trial, alleging as grounds therefor, among others, not heretofore discussed, that new evidence was discovered material to the defense, and because the witness "Len Taylor was caused to leave the jurisdiction of this court by threats of the prosecuting witness." In support of the motion for a new trial upon all questions, the appellant produced the affidavits of Len Taylor, Annie Durham, and C. E. Mullins. The affidavit of Len Taylor is not worthy of serious consideration by any court, for the reason the affidavit states that he is a resident of Winslow, Ariz., and absented himself because of fear of a criminal prosecution, and intimates nowhere that he will ever testify with regard to this matter. He does not obligate himself to appear and testify in the case at any time or at all. He sets forth certain matters alleged to be within his knowledge and swears they are true; but all of the matters set forth in his affidavit have been threshed over by other witnesses who testified, and they are not evidence newly discovered. If he should be induced to come forward and testify to the matters and things he says are within his knowledge, the effect of his testimony would be to contradict in some slight particulars the evidence given by some other witness. He mentions that the prosecuting witness stated to him on September 13, 1915, that "I am going to get Charlie Quayle for trying to have intercourse with me last night." This is in effect impeaching the statements of both the accused and prosecutrix.

The affidavit of Annie Durham was presented. She details a statement which she swears was made to her by the prosecutrix at a restaurant, relative to the prosecution of the case, as follows:

> "Anna, I was warned I had to do it, because Mr. Jordan told me that it would be perjury if I did not tell the same story I told before the justice of the peace, and he said he would prosecute me even if he did hate to do it. So I had to do what he told me. I know it put Quayle in bad, but I can't help it, because I don't want to get into any more trouble myself."

This witness testified in the case, referred in a general way to the same matter, stated that she had told the accused and his counsel about the conversation had with the prosecutrix, and certainly, in the circumstances, the statement detailed in the affidavit was made known, and is not evidence newly discovered within the rule authorizing a new trial, nor does it tend to show the former statements made of the matter were untrue.

The affidavit of C. F. Mullins details a statement alleged to have been made by the prosecutrix at San Diego, Cal., on the 25th day of March, 1916. The statement is a detail of the things the prosecutrix said she told Len Taylor on the Monday night after the assault. The effect is that she told Len Taylor what Miss O'Hearn had told prosecutrix could be done about a civil action against Quayle, with a request that Len Taylor would keep quiet about the matter. She stated further: That she did not know that Quayle could be imprisoned. That she tried to straighten the matter out several times, but the officers would not allow her to do so. They threatened to put her in jail if she did not prosecute the case. "They promised me new clothes if I would, and after this I thought I had better stick to my first story. If you can get this whole matter fixed up without getting me into trouble, I will do the right thing." Conceding that this impeaching affidavit was sufficient upon which to grant a new trial for any purpose, yet the affiant does not give his place of residence. The affidavit was made in San Diego, in the state of California, where he is presumed to reside. He does not state that he will testify to the facts stated either before the court or otherwise. If testified to, would a jury believe them? If they believed, would they therefrom disbelieve that this defendant ravished the girl in the manner she testified he did? She did not deny the truth of her first story.

The showing made by the affidavits produced is not sufficient to justify a court in vacating a verdict and granting a new trial, for the reason Annie Durham testified fully at the trial; Len Taylor evaded the process of the court to avoid testifying in behalf of the accused, and does not state in his affidavit that he will not do the same thing again; and Mullins is presumed to be in California and does not offer to testify. If they should all appear and testify to the matters they state are within their knowledge, the evidence given would be cumulative, contradictory, or impeaching in character, and it is not at all certain or probable that a different result would follow.

[9] The appellant contends that the venue was not proven. This contention is without merit. The appellant in his statement and testimony is very careful to show that the place where the only transaction between the accused and prosecutrix took place was within one-half mile of the Harvey House in the town of Winslow. Winslow is in Navajo county. Appellant is well acquainted in that vicinity from his long period of residence there. The girl was a stranger, had lived at Winslow about three weeks, and would not be as well informed of locality on a dark night as the accused would be. That a great distance was traveled after leaving the dance hall to the place of the crime, and from that place on the return to the Harvey House, as the prosecutrix testified, is not significant of any great distance from the place of the crime to the Harvey House. The distance traveled at night in a level country is no indication of the distance between the starting and stopping points. The evidence is ample from which to reasonably draw the inference that the crime was committed in Navajo county as alleged. The matter could have been readily established by the simple means of a few questions. It is an inexcusable neglect for the prosecution to omit direct proof of the venue in the trial of every criminal case, and trust to the uncertainty of the proof of facts from which the venue may be inferred; yet sometimes this occurs, and this is one of the times of its occurrence. The proof is in this record, and sustains the conviction.

The instructions complained of wrought no prejudice to the appellant's rights.

Upon the whole case, no reversible error in the pleadings or proceedings has been committed, and the accused has been awarded a fair and impartial trial. Consequently, I am of the opinion the judgment must be affirmed.

Affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(40 Nev. 403)

McINTOSH et al. v. KNOX. (No. 2226.)

(Supreme Court of Nevada. June 4, 1917.)

1. GARNISHMENT 🔑248 — WRONGFUL GARNISHMENT—LIABILITY.

The assignee of a judgment may recover damages for its wrongful garnishment in an action to which he is not a party without showing malice or suing on the attachment bond or under specific statutory authority.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 470.]

2. GARNISHMENT 🔑248 — WRONGFUL GARNISHMENT—DAMAGES.

The assignee of a judgment may recover damages for the period a wrongful garnishment of it remained in force, although the judgment debtor on the day following such garnishment instituted interpleader proceedings and paid the money into court.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 470.]

3. GARNISHMENT 🔑251 — WRONGFUL GARNISHMENT—DAMAGES.

The assignee of a judgment wrongfully garnished may recover attorney's fees paid in interpleader proceedings instituted by the garnished judgment debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 471–475.]

4. JUDGMENT 🔑735—CONCLUSIVENESS.

Where a judgment debtor instituted interpleader proceedings upon being garnished, but the right of a claimant to recover attorney's fees was not made an issue nor decided in such suit, the question is not rendered res judicata so as to prevent recovery of such fees in an action by the claimant for the wrongful garnishment of such judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265.]

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by C. H. McIntosh and H. R. Cooke, doing business as McIntosh & Cooke, against Charles E. Knox. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hugh H. Brown and J. H. Evans, both of Tonopah, for appellant. H. R. Cooke, of Tonopah, for respondents.

COLEMAN, J. Respondents brought suit in the district court of Nye county to recover damages for the wrongful attachment of a judgment which had been assigned to them, and for attorney's fees expended in procuring the release of the funds thus attached. Judgment was rendered in the lower court in favor of respondents as prayed, and from such judgment and an order denying a new trial this appeal is taken.

We will not undertake to state all of the details of the case, but such facts only as will be necessary to a full understanding of the questions involved. R. P. Dunlap brought suit in the District Court of the United States for the District of Nevada to recover judgment against the Montana-Tonopah Mining Company, of which Knox was president, for quite a large sum, and in due time recovered judgment. Thereafter the judgment was assigned by Dunlap to McIntosh & Cooke, who gave notice thereof to the judgment debtor, after which an appeal was taken by the company to the United States Circuit Court of Appeals, which later affirmed the judgment of the lower court. McIntosh & Cooke again gave notice to the company of the assignment, which was brought to the attention of Knox, after which, and before the judgment was paid, Knox brought suit in the United States District Court to recover judgment against Dunlap, who left the state before personal service was made upon him, and attached the judgment theretofore assigned by Dunlap to McIntosh & Cooke by causing garnishment papers to be served upon the Montana-Tonopah Mining Company, of which Knox was still the president. The Montana-Tonopah Mining Company filed in the United States District Court its bill of interpleader, alleging the matters hereinbefore stated, and prayed for an order allowing it to pay the money over to the clerk of the court, to be awarded to the person or persons finally found by the court to be entitled to it. Such an order was made, and the money was paid accordingly. McIntosh & Cooke and Knox appeared in the interpleader proceedings and filed their answers to the bill. On final hearing, the court awarded the money to McIntosh & Cooke.

[1] The first contention made by counsel for appellant is that the court erred in rendering judgment in favor of the respondents for damages alleged to have been sustained by them by the wrongful garnishment of the judgment which had been assigned to them by Dunlap. On this point, counsel clearly state their theory in their brief, as follows:

> "Under the great weight of authority, an action for damages, for wrongful attachment, must be grounded upon one of the three following premises: (1) There must be malice or want of probable cause; or (2) the action must be on the attachment bond; or (3) there must be some specific statutory authorization for the action."

We think the point would be well taken in a suit for damages by a defendant in an action wherein the property attached belonged to the party sued, but such is not the case here. McIntosh & Cooke were not parties to the attachment suit, but were strangers to it. The rule of law applicable to the situation here is laid down as follows:

> "Where an officer levies a writ of attachment on the property of a stranger, attachment plaintiff is liable to the claimant of the ownership and right of possession thereof not only when he directed the wrongful levy, but also when he subsequently adopts or ratifies the officer's acts, independently of any bond, and jointly with the attaching officer." 4 Cyc. 764.

See, also, Peterson v. Foli, 67 Iowa, 402, 25 N. W. 677; Moores v. Winter, 67 Ark. 189, 53 S. W. 1057; Lee Merc. Co. v. Chapman, 9 Kan. App. 374, 58 Pac. 125; Blakely v. Smith, 16 Ky. Law Rep. 109, 26 S. W. 584; Knight v. Nelson, 117 Mass. 458; Perrin v. Claflin, 11 Mo. 13; Vaughn v. Fisher, 32 Mo. App. 29; Cole v. Edwards, 52 Neb. 711, 72 N. W. 1045;

Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; Adams v. Savery House, 107 Wis. 109, 82 N. W. 703; Riethmann v. Godsman, 23 Colo. 202, 46 Pac. 684; Frick-Ried v. Hunter, 148 Pac. 83; Taylor v. Hines, 31 Mo. App. 622; Comly v. Fisher, Taney's Dec. (U. S.) 121; 6 C. J. p. 416, § 966.

May, 1917, issue of Case and Comment, on page 1023, calls attention to the note to the case of Davies v. Thompson (L. R. A. 1917B, 395); but, as that volume is not yet in our library, we have not been able to avail ourselves of the note in question.

[2] But it is insisted that in view of the interpleader proceedings, which were instituted the day after the attachment suit was commenced, pursuant to which the money due under the judgment obtained by Dunlap was paid into court, the attachment proceedings were automatically terminated, and that they lost their force and effect, and consequently practically no damage was caused respondents by the conduct of appellant in instituting the attachment suit and in causing the levy thereunder. We cannot look at the matter in this light. In view of the departure from the state of Dunlap, no personal service of process was had upon him, and the jurisdiction of the court to inquire into the controversy depended upon the contention that property belonging to him was seized and held by the attachment proceedings. If it had been conceded by Knox in the main suit that the attachment had lost its efficacy, that case would have fallen, and the subsequent proceedings along with it; hence, it was of vital importance to Knox that the force and effect of the attachment proceedings be maintained, which he seems to have realized by his conduct in the interpleader suit. Consequently, we cannot escape the conclusion that in legal effect the attachment still held good.

There is one peculiar circumstance in this case. As we have said, the writ of attachment in Knox v. Dunlap was served December 30, 1912, and the bill of interpleader was filed in the federal court at Carson City the following day. Carson City is about nine hours' travel from Tonopah, where the office of the Montana-Tonopah Mining Company is situated, and where its attorney and secretary resided. Mail leaving Tonopah on the morning of December 31, 1912, would not have reached Carson City on that day until about 6 o'clock in the evening, after the office of the clerk of the United States District Court was closed. Hence the inference is that the bill of interpleader was mailed in Tonopah on or before the morning of December 30th, the very day the attachment was served in the suit of Knox v. Dunlap. In the light of these facts, we cannot escape the conclusion that the Montana-Tonopah Mining Company knew of the contemplated attachment in the suit of Knox v. Dunlap, and in anticipation thereof had caused to be prepared the bill of interpleader before the writ of attachment had been served. If Knox did not inspire this quick action, who did? Yet he insists that because of the interpleader proceedings he must be relieved from liability in the attachment suit. But, be this as it may, the attachment suit was in full force and effect during all of the time the interpleader suit was pending; and, had the interpleader suit been dismissed for any reason, the money was still tied up in the attachment suit, according to appellant's contention, as shown by the prayer in his answer in the interpleader suit.

It is contended that, if respondents are entitled to judgment in any amount, it should not be for the amount for which judgment was rendered in the lower court, for the reason that the delay of the federal court in rendering judgment in the interpleader proceedings was due to the neglect of counsel for respondents to file briefs, and that the judgment should be reduced in an amount equal to the interest for that period of delay. The trial court found that there was nothing in the evidence to justify this contention, and in view of the record we do not feel justified in holding that the conclusion thus reached was reversible error.

[3] The next question is: Did the trial court err by including in its judgment, as an element of damage, the sum of $600, paid by respondents as attorney's fees in the suit in the federal court? We think not. It was necessary to a protection of their rights that they appear and show their title to the judgment under the assignment. No money judgment was sought against the respondents in the suit in the federal court in which the money was attached, or in the interpleader action. While, so far as we are informed, the attachment statutes of all the states provide that the plaintiff in an attachment suit shall give a bond to indemnify the defendant against all damages in case it should be adjudged that the attachment proceedings are wrongfully instituted, none of such statutes specifically designates the attorney's fee incurred by the defendant in defending the attachment proceedings as an item of damage. Yet the great weight of authority holds that such an expense is an item of damage. 2 R. C. L. 909; Plymouth G. M. Co. v. U. S. Fidelity Co., 35 Mont. 23, 88 Pac. 567, 10 Ann. Cas. 951; Parish v. Van Arsdale, etc., Co., 92 Kan. 286, 140 Pac. 835, Ann. Cas. 1916B, 981; Balinsky v. Gross, 72 Misc. Rep. 7, 128 N. Y. Supp. 1062; Drake on Attachments (7th Ed.) § 175; Boatwright v. Stewart, 37 Ark. 623; Fry v. Estes, 52 Mo. App. 1; 6 C. J. 528, 529; 4 Cyc. 878.

This rule is not only sustained by the great weight of authority, but we think is founded on sound reason as well. Attachment proceedings are purely statutory in practically all of the states (2 R. C. L. p. 801), and are very different from an ordinary action at law to recover judgment for money due. It is a harsh remedy, and for that reason one who brings the action must pay the damage sustained by the adversary in case the proceedings are wrongfully instituted. In many cases the defendant in the proceedings cannot be adequately compensated for the damages sustained, and we think the courts are amply justified in holding that attorney's fees should be allowed the defendant in case of a wrongful attachment. It is clear that a stranger to a suit whose property is wrongfully attached may recover damages, as we have shown, and we see no reason why necessary attorney's fees incurred in procuring the release of property from a wrongful attachment should not be considered as an item of such damage. If it is an item of damage in the one case, why not in the other? He who levies upon the property of a stranger does so at his peril. Such stranger should be saved harmless, and this cannot be done unless he is reimbursed his outlay in procuring the release of his property. It is no doubt true that cases may arise where this rule may work a hardship, but that may be said of every rule.

[4] It is next contended that the question of attorney's fees is res adjudicata. We think not, under the circumstances. There was no pleading in the federal court wherein the question of attorney's fees was made an issue; and, if that matter might have been adjudicated under appropriate issues, no issue of that character having been involved, and the question not having been tried and the court not having undertaken to consider it, there is nothing upon which to sustain the contention. Gulling v. Washoe County Bank, 29 Nev. 259, 89 Pac. 26.

Perceiving no error in the record, it is ordered that the judgment appealed from be affirmed.

McCARRAN, C. J., concurs. SANDERS, J., did not participate.

(40 Nev. 414)

D. C. WHEELER, Inc., v. O'BRIEN BROS.

(No. 2255.)

(Supreme Court of Nevada. June 4, 1917.)

1. ANIMALS 🔑100(3)—UNLAWFUL GRAZING—SPECIAL DAMAGES—PLEADING.

Under allegations that defendants during month of March grazed sheep upon plaintiff's property, thereby injuring it for grazing purposes, damages may be based upon the land's value for grazing purposes during the lambing season, without such damages being specially pleaded, where the land was most useful for this purpose.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 357, 364, 382, 411.]

2. ANIMALS 🔑100(4)—UNLAWFUL GRAZING—EVIDENCE.

In damage action for unlawfully grazing sheep, defendants' testimony that plaintiff's sheep also grazed upon defendants' property to his damage *held* not to require a finding of damages for defendant.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 358-360, 383, 412.]

3. APPEAL AND ERROR 🔑231(3)—RESERVING GROUNDS FOR REVIEW—EVIDENCE—SUFFICIENCY OF OBJECTION.

Rulings upon evidence cannot be reviewed when challenged only by general objections.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Trial, Cent. Dig. §§ 194, 195.]

Coleman, J., dissenting in part.

Appeal from District Court, Washoe County; Mark R. Averill, Judge.

Action by D. C. Wheeler, Incorporated, against O'Brien Bros. Judgment for plaintiff, and defendants appeal. Affirmed.

George Springmeyer, of Reno, for appellants. Le Roy F. Pike, of Reno, for respondent.

McCARRAN, C. J. This was an action for damages alleged to have been caused by the herding and grazing of 1,400 head of sheep upon a tract of land consisting of approximately 320 acres. The damage is alleged to have accrued inasmuch as "the land was thereby rendered almost valueless for grazing purposes for the year 1916 for any live stock."

The trial court found:

> "That on the 29th and 30th days of March, 1916, the defendants caused the said 1,400 head of sheep to be unlawfully herded and grazed upon the lands of the plaintiff."

As a result of this unlawful herding and grazing, the court found that the plaintiff was actually damaged in the sum of $200. The court in arriving at this sum did so by a process of reasoning which need scarcely be referred to, inasmuch as in our judgment the conclusion reached by which the court fixed the damages was correct, and the damages assessed were, as we view it, not excessive. On motion for a new trial, the court made an order that, if plaintiff would consent that the damages be reduced to $150, a new trial would be denied. To this the plaintiff consented. Appeal is from the judgment and from the order denying a new trial.

The record discloses that the tract in question, upon which the unlawful grazing is alleged to have taken place, was a wild, unreclaimed tract, used particularly by respondent, plaintiff in the court below, during the lambing season; and the record discloses that it was especially valuable for this purpose by reason of its character and location.

Appellants here complain that the court assessed special damages, inasmuch as it found that:

> "This land was more valuable, as shown by the evidence, for lambing than for grazing alone. It was worth possibly $50 for grazing only. The evidence was conclusive that the loss per sheep for lambing purposes was $1."

[1] It is the contention of appellants that inasmuch as the ad damnum allegation in

the complaint makes no claim for special damages by reason of the loss of grasses, herbage, or browse growing on the lands, during the lambing season, or that no special damages were alleged to the plaintiff for being deprived of the use of the lands for lambing purposes, the court was unwarranted in making its finding and conclusion as it did. In this connection, appellants rely upon the rule that proof of special damages cannot be introduced unless such damages have been specially pleaded; and in this connection they assert that the trial court erroneously permitted evidence as to the special damages to plaintiff for being deprived of the use of lands for lambing purposes, and that following this evidence the court arrived at an erroneous conclusion.

The record discloses evidence going to establish that this tract of land had been generally used by respondent for the purpose of lambing a given number of sheep, and that the tract was especially adapted to this use.

We are referred to the rule which we believe to be one well recognized by authority, that if the damages sought to be recovered are those known as "special damages," that is, those of an unusual and extraordinary nature and not the common consequence of the wrong complained of or implied by law, it is necessary, in order to prevent surprise to the defendant, that the declaration state specifically and in detail the damages sought to be recovered.

The rule is not applicable to this case. The damage was alleged to have been wrought during the month of March, 1916, by the willful, malicious, wrongful, and unlawful herding and grazing of sheep upon the lands of plaintiff, thereby destroying, eating, and tramping out the grasses, herbage, and browse.

The general use to which the tract of land was put during that particular season of the year was established as being for lambing purposes. The tract of land in question might have been absolutely useless either to appellants or respondent, in so far as grazing would be concerned, at some other season of the year. The general use to which the land was applied was for grazing purposes during the lambing season. It was the fact, as determined, that the land was made useless for this purpose by the acts of appellants that constituted the basis for the damage. The general use to which the land was applied was a matter of proof, and if such disclosed, as it did, that the tract of land was generally used for lambing purposes, such evidence was, in our judgment, admissible under the pleadings. The damage accruing to respondent was the loss established as having been sustained by reason of the destruction of the herbage and grasses growing on the land during that season of the year when respondent looked to the tract to maintain a given number of sheep, namely, during the lambing season. It nowhere appears that the court, in arriving at the measure of damages, based the same upon anything other than the general value of the tract for grazing purposes during the period of the year within which its value for such purpose was especially established.

We are referred to the case of Risse v. Collins, 12 Idaho, 689, 87 Pac. 1006; but it will be observed that there the Supreme Court of Idaho adhered to a rule of general acceptation that the measure of damages in such cases should be the value of the crop at the time of the injury or destruction. In the case at bar, we are dealing with the value of herbage, grasses, and browse growing upon wild, uncultivated, and unreclaimed lands, at a special season of the year when by reason of the nature of the tract and its location it is generally used for a special purpose. So we deem it applicable to say here that the measure of damages in such cases is and should be the value of the pasturage upon such a tract of land, taking into consideration its location and general surroundings at a time in the year when by reason of its peculiar character it is valuable for a special purpose. The same rule might not apply at another or different season of the year, and, indeed, might not apply to other lands differently located.

The case of Herrin v. Sieben, 46 Mont. 226, 127 Pac. 823, affords no assistance in this case.

We are referred to the case of Pyramid Land & Stock Co. v. Pierce, 30 Nev. 237, 95 Pac. 210; but, inasmuch as the court in the matter at bar assessed no special damages, the rule there relied upon is not applicable here.

In the case of Jensen v. Pradere, 39 Nev. 466, 159 Pac. 54, a majority of this court held that in cases of this character, where the land was used for pasturage only, evidence of its reasonable value for such purposes would be proper. To this we might add that, if the evidence established that the use to which the land could be applied was limited to a special season of the year, as in this case during the lambing season, evidence as to the value of the land during such season and for such purpose would be proper.

There is evidence in the record, coming from competent witnesses, to the effect that damage done by appellants in herding and grazing their sheep over the particular tract of land at the particular season of the year would amount to $1,000. Another witness placed the damage at a dollar per head. The court in fixing the damages appears to have ignored all of this testimony, as well as all evidence tending to establish special damages.

[2] Appellants assign error to the action of the trial court because that tribunal found that the plaintiff did not cause any sheep to be herded or grazed upon the lands of defendants. In this respect, it may be noted

that by way of cross-complaint appellants here had alleged damages accruing from the acts of respondent in herding sheep on the lands of appellants. It is the contention of appellants that evidence supporting this allegation was offered by them and not contradicted. Perhaps the strongest evidence supporting the allegation of appellants as to damages in this respect, if any evidence supported such allegation, is to be found in the record of the testimony of appellant Will O'Brien in which he relates that he saw sheep belonging to respondent on a certain 40-acre tract in section 19 which he claims to have had under lease at that time. The only attempt to fix the damage claimed by appellant appears in the following interrogatories and answers:

> "Q. How many sheep were there in that band? A. Well I don't know; of course they lamb close to a thousand head I should judge, up there, lambing time, you know. They split them up; may have been 600, may have been 700, I am not sure. Q. What was the damage done to the land you had under lease by the plaintiff's sheep grazing upon it in the manner you have stated? A. Well, I had the place along the ditch where I got water—$300, I believe. Q. What did you say the damages were? A. About $300, I guess. Q. How do you fix the damages? A. Well, according to the size of the band of sheep and the way that they had sued me. Q. You fix the damages on the same basis as the damages they claim? A. Yes, they figure $1,000 for my bunch that I had. Q. That is the only basis you have of fixing that $300? A. Well, they destroyed just as much of the browse where I was as I destroyed on them, if I was ever on that. Q. Assuming that you had been over? A. Yes, the same identical thing."

It is needless to say that from this record, uncertain and indefinite as it is on the question raised by the cross-complaint of appellants, the court had before it nothing in the way of facts upon which it could have found damages accruing. Hence we fail to discover error in the act of the trial court in determining as it did.

[3] Many of the errors complained of, pertaining to the admission of evidence over the objection of appellants, lose force by reason of the form of the objection; and we deem it not inappropriate to suggest that, in the light of the rule often asserted by this court, appellants cannot be heard to complain where the error relied upon was brought to the attention of the trial court only by an objection general in its nature. Robinson v. Imperial Silver Mining Co., 5 Nev. 44; Sharon v. Minnock, 6 Nev. 377; State v. Smith, 33 Nev. 438, 117 Pac. 19.

The judgment of the trial court is sustained.

It is so ordered.

SANDERS, J., concurs.

COLEMAN, J. I concur in the judgment of affirmance, but not in the views expressed in the opinion of the learned Chief Justice. I take the view that the contention of counsel for appellant as to special damage is correct; but since the attorney who tried the case in the lower court permitted some of the testimony complained of to be admitted in evidence without objection, and since the objections which were made to the rest of the evidence were on the ground that it was "irrelevant, incompetent, and immaterial," and did not specify wherein it was irrelevant, incompetent, and immaterial, I am of the opinion that the point urged on this appeal cannot be considered. The court, in the case of Sigafus v. Porter, 84 Fed. at page 433, 28 C. C. A. at page 449, in considering this question said:

> "The stock objection 'incompetent, irrelevant, and immaterial,' covers a multitude of sins. There is hardly an objectionable question but what can be classified under one or other of these heads. Sometimes the real nature of the objection is so plain that the general phrase will be quite sufficient to indicate it; indeed, it may be quite apparent without any statement of the grounds of objection at all. But there are many other objections which rest upon some particular theory of the case, or upon some single fact in proof, which a judge may readily forget in the course of a long and intricate trial. It is only fair in such cases to require counsel to state clearly to the trial judge on what ground it is that they object. Certainly, it is not fair to allow such a general dragnet as 'incompetent, irrelevant, and immaterial' to be cast over every bit of evidence in the case which counsel would like to keep out, and then to permit counsel, upon careful analysis of the printed narrative of the trial, to formulate some specification of error not thought of at the time, and which, if seasonably called to the court's attention, might have been avoided or corrected."

See, also, 1 Wigmore on Evidence, p. 57, § 18; Jones on Evidence, § 896; Noonan v. Mining Co., 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061; Patrick v. Graham, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460; Topitz v. Hedden, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961; New York El. Eq. Co. v. Blair, 79 Fed. 896, 25 C. C. A. 216; Culmer v. Clift, 14 Utah, 291, 47 Pac. 85; Cornell v. Barnes, 26 Wis. 473, 480; Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 Pac. 622; Starkweather v. Dawson, 14 Cal. App. 666, 112 Pac. 738; Rush v. French, 1 Ariz. 99, 123 Pac. 816; Harris v. Lumber Co., 97 Ga. 465, 25 S. E. 519; 38 Cyc. pp. 1375, 1376.

(22 N. M. 507)

COOK v. CITY OF SOCORRO et al.*

(No. 1930.)

(Supreme Court of New Mexico. May 12, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS 🔑955(3)—BONDS—INVALIDITY—BURDEN OF PROOF.

Where a municipal corporation has power to issue bonds upon a compliance with certain prerequisites, and the bonds are issued, they are prima facie valid obligations, and, as against a bona fide purchaser, the burden of proving want of performance of any of the prerequisites is upon the municipality, or the party attacking the validity of the bonds. Where a municipal corporation was incorporated under an act of the

*Rehearing denied August 25, 1917.

Legislature, which said act gave such corporations the power to issue bonds for the purchase or construction of waterworks upon certain conditions, and a subsequent act of the Legislature authorized municipal corporations to reincorporate under such later act and prescribed different conditions under which bonds for the construction or purchase of waterworks might be issued, and thereafter such municipal corporation issued its negotiable bonds for such purpose, the burden is upon the party attacking the validity of such bonds, where they have passed into the hands of innocent purchasers, to show, either that such city reincorporated under the later act, and that such bonds were not issued in compliance therewith, or that such bonds were not issued in conformity to the earlier act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2006.]

2. APPEAL AND ERROR 🔑194(6)—PLEADING 🔑416 — ORDER SUSTAINING DEMURRER—CORRECTION OF ERROR—CONSIDERATION OF ERROR.

Where a trial court inadvertently enters an order sustaining a demurrer to a pleading to which no demurrer has been filed, it is the duty of counsel to call the court's attention to the error so made, so that the same may be corrected, and where the record on appeal shows that an order was made by the trial court sustaining a demurrer to an answer to a counterclaim, where a demurrer was filed only to the reply, the appellate court will not consider an assignment of error based upon such order in so far as the answer to the counterclaim is concerned, where such mistake was not called to the attention of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1245; Pleading, Cent. Dig. §§ 1397-1400.]

3. JUDGMENT 🔑94 — DEFAULT JUDGMENT—CONSTRUCTIVE SERVICE—INJUNCTION.

A plaintiff is not entitled to a default judgment against nonresident defendants, served only by constructive service, in an action instituted to have certain bonds issued by a municipality adjudged null and void, and to enjoin the municipality from levying a tax to pay the interest and principal thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 153.]

Appeal from District Court, Socorro County. Mechem, Judge.

Action for injunction by George E. Cook against the City of Socorro, James G. Fitch, and others, in which only defendants James G. Fitch and J. C. Mayer appeared and answered, with counterclaim. Judgment dismissing the suit and awarding the relief prayed for in their counterclaim, and plaintiff appeals. Affirmed.

This action was instituted in the court below by George E. Cook, a resident and taxpayer of the city of Socorro, against the city of Socorro, James G. Fitch et al., to enjoin the payment of principal and interest on certain municipal water bonds issued by the city of Socorro on April 1, 1887. Of the defendants James G. Fitch and J. C. Mayer only appeared and answered. They also filed a counterclaim, in which they alleged that the present action was instituted by the plaintiff in collusion with the city of Socorro, and further alleged that the city was unlawfully misappropriating funds raised by taxation for the purpose of paying the principal and interest of such bonds, and an injunction was sought against the city, its officers and agents, to prevent it from continuing in its alleged misappropriation of the funds. Service was had on the other defendants, except the city of Socorro, by publication. Upon issue joined the case was tried by the court, which made certain findings of fact and conclusions of law, and thereupon entered its judgment dismissing said injunction suit and enjoining the city of Socorro and its officers and agents from diverting any of the funds raised for the payment of the principal and interest upon said water bonds. The facts upon which the injunction was sought by appellant may be briefly stated as follows: On April 1, 1887, the city of Socorro issued bonds bearing date of that day, to the amount of $30,000, in payment of the purchase price of a waterworks system for said city. Each bond was for the sum of $500, and was made payable to bearer 30 years after date with interest at 6 per cent. per annum. Each bond contained the following recital:

> "This bond is one of sixty, numbered from 1 to 60, inclusive, of like amount, tenor and date and is authorized by an act of the city council of Socorro, proposed on the 9th day of December, A. D. 1886. The said council being authorized by a vote of the legal voters of said city at a regular election at which the question of issuing the said bonds was duly voted upon. The result of said election being favorable to the issuing of said bonds in the amount of thirty thousand dollars on the terms and conditions herein set forth. The right to hold such election is vested in said city of Socorro by its articles of incorporation under and by virtue of the laws of the territory of New Mexico."

The bonds were signed by the mayor and under the word "countersigned" near the right-hand margin of the bond was the name of the city treasurer, signed as treasurer. Near the left hand appeared the words: "Attest, J. F. Towle, City Clerk." The city of Socorro was incorporated on January 17, 1882, under an act of the territorial Legislature approved February 11, 1880, entitled "An act for the incorporation of cities," and its legality as a municipal corporation was not legally questioned or denied for a period of more than two years. The act under which the city of Socorro was incorporated, being chapter 1 of the Laws of 1880, provided that before a city could issue bonds, the common council must be petitioned by three-fourths of the legal voters of said city, and the bonds, when issued, must be signed by the mayor and countersigned by the clerk of said city. The recitals in the bonds show that they were apparently issued under the provisions of chapter 39 of the Laws of 1884, which act does not require a petition to be presented before the bonds are issued, but requires an election to determine whether waterworks shall be constructed, and the court so found.

It appears from the evidence that for some time prior to the year 1902, the city of Socorro refused to pay interest on the bonds in question, and that during the said year 1902 one George Parker recovered two default judgments against the city of Socorro for unpaid interest on 34 of said water bonds. During the same year a peremptory writ of mandamus was issued by the district court of Socorro county against the mayor and city council of said city, compelling them to make certain levies of taxes to pay said judgments and unpaid interest coupons. This case was appealed to the Supreme Court, being reported in 12 N. M. 177, 76 Pac. 283, and in said appeal the question of the validity of the said bonds was raised by the said city, and it maintained that the waterworks bonds were void under chapter 39 of the Laws of 1884. The Supreme Court sustained the view taken by Mr. Fitch, who was the attorney for George Parker on said appeal, and held that the provisions of chapter 39, Laws 1884, did not relate or apply to the city of Socorro, but that said city derived all of its power and authority from the act of 1880. The Supreme Court, therefore, did not pass upon the validity of said bonds, because no question was raised in said suit as to their validity under the act of 1880. The city of Socorro has been paying interest on the waterworks bonds since the year 1902, and has paid judgments recovered against said city for unpaid coupons due prior to that time, under a peremptory writ of mandamus issued by the district court of Socorro county. The evidence fails to show that the 2 bonds involved in this suit were included in the 34 involved in the cases instituted by George Parker.

From the evidence introduced at the trial it appears that the records of the city of Socorro were destroyed by fire at some time after the year 1890. Appellants introduced no evidence showing the fact that the city did not reincorporate under the act of 1884, nor that the bonds were not legally issued under the act of February 11, 1880.

The court made certain findings of fact, in which it found that the bonds were issued by the city of Socorro under the power contained in chapter 39 of the Laws of 1884, but refused to find that the requirements of the act of February 11, 1880, had not been complied with. Among other findings the court made the following:

"(1) There is no evidence as to whether or not three-fourths of the legal voters of the city of Socorro petitioned the council of said city to contract the debt or loan for which said waterworks bonds were issued.

"(2) The court finds that there is no direct evidence as to whether or not an election was ever called or held to determine whether the city should abandon its organization under chapter 1. Laws 1880, and reorganize under chapter 39, Laws 1884. But there is evidence, and the court finds therefrom, that since the month of January, 1886, and from thence continually up to the date of the commencement of this suit, the city of Socorro has in fact been organized under and in accordance with the provisions of chapter 39, Laws of 1884, and has during all of said period maintained such organization, and has had in office a mayor, a board of aldermen, styled city council, a city treasurer, city clerk, city marshal, and city attorney, elected or appointed at the times and in the manner provided by said chapter 39, Laws of 1884, and amendments thereto, and that in the exercise of the duties of their respective offices and in the enforcement of the corporate powers of said city, the said city officers have proceeded in accordance with and been governed by the provisions of said chapter 39, Laws 1884; and the legality of said organization has not been legally denied or questioned for a period of more than 29 years prior to the commencement of this suit."

From the judgment dismissing the complaint and awarding defendants the relief prayed for in their cross-complaint, the appellant appeals.

M. C. Spicer, of Socorro, and Catron & Catron, of Santa Fé, for appellant. James G. Fitch, of Socorro, for appellees.

ROBERTS, J. (after stating the facts as above). [1] The first proposition advanced by appellant upon which he relies for a reversal of the judgment of the court below is that the city of Socorro, on April 1, 1887, the date when the bonds in question were issued, acquired all of its power and authority to issue the municipal waterworks bonds under chapter 1 of the Laws of 1880, and that chapter 39 of the Laws of 1884 had no application to the city of Socorro, and that said city did not derive any authority from said act to issue the bonds in question. This argument is based upon the assumption that the city of Socorro did not reincorporate under the provisions of chapter 39 of the Laws of 1884 and continued to exist as a corporation under the act of 1880.

The appellant in the court below offered no evidence showing that the city did not reincorporate under the act of 1884. Neither did he offer evidence to show that the precedent acts required under the act of 1880 for the issuance of bonds for the construction or purchase of waterworks had not been complied with. Therefore the court properly upheld the validity of the bonds. It is a well-settled rule of law that where a municipal corporation has power to issue bonds upon a compliance with certain prerequisites, and the bonds are issued, they are prima facie valid obligations, and, as against a bona fide purchaser, the burden of proving want of performance of any of the prerequisites is upon the municipality. 21 Ency. of Law, p. 76. The evidence in this case shows that Mr. Fitch was a bona fide holder of the bonds which he owned, and there is no showing that the other defendants are not likewise bona fide holders. The burden was upon the appellant to establish the fact that the city of Socorro did not reincorporate under the act of 1884, because upon the face of the bond it appeared that the bond was issued under and by virtue of power conferred by said act, and it was shown in evidence that continuously from the time the bonds were issued in 1887 up to and including the time of the trial herein that the city of Socorro was pretending to be a city incorporated under said act, and, as such, exercising all powers and duties conferred upon it by this act. But it is not necessary for us to determine in this case under which of said acts the city of Socorro was incorporated and exercised the powers and functions of a municipal corporation at the time of the issuance of the bonds in question; for, if it be conceded that the necessary steps required on the part of the city to reincorporate under the act of 1884 had not been taken, and that the city continued as a corporation under the earlier act, it will be presumed, in the absence of evidence to the contrary, that all the requirements of the act of 1880 had been complied with relative to the issuance of said bonds, nothing appearing on the face of the bonds to the contrary. It is well settled that the contracts of public corporations, formally executed, will, in the absence of proof to the contrary, be presumed to be valid and to have been made with due authority. In Abbott on Public Securities, at section 400, it is said:

> "Assuming the existence of authority to issue the securities in connection with the condition that they do not show upon their face facts sufficient to charge the holder with notice of their invalidity or of irregularities in their issue, the possession of negotiable securities then in due form establishes in favor of the holder a prima facie case in an action upon them, and throws the burden of proof upon the one attacking their validity in respect to ownership, bona fide holding, consideration, proper execution, notice, and existence of all conditions necessary to enable him to maintain the action. This rule does not dispense with all evidence but upon the production of the bonds or coupons and proof of authority to issue the plaintiff's case is established. The rule has been well stated in a leading text-book on Negotiable Instruments, in the following language: 'The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports prima facie that he acquired it bona fide for full value in the usual course of business before maturity, and without notice of any circumstances impeaching its validity, and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where indeed such proof is necessary), prima facie establishes his case; and he may there rest it. Bills and notes payable to bearer do not, in this respect, differ from others, and the bearer is entitled to all the presumptions that apply to an indorsement in his favor. But the presumption of bona fide ownership does not apply where the instrument is not payable to bearer, unless it be indorsed specifically to holder, or in blank."

For cases discussing the question see Board of County Commissioners of Grear County v. Gregory, 15 Okl. 208, 81 Pac. 422; Flagg v. City of Palmyra, 33 Mo. 440; City of Quincy v. Warfield, 25 Ill. 317, 79 Am. Dec. 330; City of Gladstone v. Throop, 71 Fed. 341, 18 C. C. A. 61.

What we have already said disposes of appellant's second and third contentions, and in view of our conclusion here, it is not necessary to determine or pass upon the effect of the opinion by the territorial Supreme Court in the case of Territory ex rel. Parker v. Mayor, 12 N. M. 177, 76 Pac. 283, nor as to the effect of plea or res adjudicata interposed by the defendants.

[2] Appellant's sixth contention is that if the city of Socorro was reincorporated under the provisions of chapter 39, Laws of 1884, as maintained by appellees and as found by the court, the court erred in sustaining the demurrer to appellant's answer to appellees' counterclaim because the answer sets forth facts sufficient to constitute a proper defense to the water bonds. The record in this case shows that appellees filed an answer to appellant's complaint, and also a counterclaim in which they sought to enjoin and restrain the city from diverting or misappropriating funds in the city treasury, or which might thereafter be derived from the levy of the special tax, etc., for the purpose of paying the principal and interest on such bonds. In the counterclaim it was alleged that certain moneys had theretofore been raised by special tax, levied for the purpose of paying the principal and interest on the water bonds, and that such city had been using this money for other purposes. The counterclaim set up facts showing that appellees were entitled to the relief sought. Appellant filed a reply to defendants' answer, setting up certain new matter, and also an answer to the counterclaim. The record shows that appellees filed a demurrer to the reply, but does not show that any demurrer was filed to the answer to the counterclaim. On the 11th day of November, 1915, there was filed in the office of the clerk of the said court, an order sustaining appellees' demurrer. This order recites:

> "This case coming on for further hearing upon demurrers of defendants to certain portions of the plaintiff's reply and of the plaintiff's answer to the counterclaim, and the court having heard the arguments of counsel and being fully advised, it is ordered that the said demurrers of the defendants be and the same are hereby sustained."

Apparently, the court's attention was never called to the error in this order, if it be true that no demurrer was ever filed to the answer to the counterclaim. Where a trial court inadvertently enters an order sustaining a demurrer to a pleading to which no demurrer has been filed, it is the duty of counsel to call the court's attention to the error so made, so that the same may be corrected; and where the record on appeal shows that an order was made by the trial court sustaining a demurrer to an answer to a counterclaim, where a demurrer was filed only to the reply, the court will not consider an assignment of error based upon such order in so far as the answer to the counterclaim is concerned, where such mistake was not called to the attention of the trial court.

[3] The last point urged is that the court erred in denying plaintiff's motion to adjudge in default for failure to answer the

city of Socorro, George Parker, and other owners and unknown owners of any water bonds of the city of Socorro issued April 1, 1887. Parker and the city of Socorro were made parties defendants and other owners of bonds whose names were unknown to plaintiff were designated as defendants, as "all other owners and unknown owners of any municipal bonds of the city of Socorro, state of New Mexico, issued April 1, 1887, payable to bearer, and known as water bonds of the city of Socorro." The city of Socorro was personally served, but failed to appear. Constructive service was had upon Parker and unknown owners. After the proofs were heard in the case and on the same day that the court found the entire issue of bonds to be legal, valid, and subsisting obligations of the city, appellant applied to the court for a default judgment against the city of Socorro, Parker, and unknown owners. The application was denied.

Appellant apparently does not contend that the court erred in overruling this motion, in so far as the city of Socorro is concerned, but contents himself by attempting to show that constructive service on the remaining bondholders was valid, and warranted a default judgment against them. No argument is required to demonstrate the unsoundness of this contention, further than to call attention to two decisions of the Supreme Court of the United States. In the case of Town of Brooklyn v. Ætna Life Insurance Company, 99 U. S. 362, 57 L. Ed. 416, the plaintiff, the Life Insurance Company, instituted suit against the town of Brooklyn on certain interest coupons issued in the name of the town of Brooklyn, Ill. The town answered, and in its fifth plea, averred that, by a decree of the circuit court of Lee county, Ill., rendered November 14, 1873, in the action of the Town of Brooklyn and others against the Chicago & Rock River Railroad Company and others:

> "'It was ordered, adjudged, and decreed that the said pretended bonds and coupons of the said town of Brooklyn, so issued to the said Chicago & Rock River Railroad Company, and registered as aforesaid in the office of the auditor of public accounts of Illinois, are void and in no wise obligatory on the said town of Brooklyn, and that the same be surrendered up by the parties holding the same to be canceled,' which decree it is averred is in full force and effect; that the said insurance company was made defendant in such suit with the other holders and owners of the bonds and coupons issued by the town, by the name and description of 'The unknown owners of certain bonds and coupons issued by Washington J. Griffin, the supervisor of the town of Brooklyn, Lee county, Illinois, to the Chicago & Rock River Railroad Company, purporting to be the bonds and coupons of said town of Brooklyn.'"

And it was further alleged that the said circuit court of Lee county then and there had jurisdiction of the person or parties defendant therein, by the issuing and return of process, and by proof of publication made as required by the statute of the state of Illinois in the case of nonresident defendants. In considering this plea the Supreme Court of the United States said:

> "The suit commenced and determined in the circuit court of Lee county was a proceeding wholly in presonam, against the holders and owners of bonds and coupons which had been issued in the name of the town, and delivered to the railroad company. Upon principle and authority, no decree therein rendered could bind any one not personally served with process, or who did not appear. It could not affect the rights of nonresident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, and authorities there cited."

In the case of Township of Empire v. Darlington, 101 U. S. 87, 25 L. Ed. 878, the court held that a decree in an Illinois court, perpetually enjoining taxation to pay railroad aid bonds and declaring them void, did not conclude any bondholders proceeded against as "unknown owners and holders," who were not served with process and did not appear, nor bondholders residing in other states who were proceeded against only by constructive service. Hence we conclude that where a suit is commenced against the holders and owners of bonds and coupons which have been issued by a municipal corporation and delivered to the purchaser or purchasers a taxpayer cannot lawfully secure a default judgment against nonresident owners and holders of such bonds upon constructive service, adjudging said bonds to be invalid.

For the reasons stated the judgment of the trial court will be affirmed; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(22 N. M. 521)

SCHWARTZ et al. v. TOWN OF GALLUP et al. (No. 2002.)

(Supreme Court of New Mexico. May 11, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS 🔑89 — MEETING OF BOARD OF TRUSTEES—NOTICE.

Notice of a special meeting of a city council or board of trustees of a town may be dispensed with, or its necessity waived, by the presence and consent of every one of those entitled to notice.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 195–198.]

2. MUNICIPAL CORPORATIONS 🔑109 — ORDINANCES—RECORD.

A statute requiring town ordinances to be recorded in an ordinance book is complied with by copying an ordinance on the typewriter and pasting the sheet of paper upon which it is copied in the ordinance book of such town in such manner as to become a permanent record.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 237, 238.]

3. INTOXICATING LIQUORS 🔑91 — LICENSE FEE—STATUTE.

Where the Legislature invests a municipality with power to license, regulate or prohibit the sale of intoxicating liquor, such municipality may impose a license fee in any amount, and the fee thus fixed is not open to review by the courts as to its reasonableness or unreasonableness or confiscatory nature.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 97.]

4. STATUTES ⚿64(1)—PARTIAL UNCONSTITUTIONALITY—EFFECT.

A part of a law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other without impairing the force and effect of the portion which remains, and where the legislative purpose, as expressed in such valid portion, can be accomplished and given effect, independently of the void provision, and where if the entire act is taken into consideration it cannot be said that the enacting power would not have passed the portion retained had it known that the void provisions would fail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 195.]

5. INTOXICATING LIQUORS ⚿112—POWER OF TOWN PROHIBITING USE OF TABLES AND BLINDS.

The use of chairs and tables in a saloon or barroom may be prohibited by a municipality in this state, and likewise such municipality may, by ordinance, prohibit the use of blinds, curtains, or screens, and require a clear view from the street of the bar and room in which liquor is sold.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 122.]

Appeal from District Court, McKinley County; Raynolds, Judge.

Action for injunction by John Schwartz and others against the Town of Gallup and others. Judgment for defendants dismissing the complaint, and plaintiffs appeal. Affirmed.

E. A. Martin, of Gallup, and E. W. Dobson, of Albuquerque, for appellants. Ove E. Overson and A. T. Hannett, both of Gallup, for appellees.

ROBERTS, J. Appellants, on the 10th day of June, 1916, were engaged in the retail liquor business in the town of Gallup, McKinley county, this state. On that date the board of town trustees of said town, at a special meeting enacted Ordinances Nos. 85 and 88. The second section of Ordinance 85, with which only we are concerned in this case, provided that on and after the 1st day of July, 1916, retail liquor dealers should pay the town of Gallup a license fee of $1,500 per annum, payable semiannually in advance. The last clause of this section further provided that all drug stores should be considered retail dealers under this section, when selling or offering for sale liquors as above provided, except under a doctor's prescription. Prior to the passage of this ordinance the license fee exacted from retail liquor dealers was $300 per annum.

Ordinance No. 88 required saloons to close at 12 o'clock midnight and to remain closed until 6 o'clock in the morning of any day, and to also close at 12 o'clock midnight of Saturday of one week and remain closed until 6 o'clock a. m. on the following Monday. The ordinance further prohibited any billiard or pool tables, chairs, tables, benches, or other furniture in any room where intoxicating liquor was sold. Winerooms were also prohibited, and likewise the use of curtains, screens, or other obstructions in the doors and windows in the lower story so that a clear and unobstructed view of the entire premises might be had from the outside. The ordinance further forbade the letting of any person into a saloon between the hour of 12 o'clock midnight Saturday night and the hour of 6 o'clock Monday morning following. Penalties were prescribed for violation of the ordinance.

On the 29th day of June, 1916, appellants filed in the district court of McKinley county their complaint, in which they sought an injunction against the town of Gallup, its officers, agents, and servants, from attempting to enforce the provisions of the two ordinances in question. In the complaint it was alleged that the appellants had been engaged in the retail liquor business in said town for some time, and had invested large sums of money in the purchase of furniture and fixtures, and had entered into contracts and leases for buildings in furtherance of their several businesses, that each and all were the holders of license of the United States government and of the state of New Mexico, authorizing them to engage in the liquor business, and that Ordinance No. 85, which fixed the license fee at $1,500, was unjust, unreasonable, oppressive, confiscatory, and prohibitive, and that such ordinance was an attempt to levy a tax upon said business in order to raise a revenue therefrom for the general purposes of said town. It was alleged that Ordinance No. 88 was discriminatory and a denial of equal protection of the law to retail liquor dealers in said town, and that under the provisions of said Ordinance No. 88 all retail liquor dealers doing business in said town were prohibited from having in their places of business any chairs, tables, pool tables, or other furniture, save and except the necessary bar and back bar, and were prohibited from having any screens, doors, curtains, or other obstructions in the front of their several places of business or in the windows or doors thereof; whereas, under the provisions of Ordinance No. 85, all drug stores within said town were, upon the payment of the license fee exacted from liquor dealers, permitted to conduct a retail liquor house without any restrictions as to tables, chairs, curtains, etc., so that an unjust and unfair discrimination existed under said ordinance between open saloons and secret tippling places under the guise of drug stores. The complaint set forth further grounds wherein it was claimed that said ordinances discriminated against saloon keepers and in favor of drug stores engaged in the sale of liquor.

It was further alleged that neither of said ordinances was passed at any regular meeting of the board of town trustees, but were pretended to have been passed at a special meeting held June 10, 1916, and that said ordinances were not properly passed, and that said meeting was not lawfully held, no notice having been given as required by the ordinance of said town.

Appellees interposed a demurrer to the complaint which was overruled by the court, whereupon they answered admitting the passage of the ordinance in question, and alleged that they were duly and legally enacted and denied the other material allegations of the complaint. Thereafter the record evidence, showing the enactment of the ordinances in question, was submitted to the court, and later the cause was set for hearing upon the merits. When the case was called for hearing appellees filed a motion for judgment on the ground that plaintiff's complaint set up no facts which entitled them to relief in equity. This motion was sustained by the court, and judgment was entered dismissing the complaint. From this judgment this appeal is prosecuted.

[1, 2] The first point urged by appellants is that Ordinances 85 and 88 were not lawfully adopted and passed by the board of trustees of the town of Gallup for two reasons: First, that Ordinance No. 4 of said town required that, whenever a special meeting of the board of trustees was deemed necessary, such meeting might be called by the chairman of the board and two members of the board, and that a written notice of the time and place of such meeting should be given to each and every member of the board, which notice was required to be served at least two hours previous to the time at which such special meeting was called to meet, which provisions were not complied with in calling and holding the special session at which said ordinances were enacted. The second point urged is that the ordinances in question were not recorded in the book which was kept for such purpose, but that said ordinances were merely pasted in at one end, and not recorded as required by the ordinance of said town.

There is no merit in either contention stated. Every member of the board of trustees and the president were present, consented to, and participated in the meeting. Notice of a special meeting of a city council or board of trustees of a town may be dispensed with, or its necessity waived, by the presence and consent of every one of those entitled to notice. Dillon on Municipal Corporations (5th Ed.) § 534. Many authorities are cited by the author in support of this proposition, and further discussion is unnecessary.

As to the second contention, it appears, and is not disputed by appellants, that the ordinances in question were typewritten on sheets of paper and pasted in a book kept for the purpose of recording the ordinances of said town. It is thus evident that the statute requiring town ordinances to be recorded has been complied with.

[3] The lower court held that, since the statutes of the state confer power upon the boards of trustees of towns "to license, regulate, or prohibit" the liquor traffic within the municipal boundaries, therefore the manner or extent to which the town authorities carried out this power was not subject to review by the courts as to the reasonableness or unreasonableness of the enactment, or as to whether or not there had been any abuse of discretion or an arbitrary and oppressive use of the town's authority. Appellants contend that they were entitled to offer proof as to the unreasonable and confiscatory character of the ordinance, and if they succeeded in establishing such facts were entitled to judgment.

The statute under which these ordinances were enacted is found in chapter 28 of the Session Laws of 1915. This statute was originally subdivision 18 of section 3564, Code 1915, but was repealed and re-enacted, in so far as material to the issues in question, in 1915, as above stated. This statute gives to municipalities the power—

> "to have the right to license, regulate, or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, within the limits of the city or town, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license."

Appellants cite many authorities holding that under a power conferred upon a municipality by the Legislature to "license or regulate" the sale of intoxicating liquors the courts will determine the question as to whether an ordinance enacted under such power is reasonable or unreasonable, and that in such cases the courts will hear proof as to the cost of issuing the licenses, the expense of police protection, and other increased expenses of the municipality or community caused by the traffic in intoxicating liquors and that under such a power granted it is not competent for a municipality to fix the license fee at such an amount as will result in prohibition of the traffic. Among the many authorities cited are the following: Ex parte J. D. Sikes, 102 Ala. 173, 15 South. 522, 24 L. R. A. 774, 775; McQuillin on Municipal Corporations, vol. 3, § 1002; Elk Point v. Vaughn, 1 Dak. 113, 46 N. W. 577; Perdue v. Ellis, 18 Ga. 586; Wiley v. Owens, 39 Ind. 429; Sweet v. City of Wabash, 41 Ind. 7; Town of Marion v. Chandler, 6 Ala. 899; Ex parte Burnett, 30 Ala. 461.

But it is to be observed that the power given to municipalities in this state is much broader and more comprehensive than the power granted to the municipalities which enacted the ordinances construed in the fore-

going cases. Here the Legislature has seen fit and proper to delegate to municipal corporations the power to "license, regulate, or prohibit" altogether the traffic in intoxicating liquors in such municipalities. Concededly, had the Legislature of the state enacted a law which required retail liquor dealers in towns having a population that the town in question has to pay a license fee in the sum fixed by the ordinance in question, or in any other sum which it saw proper to exact, no question could be raised as to the confiscatory nature of such law or as to its reasonableness or unreasonableness. It has always been conceded by the courts and lawwriters, at least for many years, that the lawmaking power of the various states has plenary and unlimited control over the liquor business, and that this business, characterized by the courts and law writers as "hurtful to public morals, productive of disorder and injurious to the public," may be arbitrarily dealt with by the lawmaking power of the states or prohibited altogether. This being true, if the town board of Gallup had the power delegated to it by the state to enact the ordinances in question and was given unlimited and arbitrary control over the liquor business, then no question of the reasonableness or unreasonableness of an ordinance enacted under such power would be open to inquiry in the courts.

As the town board had the power, under the statute in question, to prohibit altogether the traffic in intoxicating liquors in such town, appellants cannot complain of the exercise by the town board of a right within the power delegated; in other words, the town having the power to license or prohibit, appellants cannot complain of the enactment of an ordinance fixing a license fee at any amount which the board may choose to exact, even though such fee may, as alleged, amount to total or partial prohibition.

The only statute similar to the one in question which we have been able to find which has been construed by the courts was chapter 24, Rev. St. Ill. 1884, providing for the incorporation of cities and towns. Subsection 46 in section 1 of article 5 of that chapter, in so far as material, read as follows:

> "To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license."

In the case of Dennehy v. City of Chicago, 120 Ill. 627, 12 N. E. 227, the same questions were raised as are here involved. The court said:

> "The amount charged for the license is not a tax, but a burden imposed as the price of a privilege which those controlling the municipality were at liberty to restrict as they pleased, or to deny altogether. People v. Thurber, 13 Ill. 554; East St. Louis v. Wehrung, 46 Ill. 392; East St. Louis v. Trustees, 102 Ill. 489 [40 Am. Rep. 606]. There can therefore be no question of adequacy or excessiveness of the amount charged. See, also, Tenney v. Lenz, 16 Wis. 566, and State v. Cassidy, 22 Minn. 312 [21 Am. Rep. 765]. As was said in Schwuchow v. City of Chicago, 68 Ill. 449: 'This business is, in principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits.'"

In 23 Cyc. 149, it is said:

> "The Legislature of a state, having unlimited control over the liquor traffic, may, if it chooses to license the business, fix the amount of the license fee at any sum in its absolute discretion, and no one can complain that the amount so fixed is excessive or prohibitive; and the same rule applies in the case of a municipal corporation which by its character or a general statute possesses full control over the traffic. But if a municipality is given authority only to license the business, not to prohibit or suppress it altogether, its discretion as to the amount of the fee to be charged is limited, and an ordinance fixing such a fee as would be unreasonably great or practically prohibitory would be invalid."

Section 276 of Woollen & Thornton on Intoxicating Liquors reads as follows:

> "Power to prohibit includes power to license. It has been said that under the police power license fees may be imposed: (1) For regulation; (2) for revenue; (3) to give monopolies; (4) for prohibition. The fourth purpose is entirely admissible in the case of pursuits or indulgences which in their general effect are believed to be more harmful than beneficial to society, and that it is often found that prohibition of an occupation which excites or gratifies the vices or passions of large numbers of people is met by a resistance so steady and powerful as to render the law wholly ineffectual, when a heavy tax might lessen the evils and possibly in the end make the occupation unprofitable."
>
> "Where a municipal corporation has power to prohibit the doing of a thing, and also a power to license the same thing to be done, the license fee demanded by the ordinance for the doing of such thing is not a tax, but is a price paid for the privilege of doing such thing." McQuillin on Municipal Corporations, vol. 3, § 992.

Nothing would be gained by a further discussion of this point. The ordinance in question was within the power granted by the Legislature; hence it is not within the province of the courts to pass upon the questions raised by appellants.

[4] Relative to appellants' contention that the city council had not power to authorize the selling of intoxicating liquors by drug stores for purposes other than medicinal, mechanical, and scientific, it is sufficient to say that, even though this portion of the ordinance were null and void, it would not affect the remainder of the ordinance. A part of the law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other without impairing the force and effect of the portion which remains, and where the legislative purpose as expressed in such valid portion can be accomplished and given effect, independently of the void provisions, and where if the entire act is taken into consideration it cannot be said that the enacting power would not have passed the portion retained had it known that the void provisions must fail. State v. Brooken, 19 N. M. 404, 143 Pac. 479, L. R.

A. 1915B, 213, Ann. Cas. 1916D, 136. Further appellants concede that the provisions of this ordinance relative to the licensing of drug stores has been repealed by the board of trustees.

[5] Nor is there merit in the objection urged to the provisions of Ordinance 88, which required the removal of blinds, screens, etc., so that an unobstructed view might be had of the interior of the room wherein liquor is sold, and the provisions of the ordinance relative to hours of closing and prohibiting the maintaining of chairs, tables, pool tables, etc., inside of such room. In section 215, Woollen & Thornton on Intoxicating Liquors, it is said:

> "The use of chairs and tables in a barroom or saloon may be forbidden, and a municipality may adopt an ordinance to this effect."

While there is some divergence of opinion as to the validity of an ordinance requiring the removal from saloons of screens, etc., we are of the opinion that the better reasoned cases support the view that the municipality has the power to prohibit screens and curtains during business hours, and that such an ordinance is the valid and reasonable exercise of the power to regulate. Dillon on Municipal Corporations, § 674.

From the foregoing it follows that the trial court properly sustained the appellees' motion for judgment, and the case will therefore be affirmed, and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(84 Or. 429)

KING v. OREGON SHORT LINE R. CO.

(Supreme Court of Oregon. June 6, 1917.)

APPEAL AND ERROR 🔑753(1)—ASSIGNMENTS OF ERROR—ABSENCE FROM ABSTRACT.

Where the abstract on appeal contains no assignments of error and the complaint states a cause of action, questions discussed in appellant's brief will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086, 3087.]

In Banc. Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by Arthur S. King against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought to recover the value of a cow alleged to have been killed by the defendant's negligence. The action was brought originally in a justice court in Malheur county. The defendant took the case on appeal to the circuit court, where the case was tried de novo and a verdict was recovered by plaintiff for $75, interest, and costs. Defendant appeals from a judgment entered on this verdict.

Geo. H. Smith, of Salt Lake City, Utah, H. B. Thompson, of Pocatello, Idaho, and William E. Lees, of Ontario, Or., for appellant. Leslie J. Aker, of Ontario, Or., for respondent.

McCAMANT, J. Plaintiff calls attention to the absence of assignments of error in the abstract on appeal. Under the authority of Salene v. Isherwood, 74 Or. 35, 39, 144 Pac. 1175, and Dundas v. Grand View Land Co., 79 Or. 379, 380, 155 Pac. 365, this condition of the record precludes the consideration of the questions discussed in appellant's brief. We find that the complaint states facts sufficient to constitute a cause of action.

The judgment is affirmed.

(84 Or. 418)

NOBLE v. WATROUS, et al.

(Supreme Court of Oregon. June 6, 1917.)

1. TAXATION 🔑421(9) — ASSESSMENT — DESCRIPTION OF PROPERTY.

2 Hill's Ann. Laws 1892, § 2774, providing that it should be sufficient to describe lands in all proceedings relative to assessing them for taxes by initial letters, abbreviations, and figures to designate the township, range, section, or part of a section, did not authorize the use of the exponents ^{2} and ^{4} to designate half and quarter sections, though thereunder the initial letters "N. E." would be accepted as the equivalent of northeast, "Sec." as section, and the figures ¼ as one-fourth.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 734.]

2. APPEAL AND ERROR 🔑643(1)—SUPPLEMENTAL RECORD—FILING AFTER DECISION.

Leave to file a supplemental record to correct an error in the transcript on file will not be granted, after the case has been decided and a petition for rehearing has been filed, where it could not lead to any different determination of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2791–2794.]

3. TAXATION 🔑788(3) — TAX DEED — PRESUMPTIONS AND BURDEN OF PROOF.

Under B. & C. Comp. § 3127, providing for the issuance of a deed to the purchaser at a tax sale, and that such deed shall be prima facie evidence of certain facts as to the assessment and sale, such presumptions of regularity attach only to a deed in favor of the purchaser, and do not attach in favor of a deed to an assignee of the certificate of sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1559.]

4. TAXATION 🔑627—DELINQUENT TAX ROLL—DESCRIPTION OF PROPERTY.

That a delinquent tax roll did not show whether the range in which the property lay was east or west was a fatal defect.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1332–1342.]

5. TAXATION 🔑656—TAX SALE—TIME OF SALE.

Under 2 Hill's Ann. Laws 1892, § 2814, requiring the warrant for the collection of delinquent taxes to be issued within 10 days after the first Monday in April, and to be returnable on the first Monday in July, section 2815, under which the warrant, when issued, had the force and effect of an execution, and section 278, under which the life of an execution, unless prolonged in some way, was 60 days, where a warrant was not issued until July 27th, and the sale did not take place until November 29th, the warrant was functus officio, and the sale thereunder was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1347.]

Department 2. Appeal from Circuit Court, Washington County; Henry L. Benson, Judge.

On petition for rehearing. Petition denied.
For former opinion, see 163 Pac. 310.

Wood, Montague & Hunt, of Portland, and John M. Wall, of Hillsboro, for appellant. E. B. Tongue and Thomas H. Tongue, both of Hillsboro, for respondents.

McCAMANT, J. A petition for rehearing has been filed by the defendant Bacon, and we have re-examined the questions involved in this case. The petition calls our attention to the cases of Oregon Co. v. Umatilla County, 47 Or. 198, 81 Pac. 352, and Martin v. White, 53 Or. 319, 100 Pac. 290. In each of these cases the record shows an assessment in which quarter sections are undertaken to be indicated by the exponent ^{4}, and half sections by the exponent ^{2}. The former of these cases was an attack by writ of review upon an order of the county court of Umatilla county levying a tax on the property of plaintiff. On page 208 of the opinion the court suggested that the description was not as certain and definite as it should be, and that it was probably not sufficient to support a title acquired at a tax sale. In the case of Martin v. White the description was held to be insufficient on other grounds. Neither of these authorities tends to support the sufficiency of the descriptions referred to in the former opinion.

[1] Our attention is directed to section 2774 of Hill's Code, which was in force when the assessments were made on which the tax title is based. This section is as follows:

> "It shall be sufficient to describe lands, in all proceedings relative to assessing, advertising, or selling the same for taxes, by initial letters, abbreviations, and figures to designate the township, range, section, or part of a section, and also the number of the lots and blocks."

Under this statute the initial letters "N. E." may be accepted as the equivalent of northeast, and "Sec.," as a satisfactory abbreviation of section. It is not necessary to spell out one-fourth; the figures ¼ are a sufficient designation. This is as far as the statute goes. In his petition for a rehearing the defendant Bacon cites many authorities to sustain his contention that the description in question is sufficient. Atkins v. Hinman, 7 Ill. (2 Gilman) 437, is the only one of them which involved a description in which a quarter section was designated by the figure four. While the description in that case was upheld as sufficient, the attention of the court was not directed to this point; the attack being based on other grounds. We have found no case in which a court has squarely decided that such a description is sufficient. The text-books pronounce it fatally defective for purposes of assessment and taxation. For additional authorities to this effect see Keith v. Hayden, 26 Minn. 212, 2 N. W. 495; Turner v. Hand County, 11 S. D. 348, 77 N. W. 589; Stokes v. Allen, 15 S. D. 421, 89 N. W. 1023; Moran v. Thomas, 19 S. D. 469, 104 N. W. 212.

[2] The petition states that the original assessment roll for the year 1896 does not describe the property in the manner indicated in the opinion, and leave is asked to file a supplemental record here to correct the error in the transcript on file. It was held in State v. Jennings, 48 Or. 483, 494, 87 Pac. 524, 89 Pac. 421, that the record in this court cannot be corrected after the case has been decided and a petition for rehearing has been filed. The application for correction in that case was made by an appellant. If we shall assume that a different rule should apply in this case, inasmuch as the application is made by a respondent, the application should be denied, because it could not lead to any different determination of the appeal.

[3] When the property in question was sold for the payment of the 1896 taxes, the defendant Watrous was the purchaser. There was no deed issued to him, and the only deed which appears in the record is a deed executed to the defendant Bacon as his assignee after this suit was brought. The statute in force at that time made no provision for such a case. The only tax deed authorized by it was a deed in favor of the purchaser at the tax sale. It has been held that a tax deed issued in favor of a grantee not expressly entitled by the statute to receive it is void. Alexander v. Savage, 90 Ala. 383, 8 South. 93; Capehart v. McGahey, 132 Ala. 334, 31 South. 503; Sanders v. Ransom, 37 Fla. 457, 20 South. 530; Territory v. Perea, 6 N. M. 531, 30 Pac. 928. On the other hand, there is respectable authority that such a deed can issue. 1 Blackwell on Tax Titles (5th Ed.) 632; 37 Cyc. 1423. It is unnecessary in this case to determine the question of law arising on this conflict in the authorities. Under the statute in effect when the deed was made (B. & C. Code, § 3127) the presumptions as to regularity referred to in our former opinion can attach only to a deed in favor of the purchaser. This is the plain language of the statute, and we cannot extend its meaning by construction. Any statute which precludes a party from alleging and proving the truth should be strictly construed, and such construction is called for where, as in this case, a tax title is involved.

[4] In so far as the defendant Bacon relies on the sale for the taxes of 1896, there are no presumptions in his favor, and the burden devolved upon him to show a compliance with the statute in all respects. He has not sustained this burden. It appears affirmatively that the delinquent tax roll does not show whether the range in which the property lies is east or west. This has been held

a fatal defect in description. Sears v. Murdock, 59 Or. 211, 213, 117 Pac. 305.

[5] Under section 2814 of Hill's Code, which was in force at the time, the warrant for the collection of delinquent taxes should have issued within 10 days after the first Monday in April, 1897, and should have been returnable on the first Monday in July, 1897. The warrant did not issue until July 27, 1897, and the sale did not take place until November 29, 1897. It has been held that the requirements of the statute as to the time of issuing and returning the warrant are matters of substance, and if the statute is not complied with in these respects the tax title must fail. Shimmin v. Inman, 26 Mo. 228; Pinkham v. Morang, 40 Me. 587; Jenkinson v. Auditor General, 104 Mich. 34, 62 N. W. 163.

Under section 2815 of Hill's Code, the warrant, when issued, had the force and effect of an execution. The life of an execution, unless prolonged in some way not involved here, was 60 days. Hill's Code, § 278. This court has held that a stricter compliance with the law is required in tax sales than in sales under execution. Walton v. Moore, 58 Or. 237, 240, 113 Pac. 58, 114 Pac. 105. It is clear that the warrant under which the property was sold was functus officio on the day of sale. 10 R. C. L. 1269.

The petition for rehearing admits that the designation of the half section by the exponent ^{2}, and the quarter section by the exponent ^{4}, appears in the tax roll for 1896 and in the certificate of sale issued in favor of the defendant Watrous. On all of these grounds we are clear that the tax title must fail.

The title of the defendant Bacon is attacked on still other grounds. There are no dollar marks in the tax roll for 1896. The value of the property is listed as 200 and the tax as 300. These figures are not qualified by decimal marks, or separated by lines, as in the judgment docket involved in De Lashmutt v. Sellwood, 10 Or. 319, 324. It has been held by the federal court for Oregon that this is a fatal defect. Tilton v. Oregon Road, 3 Sawy. 22, 24, Fed. Cas. No. 14,055. And the holding of the California court is to the same effect. Hurlbutt v. Butenop, 27 Cal. 50, 57; People v. San Francisco Union, 31 Cal. 132; Emeric v. Alvarado, 90 Cal. 444, 466-467, 27 Pac. 356. These decisions have been somewhat criticized, and it is not necessary in deciding this case to determine whether the principle they announce is the law. The title of the defendant Bacon is doubtful on this latter ground, and clearly bad on the other grounds above noted.

The petition for rehearing strongly emphasizes the circumstances alluded to in the concluding portion of our former opinion. The position of the defendant Bacon is indeed one of hardship, but it is the province of the court to declare the law. Under the law plaintiff is entitled to prevail, and we are obliged to enter a decree as outlined in our former opinion.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(84 Or. 690)

CAMP CARSON MINING & POWER CO., Inc., v. STEPHENSON et al.*

(Supreme Court of Oregon. June 6, 1917.)

1. INJUNCTION ⇨35(2)—SUIT TO RESTRAIN TRESPASS—TITLE OR POSSESSION TO SUPPORT SUIT.

In a suit to enjoin trespass, prior possession of the premises constitutes prima facie evidence and affords sufficient strength of the plaintiff's title to entitle him to relief against a mere trespasser who entered without right.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 77.]

2. WATERS AND WATER COURSES ⇨151—APPROPRIATION—ABANDONMENT.

Under L. O. L. § 5136, declaring that ditches and mining flumes permanently affixed to the soil are real estate, provided that, when the owner shall cease to operate or exercise ownership for a period of five years, or shall remove from the state with the intent to change residence, and shall remain absent one year without using or exercising ownership, he shall be deemed to have lost all interest therein which was, impliedly, amended in respect to the period of limitation by L. O. L. § 6571, providing that the right to appropriate water may be lost by abandonment, and that by failure or neglect to use same for a period of two years such water shall revert to the public and be subject to other appropriation, but the question of abandonment shall be one of fact to be tried and determined as to the questions of fact, where there was no evidence to explain or excuse the delay of a mining corporation for more than two years to use its ditch or flume or water thereby conducted, the corporation had abandoned its appropriation, and its trustee in bankruptcy could convey no right to defendants, who in entering such property were trespassers upon the property of plaintiff, who was in actual possession after appropriation, and further trespasses by defendants will be enjoined.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 155.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit for injunction by the Camp Carson Mining & Power Company, Incorporated, against Miles Stephenson and another. From a decree dismissing the suit, the plaintiff appeals. Decree of lower court reversed, and decree entered for plaintiff.

This is a suit to enjoin trespasses upon real property. The complaint states, in effect, that the plaintiff, Camp Carson Mining & Power Company, is an Oregon corporation, and the owner and entitled to and in the possession of a group of placer mining claims, containing 1,440 acres of unpatented land, in Union county, Or., commonly known as the Camp Carson Mines, of which tract 290 acres are particularly described; that it is the owner of the right to use all the water of the Grande Ronde river, diverted at a point

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⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 3, 1917.

on the northwest quarter of the northwest quarter of section 23 in township 6 south of range 36 east of the Willamette meridian, and conducted in a ditch and flume to a point near the center of section 15, in that township and range, where it is and for a long time has been used in operating mines; that the defendants, M. A. Stephenson and H. W. ReDell, in the fall of 1914 unlawfully tore down a house belonging to the plaintiff and converted the lumber to their own use; that on April 15, 1915, they unlawfully cut the dam, whereby the water was diverted from the river into the ditch and flume referred to, and converted the lumber in the flume to their own use; that they unlawfully cut a ditch across a road owned by the plaintiff, and threaten to continue such trespasses. The answer controverts the material averments of the complaint, and alleges, in effect, that the house referred to stood on their mining ground; that they were the owners of the ditch and flume mentioned, and had the legal right to intermeddle therewith and to remove the lumber therefrom; and that the ditch which interfered with the road was dug on their own mining land, and the excavation was covered with a bridge. The reply put in issue the allegations of new matter in the answer, whereupon the cause was tried, resulting in a decree dismissing the suit, and the plaintiff appeals.

Turner Oliver, of La Grande, for appellant.
J. D. Slater, of La Grande, for respondents.

MOORE, J. (after stating the facts as above). The evidence shows that on October 18, 1907, the Indiana Mining Company, an Oregon corporation, duly appropriated from the Grande Ronde river, at a point in the northwest corner of section 23 in township 6 south of range 36 east of the Willamette meridian, about 600 inches of water, miners' measurement, which was conducted northwesterly by means of a ditch and flume and used in section 9 of that township and range in operating a quartz mill on land known as the Golden Star mine. The Grande Ronde Milling & Power Company, an Oregon corporation, on January 29, 1910, and March 4th of that year, filed amended notices of location of mining claims, showing a selection of 360 acres of land in section 15 and 60 acres in section 10, in the township and range specified, which location seems to conflict with that of the Indiana Mining Company. The latter corporation, on November 1, 1910, executed to Burt German a deed conveying, inter alia:

> "Those certain quartz mining claims known, located, and recorded as the Golden Star, Mayflower, Wallowa, and Leasia, situated on the Grande Ronde river, about one mile above the mouth of Clear creek in what is known as the Camp Carson mining district, in Union county, Or.; * * * also that certain ditch and water right connected therewith, which said ditch taps the Grande Ronde river and diverts water therefrom, on section 9, township 6 south, range 36 east, Willamette meridian, which said ditch and water right is used for power purposes in operating the machinery connected with said mining property."

Burt German and his wife, on November 16, 1910, executed to the Hot Springs Copper Company, an Oregon corporation, a deed conveying to it, inter alia, the property last above described. The latter corporation was on May 22, 1912, duly adjudged to be a bankrupt by consideration of the federal court of Oregon, and W. A. Shoemaker was appointed and duly qualified as trustee for the estate.

August Hug, as sheriff of Union county, Or., on April 29, 1913, by virtue of a decree and order of sale issued in a suit foreclosing miners' liens wherein H. A. Shropshire was plaintiff and the Oregon Mining & Milling Company and the Grande Ronde Mining & Power Company, corporations, were defendants, sold at public auction to that plaintiff the property of the defendants known as the Camp Carson Mines, in sections 4, 5, 9, 10, 15, 16, 21, 22, and 28 in township 6 south of range 36 east of the Willamette meridian.

W. A. Wilson and Frank F. Turner on June 15, 1914, filed a notice of appropriation of 1,000 inches of water, miner's measurement, from Grande Ronde river, to be diverted at the northwest corner of section 23, in that township and range, and conducted by a ditch and flume to a point on Tanner creek near the center of section 15 in such township. The notice contained a clause as follows:

> "And it is the intention of the undersigned to use as far as possible the old Indiana ditch, now abandoned."

H. A. Shropshire on August 12, 1914, executed to H. T. Harvey a deed of all the property so conveyed to him by the sheriff of Union county, Or., particularly describing each tract of land and the water right used in connection therewith. H. T. Harvey and wife, on August 31, 1914, deeded to the Camp Carson Mining & Power Company, the plaintiff herein, all of such property. The plaintiff on September 24, 1914, applied to the state water board of Oregon to appropriate from the Grande Ronde river water to be used on its mining claims and conducted in the ditch and flume constructed by the Indiana Mining Company.

W. A. Wilson and Frank F. Turner on September 30, 1914, executed to the plaintiff a deed transferring all their right to the use of the water of the river which was initiated by the notice given by them June 15th of that year.

W. H. Shoemaker, the trustee in bankruptcy of the Hot Springs Copper Company, pursuant to authority of the referee and in consideration of $50, of which $30 was evidenced by a promissory note, executed to the defendants herein on October 31, 1914, a deed purporting to transfer all the bankrupt's right in and to the ditch and flume constructed by the Indiana Mining Company.

The foregoing comprises a brief statement of the muniments of title of the respective parties which were received in evidence and have been arranged in chronological order. It is maintained by defendants' counsel that the decree rendered in the suit to foreclose the miners' liens and the order of sale issued thereon, whereby the sheriff of Union county, Or., undertook to sell and convey to H. A. Shropshire the mining property described in some of these conveyances, was ineffectual for any purpose, and that, this being so, the plaintiff is not entitled to equitable intervention.

It will be remembered that this is a suit to enjoin alleged trespasses committed upon real property of which the plaintiff was in the undisputed possession, asserting ownership and securing the occupancy thereof by a conveyance of the land, no part of which is claimed by either of the defendants, except 60 acres hereinafter specified. In Ricard v. Williams, 7 Wheat. 59, 107, 5 L. Ed. 398, it was held that the possession of land by a party claiming it as his own in fee was prima facie evidence of his ownership and seisin of the inheritance. In deciding that case Mr. Justice Story says:

"For the law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful the commencement and continuance of which is not proved to be wrongful, and this upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be deemed lawful, and coextensive with the right set up by the party."

[1] In a controversy before a judicial tribunal relating to land prior possession of the premises constitutes prima facie evidence and affords sufficient strength of the plaintiff's title to entitle him to relief against a mere trespasser who entered without right. McEwen v. City of Portland, 1 Or. 300; Oregon Ry. & Nav. Co. v. Hertzberg, 26 Or. 216, 37 Pac. 1019; Browning v. Lewis, 39 Or. 11, 64 Pac. 304; Sommer v. Compton, 52 Or. 173, 96 Pac. 124, 1065; Todd v. Pac. Ry. & Nav. Co., 59 Or. 249, 110 Pac. 391, 117 Pac. 300; Carroll v. McLaren, 60 Or. 233, 118 Pac. 1034; Friendly v. Ruff, 61 Or. 42, 120 Pac. 745; Kingsley v. United Rys. Co., 66 Or. 50, 133 Pac. 785; Parker v. Wolf, 69 Or. 446, 138 Pac. 463.

[2] It is unnecessary to consider the decree in the suit to foreclose the miners' liens, pursuant to which possession by mesne conveyances was given to the plaintiff, and, such being the case, it is entitled to maintain this suit against the defendants, whose answer does not controvert such right of possession, except as to 60 acres of mining land.

The testimony shows that the plaintiff, having obtained a deed of the mining claims, immediately commenced cleaning out a part of the old Indiana ditch, beginning at the point of diversion, and about September 30, 1914, or a month before the defendants secured their deed from the trustee in bankruptcy, conducted by means of such ditch and flume water from the Grande Ronde river to a point near the center of section 15, in the township and range mentioned, where the volume was used in operating machinery employed to save the fine gold. The defendants in April, 1915, relying upon the validity of their deed executed by the trustee in bankruptcy, prevented water from flowing into the ditch and removed from the flume forming a part of the conduit lumber, which they took to their mining claims, consisting of 60 acres, thereby precipitating this suit.

The question to be considered is whether or not the Indiana Mining Company had abandoned its right to the ditch and flume, or its grantee the Hot Springs Copper Company had forfeited its right thereto, so that the latter's trustee in bankruptcy had no title or estate in or to the conduit which he could sell or convey. The testimony discloses that the Indiana Mining Company, pursuant to the notice of October 18, 1907, constructed the ditch and flume referred to from the Grande Ronde river northwesterly to its mines, and used the water thus diverted from that stream in operating a quartz mill. The extraction of gold by such means could not have been very profitable for the work ceased in the year 1908, and was never thereafter resumed. Evidently the Indiana Mining Company, in order to protect its interest in the ditch and water right, caused some work to be done on its property after it quit operating the quartz mill. Thomas Loftus in referring thereto testified that in the year 1909 or 1910 he was employed in behalf of that corporation by William Muir:

"Q. And what particular work were you and Mr. Muir doing? A. We fixed up that Indiana ditch and turned water into it. * * * We were just prospecting to see if we couldn't find some trace of a ledge that had been lost, or something like that. * * * Q. How long did Mr. Muir stay there on the ditch? A. Oh, it took quite a while to clean it out all the way, was something like three weeks, and I guess we used it about a week after we got the water."

This witness, referring to some machinery which he saw, testified:

"It was there in the mill."

Alluding to Mr. Muir and to the Indiana Mining Company, Mr. Loftus stated on oath:

"He told me after the machinery was moved out that he wasn't in charge of it any longer; that they dismissed him."

This witness was unable accurately to state in what year he assisted in performing such work, for on cross-examination he testified in respect thereto:

"It might have been 1911. It was along there."

In speaking of the ditch Mr. Loftus stated upon oath:

"It might have been in use in 1910, but no later than that that I know of."

He further testified that the work which Mr. Muir and he rendered was performed in August and September.

John McIlroy testified that the services so performed were furnished in the year 1910, but that in the next year he worked with Mr. Muir 49 days doing assessment work for the Indiana Mining Company, and that the quartz mill was taken away from the mines in the fall of 1911. The defendant M. A. Stephenson corroborates such testimony in respect to the time of removing the machinery.

When it is remembered that the Indiana Mining Company, on November 1, 1910, sold and conveyed to Burt German all its mining claims, water right, mills, machinery, etc., and thereafter, so far as it can be determined from the evidence before us, had no interest in the property, it would seem that Mr. McIlroy and Mr. Stephenson had unintentionally erred in concluding that the last assessment work had been performed on such mining claims in the year 1911. Mr. McIlroy does not state, however, what month during that year he assisted in doing the assessment work for the Indiana Mining Company. No work whatever appears thereafter to have been done on such mining grounds until the plaintiff's agents in September, 1914, took possession of the ditch and flume, and about the 30th of that month turned into such conduit water, which was carried to a point near the center of section 15, in the township and range mentioned, where it was used for mining purposes. Giving to the testimony of Mr. McIlroy full credit as to the year when he assisted in doing such assessment work, a period of three full years had elapsed before any other labor or service was performed or any money or material was furnished in making improvements upon any of the mining property; and, this being so, had the water right together with the ditch and flume been abandoned when plaintiff's agents took possession thereof in September, 1914? As we understand, the decision of the trial court was founded upon the limitation prescribed by section 5136, L. O. L., which reads:

> "Ditches and mining flumes, permanently affixed to the soil, are hereby declared to be real estate: Provided, that whenever any person, company, or corporation, being the owner of any such ditch, flume, and the water right appurtenant thereto, shall cease to operate or exercise ownership over said ditch, flume, or water right, for a period of five years, and every person, company, or corporation who shall remove from this state with the intent or purpose to change his or its residence, and shall remain absent one year without using or exercising ownership over such ditch, flume, or water right, shall be deemed to have lost all title, claim, and interest therein."

This provision is section 9 of a statute enacted October 14, 1898 (Laws Or. 1898, p. 16), and is entitled "An act relating to mining claims," etc. As thus quoted, the language employed was impliedly amended in respect to the period of limitation by section 20 of a statute approved February 18, 1899 (Laws Or. 1899, p. 172), entitled "An Act to provide for the appropriation of water from the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and for other purposes," etc., which provisions are incorporated in section 6571, L. O. L., and read:

> "The right to appropriate water hereby granted may be lost by abandonment; and if any persons, companies, or corporations constructing a ditch, canal, flume, or pipe line under the provisions of this act shall fail or neglect to use the same for a period of two years at any time, it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority; but the question of abandonment shall be one of fact, to be tried and determined as other questions of fact."

In Pringle Falls Power Co. v. Patterson, 65 Or. 474, 486, 132 Pac. 527, 529, Mr. Justice Bean, adverting to the appropriation of water to a beneficial use and referring to the section of the statute last set forth and to the limitation thus prescribed, says:

> "Such right may be extinguished by any act showing an intent to surrender or abandon the right, after which, if the person having the right ceases its use for the statutory period for abandonment, his interest is lost."

If the clause of section 6571, L. O. L., "But the question of abandonment shall be one of fact, to be tried and determined as other questions of fact," be construed as creating only a disputable presumption, no testimony was given at the trial tending in any manner to explain or excuse the delay of the Indiana Mining Company or its grantee, the Hot Springs Copper Company, for more than two years in using the ditch, flume, or water thereby conducted; and hence the latter corporation had abandoned its appropriation, and its trustee in bankruptcy conveyed no right to the defendants, who were and are trespassers upon the plaintiff's real property.

The evidence shows that a part of the mineral lands described in the complaint, to wit, the south half of the southeast quarter of the southwest quarter, the south half of the southwest quarter of the southeast quarter, and the west half of the southeast quarter of the southeast quarter of section 10, in township 6 south of range 36 east of the Willamette meridian, containing 60 acres, was located by the defendants, and that the house which they tore down and removed the lumber therein to their claims stood upon such disputed tract. No testimony was offered tending to show which party had the superior right to this particular 60 acres of land, so that if the lumber had not been taken by the defendants no injunction would be issued to restrain the removal of such material because of a failure to establish a pre-existing right.

The alleged interference by the defendants with the road was only temporary, and, as disclosed by the testimony, they have built a bridge across the way, the travel along which was interrupted by the excavation of a ditch.

The decree will therefore be reversed, and one entered here enjoining each of the defendants, his agents and servants, from interfering in any manner with the diversion of the waters of the Grande Ronde river at the point stated in the complaint or with the flow of the specified volume in the Indiana ditch or flume to the center of section 15, in the township and range specified, and from trespassing upon the plaintiff's premises, the right to the possession of which is undisputed.

McCAMANT and BEAN, JJ., took no part in the consideration of this case.

(84 Or. 442)

ROETHLER et al. v. CUMMINGS.

(Supreme Court of Oregon. June 6, 1917.)

1. Justices of the Peace ⇨203—Writ of Review—Waiver of Service of Writ.

Where defendant's counsel appeared at hearing in circuit court of writ of review proceedings to set aside justice's judgment, the justice having voluntarily made a full return of the writ by prearrangement between counsel, and filed brief and made argument, defendant's appearance was a general one, and service of the writ was waived in view of L. O. L. § 63, providing that a voluntary appearance shall be equivalent to personal service.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 790, 791.]

2. Appearance ⇨9(1)—Presumption—General or Special.

Where the court has jurisdiction of the subject-matter, defendant's appearance will be presumed to have been general, where the record fails to show that it was special.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42, 46.]

3. Appearance ⇨24(5)—What Constitutes—Statute.

L. O. L. § 63, providing that defendant's voluntary appearance shall be equivalent to personal service of summons, is not limited to appearance by answer, demurrer, or notice specified in section 542, as constituting appearance, since the defendant may submit himself to the court's jurisdiction in other ways; the purpose of the latter section being to define what shall be construed such an appearance as will entitle defendant to be heard as a matter of right and to entitle him to service of papers.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 126, 130–132, 134–136, 139, 140.]

4. Appearance ⇨3—By Attorney—Effect of Unauthorized Appearance.

Where defendant admits right of an attorney to appear for him, and the attorney has been heard in behalf of his client, the latter is not in a favorable position to claim that appearance was unauthorized.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 9–11.]

5. Certiorari ⇨49—Writ of Review—Pleading.

In proceeding for writ of review, defendant's only pleading is a return to the writ.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 129, 130, 137, 147–149.]

6. Justices of the Peace ⇨202(2)—Writ of Review—Sufficiency of Petition.

Petition for writ of review alleging want of service of justice's summons, and no appearance by defendants, *held* sufficient to challenge the jurisdiction of the circuit court to render judgment thereon.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 781–788.]

7. Certiorari ⇨64(1) — Writ of Review—Questions Presented.

A writ of review presents questions of law alone arising on the record of the inferior tribunal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 183, 184.]

8. Certiorari ⇨56(2) — Writ of Review — Contradiction of Record.

The record of the inferior tribunal brought up on writ of review cannot be contradicted on re-examination by the reviewing court, although incorrect.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 144.]

9. Appearance ⇨9(7), 24(5) — Service of Process—Waiver of Objection.

Where attached property was released on defendant's bond as provided by L. O. L. § 310, defendant's application therefor was a general appearance, gave the court personal jurisdiction instead of jurisdiction in rem, and waived irregularities in service of process.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 51, 126, 130–132, 134–136, 139, 140.]

10. Appearance ⇨9(1)—Nature of.

The character of an appearance as general or special does not depend upon the form of the procedure but upon its substance and the relief sought.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42, 46.]

In Banc. Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Proceeding for writ of review by Amos Roethler and another against H. J. Cummings, to set aside judgment of justice court. Writ sustained by circuit court, and defendant appeals. Reversed and writ dismissed.

This is a proceeding for a writ of review to set aside the judgment of the justice's court in an action wherein H. J. Cummings was plaintiff and Amos Roethler and David Lee were defendants. The writ was sustained by the circuit court, and defendant Cummings appeals.

O. B. Mount, of Baker, for appellant. James H. Nichols, of Baker, for respondents.

BEAN, J. [1] The first error assigned for consideration upon this appeal is that there was no service of the writ. It appears, however, that by prearrangement made between counsel for the respective parties the justice of the peace voluntarily made a full return to the writ, and counsel for defendant Cummings appeared at the hearing, filed a written brief, and made an argument in the circuit court. The service of the writ was therefore waived by defendant. Section 63, L. O. L., provides that:

> "From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him."

[2, 3] In a case where the court has jurisdiction of the subject-matter the appearance by the defendant will be presumed to have been general, where the record fails to show that such appearance was special. Godfrey v. Douglas County, 28 Or. 446, 453, 43 Pac. 171. Section 542, L. O. L., is as follows:

> "A defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance, and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property. When the defendant has not appeared, notice of a motion or other proceeding need not be served upon him, unless he be imprisoned for want of bail, or unless directed by the court or judge thereof in pursuance of this Code."

It has been held that the voluntary appearance mentioned in section 63 is not limited nor defined by the terms of this section, as one may appear and submit himself to the jurisdiction of the court without either answering, demurring, or giving the plaintiff a written notice of his appearance; that the purpose of this section is to define what shall be construed such an appearance as will entitle a defendant to be heard as a matter of right, and to have served on him all papers which the law requires to be served. See Belknap v. Charlton, 25 Or. 41, 44, 34 Pac. 758; Kinkade v. Myers, 17 Or. 471, 21 Pac. 557; Multnomah Lumber Co. v. Weston Basket Co., 54 Or. 22, 26, 99 Pac. 1046, 102 Pac. 1.

[4] Where the right of an attorney to appear for a defendant is conceded and the former has been heard in behalf of his client, pursuant to his authority, the latter is not in a favorable position to claim that the appearance was not authorized. He should not be permitted to take advantage of an informality which his adversary has not exacted in the matter of giving written notice of appearance. Carter v. Koshland, 12 Or. 492, 8 Pac. 556.

[5] In a proceeding for a writ of review the only pleading on the part of defendants is a return to the writ. Gaston v. Portland, 48 Or. 82, 85, 84 Pac. 1040. It is not essential that any motion or formal plea be filed by the defendant in order to defend against the writ. In the case at bar defendant Cummings had a full hearing in the circuit court and all the advantage of his "day in court." His appearance was a general one, and he is bound by the determination in the cause. If there was any error in the circuit court so proceeding with the hearing, it was invited by defendant, and he cannot complain.

[6] The second error alleged is that the petition for the writ is insufficient. It alleges inter alia that the complaint and summons in the action in the justice's court were never served upon either of the defendants, and that there was no answer filed nor any appearance on behalf of either of them; also that no application or motion to set aside the judgment was ever prepared or filed, as appears from the docket entries of the justice's court. The petition is sufficient to challenge the jurisdiction of that court to render the judgment therein. It is therefore necessary to examine the return to the writ which discloses the procedure in the justice's court as follows: On August 28, 1916, a complaint was filed, summons issued, an affidavit and undertaking for an attachment were filed, and a writ of attachment issued. On August 30th, Amos Roethler personally appeared, and a bond with two sureties was filed for a release of the sheep under attachment in the action and a notice to the keeper of the property of such release was issued to defendant Roethler. On September 6, 1916, a default judgment for $219.35 was entered which, when corrected, was against the partnership of Amos Roethler and David Lee, and Amos Roethler personally, and an execution was ordered against the defendant "and their bondsmen." The docket of the justice's court also recites the following:

> "Application to file motion to set aside judgment and vacate order of default received from James H. Nichols, attorney for defendants, September 7, 1916.
>
> "Application to file motion to set aside judgment and vacate order of default, denied, September 30, 1916."

Section 2417, L. O. L., directs that:

> "Actions at law in justices' courts shall be commenced and prosecuted to final determination, and judgment enforced therein, in the manner provided in the Code of Civil Procedure for similar actions in courts of record, except as in this act otherwise provided. * * *"

[7, 8] A writ of review presents questions of law alone arising on the record of the inferior tribunal, and such record, though incorrect, cannot be contradicted on re-examination by the reviewing court. Curran v. State, 53 Or. 154, 99 Pac. 420; Raper v. Dunn, 53 Or. 203, 99 Pac. 889; Gue v. City of Eugene, 53 Or. 282, 100 Pac. 254; Evans v. Marvin, 76 Or. 540, 550, 148 Pac. 1119.

[9, 10] Section 310, L. O. L., provides, in effect, that whenever the defendant shall have appeared in the action, he may apply, upon notice to the plaintiff, to the court or judge or clerk where the action is pending, for an order to discharge the attachment upon the execution of the undertaking mentioned in section 311; and if the application is allowed, the property shall be released from the attachment and delivered to the defendant. The undertaking required is to the effect "that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action." Such an instrument was delivered to the justice's court upon an application of the defendants to discharge the attachment in the proceedings in question and obligated the sureties to pay any judgment that might be rendered against the defendants. Based thereon the property of the defendants was

released from the attachment. Such a procedure bound them to enter an appearance as contemplated by section 310, L. O. L., or be proceeded against as in case of personal service. Unlike the undertaking for a redelivery or forthcoming bond provided for in section 305, to be given to the attaching officer, the application to discharge the attachment invokes the judgment of the court upon a matter which presupposes and acknowledges the jurisdiction of such tribunal, or asks for relief which can be granted only after jurisdiction has been acquired. Such an appearance by defendants was a general one, and gave the justice's court jurisdiction of their persons. The character of the appearance does not depend upon the form of the procedure, but upon its substance and the relief sought. Winter v. Union Packing Co., 51 Or. 97, 93 Pac. 930; Spores v. Maude, 81 Or. 11, 17, 158 Pac. 169; Anvil Gold Min. Co. v. Hoxsie, 125 Fed. 724, 728, 60 C. C. A. 492; 4 C. J. p. 1331, § 25, where it is stated:

> "The giving of a bond operating as a discharge or dissolution of an attachment or garnishment operates as an appearance converting the action from one in rem into one in personam."

So here, by appearing and making application to the justice's court for a release of their property then under attachment, the defendants in effect said to the court:

> "Grant our request and we will give security that we will pay any judgment that may be rendered against us in the action pending."

Their pledge to the court was not that the judgment would be paid if the officer could find the defendants and make proper service of the summons upon them. They had already authorized the court to proceed in the matter. There had been an attempted service upon the agent of defendants which was of no force. This irregularity or failure was waived by defendants by the proceedings referred to. The justice's court having jurisdiction of the subject-matter, the action was thereby converted from one in rem into one in personam. The ruling in this state in this respect is in consonance with the general rule. See 4 C. J., supra, and notes; 2 R. C. L., p. 332, § 12. This view renders it unnecessary to consider the effect of the application made by defendants to set aside the judgment in the justice's court. We note, however, that no record appears of any answer to the complaint being tendered by them in that action.

There were informalities in the justice's court which the petition refers to, and which we have examined. We find no fatal defect nor any error in the procedure affecting the substantial rights of those defendants. It is alleged in the petition that the complaint unites several causes of action. Such an irregularity should have been taken advantage of by a demurrer, and is cured by judgment. Sections 68 and 72, L. O. L.; 31 Cyc. 776 et seq.; Davidson v. O. & C. R. R. Co., 11 Or. 136, 1 Pac. 705. From the return to the writ of review we find no substantial error. It follows that the judgment of the lower court must be reversed, and the writ dismissed; and it is so ordered.

(85 Or. 61)

ROGERS v. MALONEY. *

(Supreme Court of Oregon. June 6, 1917.)

1. INDIANS 🔑16(3) — LEASE BY ALLOTTEE — APPROVAL—"CONDITION PRECEDENT."

A provision in a lease by an Indian allottee that it should become binding only after approval by the Indian reservation superintendent, or Secretary of the Interior, is a "condition precedent."

[Ed. Note.—For other cases, see Indians, Cent. Dig. 45.

For other definitions, see Words and Phrases, First and Second Series, Condition Precedent.]

2. CONTRACTS 🔑221(2)—"CONDITION PRECEDENT."

A "condition precedent" is a condition which calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, and before the contract shall take effect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1015, 1016, 1019.]

3. FRAUDS, STATUTE OF 🔑158(2) — PAROL — MODIFICATION.

Ordinarily an agreement within the statute of frauds cannot be varied by parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 374.]

4. FRAUDS, STATUTE OF 🔑119(2) — PAROL — MODIFICATION—ESTOPPEL.

Where a parol modification of a lease has been acted upon by a party to his disadvantage, the other party cannot set up the statute of frauds and stand on the original agreement.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 270.]

5. INDIANS 🔑16(8) — LEASE — APPROVAL — CONDITIONS PRECEDENT—WAIVER.

Where a lease by an Indian allottee provided that it should not become effective until approved, evidence that the lessee advanced the lessor money, furnished supplies, and did some work on the property, all in reliance upon the lease, makes the lessor's waiver of the condition regarding approval, etc., a jury question.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45.]

In Banc. Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge.

Forcible entry and detainer action by Frank Rogers against James W. Maloney. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action of forcible entry and detainer which involves plaintiff's right to the possession of a quarter section of land in the Umatilla Indian reservation, in Umatilla county. Prior to September 30, 1916, the land was in the undisputed possession of the defendant, under a lease from Ellen Darr, the Indian allottee. On June 1, 1916, a new lease was given by Mrs. Darr to the defendant, running from October 1, 1916, to September 30, 1920. This lease contained the following clause:

*Rehearing denied July 10, 1917.

> "It is further understood and agreed by the parties hereto that this lease shall be valid and binding only after approval by the superintendent or other officer in charge of the Umatilla Indian reservation, or by the Secretary of the Interior."

The lease has never been so approved, nor did the lessor at any time make a new agreement in writing which made the lease effective, notwithstanding the condition created by the foregoing covenant. Under date of May 4, 1916, a patent was issued to Mrs. Darr for the property in question, pursuant to the provisions of the act of May 8, 1906 (34 Statutes at Large, 182, c. 2348 [U. S. Comp. St. 1916, §§ 3951, 4203]), and she thereupon became vested with entire control over the property and with the right to convey or lease the same without approval of any official. This patent reached the superintendent of the Umatilla reservation on June 25th, and was delivered to Mrs. Darr on July 3d. The lease under which the defendant claims the property was executed in ignorance of the existence of the patent. Subsequently, and on September 16, 1916, Mrs. Darr executed a lease of this same property to plaintiff for a period of ten years after the expiration of defendant's lease, which was then effective. Plaintiff claims that he has been entitled to the possession of the property at all times subsequent to October 1, 1916, under the operation of this lease. He undertook to take forcible possession of the property on October 17 and 18, 1916, but the defendant withheld possession from him, and he thereupon brought this action. The defendant contends that the condition in the lease above quoted was waived by Mrs. Darr. The case was tried before a jury. A verdict was rendered in favor of the defendant, on which judgment was entered, and plaintiff appeals.

J. H. Raley, of Pendleton (Raley & Raley, of Pendleton, on the brief), for appellant. James A. Fee and Charles H. Carter, both of Pendleton (Fee & Fee and Carter & Smythe, all of Pendleton, on the brief), for respondent.

McCAMANT, J. (after stating the facts as above). [1-4] The clause in defendant's lease providing that it shall be binding only after approval by the superintendent of the Indian reservation, or by the Secretary of the Interior, is a "condition precedent." Wellsville Co. v. Miller, 44 Okl. 493, 145 Pac. 344; Id., 37 Sup. Ct. 362, 243 U. S. 6, 61 L. Ed. 559. A "condition precedent" is a condition which calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect. 8 Cyc. 558. Defendant's lease was therefore ineffective unless the foregoing condition was waived. Johnson v. Warren, 74 Mich. 491, 497, 42 N. W. 74; People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481, 485. The defendant's lease, being for a longer period than one year, is within the statute of frauds. L. O. L. 804, 808. The general rule is that an agreement within the statute of frauds cannot be varied by parol. Neppach v. Oregon Co., 46 Or. 374, 395, 80 Pac. 482; Kingsley v. Kressly, 60 Or. 167, 173, 111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746; Caples v. Morgan, 81 Or. 692, 704, 160 Pac. 1154. If the modification made by parol has been acted upon by the parties, and the position of one of them has been changed for the worse in reliance on the modification, the other party will be denied the right to set up the statute of frauds and stand on the original agreement. Neppach v. Oregon Co., 46 Or. 374, 395, 80 Pac. 482; Kingsley v. Kressly, 60 Or. 167, 173, 111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746. This principle of law is clearly set out by the Supreme Court of California:

> "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. * * *
>
> "We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz. that it applies 'in every transaction where the statute is invoked.' It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U. S. 580, 25 L. Ed. 618, and quoted therefrom in Carpy v. Dowdell, 115 Cal. 687, 47 Pac. 697, as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.'" Seymour v. Oelrichs, 156 Cal. 782, 794, 106 Pac. 88, 94, 134 Am. St. Rep. 154.

To the same effect see Smiley v. Barker, 83 Fed. 684, 687, 28 C. C. A. 9.

[5] The question with which we are concerned in this case is whether Mrs. Darr waived the condition precedent and thereby made the defendant's lease effective. In 29 A. & E. Enc. of L. 1103, it is said:

> "A person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it."

In Bishop on Contracts, § 792, the principle is stated thus:

> "Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward."

Do the facts in the case at bar bring the defendant within the principle announced in the foregoing authorities?

It appears that on June 3, 1916, the defendant indorsed the lessor's note for $200 to the First National Bank of Pendleton. The defendant testifies that he did this solely in reliance on the lease. This note remained unpaid at the time when plaintiff undertook to take forcible possession of the property. It was paid by Mrs. Darr on October 21st. On September 7, 1916, the defendant gave Mrs. Darr $30. The check by which the money was paid contained the words, "Advance on lease," and the defendant testified that he paid this money on account of the rentals which would become due under the lease. On October 21, 1916, Mrs. Darr deposited the sum of $30 to the credit of the defendant with the defendant's bankers. The defendant declined to accept the money. The bank thereupon put it in the form of a certificate of deposit and sent it to Mrs. Darr. The certificate had not been cashed at the time when the case was tried. Some testimony was offered on behalf of the defendant to the effect that at the time when this $30 was paid to Mrs. Darr she said to the defendant that the defendant "need not fear the lease. It was a good one, and if it was not satisfactory she would make it satisfactory." About this same time, on Mrs. Darr's application, the defendant gave her a load of hay and two sacks of barley. The defendant testified that he did this in reliance upon the lease of date June 1st. This lease obligated the defendant to do some fencing on the property. It appears that the defendant hauled three loads of posts for this purpose from Mrs. Darr's cabin, 25 miles distant, using for such purpose two six-mule teams and one two-mule team. It took two days for each team to make the trip.

We think that these facts were sufficient to go to the jury on the question of waiver. It has been twice held by this court that by the acceptance of a premium and the issuance of a policy an insurance company is estopped to set up a condition in the policy under the operation of which the policy was never at any time effective. Allesina v. London Co., 45 Or. 441, 78 Pac. 392; Arthur v. Palatine Co., 35 Or. 27, 31, 57 Pac. 62, 76 Am. St. Rep. 450. Since these cases were decided the Legislature has provided a standard form of fire insurance policy, and the law of waiver announced in these decisions is for that reason no longer applicable to similar states of fact. Oatman v. Bankers' Association, 66 Or. 388, 393-394, 133 Pac. 1183, 134 Pac. 1033. The principle announced in the Allesina and Arthur Cases is still regarded as sound wherever applicable. We think that the principle is controlling in this case, and that the lower court did not err in denying plaintiff's motion for a directed verdict.

The instructions requested by plaintiff did not recognize the principles of the law of waiver hereinafter set forth. While they correctly stated the general principle that a contract within the statute of frauds cannot be varied by parol, they would have misled the jury and were properly refused. The evidence admitted over the objection of plaintiff tended to prove the waiver which the defendant was entitled to prove, and the court did not error in admitting the testimony.

The judgment is affirmed.

(84 Or. 702)

STUART v. CAMP CARSON MINING & POWER CO. et al.*

(Supreme Court of Oregon. June 6, 1917.)

1. EQUITY 🔑271 — AMENDMENT OF COMPLAINT—AFTER SUBMISSION OF CASE.

It was proper to allow plaintiff to amend complaint in equity suit to foreclose a mining lien after submission of cause, by attaching copy of notice of lien; the cause being considered upon its merits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 558-560.]

2. EQUITY 🔑265—AMENDMENT OF COMPLAINT—LIBERAL RULE.

The rule of amendment should be applied more liberally in equity suits than in actions at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 541-543.]

3. MINES AND MINERALS 🔑114—LIENS—RECORDING OF CLAIM—COMPLIANCE WITH STATUTE.

Where a claim of lien for work on mines was recorded in same book as mechanics' liens, and directly and indirectly indexed, this was suficient compliance with L. O. L. § 7446, providing that the county clerk shall record claims in a book kept for that purpose and indexed as deeds and other conveyances are required to be indexed, and section 7421, providing substantially the same requirements for mechanics' liens.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236.]

4. EVIDENCE 🔑376(1)—BOOKS OF ACCOUNT—NECESSITY OF AUTHENTICATION.

Books of account offered in evidence must be authenticated by the oath of some one who made or directed the entry with authority, or, if this is not possible, by proof of handwriting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1632.]

5. EVIDENCE 🔑376(1)—BOOKS OF ACCOUNT—AUTHENTICATION.

Witness' testimony *held* insufficient to authenticate time book offered in evidence in mining lien foreclosure.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1628.],

6. MINES AND MINERALS 🔑112(2)—LIENS—CONSTRUCTION OF STATUTE—"LABOR."

"Labor" mentioned in miners' lien statute means actual physical labor unequivocally performed on the property.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 234.

For other definitions, see Words and Phrases, First and Second Series, Labor.]

7. INTEREST 🔑1—ALLOWANCE—NECESSITY OF STATUTORY PROVISIONS.

Interest as such cannot be allowed on foreclosure of lien for work on mines, since the statute does not provide for it.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 1.]

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 3, 1917.

8. MINES AND MINERALS 🔑117—LIENS—ALLOWANCE OF ATTORNEY FEES — COMBINED CLAIMS.

An attorney fee was properly allowed in a lump sum, although founded on several claims for mining liens assigned to plaintiff.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239.]

9. MINES AND MINERALS 🔑115—LIENS—EFFECT OF FAILURE OF LIEN.

Failure of a mining lien in foreclosure proceedings does not necessarily involve validity of defendant's indebtedness to claimants.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 237.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit to foreclose mining lien by E. J. Stuart against the Camp Carson Mining & Power Company and others. Decree allowing part of plaintiff's claim, and defendant named and defendant Turner Oliver appeal. Modified.

The Camp Carson Mining & Power Company is a corporation said to have conducted a general mining and sawmill business on about 1,440 acres of unpatented placer mining ground in Union county, owning and possessing certain buildings thereon, together with ditches, flumes, and machinery used in operating the mines. For himself the plaintiff alleges, in substance, that he performed work and labor as a mechanic for the company upon the mining property at the agreed and contract price of $4 a day covering a certain number of days in April, May, and June, 1915, totaling $208.80, against which he allows a credit of $67.45 by supplies and cash, leaving a balance of $141.35. Then follows in the original complaint this allegation:

> "That plaintiff performed the last of said labor and ceased to work on said property on the said 8th day of June, 1915, and thereafter, to wit, on the 22d day of July, 1915, duly prepared and verified his notice and claim of lien for the whole of said sum of $141.35, upon the whole of said described property, in the form and manner provided by law, and thereafter, to wit, on the 23d day of July, 1915, duly filed said notice and claim of lien in the office of and with the county clerk of Union county, state of Oregon, who then and there duly recorded said notice and claim of lien in Book D, Record of Mechanics' Liens of said county, at page 428 thereof, where said claim and notice of lien ever since has remained, and still remains, so of record, that said record was and is a record kept by said clerk for the purpose of recording therein such liens, and that said clerk then and there duly indexed the record of said notice and claim of lien in the manner and as deeds and other conveyances are required by law to be indexed."

He avers that no part of the above-mentioned balance has been paid by the company or any one else, and that the whole thereof remains due, together with interest thereon at the rate of 6 per cent. per annum from June 8, 1915, until paid, that he paid $4.20 for filing and recording the lien, and that the sum of $50 is a reasonable amount to be allowed him as attorney's fee for foreclosing the lien. He also declares as assignee on 21 other lien claims for labor performed and materials furnished to the defendant mining company by other parties. The form of pleading is the same in each count. A general demurrer by the company and Turner Oliver, also defendant, against the original complaint, having been overruled, they filed an answer denying all the allegations of each count except the corporate character of the company and its ownership of the property mentioned. After all the testimony was in and the case had been finally submitted, the court permitted the plaintiff to file an amended complaint. The change consisted in adding to the quoted allegation above set out in each count these words:

> "A true copy of said notice of lien is hereunto attached, marked 'Exhibit A,' and made a part of this amended complaint."

The answering defendants move to strike out the new pleading on the ground:

> That it "does not purport to add any name or to strike out the name of any party from the pleading, and does not purport to correct any mistake in the name of any party or a mistake in any other respect, and does not purport to make the pleading conform to any facts proved, but substantially changes the cause of action after the case has been tried and submitted, * * * and the court has no jurisdiction to consider such pretended amended complaint nor any discretion to permit the same to be filed, and no motion was attached to said pretended amended complaint asking permission of the court to file the same."

This motion was overruled, and afterwards the defendants who appeared answered the amended complaint as before, traversing it and setting up the title of Turner Oliver to the property by virtue of a foreclosure of mortgage upon the property. The reply put in issue all the new matter. The court made findings of fact and conclusions of law followed by a decree which rejected the claims assigned to plaintiff by Rudolph F. Peterson, S. S. Somerville, Gordon Land, F. F. Turner (on his second claim), Mrs. J. R. Somerville, and Hans Olsen. It allowed a portion of the plaintiff's claim and sustained the demands of Axel Wengren, O. J. Burnett, Charles Denny, J. A. Shira, F. F. Turner (on his first claim), Cecil Merrill, L. W. Becker, Christy Nelson, Earl Taylor, R. E. Lindley, Elmer Somerville, J. R. Somerville, W. W. Dill, La Grande Grocery Company, and Sawyer-Clark Company, some in full and others only in part. The mining company and Turner Oliver alone appealed, there being no complaint of the decree on the part of the plaintiff or the other defendants, the latter of whom defaulted.

Turner Oliver, of La Grande, for appellants. F. S. Ivanhoe, of La Grande, for respondent.

BURNETT, J. (after stating the facts as above). [1] The defendants assign as error the overruling of their demurrer to the original complaint and the action of the court in permitting the plaintiff to amend after the cause was submitted. Conceding that the original complaint was demurrable because it stated mere conclusions of law about the making and filing of the notice of lien, yet we may set it down as a defective statement of a cause of suit which might be aided by amendment. The matter in hand is not like Golden Rod Milling Co. v. Connell, 164 Pac. 588, where we held that even in an equity suit the plaintiff had no right to amend his complaint after the cause had been submitted when the change involved the averment of a new and distinct cause of suit. The only attack made upon the new pleading of the plaintiff here was a motion to strike out the same, which being denied, the defendants answered it. It does not appear that the evidence required to support the second complaint was any different from that offered to prove the first. Neither is it apparent from the record that the defendants were deprived of any defense upon the merits or that they were denied any opportunity to take additional proof. For aught that the abstract discloses, the cause was considered upon its real merits under the issues formed by the amended pleadings.

[2] This being an equity suit heard and determined by the court, we think the rule of amendment should be applied more liberally than in the strict procedure of an action at law, and that, unless the defendant mining company can show that its rights on the real merits were abused, the error is negligible.

[3] The defendants also complain that the court erred in admitting in testimony each of the 22 claims of liens, copies of which are attached to the amended complaint, for three reasons: (a) That each of the notices fails to show that the contract of employment was made by any one having authority to bind the defendant company; (b) that each of the notices was recorded in the record of mechanics' liens, and not in the record of miners' liens; (c) it affirmatively appeared in the testimony that neither of said notices of lien was indexed as "deeds and other conveyances are required by law to be indexed"; and (d) that it was clearly shown by the evidence that none of said claims for labor contained a true statement of claimant's demand after deducting all just credits and offsets, and each of them contained charges for matters and things other than for labor upon or in development of the mining property described in the complaint. It is required by section 7446, L. O. L., that:

> "The county clerk shall record said claim in a book kept for that purpose, which shall be indexed as deeds and other conveyances are required by law to be indexed. * * *"

In respect to what are commonly known as mechanics' liens, section 7421, L. O. L., provides that:

> "The county clerk shall record said claim in a book kept for that purpose, which record shall be indexed as deeds and other conveyances are required by law to be indexed."

Substantially the same language is used in providing for the filing of liens for laborers' wages due from any concern put in the hands of a receiver. L. O. L. § 7441. The testimony in this case coming from the county clerk is to the effect that the book in which the claims in question were recorded was one kept for that purpose, although in the same volume mechanics' liens were likewise recorded, and that in the book there was a direct and indirect index citing the page whereon each claim was inscribed. This point is ruled against the contention of the defendants in Slover v. Bailey, 49 Or. 426, 90 Pac. 665. Mr. Chief Justice Bean there says:

> "Where the book in which a particular instrument shall be recorded is prescribed by law, it must be recorded in such book; but, where no particular book is designated, recording it in any book kept by the officer for that purpose is sufficient," citing authorities.

Other precedents are these: Ivey v. Dawley, 50 Fla. 537, 39 South. 498, 7 Ann. Cas. 354; Farabee v. McKerrihan, 172 Pa. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Switzer v. Knapps, 10 Iowa, 72, 74 Am. Dec. 375; Mee v. Benedict, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. Rep. 543.

In Osborn v. Logus, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997, it was held, in substance, that it was unnecessary for the notice of lien in terms to connect the claimant with the owner in a contract relation. It was deemed sufficient to follow the words of the statute, but that case does not dispense with the necessity of establishing such a relation as a matter of pleading and proof at the trial either directly or through an agent who may be such by virtue of the enactment or by appointment of the owner. See, also, Smith v. Wilcox, 44 Or. 323, 74 Pac. 708, 75 Pac. 710, Litherland v. Cohn Real Est. Co., 54 Or. 71, 100 Pac. 1, 102 Pac. 303; Equitable Savings & Loan Association v. Hewitt, 55 Or. 329, 106 Pac. 447. In form we consider the notices sufficient and the manner of indexing them complies substantially with the directions of the statute in that a means is provided whereby any one searching the book for a record of liens is directed by the index to the page where he may obtain the information desired. The other objection requires an examination of the evidence.

The principal question in the matter of testimony hinges upon a time book introduced in evidence by the plaintiff. This was produced by a witness, W. W. Dill, and he alone gives to it whatever of authenticity it may have. Called upon to testify about the length of time the men were at work and when they quit, he said:

> "Well, I would have to go to the data because I can't remember it. Q. Now, this data you

speak of, state what that is. A. Why, I have the time book of the company. Q. State whether you had anything to do with the keeping of the time book. A. I did. I kept the time book from the 29th day, I think it was the 29th day, of June, until the 29th day of July, when I left there. I kept the time book most of that time. Q. From that data do you know when these different men quit work there? A. I do. Q. Now, Mr. Dill, will you refer to such data as you have and made yourself, that you can testify from, as to when Mr. Stuart was there, and when he quit work. A. Well, I will have to go to the time book."

Then an objection was sustained by the court to the effect that the testimony was incompetent except during the time that the book was kept by Mr. Dill himself, the rest being hearsay. The question being repeated, the witness said:

> "Mr. Stuart left there before I got the time book to keep time with. * * * Q. You have knowledge of his working there, have you? A. Oh, yes; I know he was there and worked. Q. Have you any record in your possession that the company kept, of his time? A. I have as far as the time book is concerned."

Objection was then made to the time book being admitted for the reason that it is incompetent, irrelevant and immaterial, and it is not shown that he kept it nor that it is correct, but the court admitted it in evidence.

[4] Books of account and the like are received in testimony as ancillary to the declarations on oath of a witness who either knows the fact in general and is compelled to refer to the books for detail, or where, having at one time knowledge of the fact, he is compelled to refresh his memory from them, or, failing in that, he is able to state that he knew the fact when he made the entry and that it was entered correctly. Such writings are not evidence per se. They do not prove themselves, and are not original evidence in the full sense of the word. Books therefore must be authenticated by the oath of some one who made or directed the entry with authority, if living and capable as a witness, otherwise by proof of his handwriting posting the entries. 10 R. C. L. 1174; Harmon v. Decker, 41 Or. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748; Mason v. Melhase, 64 Or. 522, 130 Pac. 1134; Lintner v. Wiles, 70 Or. 350, 141 Pac. 871.

[5] Dill only testifies that he kept the book most of the time from June 29th to the same date in the successive month. He does not even say that he kept it correctly or that he had knowledge of the facts upon which his entries were founded. He does not point out even what entries he made for that part of the time that he kept the book. The greater portion of the claims for which liens are sought to be enforced were founded upon labor alleged to have been performed before he ever had custody of the book. It is true that he says that a few days before he appeared in the circuit court as a witness he received the book indirectly from the secretary of the company in Seattle; but there is an utter absence of any sworn testimony authenticating it before he received it into his custody. Under all the authorities it must be laid out of the case as evidence.

The following claims assigned to the plaintiff depend entirely upon the translation which Dill made of the time book in question to show how long the original claimants worked at the mine, viz.: Axel Wengren, Charles Denny, F. F. Turner (first claim), Cecil Merrill, L. W. Becker, Earl Taylor, Elmer Somerville, J. R. Somerville, and J. A. Shira. The latter was a witness in behalf of the plaintiff, but made no statement respecting the length of time he himself labored, if at all, or the character of his services.

[6] As to the claim of F. F. Turner, his own testimony shows that he was away from the mine much of the time, that while there he was a mere caretaker, and that his claim consists largely of hotel bills in La Grande and Union while he was thus absent. None of his evidence brings him within the rule laid down in Durkheimer .v. Copperopolis Copper Co., 55 Or. 37, 104 Pac. 895, holding that the labor mentioned in the statute for miners' liens means actual physical labor unequivocally performed upon the property.

The support of the following claims does not depend upon the time book, for the claimants themselves appeared in person as witnesses and testified respecting their services in kind and quantity as follows: E. J. Stuart, $141.35; O. J. Burnett, $130.50; Christy Nelson, $62.72; R. E. Lindley, $234.21; W. W. Dill, $563.40; La Grande Grocery Company, $172.13; Sawyer-Clark Company, $44.58. No assignment of error is made in regard to the finding of fact that these two latter claims, being for groceries and other supplies furnished for use at the mine, were true as stated in the complaint.

[7] The demand for interest must be denied on the authority of Sargent v. Am. Bank & Trust Co., 80 Or. 16, 154 Pac. 759, 156 Pac. 431. The claims last above mentioned will therefore be allowed, and a decree entered foreclosing the same at those amounts, including the sum of $4.20 for each one as a fee for filing and recording the same.

[8] The attorney fee will be fixed at $250. This is properly allowed in a lump sum, although founded on several claims. Bishop v. Henry, 165 Pac. 237, decided May 29, 1917. The other claims must be dismissed for failure of proof.

[9] We remember, however, that this is a foreclosure proceeding, and that failure of the lien does not necessarily involve the actual validity of the indebtedness of the defendant company to the claimants who have fallen short in the testimony. As to them, therefore, the decree will be that this suit is dismissed without prejudice to the right of their assignee to recover from the de-

fendant company by action at law or otherwise, as he properly may be advised.

BEAN, J., took no part in the consideration of this case.

(84 Or. 399)

STODDARD LUMBER CO. v. OREGON-WASHINGTON R. & NAV. CO.

(Supreme Court of Oregon. May 29, 1917.)

1. CARRIERS 🔑86—CARRIAGE OF GOODS—DELIVERY—DUTY OF CARRIER.

At common law, when it became impossible for a common carrier to deliver shipments in accordance with the contract of carriage, it was its duty to exercise ordinary care and diligence for the protection of the property of the owner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316–322.]

2. CARRIERS 🔑89 — CARRIAGE OF GOODS—FAILURE TO DELIVER GOODS TO CONSIGNOR.

Where a common carrier is unable to deliver the goods shipped to the consignee, it is its duty to exercise due diligence to notify the consignor within a reasonable time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 324–330.]

3. CARRIERS 🔑94(3) — CARRIAGE OF GOODS—FAILURE TO DELIVER—NOTICE.

Where a common carrier is unable to deliver the goods shipped to the consignee, the burden is upon it to show a state of facts relieving it from its duty to notify the consignor within a reasonable time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 378–385.]

4. CARRIERS 🔑86—CARRIAGE OF GOODS—NOTICE OF FAILURE TO DELIVER.

Where goods are consigned by a shipper to its own order, with directions to notify a person named, upon failure of the carrier to deliver the goods it is not sufficient that it notify such person, but it must notify the consignor, if the bill of lading shows that he is the owner of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316–322.]

5. CARRIERS 🔑175 — CARRIAGE OF GOODS—CONNECTING CARRIERS—NOTICE OF NONDELIVERY.

Where a carrier is unable to deliver the goods, which have been shipped through connecting carriers, the Carmack Amendment treats such carriers as if they were controlled by a single corporation, and the initial carrier is not relieved of its duty to notify the consignor because the terminal carrier did not know his residence; such carrier being chargeable with the knowledge of the initial carrier thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 764, 765.]

6. CARRIERS 🔑86—CARRIAGE OF GOODS—NOTICE OF NONDELIVERY.

Where goods are shipped to the consignor's order, with directions to notify the purchaser of the goods, the carrier cannot extend credit to such person, but must give notice of nondelivery not later than the day following that on which the goods were offered to the purchaser.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316–322.]

7. CARRIERS 🔑177(3)—CARRIAGE OF GOODS—NOTICE OF NONDELIVERY—CARMACK AMENDMENT.

Under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. 1916, § 8604a]), providing that any common carrier, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss caused by it, or by any common carrier to which such property may be delivered, or over whose lines such property may pass, the initial carrier is liable for the failure of the terminal carrier to properly notify the consignor of failure to deliver goods shipped.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 779–789.]

8. APPEAL AND ERROR 🔑1050(1)—REVIEW—HARMLESS ERROR.

In an action against an initial carrier for damages because of the terminal carrier's failure to give notice of nondelivery of the goods shipped, admission of evidence of the custom of railway companies to give notice when the shipment cannot be delivered, if error, was harmless, where such evidence only tended to charge defendant with its legal duty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

9. CARRIERS 🔑89 — CARRIAGE OF GOODS—NONDELIVERY OF GOODS.

Where goods are shipped to the consignor's order with directions to notify purchaser thereof, the carrier will not be relieved of its duty to exercise due diligence in caring for goods because of the fact that the consignee is derelict in his duty to receive the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 324–330.]

10. CARRIERS 🔑86—CARRIAGE OF GOODS—NOTICE OF NONDELIVERY—AGENCY.

Where goods are shipped to the consignor's order, and the bills of lading are sent to a bank at destination, such bank is the consignor's agent for the purpose of presenting the draft only, and not for the purpose of receiving notice that the goods cannot be delivered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316–322.]

11. CARRIERS 🔑94(1)—CARRIAGE OF GOODS—NOTICE OF CLAIM.

In an action against a common carrier for damages, due to failure to notify consignor of nondelivery of goods, failure to present a formal bill as a claim for damages within the time limited in the contract was not fatal, where defendant was notified in writing that the consignor had a claim against them and insisted upon its payment; such notification having been given in due time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367–369.]

12. APPEAL AND ERROR 🔑1068(4)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action against a common carrier for failure to notify the consignor of nondelivery, an instruction that the measure of damages was the difference between the market value of the goods when notice should have been given and their value when it was actually given, if erroneous, was harmless, where the verdict gave the proper amount of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Trial, Cent. Dig. §§ 484, 558.]

13. CARRIERS 🔑89 — CARRIAGE OF GOODS—NOTICE OF NONDELIVERY.

In an action against a common carrier for damages due to failure to give the consignor notice of nondelivery, where the bill of lading provided that the purchaser should have 10 days within which to pay for the goods, the duty did not devolve upon the carrier to give notice of nondelivery until after the expiration of such 10 days.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 324–330.]

14. Appeal and Error 🔑169—Presentation of Grounds—Failure to Raise Question.

Questions not raised in the lower court will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034.]

In Banc. Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Action by the Stoddard Lumber Company against the Oregon-Washington Railroad & Navigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought to recover damages sustained by plaintiff's assignors, Stoddard Lumber Company, a Utah corporation, and Shockley & McMurren Lumber Company, by reason of the alleged failure of a connecting carrier of the defendant to notify plaintiff's assignors of the nondelivery of shipments of box shooks, carried over the lines of defendant and its connecting carriers, in the year 1912. The complaint sets up five causes of action. It appears that plaintiff's assignors had received orders from Pierce & Maternes, of Hotchkiss, Colo., for the shooks in question, and that pursuant to these orders the first carload was shipped from Baker, Or., July 29, 1912, reaching Hotchkiss on August 12th. The car mentioned in the second count of the complaint left Baker August 2d, and reached Hotchkiss August 14th; that mentioned in the third count left Baker August 17th, arriving at Hotchkiss September 7th; that in the fourth count left Baker August 19th, and reached Hotchkiss September 4th; that mentioned in the fifth count, being the car sold by Shockley & McMurren Lumber Company, left Baker August 10th, and reached Hotchkiss August 23d. The shipments were in each case consigned to the order of the shipper, and a direction was written on the bill of lading requiring the carrier to notify Pierce & Maternes. The bill of lading in each case was handed by plaintiff's assignors to the Baker Loan & Trust Company, by which course it was transmitted to the Bank of North Fork at Hotchkiss, Colo. A draft for the purchase price accompanied the bill of lading, and the instructions given to the Hotchkiss bank required it to insist upon payment of the draft before surrender of the bill of lading.

The goods in each case reached Hotchkiss over the lines of the Denver & Rio Grande Railroad Company. It is conceded that this carrier notified Pierce & Maternes, and that Pierce & Maternes failed to take up the bills of lading. The defendant alleges in its answer that these purchasers promised from day to day that they would secure the bills of lading and accept delivery of the goods, but no evidence was offered in support of this allegation. No notice was given plaintiff's assignors of the nondelivery of the goods, and on September 26th they applied to the defendant at Baker to send a tracer after the shipments. On the following day, September 27th, they were notified that the box shooks were still undelivered at Hotchkiss. The shooks were suitable for the making of peach boxes and for no other purpose. At the time when they reached Hotchkiss, the evidence satisfactorily shows an active market for peach boxes, justifying the conclusion that, if plaintiff's assignors had been promptly notified, they could have disposed of the goods. About September 15th the peach crop in that part of Colorado was destroyed by frost, and thereafter the box shooks were unsalable. By the time plaintiff's assignors were notified of the nondelivery of the goods, considerable charges had accumulated against them for freight and demurrage. Plaintiff's assignors refused to pay these charges. The railroad company thereupon stored the goods in the vicinity and sold them during the following season, accounting to plaintiff's assignors for the net proceeds, which were received under a stipulation that plaintiff should not be prejudiced thereby in this litigation.

Plaintiff claims the right to charge the defendant with the dereliction of its connecting carrier, under the Carmack Amendment to the Interstate Commerce Law. The jury found for plaintiff in the invoice value of the shipments, less the sums which had been paid plaintiff's assignors on the sale of the box shooks in 1913. The defendant appeals.

William D. Riter, of Salt Lake City, Utah (James H. Nichols, of Baker, on the brief), for appellant. John L. Rand, of Baker, for respondent.

McCAMANT, J. (after stating the facts as above). Plaintiff's right of action in this case is based wholly on its contention that, where goods cannot be delivered by a terminal carrier in accordance with the contract of transportation, the duty devolves on such carrier to notify the owner of the goods, whether he be consignor or consignee. This principle is challenged by counsel for defendant. The liability of an initial carrier under the Carmack Amendment is only that imposed by the common law on its connecting carrier. Adams Express Co. v. Croninger, 226 U. S. 491, 511, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. Judson on Interstate Commerce (2d Ed.) § 46. The common law was evolved before the days of mail and telegraphs. We cannot, therefore, expect to find in the common law anything more than a statement in general terms of the duties devolving on a common carrier when it becomes impossible for the carrier to deliver shipments in accordance with the contract of carriage.

[1] The common-law principle is that in

such case the carrier is charged with the duty of ordinary care and diligence for the protection of the property of the owner. 4 Elliott on Railroads (2d Ed.) § 1463; 2 Hutchinson on Carriers (3d Ed.) § 714. What, then, is the duty which ordinary care and diligence, as applied to the conditions under which we live, impose upon a terminal carrier when it is unable to deliver a shipment at the point of destination? The shipments so carried by interstate carriers are of great variety; some of them are perishable, many of them fluctuate in value, many of them are valuable only in limited territories and for short seasons, and their marketing often requires special skill and instruction. It is not to be expected that the terminal agents of the carrier will be advised in all cases of the value of the shipments, or of the proper method of caring for them and protecting their owners from loss. The Interstate Commerce Commission, in the case of Kehoe v. Nashville Co., 14 Interst. Com. Com'n, 555, 556, said:

> "It is in the interest of the public that the consignor should be promptly notified when the shipment is not delivered."

We think the interests of the carrier are subserved by a rule which requires notice to the consignor within a reasonable time after the refusal or failure of the consignee to accept delivery. A rule which requires such prompt notification will be of value in releasing the rolling stock of the carrier and making it available for future business. Ordinarily, a post card notification would be sufficient.

[2] There is a conflict of authority on the question as noted by this court in Normile v. Oregon Co., 41 Or. 177, 182, 69 Pac. 928. We think the weight of authority sustains the principle that in such case the carrier must exercise due diligence to notify within a reasonable time. 5 Thompson on Negligence, § 6622; 12 A. & E. Enc. of L. (2d Ed.) 557; Nashville Co. v. Dreyfuss Co., 150 Ky. 333, 150 S. W. 321; American Co. v. McGhee, 96 Ga. 27, 21 S. E. 383; Alabama Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18; Michigan Co. v. Harville, 136 Ill. App. 243, 253; Carrizzo v. New York Co., 66 Misc. Rep. 243, 123 N. Y. Supp. 173; Fine v. Barrett, 81 Misc. Rep. 234, 142 N. Y. Supp. 533; Sauer v. Lehigh Valley Co., 150 N. Y. Supp. 977. This court is partially committed to the doctrine of these authorities. McGregor v. Oregon Co., 50 Or. 527, 536–537, 93 Pac. 465, 14 L. R. A. (N. S.) 668. As applied to interstate shipments, the question is one of federal law, and the federal Supreme Court is the final arbiter. Its decisions trend in the direction of the above rule. The Thames, 14 Wall. 98, 107, 20 L. Ed. 804; North Penn. Co. v. Commercial Bank, 123 U. S. 727, 734, 8 Sup. Ct. 266, 31 L. Ed. 287.

[3] Circumstances will doubtless arise from time to time which will relieve the carrier from this duty, as, for example, when the owner of the goods has no place of abode. Butler v. East Tennessee Co., 8 Lea (Tenn.) 32, 34. The burden of showing such a state of facts devolves on the carrier. The authorities cited by the defendant state no consistent rule. Some of them hold that the duty of carriers is a variable duty, dependent upon the circumstances. Steamboat Keystone v. Moies, 28 Mo. 243, 246; Manhattan Co. v. Chicago Co., 9 App. Div. 172, 41 N. Y. Supp. 83, 85; Kremer v. Southern Express Co., 6 Cold. (Tenn.) 356. Some of the authorities relied on by defendant involve no question of notice. Fisk v. Newton, 1 Denio (N. Y.) 45, 43 Am. Dec. 649; Ginnochio v. Missouri Co., 153 Mo. App. 598, 134 S. W. 1028. Others of the authorities cited sustain defendant's contentions. Hudson v. Baxendale, 2 Hurlstone & N. 575; Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96. These cases are out of harmony with the weight of American authority, and, in our judgment, are not sustained by sound reasoning.

The lower court charged the jury in the case at bar that the terminal carrier was chargeable with the duty of due diligence in the protection of the property of plaintiff's assignors, and that, if the jury found that reasonable care of the property required notice to plaintiff's assignors, then the jury should find for plaintiff on this issue. We think the charge of the court was more favorable to the defendant than was warranted by the law.

[4] The defendant contends that the above principle is inapplicable to this case, because the goods were consigned by the shipper to its own order, with directions to notify Pierce & Maternes; that by this method of shipment the shipper made Pierce & Maternes its agents for the purpose of receiving notice; and that, when the terminal carrier gave notice to Pierce & Maternes, it fulfilled its duty in the premises. This contention of the defendant is supported by the case of Hardin v. Chicago Co., 134 Mo. App. 681, 114 S. W. 1117, 1118. On this issue plaintiff relies largely on the case of Nashville Co. v. Dreyfuss Co., 150 Ky. 333, 150 S. W. 321. The facts in this case are closely akin to those in the case at bar. Plaintiff in the Kentucky case shipped goods from Paducah, Ky., to De Soto, Ga., consigned to itself, with instructions to notify R. E. Howe. Howe was notified by the terminal carrier and refused to take the goods. The carrier neglected to notify plaintiff, and while the goods were held in the carrier's warehouse they were destroyed by fire. The Kentucky court said:

> "When the goods reached De Soto, Ga., and R. E. Howe, on being notified of their arrival, refused to accept them, it was incumbent upon the carrier to notify Dreyfuss-Weil Company of this fact, for, if they had been notified that their goods were there, they might have taken steps to protect themselves. The bill of lading showed that the goods were the property of Dreyfuss-Weil Company. The goods were consigned to their order. While there is some conflict in the decisions on the subject, the better

rule is that, where the consignee refuses to accept the goods, the carrier must notify the consignor of this fact if the bill of lading is sufficient to show that he is the owner of the goods. This rule has the approval of the United States Supreme Court and the Supreme Court of Georgia. See Amer. Sugar Refining Co. v. McGehee, 96 Ga. 27, 21 S. E. 383; Hutchinson on Carriers (3d Ed.) § 721. When Howe refused to accept the goods, the carrier held them subject to the shipper's order, and notice to the shipper was essential to his protection. We therefore conclude that the Seaboard Air Line, having failed to notify Dreyfuss-Weil Company of the refusal of Howe to accept the goods, was liable to the shipper for the subsequent destruction of the goods while lying in its warehouse."

We think the case last cited correctly states the law. It appears from the books that goods are frequently shipped consigned to the order of the shipper, with instructions to notify some one for whom the goods are intended. North Penn. Co. v. Commercial Bank, 123 U. S. 727, 736, 8 Sup. Ct. 266, 31 L. Ed. 287; 4 Elliott on Railroads, 1427, 1530; 4 R. C. L. p. 842. The purpose of shipping in this manner is plain; it is the intention of the shipper in every such case to exact payment of the purchase price of the goods on delivery. In the case at bar plaintiff proved without objection from the defendant a general custom to ship in this manner, when the shipper is unwilling to extend credit to the purchaser by whom the goods are ordered. The answer shows affirmatively that the purpose and effect of shipping in this manner were understood by the defendant.

[5] The defendant contends that it should be relieved of the duty to notify in the case at bar, because there was no evidence tending to show that the terminal carrier knew the residence of the consignor. The effect of the Carmack Amendment is to treat a line of connecting carriers as if they were owned and controlled by a single corporation. The terminal carrier is chargeable with the knowledge of the initial carrier, and it appears from the record in this case that plaintiff's assignors had many dealings with the defendant and the defendant must have been apprised of their place of business. We think, furthermore, that no carrier can be held to have fulfilled its duty of due diligence in the matter of notification, when it has made no effort to notify the consignor at the place where the shipment originates.

[6] There is no evidence of a refusal on the part of Pierce & Maternes to receive the goods in question, but the pleadings admit their failure so to do. The defendant contends that this circumstance differentiates the case at bar from the ordinary case, and that the terminal carrier was justified in assuming from day to day that Pierce & Maternes would take the box shooks, thus rendering notification unnecessary. We do not think that the duty of notification arises as a matter of law immediately on the tender of the goods to the purchasers, unless the purchasers refuse to accept them. On the other hand, the carrier is unauthorized to extend any appreciable time by way of credit to the purchasers. The fact that the goods are consigned to the order of the shipper is evidence that the shipper is unwilling to extend credit to the purchaser. The principles of the law of agency forbid the carrier to extend to the purchaser a credit which the shipper was unwilling to grant. We think the duty of the carrier to notify is analogous to the duty arising under the law merchant on the dishonor of negotiable paper, and that therefore the notification should not be deferred beyond the day following that on which the goods are offered to the purchaser.

[7] Plaintiff finds no fault with anything done by the defendant, basing its right of recovery wholly on the liability of the defendant under the Carmack Amendment to answer for the fault of the Denver & Rio Grande Railroad Company, the terminal carrier. The defendant contends that the Carmack Amendment is inapplicable to such a complaint as that made in the case at bar. The amendment in question, in so far as it is material to the present case, is as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass." 34 Stat. p. 595.

The defendant cites Norfolk Co. v. Stuart's Co., 109 Va. 184, 63 S. E. 415-417; Hogan v. Union Pacific Co., 91 Kan. 783, 139 Pac. 397. These authorities seem to sustain the defendant's contention, but the construction of this statute is a federal question, and the United States Supreme Court has construed it. New York Co. v. Peninsula Exchange, 240 U. S. 34, 37, 36 Sup. Ct. 230, 231 (60 L. Ed. 511, L. R. A. 1917A, 193). This was an action for damages arising from delay in the transportation of merchandise. It was contended that the initial carrier was not liable, inasmuch as no injury had been done to the goods, and the case therefore fell without the operation of the amendment. The court said:

> "We need not review at length the considerations which led to the adoption of this amendment. These were stated in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 199-203 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7]. It was there pointed out that, along with singleness of rate and continuity of carriage in through shipments, there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only 'for loss, damage or delay' occurring on its own line. This 'burdensome situation' was 'the matter which Congress undertook to regulate.' * * * The rule, said the court in defining the purpose of the Carmack Amendment, 'is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility.' * * * It is now in-

> sisted that Congress failed to accomplish this paramount object; that while unity of responsibility was secured, if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable dispatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words 'any loss, damage, or injury to such property' caused by the initial carrier or by any connecting carrier are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural, in view of the general purpose of the statute, to take the words 'to the property' as limiting the word 'damage' as well as the word 'injury,' and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable dispatch is none the less an integral part of the normal undertaking of the carrier. And we can gather no intent to unify only a portion of the carrier's responsibility."

The initial carrier was held liable for the damage sustained. For further authoritative construction of this legislation see Georgia Co. v. Blish Milling Co., 241 U. S. 190, 194, 36 Sup. Ct. 541, 60 L. Ed. 948, and Cleveland Co. v. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453. Under the construction which has been placed by the federal Supreme Court on the Carmack Amendment, we are clear that the defendant is chargeable with the neglect of the Denver & Rio Grande Railroad Company to notify plaintiff's assignors.

[8] The defendant contends that there was error in admitting evidence of the custom of railway companies to give notice when a shipment cannot be delivered. The evidence objected to tended only to charge the defendant with the duty devolving upon it under the law, and its admission was therefore harmless error, if error at all.

[9] The defendant strenuously contends that it was the duty of plaintiff's assignors to be present at Hotchkiss to receive the goods. Many of the authorities announce the doctrine that the duty of the consignee to receive and that of the carrier to deliver are correlative duties, equally binding on the parties. An examination of these authorities discloses the fact that the doctrine so announced is incidental to the determination of the question of when the liability of the carrier as an insurer terminates. It is held that the consignee cannot extend the period in which the carrier is an insurer by failure to take the goods when the carrier is ready to deliver them. 2 Hutchinson on Carriers (3d Ed.) § 723. It does not follow that the failure of the consignee to take the goods works a forfeiture, or relieves the carrier of its duty to exercise due diligence in caring for them.

[10] It is next contended that the bank at Hotchkiss was the agent of plaintiff's assignors, and that therefore the knowledge of the bank was the knowledge of plaintiff's assignors. Inasmuch as this bank knew that the drafts drawn on Pierce & Maternes were not taken up and the bills of lading were not surrendered, it is argued that plaintiff is chargeable with this knowledge. It is alleged in the complaint that plaintiff's assignors sent the respective drafts, with bills of lading attached, to the Hotchkiss bank, with proper instructions. These allegations are admitted by the answer. We think that the pleadings admit that the Hotchkiss bank was the agent of plaintiff's assignors. 3 R. C. L. pp. 610, 622, 624; 1 Mechem on Agency (2d Ed.) §§ 332, 333, 337; 31 Cyc. 1597; Bank v. Triplett, 1 Pet. 25, 7 L. Ed. 37; Wilson v. Smith, 3 How. 763, 769–770, 11 L. Ed. 820.

> "It is a familiar and well-settled rule that, as to third parties, notice to an agent while acting within the scope of his authority is notice to the principal. But it is equally as well settled that such notice, in order to bind the principal, must relate to the business or transaction in reference to which the agent is authorized to act for and on behalf of his principal, and to matters over which his authority extends. Story on Agency, § 118; Mechem on Agency, § 718. If it relates to a matter over which the agent has no authority, and concerning which he is not authorized to act for his principal, although he may be an agent for other purposes, it will not affect the principal or be binding on him." Pennoyer v. Willis, 26 Or. 8, 36 Pac. 569, 46 Am. St. Rep. 594.

The authority of the Hotchkiss bank extended only to the collection in each case of the draft and the surrender of the bill of lading. It had no physical control over the goods or authority to deliver them. There is no evidence that it had any knowledge as to the whereabouts of the freight, and, if it had, such knowledge cannot be imputed to plaintiff's assignors, because it would be without the scope of the agency. The goods should not have been delivered by the terminal carrier without surrender of the bill of lading, but our attention has been directed by the authorities cited in the briefs of these parties to a number of cases where goods have been delivered by the carrier without demanding the bill of lading. See, for example, Georgia Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. It may be that the knowledge imputable to plaintiff's assignors that the drafts were unpaid and the bills of lading unsurrendered was enough to create suspicion in their minds that the goods had not been delivered, but we think the doctrine of constructive notice is inapplicable to this case. The defendant's connecting carrier neglected to notify the shippers. It cannot excuse its neglect by showing that they could have secured the information in question by inquiry from some one else. If the shipper has actual knowledge of the nondelivery of the shipment the carrier will be absolved from liability. 2 Hutchinson on Carriers (3d Ed.) § 721; Manhattan Co. v. Chicago Co., 9 App. Div. 172, 41 N. Y. Supp. 83, 85; Wien v. New York Co., 166 App. Div. 766, 152 N.

Y. Supp. 154. This is as far as the authorities go.

[11] The defendant asked a directed verdict as to the third count in the complaint, on the ground that no claim had been presented with reference to the shipment covered by this count until April 22, 1913. The bill of lading in question provided that:

> "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

It is true that no formal bill stating in dollars the damages of plaintiff's assignors was presented to the defendant until April 22, 1913; but under dates of December 19 and December 22, 1912, the defendant was notified in writing that plaintiff's assignors had such a claim and insisted upon its payment. These letters were specific as to the shipment in question, and gave defendant the preliminary information necessary to a proper investigation of the facts. These letters were a sufficient assertion of the claim, within the construction placed upon the clause in question by the federal Supreme Court. Georgia Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 545, 60 L. Ed. 948.

[12] The defendant challenges the correctness of the instruction given by the lower court on the measure of damages:

> "If you find for plaintiff, the measure of damages for you to determine from the evidence should be the difference between the market value of the goods at Hotchkiss, Colo., at the time the owner should have been notified of their arrival and nondelivery, if due care had been taken, and the market value the goods had at same place at or about the time the shipper did receive such notice and was offered opportunity to receive the goods. You will ascertain the value, the market value of the goods at Hotchkiss, Colo., at the time when the plaintiff's predecessors should have had notice of the nondelivery, and ascertain the value of the goods when the shippers were actually informed that the goods had been received and not delivered, and the difference in those values would be the measure of damages, if you find defendant was negligent under the instructions heretofore given and that the plaintiff is entitled to damages, and from the amount you thus arrive at, if you find for the plaintiff, you will deduct the amount it is admitted was paid to the plaintiff's predecessors, and state that balance in your verdict."

It is contended that this instruction is error, because there was no evidence in the record as to the market value of the box shooks at the time when notice was given plaintiff's assignors. The record sufficiently shows the market value of the shooks at the time when they were shipped, but it appears affirmatively that there was no market for them subsequent to September 15, 1912. The case of Hardin v. Chicago Co., 134 Mo. App. 681, 114 S. W. 1117, 1118, sustains the defendant's contention that it is error to instruct the jury to measure damages by the market value when there is no evidence of market value. A careful reading of the foregoing instruction given by the lower court indicates that the court corrected himself as to the point in question, and that the jury must have understood that the measure of damages would be the difference between the market value of the goods when plaintiff's predecessors should have had notice and their value when notice was actually given. There was but little evidence in the record tending to show what was the value of the goods when notice was given. One of plaintiff's witnesses testified that they had some value, but the only testimony tending to fix this value in dollars is the amount which was secured for the box shooks when sold under the direction of the Denver & Rio Grande Railroad Company in 1913. It is apparent from the verdict that the jury gave credit for this amount, and we think, therefore, that the error, if any, in the instruction of the court, was harmless, within the rule announced in Lemler v. Bord, 80 Or. 224, 228-230, 156 Pac. 427, 1034.

[13] There remains a single question. It is alleged in the answer:

> "That it was the shipper's intention that Pierce & Maternes should have at least 10 days to take up the bill of lading after the arrival of the car, for it notified both Pierce & Maternes and the bank that a discount of 2 per cent. would be allowed if the draft were paid within 10 days."

As to the first, second, and fourth counts in the complaint, the testimony sustains this allegation. It clearly appears that the three cars of shooks referred to in these counts were sold on a contract under which Pierce & Maternes were allowed 10 days in which to make payment, and were given a cash discount of 2 per cent, if they paid within that time. As to the fifth count, while the allegation is identical, the proof is that the purchasers were allowed 60 days' time within which to make payment. The defendant is, of course, limited to its allegations, and cannot avail itself of proof unsupported by its pleading. The record, therefore, would seem to show that Pierce & Maternes were allowed 10 days within which to pay the drafts and take up the bills of lading for the cars reaching Hotchkiss August 12th, 14th, and 23d and September 4th. The terminal carrier was not chargeable with neglect in failing to notify the shipper until after the expiration of the 10 days in question. As to the cars reaching Hotchkiss August 12th, 14th, and 23d, it was competent for the jury to find that a notice given the shipper at the expiration of 10 days from the arrival of the cars would have averted the loss; but such a conclusion cannot have been reached by the jury with reference to the car which reached Hotchkiss on September 4th. The evidence is that the market broke in the middle of September; it would have taken at least two days for a notice by mail to reach plaintiff's assignors.

[14] We think it clear therefore, that defendant was entitled to prevail as to the

cause of action set up in the fourth count of the complaint. If the defendant had moved for a directed verdict as to this count, its motion would have been well taken. No such motion was made, nor was the question otherwise raised in the circuit court. This court is exercising appellate jurisdiction; its province is to review questions raised in the lower court; unless questions are raised there, they are not reviewable here. United States Co. v. Marquam, 41 Or. 391, 405, 69 Pac. 37, 41; State v. Anderson, 10 Or. 448; State v. Abrams, 11 Or. 169, 8 Pac. 327.

On the whole case the record fails to show reversible error, and the judgment is affirmed.

(84 Or. 557)

MORGAN v. JOHNS.

(Supreme Court of Oregon. May 22, 1917. Rehearing Denied June 19, 1917.)

1. **Appeal and Error 🔑189(3)—Record—Matters to be Shown—Exceptions to Ruling.**

Though L. O. L. § 172, provides that no exception need be taken or allowed upon any decision or matter of law when the same is entered in the journal or made wholly on matters in writing and on file in court, where defendant's bill of exceptions did not disclose any objection by him to the ruling denying his motion for judgment of nonsuit, such ruling could not be assigned as a reason for reversal, since the ruling was not made wholly upon written data before the circuit court; the bill of exceptions must not only show what the ruling was, but also that the party appealing objected to the decision when it was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1152½, 1153.]

2. **Corporations 🔑123(15)—Stock—Pledge or Sale—Jury Case.**

In an action for conversion of corporate stock, the question whether the deposit of the stock with defendant was a pledge or sale *held* for the jury.

3. **Corporations 🔑123(15) — Stock — Conversion by Pledgee—Damage.**

In an action for conversion of corporate stock by the pledgee, though the stock was not known in the market, and so was without market value, plaintiff could recover the actual value of the stock.

4. **Corporations 🔑123(15)—Stock—Pledge—Conversion—Instruction.**

In an action for conversion of corporate stock, an instruction that a pledge is a transfer of personalty, as security for a debt or other obligation, which the pledgee has a right to repledge without the pledgor's consent, but that the new transaction would not change the character of the chattels as being hypothecated for debt, was proper as an expanded statement of the doctrine once a pledge always a pledge until its status has been changed by the foreclosure or further contract.

5. **Pledges 🔑1—Continuance as Such.**

A pledge is always a pledge until its status has been changed by foreclosure or further contract of the parties.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 1, 4, 5.]

6. **Corporations 🔑123(14) — Stock — Conversion by Pledgee.**

If corporate stock was pledged to defendant only to secure a debt, he had no authority to sell the stock outright, and if he did so there was a conversion rendering him liable to the pledgor for the reasonable value of the stock, not exceeding the sum mentioned in the complaint.

7. **Corporations 🔑123(12)—Conversion of Pledged Stock—Refusal of Tender.**

If corporate stock was pledged as security with defendant, and plaintiff, the pledgor, tendered or offered to pay the debt, being at the time able, ready, and willing to make the payment, defendant's lien on the stock was discharged, and his refusal to return the stock was a conversion rendering him liable to plaintiff for the reasonable value of the property, not exceeding the amount stated in the complaint.

8. **Corporations 🔑123(15)—Stock—Conversion by Pledgee—Damages—Mitigation—Pleading.**

If defendant, charged with conversion of plaintiff's corporate stock, had wholly made way with the stock, the only method by which he could put in as a defense plaintiff's indebtedness to him, to secure which the stock was pledged, was to plead it in mitigation of damages.

9. **Trial 🔑252(20)—Instruction—Applicability to Evidence.**

In an action for conversion of corporate stock, an instruction that the jury, if they found for plaintiff, should give verdict for damages for a sum equal to the reasonable market value of the stock, was erroneous, where there was no evidence as to the reasonable market value of the stock, which had never been known on the market.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610.]

10. **Corporations 🔑123(15) — Stock — Pledge—Conversion—Value.**

In an action for conversion by pledgee of corporate stock which had never been known on the market, the court improperly limited the jury to a consideration of the reasonable market value of the assets of the corporation in arriving at a just valuation of the stock; since not only the value of the company's assets, but also the amount of its indebtedness, must be considered.

11. **Appeal and Error 🔑1129—Determination—Ascertaining Damages.**

On appeal in an action for conversion of corporate stock which had never been on the market, wherein the court improperly limited the jury to a consideration of the reasonable market value of the company's assets in arriving at a just valuation of the stock, the Supreme Court will not support verdict for plaintiff by attempting to ascertain the correctness of the verdict by computation of figures shown in the testimony as the amount of the company's indebtedness and the valuation of its assets.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4441, 4442.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by Thomas Morgan against James Johns. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

This action is one in the usual form charging the defendant with the conversion of 15 shares of stock in the Union County Farm Company, a corporation, of the value of $9,812.50, the property of the plaintiff, to his damage in that sum. The answer denies the whole complaint, except as otherwise stated, and then in substance avers that the plaintiff, being the owner of the stock mentioned, sold the same to a brother of the defendant, taking from the vendee an option to repurchase it on a certain date at a stipulated price, and that this transaction constitutes the conversion described as a cause of action. Substantially the reply controverts the defendant's pleading so far as inconsistent with the complaint, and in addition thereto declares:

> "That plaintiff at no time bargained and sold said certificate of stock to John G. Johns, and has never at any time seen said John G. Johns, and did not know of said John G. Johns until about the 20th day of March, 1914; that no lien as claimed by said John G. Johns or by defendant has ever been foreclosed, and on the 22d day of March, 1915, plaintiff in writing offered to pay defendant and said John G. Johns the sum of $1,440, which is the sum of $1,382.73, with interest thereon from the said 10th day of December, 1913, until the date of said offer of payment; that the defendant thereupon refused to return the said certificate of stock upon demand by this plaintiff, and still refuses so to do."

The outcome of a jury trial was a judgment for the plaintiff, from which the defendant appeals.

Thos. H. Crawford, of La Grande (Crawford & Eakin, of La Grande, on the brief), for appellant. George T. Cochran and Colon R. Eberhard, both of La Grande, for respondent.

BURNETT, J. (after stating the facts as above). [1] At the close of the plaintiff's case the defendant moved for a judgment of nonsuit which was denied, and this is assigned as error. On the other hand, the plaintiff points out that the bill of exceptions does not disclose any objection by the defendant to this ruling, and hence that it cannot be assigned as a reason for reversal, maintaining that it is not error alone, but a mistake to which an exception has been regularly taken that will avail the appellant in this court. The defendant seeks to avoid this argument by reference to the statute which says:

> "No exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court." L. O. L. § 172.

The defendant urges that the written bill of exceptions fulfills this rule of procedure so that the decision is indeed made upon matters in writing and on file in the court. We cannot concur in this view, because the ruling was not made wholly upon written data then before the circuit court. When it was made, the determination of the application for nonsuit depended mainly upon the oral testimony which the judge had heard, and, although that has been reduced to writing by the official stenographer since then, and appears in certified form attached to the bill of exceptions, yet it does not alter the situation as it existed before the circuit court when the motion was denied. The recitals of the bill of exceptions relate to matters already past when that document was framed. It narrates that the defendant objected, or, in other words demurred to, the sufficiency of the plaintiff's testimony, but it does not appear therefrom that any objection was made to the ruling of the court on the motion for a nonsuit. This much to settle the question of practice suggested by the discussion to which allusion has been made. In brief, the bill of exceptions must not only show what the ruling was, but also that the party appealing objected to the decision at the time it was made.

[2] On the merits, however, the determination of the motion for a nonsuit was correct; for we find in the report of the testimony sent up for the purpose of explaining the matter that there was enough to take to the jury the question of whether the deposit of the stock with the defendant was a pledge or a sale. The statement of the defendant that he had taken the shares as collateral, as related by the witness Holmes, and his other admission to the same witness that the stock had been pledged to him for the loan, are sufficient in themselves to support the ruling on the motion. This being true, it eliminates from our consideration the error assigned on the refusal of the court to direct a verdict for the defendant at the close of all the testimony.

[3] From the evidence it appears that Morgan was the owner of an undivided third of a tract of agricultural land in Union county, the remainder of which was the property of the wife of the defendant, for whom the latter was acting. This realty was heavily incumbered. The plaintiff had farmed the same during the crop year of 1913, and when settlement of their affairs was made at the end of the season he lacked $1,282.73 of having money enough to pay his share of the expenses and what was due at the time upon the incumbrances. It seems that the defendant arranged to advance that money for him. In connection with the transaction, they formed the corporation mentioned in the complaint, and one-third of the capital stock, 15 shares, was issued to the plaintiff. His contention is that he pledged the same to the defendant to be used in raising money to pay his balance of the indebtedness; while the latter maintains that the plaintiff sold the stock absolutely to the person named in the answer as vendee. As all this was done concurrently with the formation of the company, naturally there could be no market value of the stock, for there had been no sale for the same. In that connection the defendant requested the court to charge the jury thus:

> "I further instruct you that there is no evidence in this case upon the question of the market value of this stock, or as to whether or not it had a market value, and that, if you find for the plaintiff in this case, you can only find for nominal damages—that is, one cent, or one dollar, or some nominal sum."

It was no error to refuse this instruction, because it excluded from the consideration of the jury the actual reasonable value of the stock, although it was not known in the market, and hence could not have what is called market value.

[4, 5] The defendant takes exception to a charge of the court to the effect that a pledge is a transfer of personal property as a security for a debt or other obligation which the pledgee has a right to repledge without the pledgor's consent, but that this new transaction would not change the character of the chattels as being hypothecated for debt. The principle is that once a pledge always a pledge until the status of the same has been changed by foreclosure or further contract of the parties. As between the litigants the instruction was an amplified statement of this doctrine, and is not subject to criticism on that ground.

[6] The same precept applies to the further charge of which the defendant complains and which states, in substance, that if the stock was pledged to the defendant only to secure the money with which to repay himself, he would have no authority to sell the same outright, and if he did it would constitute a conversion calling for a verdict for the plaintiff for the reasonable value of the pledge, not exceeding the sum mentioned in the complaint.

There is assigned as error also the instruction of the court to the purport that, if the shares were pledged as a security, and the plaintiff had tendered or offered to pay the debt, being at the time able, ready, and willing to make the payment, the lien of the defendant would be discharged, and his refusal to return the pledge would be a conversion thereof on account of which the jury should find for the plaintiff for the reasonable value of the property, not exceeding the amount stated in the complaint.

[7] The conduct of the defendant as described in that instruction does, indeed, constitute a conversion, because it is the exercise of an unjustifiable control over the plaintiff's property in derogation of his title to the same. The plaint of the defendant is that the court left out of consideration the amount of the debt for which the shares were pledged. The defendant, however, is in no position to complain of this, for, as stated by Mr. Chief Justice Bean in Springer v. Jenkins, 47 Or. 502, 84 Pac. 479:

> "The defendants cannot invoke this rule, because they have not pleaded the amount due on the mortgage in mitigation of damages."

[8] If, indeed, the defendant has wholly made way with the plaintiff's property and is charged with the same in trover, the only method by which he can put in the indebtedness as a defense is to plead it in mitigation of damages, as taught by Springer v. Jenkins, supra. In this case there is no attempt to state any such defense. The complaint, on the one hand, charges direct conversion. The answer denies this. No mention whatever of indebtedness is made in the defendant's pleading. For want of this he has no standing to complain of this instruction; for it conforms to the pleadings made by the parties. A good reason for requiring the indebtedness charged against a chattel to be averred in mitigation of damages for conversion of the property is that otherwise the jury might actually deduct the amount of the debt, and there would be nothing in the record which the debtor could plead in bar of a subsequent action to recover it. On the other hand, if the claim is litigated in the trover action by way of reducing the damages, the resulting judgment will protect the debtor from further exactions.

The remaining error assigned by the defendant is predicated upon this direction given to the jury at the trial:

> "I further instruct you that, if you find for the plaintiff, you should give your verdict for damages in a sum equal to the reasonable market value of said shares of stock at the time of conversion, if any, or within a reasonable time thereafter, and if you find that the said shares of stock have no market value, then, in ascertaining their reasonable value, you will consider the reasonable market value of the assets of said corporation, if any, in arriving at the reasonable value of said stock, if any, and your verdict should be for such amount as you may find said stock to be reasonably worth."

[9] This charge was materially erroneous In the first place there was no evidence about the reasonable market value of the stock, for, as we have seen, it had never been known on the market. It then remains to consider the rule by which to determine its reasonable value.

[10] The court was wrong in limiting the jury as it did to a consideration of the reasonable market value of the assets of the corporation in arriving at the just valuation of the stock. We have almost daily instances of corporate concerns which have considerable assets, but whose indebtedness far exceeds the worth of the property. It is common sense to say that the value of the stock of the institution would be nil under those circumstances. In such an investigation we must necessarily consider not only the value of the assets, but also the amount of the indebtedness. The instruction was also bad in this respect.

[11] The plaintiff, however, charges that the correctness of the verdict can be ascertained by computation of figures shown in the testimony as to the amount of indebtedness and the value of the land. We cannot, however, determine from the record whether the jury took the opinion of the witnesses as to the worth of the realty at the highest price mentioned in the evidence and then deducted the amount of the indebtedness, or whether they merely discounted the estimate of the witnesses without reference to the debt. If they did the latter, it would strictly conform to the instruction of the court as to the formula for ascertaining the reasonable value of the shares. There is a diversity of views of the testimony either one of which might be

assumed as a starting point in calculating the proper value of the stock to be assessed in a verdict, and it is possible that a result might be figured from some of these bases substantially equivalent to the one set down by the jury. It is impossible, however, for us safely to enter upon such a quest on the record before us. The trial by jury is the proper method for solution of the question.

For this mistake in directing the jury in effect to consider only the assets of the concern in assessing the value of its stock, the judgment must be reversed, and the cause remanded for further proceedings.

(84 Or. 431)

STATE LAND BOARD v. LEE et al.

(Supreme Court of Oregon. June 6, 1917.)

1. LIMITATION OF ACTIONS 🔑11(1)—STATUTES—APPLICABILITY TO STATE.

It is a rule that the government is not included in a general statute of limitations unless expressly or by necessary implication included.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35, 36.]

2. LIMITATION OF ACTIONS 🔑11(1)—STATUTES—APPLICABILITY TO STATE.

Although the state is not named, if it appears that it is the real party in interest, a limitation statute which does not expressly or by necessary implication include the state will not be permitted to operate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35, 36.]

3. CONSTITUTIONAL LAW 🔑121(1)—OBLIGATION OF CONTRACTS—STATE.

The state, like a private person, is prohibited from impairing the obligation of a contract entered into by it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 285, 304–311.]

4. CONSTITUTIONAL LAW 🔑171—IMPAIRING OBLIGATION OF CONTRACTS—STATUTE OF LIMITATION.

A pure statute of limitation affects the remedy, and not the debt, and does not impair any obligation imposed by contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 506.]

5. LIMITATION OF ACTIONS 🔑11(1)—STATUTES—APPLICABILITY TO STATE—"REAL PARTY IN INTEREST."

Under Laws 1913, pp. 580, 581, §§ 1, 2, 3, providing that no mortgage upon real estate heretofore or hereafter given shall be a lien or incumbrance after the expiration of ten years, etc., does not apply to the foreclosure by state land board of a mortgage given to secure moneys borrowed from the irreducible school fund; the state being the real party in interest, although proceedings are in the name of the state land board.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35, 36.

For other definitions, see Words and Phrases, First and Second Series, Real Party in Interest.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit by the State Land Board against Mary E. Osborn Lee, formerly Mary E. Osborn, and others. From a decree awarding partial relief, the State Land Board appeals. Decree modified.

This is a suit to foreclose a note and mortgage given to the state land board by George H. Osborn and his wife, Mary E. Osborn. The note is dated October 13, 1902, recites that it is for $700 "borrowed on account of the irreducible school fund," bears interest at the rate of 6 per cent. per annum, and by its express terms became due "one year after date." The note was secured by a mortgage on 480 acres of land in sections 10 and 15 of a designated township. No payments were made on the principal of the note. Payments were made on the interest from time to time, the last payment being on March 19, 1913, when the interest was satisfied to August 5, 1912.

The land in section 15 was conveyed to E. T. Kaster and C. J. Forsstrom on August 7, 1911, while the remainder of the mortgaged premises was acquired by Ed Lee and F. M. Lee prior to December 20, 1915, when this suit was commenced by the state land board. The present owners of the land purchased with notice of the mortgage; and hence, if the mortgage is enforceable against the mortgagors, it is likewise enforceable against the subsequent purchasers of the land.

The defendants resisted the attempt to foreclose the mortgage by interposing chapter 304, Laws 1913. The statute reads thus:

"Section 1. No mortgage upon real estate now, heretofore or hereafter given, shall be a lien or incumbrance, or of any effect or validity for any purpose whatsoever, after the expiration of 10 years from the date of the maturity of the obligation or indebtedness secured or evidenced by such mortgage, or from the date to which the payment thereof has been extended by agreement of record. If the date of the maturity of such obligation or indebtedness is not disclosed by the mortgage itself, then the date of the execution of such mortgage shall be deemed the date of the maturity of the obligation or indebtedness secured or evidenced by such mortgage.

"Sec. 2. After 10 years have elapsed from the date of the maturity of any mortgage upon real estate, as herein provided in section 1 of this act, such mortgage shall conclusively be presumed to be paid, satisfied and discharged, and no action, suit or other proceeding shall be maintainable for the foreclosure of the same.

"Sec. 3. This act shall not take effect until the first day of January, A. D. 1914; after which date the same shall be in full force."

The trial court awarded a judgment against the makers of the note for the principal and interest due, an attorney's fee and costs and disbursements; but a decree foreclosing the mortgage was refused on the theory that the lien of the mortgage was released on January 1, 1914. The state land board appealed.

Colon R. Eberhard, of La Grande, and Geo. M. Brown, Atty. Gen. (I. H. Van Winkle, Asst. Atty. Gen., on the brief), for appellant. C. H. Finn, of La Grande (R. J. Kitchen, of La Grande, on the brief), for respondents.

HARRIS, J. (after stating the facts as above). It is conceded that the payment of interest tolled the statute of limitations as against the note, and that therefore the plaintiff is entitled to a judgment for whatever sums may be due on the note. Section 25, L. O. L. The defendants contend, however, that chapter 304, Laws 1913, bars the plaintiff from enforcing the lien of the mortgage. The parties did not make any agreement of record extending the time for payment; more than 10 years expired from the date of the maturity of the note before the commencement of this suit; and hence the mortgage cannot be foreclosed if chapter 304, Laws 1913, is available to the defendants, although the note which the mortgage was designed to secure can be reduced to a money judgment. The question for final decision is whether the statute applies to mortgages given to secure moneys borrowed from the irreducible school fund. The defendants argue that chapter 304 is a statute of limitation, and that the language of the enactment is sufficiently comprehensive to embrace mortgages given to the state land board to secure money borrowed from the irreducible school fund. The plaintiff contends that this is in reality a suit by the state, and that, if chapter 304 is assumed to be a statute of limitation, it does not embrace the state for the reason that the state is neither expressly mentioned nor included by necessary implication.

[1] Stated in broad terms, it is a rule of universal recognition that the government is not included in a general statute of limitation, unless it is expressly or by necessary implication included. This rule is said to be founded upon the legal fiction expressed in the maxim, "Nullum tempus occurrit regi." However, it is not necessary to predicate this salutary precept upon any fiction, since sound reason for the rule is found in the fact that as a matter of public policy it is necessary to preserve public rights, revenues, and property from injury and loss by the negligence of public officers. State v. Warner Valley Stock Co., 56 Or. 283, 308, 106 Pac. 780, 108 Pac. 861; United States v. Nashville, C. & St. L. Ry. Co., 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81; Catlett v. People, 151 Ill. 16, 37 N. E. 855; State v. Fleming, 19 Mo. 607; Blazier v. Johnson, 11 Neb. 404, 9 N. W. 543; Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534; State v. School Dist., 34 Kan. 237, 8 Pac. 208; Buswell on Limitations and Adverse Possession, § 97; 19 A. & E. Ency. Law (2d Ed.) 188; 25 Cyc. 1006; 36 Cyc. 1171.

For the purpose of avoiding the common-law rule exempting the government from limitation statutes, the Legislature passed a statute in 1862 which provided that:

> "The limitations prescribed in this title, shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties." Section 13, Deady's Code.

This statute remained unchanged until 1903, when the Legislature amended it so as to read thus:

> "The limitation prescribed in this title shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit. * * *" Section 13, L. O. L.

Another section provided that a suit shall only be commenced within the time limited to commence an action. Section 391, L. O. L. From 1862 until 1903 statutes of limitation applied to the state and private persons alike, for the sole reason that the state, acting through its Legislature, had expressly consented that limitation statutes be made applicable to the commonwealth.

That the Legislature recognized the existence of the common-law rule exempting the government is conclusively proved by the passage of the act of 1862, because, if the common-law rule did not at that time prevail in this jurisdiction, then the enactment of the statute of 1862, so far as made applicable to the state, was a work of supererogation; and, moreover, whenever the courts applied the bar of a statute of limitation to an action prosecuted by the state, they did so only because the limitation statute had been made applicable to the state by an express legislative enactment. State v. Baker, 24 Or. 141, 146, 33 Pac. 530; Schneider v. Hutchinson, 35 Or. 253, 254, 57 Pac. 324, 76 Am. St. Rep. 474; Wallowa County v. Wade, 43 Or. 253, 260, 72 Pac. 793; State v. Portland Gen. Elec. Co., 52 Or. 502, 515, 95 Pac. 722, 98 Pac. 160; State v. Warner Val. Stock Co., 56 Or. 283, 308, 106 Pac. 780, 108 Pac. 861; Silverton v. Brown, 63 Or. 418, 424, 128 Pac. 45; State v. Warner Val. Stock Co., 68 Or. 466, 471, 137 Pac. 746. Had the Legislature merely repealed section 13 in 1903, the repeal would of itself have restored the common-law rule which had been suspended since 1862 (State ex rel. Goodman v. Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7); but the common-law rule was first revived and then reinforced by an express legislative declaration that statutes of limitation shall not apply to actions brought in the name of the state or for its benefit. The history of section 13 is helpful in ascertaining the legislative purpose concerning the statute of 1913. In 1862 the state adopted the policy of submitting itself to limitation statutes, but subsequently in 1903 the state concluded that a different policy would be better and accordingly declared that it would no longer submit itself to limitation statutes. Chapter 304, Laws 1913, does not contain any words expressly including the state nor does its language necessarily imply that the state is included. When viewed in the light of the previously declared policy of the state, the act of 1913 is devoid of any suggestion whatever, and much less a necessary implication that the state is included.

[2] Although the state is not a party plaintiff eo nomine, nevertheless, if the suit is in truth for the benefit of the state, and if it is the real party in interest, a statute of limitation will not operate against the commonwealth. Even in the absence of a statute like section 13, L. O. L., the court will examine the record, and if it appears that the state is the real party in interest, a limitation statute which does not expressly or by necessary implication include the government will not be permitted to operate against the state. State Bank v. Brown, 1 Scam. (2 Ill.) 106; Commonwealth v. Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 33; Glover v. Wilson, 6 Pa. 290; Eastern State Hospital v. Graves, 105 Va. 151, 52 S. E. 837, 3 L. R. A. (N. S.) 746, 8 Ann. Cas. 701; Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 N. E. 1065; People v. Kerber, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93; Sixth Dist. Agr. Ass'n v. Wright, 154 Cal. 119, 97 Pac. 144; United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; State ex rel. Goodman v. Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7; Hill v. Josselyn, 13 Smedes & M. (Miss.) 597; Wasteney v Schott, 58 Ohio St. 410, 51 N. E. 34.

Having determined that chapter 304, Laws 1913, does not include the state, and having concluded that, if the state is the real party in interest, the statute is not available to the defendants, even though the state land board is the nominal plaintiff, we must now direct attention to the origin and functions of the state land board and to the history of the irreducible school fund in order to discover whether this suit is for the benefit of the state.

The act of Congress approved February 14, 1859, c. 33, 11 Stat. 383, admitting Oregon to statehood, offered to the commonwealth sections 16 and 36 in every township of public lands in the state for the use of schools. Article 8, § 2, of the state Constitution provides that:

> "The proceeds of all the lands which have been, or hereafter may be, granted to this state, for educational purposes; * * * all the moneys and clear proceeds of all property which may accrue to the state by escheat or forfeiture;" and all moneys derived from other specified sources "shall be set apart as a separate and irreducible fund, to be called the common school fund, the interest of which, together with all other revenues derived from the school land mentioned in this section, shall be exclusively applied to the support and maintenance of common schools in each school district, and the purchase of suitable libraries and apparatus therefor."

Section 3 of the same article directs the Legislature to provide by law for the establishment of a uniform and general system of common schools. Section 4 commands that provision shall be made by law for the distribution of the income of the common school fund among the several counties of the state; and section 5, so far as material here, reads thus:

> "The Governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school * * * lands, and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law. * * *"

By the terms of section 3882, L. O. L., the Legislature declared that the Governor, secretary of state, and state treasurer "are hereby made a board of commissioners for the sale of state lands, and for the investment of the funds arising therefrom, and shall be styled the 'state land board.'" Section 3913, L. O. L., provides that the irreducible school fund of this state shall be composed of moneys derived from specified sources. The state land board is required by sections 3914, 3915, L. O. L., to loan all moneys belonging to the irreducible school fund, and the board is commanded to secure such loans by notes and mortgages "to the state land board on real estate in this state." Section 3926, L. O. L., makes it the duty of the state land board to foreclose all mortgages taken to secure loans from the school fund whenever more than one year's interest is due and unpaid.

By the terms of the Constitution the Governor, secretary of state, and state treasurer are made a board of commissioners for the sale of school lands and for the investment of the funds arising from such lands; and the powers and duties of the board "shall be such as may be prescribed by law." The Legislature has given the board a name by calling it the state land board, and, acting on the authority of the Constitution, has prescribed the powers and duties of the board. Every power conferred upon the board and every duty imposed upon it, whether conferred or imposed by the Constitution or legislative enactment, is for the direct benefit of the state. The state land board exists for the sole purpose of serving the state. Every attribute given to it and every function performed by it is for the benefit of the commonwealth. The state land board is the land department of the state. It is not an inferior board, but it is created by the Constitution and is a co-ordinate department of the state government. Corpe v. Brooks, 8 Or. 223, 225; Robertson v. State Land Board, 42 Or. 183, 187, 189, 70 Pac. 614; Miller v. Wattier, 44 Or. 347, 351, 75 Pac. 209; Warner Val. Stock Co. v. Morrow, 48 Or. 258, 262, 86 Pac. 369; State v. Warner Val. Stock Co., 56 Or. 283, 303, 106 Pac. 780, 108 Pac. 861; De Laittre v. State Land Board (C. C.) 149 Fed. 800. Manifestly the state land board is acting for the benefit of the state, and the latter is the real party in interest.

The defendants proceed with their argument by contending that, even though it is assumed that the state is the real party in interest, nevertheless, when the state loans money, it strips itself of the prerogatives attaching to sovereignty and acts in a purely proprietary capacity, subject to all the rules governing private parties. The defendants are relying upon precedents which do not apply to the instant case. If it be assumed that the state land board is a private corporation and that the state is a mere creditor of the board, then cases like Calloway v. Cossart, 45 Ark. 81, might be available to the defendants. Cases where the state is the real party in interest are widely different from those where the state is a mere creditor of a party who is both the nominal and real party to a legal proceeding. Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. Ed. 244; Bank of United States v. McKenzie, Fed. Cas. No. 927. See, however, Glover v. Wilson, 6 Pa. 290; State ex rel. Goodman v. Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7; and Buswell on Limitations and Adverse Possession, 150. Again, if it be assumed that, prior to the time fixed by the note as the date of its maturity, the Legislature had passed a statute shortening the period for the maturity of the note, or if a law had been enacted prescribing that the interest should be paid monthly instead of semiannually as stipulated in the note, then the defendant might be able to rely upon adjudications like Davis v. Gray, 16 Wall. *203, 21 L. Ed. 447; Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302; Patton v. Gilmer, 42 Ala. 548, 94 Am. Dec. 665; Chapman v. State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624; People v. Stephens, 71 N. Y. 527; Boston Molasses Co. v. Commonwealth, 193 Mass. 390, 79 N. E. 827.

[3, 4] The state, like a private person, is prohibited from impairing the obligation of a contract entered into by it. A pure limitation statute does not operate upon the contract itself, and hence does not impair any obligation imposed by a contract; but a statute of limitation only affects the remedy and does not act upon the debt. Anderson v. Baxter, 4 Or. 105, 113; Kaiser v. Idleman, 57 Or. 224, 228, 108 Pac. 193, 28 L. R. A. (N. S.) 169; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143; Waltermire v. Westover, 14 N. Y. 16; 6 R. C. L. 367. Cases where, independent of any statute of limitation, the equitable defense of laches has been recognized, are also distinguishable from questions arising out of chapter 304, Laws 1913.

[5] When the state loans money belonging to the irreducible school fund, it does not act in a proprietary capacity stripped of the attributes of sovereignty; but, on the contrary, it is performing a duty enjoined upon it by law and is acting for the public. The state is expressly commanded by the Constitution to provide for the establishment of a uniform and general system of common schools; and, furthermore, the Constitution commands that the school funds derived from specified sources shall be irreducible, and that the interest shall be applied exclusively to the support of the common schools. The state does not loan the money for a private purpose, but the moneys are loaned in order that revenue may be obtained to educate the children, upon whom in after years will largely depend the welfare and stability of the commonwealth. This is a public purpose of the highest type. The title to the funds is vested in the state in its sovereign capacity; the state is not a mere dry trustee, but it holds the funds in trust for the common schools of the state, and hence in trust for a public purpose; and therefore chapter 304, Laws 1913, cannot bar the foreclosure of mortgages given to secure moneys borrowed from the irreducible school fund. State v. Chadwick, 10 Or. 423, 428; Lawrey v. Sterling, 41 Or. 518, 531, 69 Pac. 460; Alexander v. Knox, 6 Sawyer, 54, 59, Fed. Cas. No. 170; Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 505, 86 N. E. 1065; United States v. Beebe, 127 U. S. 338, 342, 8 Sup. Ct. 1083, 32 L. Ed. 121; State ex rel. Goodman v. Halter, 149 Ind. 292, 297, 47 N. E. 665, 49 N. E. 7; Hill v. Josselyn, 13 Smedes & M. (Miss.) 597; United States v. Nashville, etc., Ry. Co., 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81.

The plaintiff is entitled to the money judgment awarded by the trial court, and also to a decree foreclosing the mortgage. The decree appealed from will be modified to conform to the conclusions herein expressed.

(96 Wash. 515)

INGERSOLL v. CUDIHEE, Sheriff, et al.

(No. 13687.)

(Supreme Court of Washington. May 26, 1917.)

1. APPEAL AND ERROR ⚷614—STATEMENT OF FACTS—SUFFICIENCY OF CERTIFICATE.

Where certificate recited that statement of facts on appeal contained "only a portion" of facts and proceedings, it was insufficient, and a motion to strike the statement of facts will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2708-2713.]

2. APPEAL AND ERROR ⚷934(1)—PRESUMPTIONS—JUDGMENT.

On appeal, the presumption is in favor of the correctness of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777, 3780-3782.]

3. APPEAL AND ERROR ⚷544(1)—NECESSITY OF STATEMENT OF FACTS.

In the absence of a statement of facts on appeal, the record presents no question upon the merits for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412.]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by M. H. Ingersoll against Edward Cudihee, Sheriff of King County, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

M. H. Ingersoll, of Seattle, in pro. per. Flick & Frater, of Seattle, for respondents.

MAIN, J. The controversy in this case is over the ownership of an automobile, upon which an execution had been levied by the sheriff of King county, as the property of a judgment debtor. Under the third party claim statute (sections 573 to 577, Rem. Code), the plaintiff filed an affidavit and bond, claiming ownership of the property. The defendants are the sheriff and the plaintiff in the action out of which the execution issued. The cause was tried to the court and a jury, and resulted in a verdict adverse to the plaintiff's claim. From the judgment entered upon the verdict, the appeal is prosecuted.

[1] The respondents move that the statement of facts be stricken, because the certificate thereto is insufficient. The certificate recites that the matters and proceedings embodied in the statement of facts are "a portion of the matters and proceedings occurring in said cause"; that the statement contains "a portion of the material facts, matters and proceedings heretofore occurring in said cause"; and that "the foregoing statement of facts contains a portion of the evidence and testimony introduced upon the trial of said cause." The certificate neither recites that the statement of facts contains all the facts, matters, and proceedings occurring in the cause, and not already a part of the record, nor that it contains all the facts upon any particular phase of the case. Under the holding of this court in Taylor v. Andres, 83 Wash. 684, 145 Pac. 991, this certificate is not sufficient, and, upon the authority of that case, the motion to strike the statement of facts must be granted.

[2, 3] The presumption is in favor of the correctness of the judgment, and, in the absence of a statement of facts, the record presents no question upon the merits for review.

The judgment will be affirmed.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(96 Wash. 503)

M. A. PHELPS LUMBER CO. v. BRADFORD-KENNEDY CO. (No. 13770.)

(Supreme Court of Washington. May 23, 1917.)

ACCORD AND SATISFACTION 🔑12(1)—WHAT CONSTITUTES—STATEMENTS ON CHECKS.

Where statements for lumber were paid by voucher checks each reciting "In full settlement of account below" and containing notation of the statement covered, and following the signature the words: "Indorsement of this voucher check constitutes acknowledgment by payee of full payment of the account specified hereon. Void if altered or erased in any way. Return to payor if not correct"—the condition following the signature was only a statement as to the conception the drawer of the check had as to its legal effect when received and indorsed.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 92.]

Department 1. Appeal from Superior Court, Spokane County; Hugo E. Oswald, Judge pro tem.

Action by the M. A. Phelps Lumber Company against the Bradford-Kennedy Company. Judgment for plaintiff in part, and defendant appeals. Affirmed.

Zent & Powell, of Spokane, for appellant. Danson, Williams & Danson and Geo. D. Lantz, all of Spokane, for respondent.

CHADWICK, J. Respondent, a dealer in fence posts, contracted with appellant, whose principal office is at Omaha, Neb., to furnish posts in carload lots. The posts were shipped by respondent, upon the order of appellant, to various places throughout the Middle West, where it had found customers. The transactions between the parties ran over a period of more than two years. Differences growing out of rejections by customers, and shortages, and other like items arose between the parties, so that in April, 1915, respondent claimed there was due him from appellant a balance of $498.81. Appellant pleads accord and satisfaction. The trial judge rejected a part of respondent's claims, and rendered judgment for $262.16. Payments were made by what are called by counsel voucher checks. These checks were upon printed forms; each of them reciting: "In full settlement of account below." Below is a ruled space for items. In this space is written: "As per statement No. ——, $——." Each shipment was a separate transaction, and each voucher contained a different statement number and a different amount. The voucher checks also contain the following words following the signature of the payee:

> "Indorsement of this voucher check constitutes acknowledgment by payee of full payment of the account specified hereon. Void if altered or erased in any way. Return to payor if not correct."

The trial judge found that, notwithstanding the form of these voucher checks, they had been received with an understanding on the part of the payee that the differences existing between the parties were to be settled later on, and that as to some of the items the appellant itself had taken the position that the checks were not final as between the parties.

Appellant has filed a very able brief to sustain its contention, but we are unable to distinguish the case from that of Allen v. Tacoma Mill Co., 18 Wash. 216, 51 Pac. 372, and, without further discussion, we rest the law of the case upon that authority.

Having in mind the authority cited, we think that the words following the signature of the payee are no more than a statement on the part of the drawer of the check of its conception of the legal effect of receiving and indorsing the voucher check. The controlling words, if any, are those printed as a part of the body of the check, to wit: "In full settlement of account below."

As for the facts, we are not prepared to say that the findings of the trial judge are not sustained by a preponderance of the testimony.

Affirmed.

ELLIS, C. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

(96 Wash. 486)

STEWART v. NORTHERN PAC. RY. CO.

(No. 13783.)

(Supreme Court of Washington. May 21, 1917.)

RAILROADS ⇨350(22)—CROSSING ACCIDENTS —QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

Plaintiff's horse-drawn vehicle was struck at a crossing by a passenger train running down a grade by gravity without the noise usually incident to the application of steam power. A building, an orchard, and a box car standing on a spur track, the corner of which was 28 feet from the center of the main track, obstructed the view, so that there was a very limited view until nearly opposite the corner of the car. An electric gong intended to ring automatically and on which plaintiff had come to depend was not ringing. He proceeded very slowly, almost stopping his horse, and listening for trains, until he arrived near the standing car, and then speeded up his horse to pass in front of an engine which he saw some distance away. After passing the car he saw the train and tried to turn so as to avoid it, but was unable to do so. *Held* that, in view of the fact that he was driving a horse, making it unsafe to stop close to the track, and his right to rely to some extent on the electric gong, it was a question for the jury whether he obeyed the stop, look, and listen rule to the extent he should have done.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1177, 1178, 1186.]

Department 2. Appeal from Superior Court, Spokane County; Thomas E. Grady, Judge.

Action by G. M. Stewart against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Englehart & Rigg and R. J. Venables, all of North Yakima, for appellant. Snively & Bounds, of North Yakima, for respondent.

PARKER, J. The plaintiff, Stewart, seeks recovery of damages for personal injuries, for the killing of his horse, and injury to his buggy, which he claims resulted from the negligence of the defendant railway company. Trial in the superior court for Yakima county sitting with a jury resulted in a verdict and judgment awarding him $2,500, from which the defendant has appealed to this court.

Counsel for appellant make the single contention here that respondent's own negligence and want of care so contributed to his damages that he should not be allowed to recover in this action, and that it should be so decided as a matter of law. They made appropriate motions in that behalf in the superior court at the close of the trial, which motions were by the trial court denied, and the question of respondent's contributory negligence submitted to the jury, together with the question of appellant's negligence. It is conceded by counsel for appellant that the evidence introduced was such as to call for the submission to the jury of the question of appellant's negligence and sufficient to support recovery against appellant but for respondent's contributory negligence.

The accident in question occurred at the crossing of appellant's main line of railway and a much-traveled street the center line of which marks the northern city limits of Yakima. The railway at this point runs approximately north and south, while the street runs east and west, so that they cross each other at approximately right angles. East-bound trains approach this crossing and the city of Yakima from the north. For a considerable distance north of this crossing, indeed for several miles, and also south of it into the city the railway runs down grade. Because of this, east-bound trains coming into the city from the north are allowed to run towards and over this crossing by gravity and their own momentum without the application of steam power and without the noise usually incident thereto, commencing to so run a long distance before reaching the crossing. Passenger trains are in the habit of going over this crossing at a rate of about 20 miles per hour, which is the city ordinance speed limit. This is a very much used crossing, it being on the main traveled highway from the business portion of the city to a suburb of some considerable population called Fruitvale. Appellant, evidently appreciating its dangers, maintains an electric gong at the crossing which when in working order automatically commences to ring as a warning of the approach of any train from the north when it reaches a point approximately one-half mile north of the crossing. On the north side of the street and east of the railway tracks are Standard Oil Company buildings and a yard surrounded by a high board fence, and also an orchard. The main building of the oil company at its southwest corner is on the street line and is 42.7 feet from the center of the main line track of the railway. At the time of the accident there was a box car on a spur track adjacent to the building on the west which projected one foot into the street beyond the building. The southwest corner of this car was 28.4 feet from the center of the main line track, and would be approximately 23 feet from the end of the crossbeam on the front of a passing engine and about the same distance from the side of the cars of a passing train. The orchard back of the oil company's yard comes to within about 30 feet of the main track.

The orchard, the oil company's structures, and the car standing upon the spur obstructed the view of the track to the north from the street, so that one approaching the track from the east would have no view of the track to the north except such as could be obtained when he had reached a point near the southwest corner of the car. The usable driveway portion of the street was principally to the north of the center line of the street, so that one approaching the railway from the east would drive along within approximately 20 or 25 feet of the oil company's fence and buildings and slightly closer to the end of the car on the spur track at the time of the accident. Thus a person so approaching the track along the roadway from the east would have a very limited view of the track to the north until he came nearly opposite the corner of the car. Respondent lived at Fruitvale, and was driving his horse hitched to his buggy from the business portion of the city to his home, approaching the track along the street from the east. He was quite well acquainted with the crossing, having driven over it a great many times. He knew of the electric gong being there and had heeded its warning on previous occasions of the passing of trains, and had come to depend upon it. He did not know that it was then or ever had been out of working order. When he arrived near the corner of the oil company's building and the car upon the spur track he proceeded very slowly, almost stopping his horse, and listened for the approach of any train from the north. Not hearing the approach of any train from that direction, and the gong then not ringing, and seeing only an engine on the west side track about 150 feet south of the crossing headed north, apparently about to start, he speeded up his horse to about 5 miles per hour with the view of passing quickly over the tracks, which plainly he could safely do in so far as that engine was concerned. Upon passing the end of the car he saw a passenger train bearing down upon him from the north a very short distance away at a speed estimated by the several witnesses at from 20 to 25 miles per hour. He tried to turn his horse to the left, but before he could do so the horse was struck by the end of the crossbeam on the front of the engine, throwing it against the side of the engine, killing it instantly, injuring the buggy, and also seriously injuring him. The fireman having a clear view on that side of the engine, and being then on the lookout, first saw the horse's head and shoulders when the front of the engine was about 50 feet and the cab about 100 feet from the crossing. If the fireman's version is correct, then it seems plain the respondent did not see the engine until his horse was somewhat closer to the track, since he was sitting in the buggy some 13 feet back of the horse. The jury might well conclude that from the time the fireman saw the horse or from the time the respondent first saw his own danger until the collision less than two seconds elapsed. The whistle of the engine seems to have been blown for the station at the usual place some half a mile north of the crossing. Respondent says he did not hear it, nor did he hear the engine's bell ring. This it is possible to account for by the orchard and oil company's structures being between him and the approaching train. It seems to be conceded that there was no blowing of the whistle for the crossing, though apparently the bell was being rung. The train was running on schedule time, but respondent says that he did not know it was then time for any train to pass. Respondent's driving a horse would render his position somewhat more critical than as if he had been driving a motor-propelled vehicle, which, of course, would have been subject to more effectual control because of the absence of the element of fright on the part of the horse. This summary of the facts, we think, is as favorable to appellant's contention that respondent was guilty of contributory negligence as a matter of law as the evidence will warrant.

Counsel for appellant invoke the general rule of stop, look, and listen as though it were a hard and fast rule of law which can be applied and made determinative of the question of plaintiff's contributory negligence in a crossing case without regard to the varying circumstances of the particular case to be decided and as though it was under all circumstances negligence per se not to stop, look, and listen upon approaching a railway crossing. They also seem to argue that it can be readily determined as a question of law whether one has stopped, looked, or listened to the extent required by law in a given case. It seems to us that the rule cannot be so readily applied as an exact measure of duty on the part of one approaching a railway crossing. If the probability of danger is very great one might well be held to the duty of stopping some considerable time and looking or listening or both with great care. On the other hand, if the surrounding circumstances are such as to indicate to an ordinarily prudent person that the probability of danger is but slight, then the measure of time and care to be used in stopping to look or listen would seem to diminish proportionately. These observations seem to suggest, even if there be no dispute as to the facts, that the inference to be drawn therefrom may be so debatable as to induce different minds to arrive at different conclusions upon the question of whether or not one approaching a railway crossing and injured there by a passing train is guilty of contributory negligence because of his failure to stop, look, and listen with that degree of care the law requires. Judge Dunbar, speaking for the court in Averbuch v. Great Northern Ry. Co., 55 Wash. 633, 636, 104 Pac. 1103, made some observations touching the general rule of stop, look, and listen in harmony with these views. Now an inquiry which involves the possible affirmative determination that plaintiff has been guilty of contributory negligence as a matter of law, the negligence of his opponent concededly appearing sufficient for submission to the jury, we apprehend should be approached with somewhat greater caution than an inquiry which involves only the question of whether or not any evidence has been produced warranting the submission of a question to the jury. In the former case it is deciding as a matter of law that the fact has been conclusively affirmatively proven, while in the latter it is deciding as a matter of law that no evidence has been introduced to prove a fact. It seems to us that there is more danger of invading the province of the jury in the former than in the latter inquiry. In Steele v. Northern Pac. Ry. Co., 21 Wash. 287, 57 Pac. 820, Judge Dunbar, speaking for the court, observed and quoted with approval from two eminent authors as follows:

> "'It is frequently stated that, when the facts are undisputed or conclusively proved, the question of negligence is to be decided by the court. A better opinion, however, would seem to be that, in order to justify the withdrawal of the case from the jury, the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable. Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury.' 2 Thompson, Negligence, p. 1236.
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> "As showing the impropriety of judges taking this question from the jury, except in cases showing undisputed and palpable negligence, it is said by Mr. Cooley, in his work on Torts (page 802): 'If the judge in such a case were to pass upon negligence as a question of law, he must, in doing so, be endeavoring to enforce a rule of a variable nature, which must take its final coloring from the experience, training, and temperament of the judge himself; a rule which his predecessor might not have accepted, and which his successor may reject, and upon which a court of review may reverse his action, not because the facts are differently regarded, but because judges are men, and men are different. As has been said in one case, it must be a very clear case, indeed, which would justify the court in taking upon itself this responsibility. For when the judge decides that a want of due care is or is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the conduct of the party by that, turns the case out of court or otherwise disposes of it upon his opinion of what a reasonably prudent man ought to have done under the circumstances.'"

Observations made by us in Richmond v. Tacoma Ry. & P. Co., 67 Wash. 444, 456, 122 Pac. 351, are quite in harmony with these views. A number of decisions of this court there noticed clearly show the reluctance with which this court ever takes the question of contributory negligence away from the jury and decides affirmatively that the plaintiff is guilty of such negligence. Probably the clearest general statement of the view of this court upon that question is that made by Judge White in Traver v. Spokane Street Ry. Co., 25 Wash. 225, 239, 65 Pac. 284, 289, as follows:

> "The great weight of authority is to the effect that, before a court will be justified in taking from the jury the question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them."

See, also, 1 Thompson, Negligence § 425; 2 Cooley, Torts (3d Ed.) p. 1428.

Now, we have seen that respondent did come almost to a stop and listened when, as can well be argued, he was as near the main track of the railway as it was safe for him to go with his horse before deciding that he could safely proceed; that the electric gong was then silent; that he failed to hear the approach of any train from the north; and that the train was running down grade of its own momentum, and therefore not making as much noise as it otherwise would. In view of these facts we think it cannot be said as a matter of law that a reasonably prudent man in the situation respondent was would not have proceeded across the track. It is true respondent did not look. Where he came almost to a stop with a view of listening he could not have seen had he looked in the direction of the approaching train. It may well be argued, as already suggested, that he then had approached as close to the main track as it was safe for him to do before deciding whether or not he could safely proceed, in view of the fact that he was driving a horse, and not an inanimate motor-propelled vehicle. Had he proceeded beyond the end of the freight car a sufficient distance so that he could have seen north along the track for any considerable distance before stopping, he would have then placed himself and horse in great danger considering the great probability of the fright of the horse with its head so close to the track on which the train was approaching. Had he been injured by reason of having come into that position, which would have been highly probable, though not by collision with the train, and sought relief from the railway company on account of its negligence, it would, no doubt, be here urging his contributory negligence as it is now doing and with just as much reason for success upon that ground. It may be that the jury would and should have found that respondent was guilty of contributory negligence in approaching and attempting to cross as he did, and it may be that the trial judge, and also the judges of this court, were they triers of the facts, would arrive at that conclusion; but that is quite a different matter than so deciding as a matter of law. That of itself does not argue that there was nothing for the jury to decide as a matter of fact. We cannot escape the conclusion that there is room for honest difference of opinion as to whether respondent obeyed the stop, look, and listen rule to the extent he should have done, in the light of the facts then appearing to him as a reasonably prudent man. The following decisions of this court in crossing cases, as well as those already noticed, we think, support this conclusion: Northern Pac. R. R. Co. v. Holmes, 3 Wash. T. 543, 18 Pac. 76; Ladouceur v. Northern Pac. R. R. Co., 4 Wash. 38, 29 Pac. 942. The decisions in Dukeman v. C., C., C & St. L. Ry. Co., 237 Ill. 104, 86 N. E. 712, and Pendroy v. Great Northern Ry. Co., 17 N. D. 433, 117 N. W. 531, are in point as showing that the rule of stop, look, and listen does not in all cases render a party approaching a railway crossing guilty of contributory negligence as a matter of law by his failure to stop, look, and listen, and also as showing that the extent to which he must stop, look, and listen and the degree of care he must exercise in that regard is not always the same.

In the following decisions the courts seem to have regarded the presence of an automatic electric bell or gong maintained at a crossing as a warning of the approach of trains, and its ringing or failure to ring as an element entering into the question of one's negligence in approaching a crossing in the light of the stop, look, and listen rule. McSweeney v. Erie R. Co., 93 App. Div. 496, 87 N. Y. Supp. 836; C., C., C. & St. L. Ry. Co. v. Heine, 28 Ind. App. 163, 62 N. E. 455; Cincinnati, N. O. & T. P. Ry. Co. v. Champ (Ky.) 104 S. W. 988; Jacobs v. Atchison, T. & S. F. Ry. Co., 97 Kan. 247, 154 Pac. 1023, L. R. A. 1916D, 783. It is true these cases all seem to hold that one approaching a railway crossing has no right to rely entirely upon an automatic gong maintained there by the railway company to give warning of the approach of trains, but they do recognize that he may properly consider the ringing or failure to ring of such a gong in connection with other things evidenced by the proper use of his senses to determine whether or not there is present danger. The last-cited case may seem to be opposed to this view, but, read in the light of its own facts, we can hardly so regard it. That was a case of an automobile approaching a railway crossing under such circumstances that it could have been stopped at a point near the track where the approaching train would have been plainly seen. Common experience teaches us that an automobile can be stopped with safety much closer to a track upon which there is a speeding train than can the ordinary horse. To stop a horse with its head say within 10 feet of a track on which there is a speeding train would ordinarily seem little short of foolhardy, while an automobile could stand even closer to a train moving at great speed with comparative safety; the difference being that the driver has not that absolute control over his horse that the driver has over his automobile. In harmony with the views expressed in these cases similar views have been expressed in cases where there are maintained gates at crossings, and the gates being open has been considered as some evidence to the public that no train was approaching. Ellis v. Boston & Maine R. R., 169 Mass. 600, 48 N. E. 839; McClain v. Chicago, R. I. & P. Ry. Co., 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914C, 699.

We are not arguing that respondent had the right to depend wholly upon the ringing of the electric gong at the crossing to advise him of the approach of a train without the use of his senses in other respects or without in some measure stopping and listening, but only that the presence of the gong there, his knowledge thereof, his experience with it on previous occasions and not knowing that it was then out of order or that it ever had been out of order in some measure lessen the degree of care to be exercised by him in stopping and listening. These facts, taken together with the fact that he was driving a horse instead of an inanimate motor-driven vehicle, might have induced the jury to believe that as a reasonably prudent man he was not negligent in proceeding as he did and without first going forward a sufficient distance to see along the track and stopping and looking.

Let us now notice the decisions of the courts relied upon by counsel for appellant, and also one or two others which may seem to lend it support.

In Woolf v. Washington Ry. & N. Co., 37 Wash. 491, 79 Pac. 997, the plaintiff was held guilty of contributory negligence as a matter of law, but it was because at approximately 100 feet from the crossing he could see along the railway track for a distance of 600 feet, and, seeing a train approaching, he attempted to cross the track ahead of it.

In Cable v. Spokane & I. E. R. R. Co., 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224, the driver of an open buggy approaching a railway was held guilty of contributory negligence as a matter of law. In that case it appears that he knew that the train was approaching, and that it usually ran at high speed at that point.

In Bowden v. Walla Walla Valley R. R. Co., 79 Wash. 184, 140 Pac. 549, the driver of an automobile approaching a railway crossing was held guilty of contributory negligence as a matter of law. From a point 100 feet from the crossing he could see a train upon the railway 200 feet away, and from a point 40 feet from the crossing he could have seen a train at least 300 feet away. He proceeded without using his senses, which would have plainly revealed his danger, and he could have stopped the automobile before reaching the track.

In Aldredge v. Oregon-Washington R. R. & N. Co., 79 Wash. 349, 140 Pac. 550, the plaintiff was held guilty of contributory negligence because he apparently took no precaution whatever to ascertain that the train was approaching. Just before turning on to the crossing he was driving parallel to the railway track in plain view of an approaching train, though apparently his view was obstructed by some bushes in some degree when he was close to the track.

In Cole v. Northern Pacific Ry. Co., 82 Wash. 322, 144 Pac. 34, a boy riding a bicycle was held guilty of contributory negligence as a matter of law because he approached a double-track railway and slowing up to await the passing of a train in one direction immediately proceeded without looking and was struck by a train from the opposite direction.

In Skaala v. Twin Falls Logging Co., 82 Wash. 679, 144 Pac. 897, a pedestrian was held guilty of contributory negligence in crossing railway tracks under such circumstances as rendered it almost too plain for argument that he did not use his senses in any degree looking to his own protection. Of course, a pedestrian can so control his actions by using proper caution as to render himself safe though he be very close to a moving train.

In Allison v. Chicago, M. & St. P. Ry. Co., 83 Wash. 591, 145 Pac. 608, the plaintiff, driving an automobile upon a crossing at night, was held guilty of contributory negligence as a matter of law because he ran into a slowly moving train which his own headlights would have plainly revealed had he used his sense of sight.

In McKinney v. Port Townsend & P. S. Ry. Co., 91 Wash. 387, 158 Pac. 107, it was held that an automobile driver was guilty of contributory negligence as a matter of law upon approaching a railway track, the evidence rendering it certain that his automobile was running under such conditions that it could have been stopped within 3 to 7 feet, and he came within plain view of the track and the approaching train within a distance of 15 or 20 feet of the crossing. That case was not finally disposed of by that decision, but was remanded for new trial because of the failure of the trial court to properly submit to the jury the question of last clear chance as bearing upon the liability of the company.

In Blackburn v. So. Pac. Co., 34 Or. 215, 55 Pac. 225, we have a case of contributory negligence, and so decided as a matter of law where the deceased was familiar with the crossing and aware of the fact that it was about time for the train to pass, and he proceeded without stopping to look or listen. That case, we think, can be distinguished from the one before us by the fact that deceased knew it was about time for a train to pass, and there was not present any automatic electric bell or gong for the purpose of giving warning of the approach of trains. In other words, there was nothing present there to suggest to the deceased that there was no train approaching, but, on the contrary, he knew it was about time for one to pass.

In Griffin v. San Pedro, L. A. & S. L. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842, an automobile driver was held guilty of contributory negligence as a matter of law in approaching a crossing without stopping to look and listen. He stopped about 35 feet from the track, where obstructions made it impossible for him to see the approaching train, and, hearing no noise and seeing no smoke, he proceeded. Had he driven within 17 feet of the track and stopped his machine he could have seen the approaching train. There was no gong present to suggest to him by its ringing or silence what the then probability of danger was. Two of the justices dissented, they being of the opinion that plaintiff could not be held guilty of contributory negligence as a matter of law.

The decision in Chicago, R. I. & P. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 285, cited and relied upon by counsel for appellant, seems to make some general observations lending support to their contention. It was not, however, there decided as a matter of law that plaintiff was guilty of contributory negligence, the case being remanded for new trial because of error in instructions. The observations made in the opinion, however, do suggest the thought that the extent to which one approaching a railway crossing must stop, look and listen is not always capable of exact measurement.

We are of the opinion that it cannot be held as a matter of law that respondent was guilty of contributory negligence, and that the trial court properly left that question to the jury.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

(96 Wash. 366)

CITY OF HILLYARD ex rel. TANNER, Atty. Gen., v. CARABIN et al. (No. 13762.)

(Supreme Court of Washington. May 18, 1917.)

1. MUNICIPAL CORPORATIONS 🔑894—PAYMENT OF FUNDS BY TREASURER—WARRANT—STATUTE.

Under Rem. & Bal. Code, § 7687, providing that all demands against cities of the third class shall be paid by warrants specifying the purpose for which they are drawn, the action of the treasurer of such a city in paying claims against the city in cash without warrant was illegal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1877, 1878, 2188.]

2. MUNICIPAL CORPORATIONS 🔑894—PAYMENT OF FUNDS—SHORTAGE.

All city funds, once in the hands of the city treasurer, must in law be regarded as continuing in his official custody until lawfully drawn out. Payments made otherwise are made in his own wrong, and cannot diminish the fund for which he is responsible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1877, 1878, 2188.]

3. MUNICIPAL CORPORATIONS 🔑173(5)—MISAPPROPRIATION OF FUNDS BY TREASURER—MANNER—PROOF.

Where, by his illegal act in paying out the money of a city of the third class in cash without warrant, the city treasurer created a shortage in his official fund, and illegally paid out the city's money, to recover from him the city need not show also the manner of the misappropriation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 404–409.]

4. MUNICIPAL CORPORATIONS 🔑894—PAYMENT OF FUNDS IN CASH—CITY COUNCIL.

The city council of a city of the third class could not pay the city's current indebtedness by cash, and could not ratify the city treasurer's illegal act in so doing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1877, 1878, 2188.]

5. MUNICIPAL CORPORATIONS 🔑173(5) — FUNDS OF CITY—SHORTAGE IN CITY TREASURER'S FUND—LIABILITY.

Where the city treasurer of a city of the third class without warrants illegally paid out money in cash, in pursuance of a fraudulent scheme on his part to appropriate the city's money by forging voucher signatures of laborers, the city treasurer was liable for the shortage thus created in his fund.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 404–409.]

6. MUNICIPAL CORPORATIONS 🔑173(5) — PRINCIPAL AND SURETY—CITY TREASURER—SHORTAGE—AUDIT—LIABILITY.

The failure of auditing officers of the state to discover a shortage in the accounts of a city treasurer did not relieve the latter or his bond from liability, since the failure of auditing officers, whose examination and reports are not conclusive, cannot be binding on either the officer or the public he serves; the bureau of inspection having no power to discharge an official from liability.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 404–409.]

7. LIMITATION OF ACTIONS 🔑22(8)—ACTION AGAINST SURETY—ACTION ON WRITTEN CONTRACT.

An action against an official bond, the basis of which is the wrongful and illegal act of the principal, on which the liability of the surety is dependent, is not an action on a written contract.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 109.]

8. LIMITATION OF ACTIONS 🔑57(4)—STATUTE OF LIMITATIONS—ACTION AGAINST BOND OF OFFICIAL—TERM OF OFFICE.

The three-year statute of limitations for actions on unwritten contracts (Rem. Code 1915, § 159, subd. 3) begins to run on a city's cause of action against its treasurer and his bond for misappropriation of funds at the end of his term of office, whether or not the relief asked for is based on undiscovered fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 321.]

9. COSTS 🔑231(2)—ON APPEAL.

Appellants, who obtained a more favorable judgment in the Supreme Court than that secured below, in point of the amount of recovery awarded against them, will recover costs of the appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 872.]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the City of Hillyard, on the relation of W. V. Tanner, Attorney General, against John A. Carabin and the Massachusetts Bonding & Insurance Company. From a judgment for plaintiff, defendants appeal. Judgment modified.

W. C. Donovan and Chas. E. Swan, both of Spokane, for appellants. W. V. Tanner, Atty. Gen., Scott Z. Henderson, Asst. Atty. Gen., C. C. Upton, of Hillyard, and L. L. Thompson, of Olympia, for respondent.

HOLCOMB, J. This action was brought on behalf of the city of Hillyard to recover from appellants Carabin and Massachusetts Bonding & Insurance Company, the surety on his official bond, certain sums of money which the city claims to have lost by reason of alleged fraudulent acts committed by Carabin, while acting as the city treasurer, together with his alleged coconspirators, the city engineer and city clerk.

The record shows that during Carabin's terms of office a great many men were employed by the city in constructing a water system, and that, instead of paying these men by warrant as provided in Rem. & Bal. Code, § 7687, they were paid in cash by Carabin when they presented a time certificate to him, signed by the foreman of the works, at which time they signed a voucher for the same. During the first part of the work this was the only record kept of these men. Later on pay rolls were kept, but the men were still paid by cash, instead of warrants. At the end of the month a warrant to relieve cash would be issued to Carabin by order of the city council. Carabin would then take this warrant to the bank, where it would be cashed, and the cash deposited to the credit of the city of Hillyard. The bank would hold the warrant until it was presented and paid. On April 1, 1913, Carabin, the city engineer, and the city clerk were charged with conspiracy, and later pleaded guilty to conspiring to defraud the city out of certain money by forging the names of fictitious persons on the pay roll. The evidence of handwriting experts was introduced also tending to show that the names on the receipts, vouchers, and pay roll were forged by Carabin, the city engineer, and the city clerk; it being respondent's theory that the alleged payees were fictitious persons, and that the moneys purported to have been paid to them were wrongfully retained by the conspirators.

From an adverse judgment in the sum of $4,015.93, appellants appeal, and urge that, since the gravamen of this action is fraud, in order for respondent to recover, it must establish by a preponderance of the evidence that Carabin was guilty of fraud as alleged, and also that the men whose names were alleged to have been forged to the pay roll and vouchers were fictitious persons, or had not worked for the city as pretended, and that such money was retained by Carabin and his coconspirators.

[1, 2] In considering this question, the evidence shows that Carabin might have incurred a prima facie liability on the ground of illegally paying out the city's money, ir-

respective of the question of active fraud, for Rem. & Bal. Code, § 7687, specifically provides that all demands against cities of the third class shall be paid by warrants which shall specify the purpose for which they are drawn. From this statute it is apparent that the action of Carabin in paying claims against the city in cash without warrant was an illegal act. McCormick v. Bay City, 23 Mich. 457. And it also created a shortage, as:

> "All district funds once in the hands of the town treasurer must in law be regarded as continuing in his official custody until lawfully drawn out. Payments made otherwise are made in his own wrong, and cannot diminish the fund for which he is responsible." People ex rel. Burns v. Bender, 36 Mich. 195; Seymour v. Ellensburg, 81 Wash. 365, 142 Pac. 875.

[3, 4] By his illegal act Carabin created a shortage in the fund of the city treasurer and illegally paid out the money of the city. Because of these facts we do not think that, in order to recover in this action, respondent must show also the manner of the misappropriation, which in this case would be impossible, for respondent could not show that men whose names were signed to the pay roll and time certificates did not work for the city at the time the cash was paid out. By ostensibly paying out the money, but in a wrongful manner, Carabin rendered it impossible for respondent to make this proof; and to now hold that respondent must so do would be to render ineffective the statute which requires that claims against the city must be paid by warrants, and place a premium upon its violation. Nor is the issuance of a warrant by the council to relieve the cash of any consequence, inasmuch as the council itself could not pay the city's current indebtedness by cash, and could not ratify Carabin's illegal act in so doing.

[5] As it was not necessary for respondent to show that these men whose names were signed to the pay roll did not work for the city of Hillyard, by showing that the money was illegally paid out, together with the evidence of fraud on the part of Carabin, respondent established a case which, if believed, would render Carabin liable for the shortage, and the evidence of fraud is sufficient in our minds to show that the shortage shown was misappropriated by Carabin.

[6] In their original answers, by way of affirmative defense, appellants pleaded that Carabin's books were examined during the years 1910, 1911, and 1912, by officers of the state, that no report of these shortages was ever made, that the bond was executed in reliance upon such examinations, and that consequently appellants were discharged from liability. The action of the lower court in sustaining the demurrer to these defenses is next assigned as error. No authority is cited to sustain this contention, nor are we able to find any. On the other hand, the rule seems to be well settled that the failure of an auditing officer to discover a shortage in the accounts of another officer does not relieve the latter or his bond from liability. Anderson v. Blair, 121 Ga. 120, 48 S. E. 951, 2 Ann. Cas. 165. That the auditing officers were incompetent or negligent in their examinations at those times is established by the facts. But the failure of such officers, whose examinations and reports are not conclusive, cannot be binding upon either the officer or the public he serves. The bureau of inspection assuredly has no power to discharge an official from liability.

[7, 8] This action was commenced in June, 1914, and it is appellants' contention that all transactions which occurred prior to March, 1911, the date of the expiration of Carabin's first term as city treasurer, are barred by the statute of limitations. While it is true this is an action against a bond, it is not an action on a written contract, as the basis of the action is the wrongful and illegal act of the principal upon which the liability of the surety is dependent. Board of County Com'rs v. Van Slyck, 52 Kan. 622, 35 Pac. 299. Appellants therefore urge that this action comes within the provisions of subdivision 3, § 159, Rem. Code, which provides that actions on unwritten contracts must be brought within three years, and this theory would seem to be well founded, unless respondent's contention that, since this is an action for relief on the ground of fraud, the statute does not commence to run till the fraud is discovered, as provided in subdivision 4, § 159, Rem. Code, is meritorious. However, in a case of this kind, whether or not the relief asked for is based on fraud which has not been discovered, the rule is well established by this court that the statute starts to run at the end of the term of office within which the cause of action arose. Spokane County v. Prescott, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733; Skagit County v. American Bonding Co., 59 Wash. 1, 109 Pac. 197. In the latter case the court said:

> "It should rather be held that, for the purposes of the statute of limitations, all causes of action matured at the expiration of his term, for defalcations during such term, without reference to the several dates on which they occurred, and that as between the county on the one part, and the delinquent officer on the other, the period of limitation would not commence to run prior to the expiration of his term."

Subsequently in that case it is determined that the statute does not start to run at the times the different misappropriations were made, when they were not discovered at such times, and respondent therefore argues that the statute does not run till such discoveries are made. But this case plainly places a limit, viz., the end of the term of office, when the statute does in any event start to run; and the failure to discover the fraud cannot stop the toll of the statute after that time. It was therefore error for the court to allow a recovery for items misappropriated prior to January, 1911, the end of Carabin's first term of office. Their recovery is barred by the statute of limitations.

Several other assignments of error are urged, based on the admission and refusal to strike certain evidence. It is sufficient to say that we have considered these assignments, and do not deem them of sufficient merit to warrant a reversal.

The judgment of $4,015.93, which was computed by adding together the sums of $3,171.07 as principal and $844.86 interest to November 30, 1915, the date of the judgment below, must be and is modified by eliminating the items of loss caused by defalcations prior to January, 1911, amounting to $1,636.80 principal and $521.33 interest to November 30, 1915. The remaining defalcations, amounting to $1,534.27 principal and $323.53 interest to November 30, 1915, totaling $1,857.80, are recoverable, and as to them the judgment is affirmed. In making these deductions we are not unmindful of the fact that some deductions were made from these items by the trial court, but in so far as this is ascertainable from the record none of them were made for defalcations in 1910. To $1,857.80 should also be added the sum of $723.81, being the sum of $608.93, with interest to November 30, 1915, which amount the trial court found to be due respondent, but inadvertently failed to include it in the judgment.

[9] Appellants, having obtained a more favorable judgment here than they secured below, will recover costs of this appeal. Let the judgment be modified, and ordered accordingly, for the sum of $2,581.61, with trial costs.

ELLIS, C. J., and FULLERTON, MOUNT, and PARKER, JJ., concur.

(96 Wash. 511)

TOMKINS v. SEATTLE CONSTRUCTION & DRY DOCK CO. (No. 13847.)

(Supreme Court of Washington. May 23, 1917.)

1. CONTRACTS 🔑140—EFFECT OF ILLEGALITY—VIOLATION OF STATUTE—SUBSEQUENT AGREEMENT.

Where defendant employed plaintiff, a British subject, to come to the United States to work as an engineer, contrary to Act Feb. 26, 1885, c. 164, § 2, 23 Stat. 332 (U. S. Comp. St. 1916, § 4245), prohibiting the importation and migration of foreigners under contract to perform labor in the United States, and invalidating such contracts, the employé could not recover on a subsequent agreement by which he was to continue such work; the complaint showing that the subsequent agreement grew out of and was connected with the original void contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 713–721.]

2. CONTRACTS 🔑140—EFFECT OF ILLEGALITY—VIOLATION OF STATUTE—SUBSEQUENT AGREEMENT.

In determining whether a new contract is so connected with an illegal contract as to render it void, the test is whether plaintiff is required to resort to the illegal contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 713–721.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by J. A. Tomkins against the Seattle Construction & Dry Dock Company. Complaint dismissed, and plaintiff appeals. Affirmed.

E. N. Sears, of Seattle, for appellant. Bogle, Graves, Merritt & Bogle, of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damages for the breach of an alleged contract of employment. To the third amended complaint, which will be hereafter referred to as the complaint, a demurrer was interposed, and sustained by the trial court. The plaintiff refused to plead further, and elected to stand upon the complaint. From a judgment of dismissal, the plaintiff appeals.

The facts, as stated in the complaint, so far as necessary to present the decisive question, may be summarized as follows: The respondent was a corporation, organized under the laws of the state of New Jersey, doing business in Seattle, Wash., and at Barnett, in the province of British Columbia, Canada. The appellant was a British subject, and a skilled artisan. On or about September 22, 1915, the respondent, at Vancouver, B. C., "entered into an oral contract of hiring and employment whereby it was mutually agreed by and between them that defendant [respondent] on said date employed plaintiff [appellant] to serve it from month to month in the capacity of mechanical engineer in Seattle, Wash., and elsewhere, at a monthly wage and salary of $300 a month, and plaintiff agreed to serve defendant as mechanical engineer on said terms and at said salary." Immediately after this contract was entered into, the appellant came to Seattle, Wash., and there, for one month, beginning on or about September 25, 1915, performed his duties as mechanical engineer in the respondent's employ. At the "end of said month it was agreed by and between these parties that thereafter plaintiff should continue to perform said services for defendant at said monthly salary of $300, from month to month beginning on the 1st day of each calendar month thereafter, and plaintiff continued to perform said services for defendant on said terms until December 8, 1915." On the date last mentioned the appellant was discharged by the respondent. The present action was instituted for the purpose of recovering as damages the salary which the appellant would have earned between December 8, 1915, when he was discharged, and the end of that month. There is no claim that all salary earned up to the date of the discharge had not been paid.

[1, 2] The controlling question is whether the contract pleaded is tainted with illegality. From the facts stated it appears that the appellant was a British subject, residing in or near Vancouver, B. C., when the contract of employment was originally entered into, and that performance of the contract was to take place in Seattle, Wash.

Section 2 of chapter 164 (23 U. S. Stat. L. p. 332), being an act entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia," provides:

> "That all contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person, company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect."

By this act the original contract of the parties in the present case, made at Vancouver, B. C., was illegal and void and of no effect. This is recognized by the appellant, but it is claimed that at the end of the first month's service in Seattle a new contract was entered into, and that such new contract does not violate the act of Congress.

It will be noticed by reference to the second excerpt quoted above from the complaint that, where it is sought to allege the contract made at the end of the first month, it is stated that the appellant "should continue to perform said services for defendant at said monthly salary of $300." Here is a direct reference which connects the original void contract with the one alleged to have been made at the end of the first month.

It is also alleged that when, on December 8, 1915, the appellant was discharged, he was performing services "under said employment from month to month." Here again is a direct reference to the contract alleged in the preceding part of the complaint. The general rule, which is supported by the authorities, is well stated in volume 15, A. & E. Encycl. of L. (2d Ed.) p. 992, as follows:

> "Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new contract and render it illegal. * * * But if the new contract is not connected with the illegal contract or transaction, but is founded on a new consideration, it is not affected by such prior illegal contract or transaction, though the latter may have indirectly given rise to it."

In determining whether a new contract is so connected with an illegal contract as to render it also illegal and void, the test is whether the plaintiff, to make a case, is required to resort to the illegal contract. In Stirtan v. Blethen, 79 Wash. 10, 139 Pac. 618, 51 L. R. A. (N. S.) 623, it was said:

> "Where a plaintiff, to make a case, must rely upon the illegal contract itself, he cannot recover. The law will aid neither party to an illegal agreement, but will leave the parties where it finds them."

While the facts in that case are not the same as those in this case, the controlling legal principle is the same. The allegations of the complaint in the present case show that the contract alleged to have been made at the end of the first month's service grew out of and was connected with the prior void contract, made in British Columbia, and, under the law, the illegality of the latter contract entered into the new contract, and rendered it likewise void.

The judgment will be affirmed.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(96 Wash. 529)

WILLIAMSON INV. CO. v. WILLIAMSON. (No. 13666.)

(Supreme Court of Washington. May 29, 1917.)

1. PARTITION ⚷13—TENANTS IN COMMON.

Where there are no complications as to the title of either party, either tenant in common can demand partition as a matter of right.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 36, 81.]

2. PARTITION ⚷26—DEFENSES—INJURY—INCONVENIENCE.

Probable injury to the property by a partition between tenants in common, inconvenience, or hardship to either of the parties are not adequate barriers to the assertion of the right to partition, nor a valid excuse for material delay in according the remedy.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 68–71, 75.]

3. PARTITION ⚷77(1)—EQUITY JURISDICTION—SALE.

In the original jurisdiction of equity, there was no partition of property between tenants in common by means of sale, except where all parties were sui juris and consented; wanting such capacity and consent, the division was always in kind, and, where the land was incapable of exact or fair division, compensation for the inequality was made by an award of owelty of partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211–216, 218.]

4. PARTITION ⚷77(1)—PARTITION IN KIND.

The courts still, as formerly, favor a partition of land in kind between tenants in common whenever practicable.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211–216, 218.]

5. PARTITION ⚷77(4)—PRESUMPTIONS—DIVISION OR SALE.

Since by Rem. Code 1915, § 838, authorizing actions for partition of property, and a sale if it appear that a partition cannot be made without great prejudice to the owner, the power of the court to order a sale is conditioned on showing that great prejudice would result from a division, there is a presumption that land held in common can be equitably divided according to the interests of the parties measured by value.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 223.]

6. **Partition 🔑77(4) — Sale — Burden to Show Prejudice from Division.**

In an action for partition by a tenant in common who seeks a sale of the property on the ground that it cannot be divided without great prejudice to the owners, the burden to show great prejudice rests on him who asserts it.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 223.]

7. **Partition 🔑77(3)—Sale for Division—Statute—"Great Prejudice."**

"Great prejudice," as used in Rem. Code 1915, § 838, authorizing actions for partition of property and a sale if it appear that a partition cannot be made without great prejudice to the owners, means material pecuniary loss, not mere temporary inconvenience, or temporary impairment of income, slight in comparison with the value of the property for the uses for which it is suitable.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 219–222.

For other definitions, see Words and Phrases, Great Prejudice.]

8. **Partition 🔑77(3) — Unimproved Land — Building.**

Where a lot was worth on a depressed market $20,000 to $22,000, and, on a normal market, $30,000 to $37,000, and the building there rented precariously for only $40 or $50 a month, requiring continual reductions to keep it tenanted at all, the property was not permanently improved, or improved at all in any real or material sense, the lot being worth as much without it as with it, and the property should be treated for the purpose of partition as if the building were not there, since its absolute destruction would not greatly prejudice the owner in the legal sense of material pecuniary loss.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 219–222.]

9. **Partition 🔑77(4)—Party Wall Agreement—Burden of Proof.**

In suit for partition, the burden was upon plaintiff, to whom was awarded the east half of the lot, to show that there was a continuing party wall agreement, obligating the owner of the east half to sustain the building on the adjoining lot.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 223.]

10. **Adjoining Landowners 🔑4(5)—Removal of Building—Absence of Party Wall Agreement.**

Where buildings on adjoining lot serve to sustain one another, but there is no party wall agreement, the only duty of either party, who desires to remove his building, is to notify the other that the latter may protect his own building, and thereafter the removing party is liable only for failure to exercise reasonable care.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 34, 35.]

11. **Partition 🔑77(3)—Partition in Kind —Diminution in Value.**

Where division of a lot owned by tenants in common would reduce the aggregate value of the halves, but a sale for partition on the existing market for division of the proceeds would result in even a greater loss, simply because the aggregate value of the halves would be somewhat less than the value of the whole, the law will not deny partition in kind, and force one or possibly both of the common owners to change the form of his holding and forego the value of his investment by selling the entire property at a sacrifice.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 219–222.]

12. **Evidence 🔑486—Opinion—Value.**

Opinion evidence is always admissible on questions of value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2271, 2283–2289.]

13. **Appeal and Error 🔑1009(1)—Findings —Conclusiveness.**

In a suit in equity for a partition, on appeal the trial in the Supreme Court is one de novo, and, by Rem. Code 1915, § 1736, the findings of the trial court are not binding upon the Supreme Court, but they are entitled to great weight, particularly when supported by the referee's report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978.]

14. **Partition 🔑103—Sale for Division— Bid by Owners.**

In case of a sale ordered for partition of property between tenants in common, either party may become a bidder at the sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 339.]

15. **Appeal and Error 🔑1046(5)—Immaterial Error.**

In a suit for partition, where no sale of the property for division was ordered, error of the trial court in expressing the view that if he ordered a sale he should not permit either party to the suit to become a bidder was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134.]

16. **Partition 🔑91 — Competency of Referee.**

A witness at the original hearing of a partition suit was not disqualified to be a referee to partition the property; the fact having been known when he was appointed, and no objection having been made at that time.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 225–264.]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the Williamson Investment Company against Mabel C. Williamson. From a decree confirming partition made by referees, plaintiff appeals. Affirmed.

Voorhees & Canfield, of Spokane, for appellant. Wellington D. Rankin, of Helena, Mont., and Sam H. Cone, of Spokane, for respondent.

ELLIS, C. J. This is an action for partition. The question is whether the land should be sold or divided in kind.

The property is described as lot 20, block 8, Havermale's addition to Spokane Falls, now Spokane. It is located on the north side of Main avenue, between Brown and Barnard streets, in the business district of the city. It has a frontage of 50 feet on Main avenue and a depth of 90 feet to the north. It is owned in undivided moieties by the parties to this action as tenants in common. It is adjoined on the east by lot 21 of the same dimensions and in the same block. Many years ago the then owner of lot 20 and the then owner of lot 21 erected a two-story wooden building covering both lots. The building had a common entrance on the line between the two lots giving access to the second story. Sixteen years ago Volney D. Williamson, president of the plaintiff corporation, became the owner of lot 20, and another owner acquired lot 21. The building was an old building at that time. A few years later the common entrance was closed, and a wooden partition wall cutting the original building into two was run through on the line between lots 20 and 21. Thereafter the two buildings were operated as separate buildings, the main entrance to that on lot 20 being placed in the middle of the Main avenue or front wall, with a stairway leading to the second story. The ground floor consists of two storerooms. The upper floor is fit only for a cheap rooming or lodging house. The upper hallway, office, laundry, and rooms are so arranged that a partition and double stairway could not be run through on the middle line of lot 20 so as to make two separate buildings without prohibitive expense. At the time of the trial the west storeroom was rented for a small monthly rental. The other storeroom was vacant. The upper story was rented at a monthly rental of about $40. It is admitted that the income from the building is hardly sufficient to carry the taxes and insurance, and that the rent is being continually reduced in order to keep the building tenanted at all. Three of plaintiff's witnesses somewhat indefinitely valued the building at from $1,500 to $3,000, though all of them admitted that it added little or nothing to the value of the lot, and that its only value was as an aid in carrying the property till the lot shall be used by the erection thereon of modern improvements as business property. Two witnesses for defendant and the three referees in partition appointed by the court testified that the building had little or no value, and, in substance, that the property would sell as readily, and for as much, without the building as with it. From the whole evidence it is plain that the building is an old wooden shell, badly out of repair and not worth repairing. Props have been placed in the rear, presumably to keep it from falling. On the part of the city officials there have been threats, or at least talk, of condemning it. One of the referees, a practical contractor and builder of 40 years' experience, who said he had examined the building critically, testified as follows:

> "As a matter of fact this property can be partitioned without any great prejudice to the owners. I do not consider the building of any value. I will have to answer that way. If it was a good building, I would say it hurts it. But I consider the lot as though the building was not there. Independent of the question of the times, it would not be any great prejudice to cut the lot in two, not particularly, but then, as a rule, you can sell 50 feet better than you can 25 feet, but there is no great detriment on that property, because very often some one wants 25 feet, but I prefer 50 feet myself. That would be owing to the buyer. As to the condition of the building, can the stenographer spell 'rotten'? It is in bad shape. It is gradually rotting down. The back timbers or studding are all rotten on the bottom. They put these braces up for fear it might fall—these braces on the back. I don't know if it would fall, but it looks bad. The plumbing is in bad shape. They do not use the bathroom at all; they use the sink and toilet; and the plastering is all broken down, and lathing exposed, and paper and all off, and I would think the building was ready to be condemned, myself; I think it's worthless."

As to the value of the lot, one of plaintiff's witnesses, an architect, expressed the opinion that it was worth at the time of the trial about $20,000; that he thought there was then a market for it at that price; that the real estate market was then much depressed, and that in normal times he would consider $600 a front foot, or $30,000, a good price. He expressed the further opinion that to cut the lot in two would reduce the aggregate value by 25 per cent. to 30 per cent. Another of plaintiff's witnesses, an experienced real estate man, was of the opinion that a high or boom price for the lot would be $60,000, a low or "hard-times" price $22,000, and the normal value $30,000; that to cut the lot in halves would reduce the aggregate value by 10 per cent. When asked in substance, which would result in greater loss to the owners, to divide the property in kind or sell it on the present market, he said it would be a "toss up" as to which would be advisable, and that "assuming that one could wait till normal times * * * it would be more prejudicial to sell than to divide." Still another witness, an architect not acquainted with real estate values in Spokane, expressed the view that a division in kind would depreciate the aggregate value by about 20 per cent. Another real estate dealer placed the values higher and the loss by division at about 33 per cent. He also placed the market value at the time of trial more than one-third below normal value. Of defendant's witnesses, one, a real estate dealer of long experience, was of the opinion that the property could not be sold at the time of the trial for more than 30 per cent. to 50 per cent. of its ordinary normal value. Another experienced real estate agent, who has had this property in his charge for about 3 years, while not expressing himself in terms of percentage, was of the positive opinion that the property could not be sold to advantage on the depressed market existing at the time of trial, and he said:

> "As far as that particular property is concerned I would rather have half of it all my own than to have it sold and take half of the money at this time."

An experienced contractor and builder, who was also one of the referees afterwards appointed by the court to partition the property, who had had 30 years' acquaintance with conditions and relative real estate values in

Spokane, stated that he would not sell real estate at this time unless forced to do it; that it could not be done without considerable loss, which in some cases might run as high as 70 per cent.

The trial judge was of the opinion that the building was of little or no permanent value to the property, and that the fact that it could not be advantageously divided should not be permitted to stand in the way of a partition in kind. He found that the property could be divided into equal parts without great prejudice, or any substantial prejudice, to either of the owners, and that it should be so divided and partitioned between the parties without a sale. He accordingly entered an interlocutory decree of partition, appointing three duly qualified and disinterested persons to make the partition, and directing, if they were unable to partition and assign to each of the parties an equal portion, quantity, and quality relatively considered according to their respective rights, without great prejudice to the parties respectively, that they make and file a report to that effect. The referees accordingly partitioned the property, reporting that they had done so without great prejudice to either of the parties, by dividing it into two equal portions, quantity and quality relatively considered, by drawing a straight line from the center point of the north line of the lot to the center point of the south line, and that they had assigned the west half to defendant and the east half to plaintiff. Plaintiff filed exceptions to this report and contested its confirmation. After a full hearing the court entered its final decree confirming the partition as made by the referees. Plaintiff appealed.

Both parties concede that the sole question for the court's determination was whether or not a partition in kind could be made without great prejudice. The appellant throughout took and still takes the negative of this issue, the respondent the affirmative. It is obvious that every case of this character must ultimately depend upon its own peculiar facts. For that reason we have endeavored to set out fairly and fully the purport of the evidence. There are, however, certain broad guiding principles which it may profit to notice.

[1] Where, as here, there are no complications as to the title of either party, either of the tenants in common can demand partition as a matter of right. Freeman, Cotenancy & Partition (2d Ed.) § 424; Moss v. Nye, 183 Ala. 544, 62 South. 776.

[2] Probable injury to the property, inconvenience, or hardship to either of the parties are not adequate barriers to the assertion of the right, nor valid excuses for material delay in according the remedy. Wittel v. Wittel, 82 N. J. Eq. 229, 91 Atl. 722; Mylin v. King, 139 Ala. 139, 35 South. 998.

[3] In the original jurisdiction of equity there was no such thing as partition by means of sale, except where all parties were sui juris and consenting. Wanting such capacity and consent, the division was always in kind, and where the land was incapable of exact or fair division, compensation for the inequality was made by an award of "owelty of partition." 4 Pomeroy's Equity Juris. (3d Ed.) §§ 1389, 1390.

[4] The practical inconvenience and frequent inadequacy of this method led to the enactment in England, and in nearly all of the states of the Union, of statutes conferring upon the courts power to make partition by sale of the land, when not partible in kind without greater injury than a sale would cause, independently of the consent of the parties. But partition has not lost its original purpose of a division without changing the existing character of the inheritance. The courts still, as formerly, favor a division in kind whenever practicable. 4 Pomeroy's Equity Juris. (3d Ed.) § 1390.

> "The law favors partition of land among tenants in common, rather than a sale thereof and a division of the proceeds, and it is only when the land itself cannot be partitioned that a sale may be ordered." Kloss v. Wylezalek, 207 Ill. 328, 69 N. E. 863, 99 Am. St. Rep. 220.

It is still recognized that an owner has the right to retain his inheritance or investment in the form in which he has it, so long as it can be done without great prejudice to his cotenant.

> "The power to convert real estate into money against the will of the owner, is an extraordinary and dangerous power, and ought never to be exercised unless the necessity therefor is clearly established." Vesper v. Farnsworth, 40 Wis. 357.

Nearly all of the state statutes, of which that of this state is typical, therefore, condition the power of the court to order a sale upon a finding from evidence that partition in kind cannot be made without "great prejudice" to the owners. Our statute (Rem. Code, § 838) authorizes actions for partition of property, "and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners." And again section 845 declares:

> "If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided for the owners whose interest remain unknown or are not ascertained."

Construing a statute couched in terms not materially different from ours, an able court has held that the term "great prejudice to the owners" means material pecuniary loss. The court said:

> "So the established test of whether a partition in kind would result in 'great prejudice to the owners' is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole." Idema v. Comstock, 131 Wis. 16, 110 N. W. 786, 120 Am. St. Rep. 1027.

See, also, to same effect Vesper v. Farnsworth, supra.

The Supreme Court of Appeals of West Virginia has clearly expressed what we conceive to be fundamental guiding principles in all cases, though the statute there involved made the criterion "convenience" instead of great prejudice. That court said:

> "In any case such sale may be made if the parties are all adults and consent thereto. But the court has no right to decree a sale without their consent, unless it finds: First, that partition in kind cannot be conveniently made; and, second, that the interests of the parties owning the land will be promoted by a sale. These two requisites are conditions imposed by the statute which alone confers upon a court of equity the power to make a sale at all. They are important and indispensable conditions. The statute is an innovation upon the common law, taking away from the owner the right to keep his freehold, and converting his home into money. That must not be done except in cases of imperious necessity. It is a legislative alteration of a canon of the law which forms part of the substructure of our jurisprudence. Forcible conversion of property into money is avoided wherever possible." Croston v. Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918.

See, also, Roberts v. Coleman, 37 W. Va. 143, 16 S. E. 482. Pomeroy (section 1390) expresses the same thought when he says the power of sale is to be exercised "whenever it shall appear to the court * * * that a sale would be more beneficial, or less injurious, than an actual division."

[5, 6] Since by the statute itself the power of the court to order a sale is conditioned upon a showing that great prejudice would result from a division, there is a presumption that land held in common can be equitably divided according to the interests of the parties, measured by value. The burden of proof to show great prejudice, therefore, rests upon him who asserts it. East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 Pac. 999; Mitchell v. Cline, 84 Cal. 418, 24 Pac. 164; Hellier v. Syck, 147 Ky. 762, 145 S. W. 1110; Idema v. Comstock, supra.

In the case before us the burden to show that great prejudice would result from division in kind was upon the plaintiff. In the light of the foregoing well-established principles has this burden been adequately met?

[7, 8] It is first urged that, because the building cannot be advantageously divided, to divide in kind amounts to an order for a destruction of the building, or for the construction of a wall on the dividing line at a cost greater than the value of the building, and that either alternative works great prejudice. But great prejudice means material pecuniary loss, not mere temporary inconvenience or temporary impairment of an income slight in comparison with the value of the property for the uses for which it is suitable. The question is, Should this property, in view of its suitable location for business purposes, be treated as permanently improved property would be treated? It seems to us that where a property worth on a depressed market $20,000 to $22,000, and on a normal market $30,000 to $37,000, is renting for only $40 to $50 a month, and precariously at that, since the evidence shows continual reductions in rent to keep it tenanted at all, it cannot be said to be permanently improved, nor improved at all in any real or controlling sense. The building is an old wooden shell so out of repair that it has been propped for safety; the plumbing is antiquated and out of repair; the plastering is off; the lathing is exposed. It is not worth repairing. The court in his findings gave it a value of about $1,000, but we think the evidence shows this valuation excessive by at least one-half. One cannot read the evidence without being impressed with the view of many of the witnesses that the lots would be worth as much without it as with it. On the facts we agree with the trial court and the referees that this building as an element of value is negligible. The property should be treated for the purpose of division as if it were not there. Its absolute destruction would not be great prejudice in the legal sense of material pecuniary loss.

[9, 10] The further claim that the building on lot 20 cannot be removed without entailing upon the owner of the east half of it the expense of building a wall to sustain the building on lot 21 adjoining it on the east is not supported either by the law or by the preponderance of the evidence. The evidence fails to show that there was ever a continuing party wall agreement of any kind. If there was any, the burden was upon appellant to show it. We must assume that there was none. In such a case, the only duty of either party who desires to remove his building is to notify the other of that intention, so that the other may do whatever he deems advisable to protect his own building. Thereafter the first party is only liable for a failure to exercise reasonable care in removing his structure. Clemens v. Speed, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; Hieatt v. Morris, 10 Ohio St. 523, 78 Am. Dec. 280. No law to the contrary is cited, and we know of none as applied to the facts here presented. That no such support would be necessary in any event we think is supported by a preponderance of the evidence. Two of the referees testified that the dividing wall was a double wooden wall. One of them, who seems to us probably the best qualified witness who testified in the case, said:

> "I am a builder and contractor. It is two buildings that were built on lots 20 and 21. They are two buildings. There are two separate supports there. I examined it critically when I was there. There were two six-inch walls. The wall is a foot thick. I went into the dark room and could see through the partition. It is a

window they put through there. Evidently there is a vent there at the top. The building could be removed from the east half without furnishing any support for the building lying on lot 21."

The evidence to the contrary was vague and uncertain.

[11, 12] It is next urged that to divide the lot would reduce the aggregate value of the halves from 10 per cent. to 30 per cent. below its value as a whole, and that this would be great prejudice. Assuming that this is true, though respondent's witnesses could see no such excessive result, the fact remains that every one of appellant's witnesses who testified on the subject was just as positive that even a greater loss would result from a sale on the existing market, and on this point there was an absolute unanimity of opinion on the part of all the witnesses on both sides. To use the language of Pomeroy, Can such a sale be justly said to be "more beneficial, or less injurious, than an actual division?" Simply because the aggregate value of the halves would be somewhat less than the value of the whole, must the law on that account force one, or possibly both, of the common owners to change the form of his holding, a thing never favored in law, and forego the value of his investment by selling the entire property at a sacrifice? We think not. But it is argued that the evidence as to the present depressed condition of the real estate market and a probable advance of this land in value was inadmissible and purely speculative. We fail, however, to see that it was more so than the evidence of loss in value by a division. Both are matters of opinion, and opinion evidence is always admissible on questions of value. In Craighead v. Pike, 58 N. J. Eq. 15, 43 Atl. 424, Vice Chancellor Pitney, now Associate Justice of the Supreme Court of the United States, gave to evidence of this character a controlling weight. He held that the fact that the property as a body had been on the market for a long time and could not be sold except at great loss was a sufficient reason to divide it in specie.

[13] After all, the question of value in partition suits, as in other cases where it enters, is one resting largely in opinion. The question whether the division of a given piece of property, which is capable of exact division, will result in greater loss than a sale is, in almost every case, essentially a question of opinion. The witnesses in this case were practically at one in the opinion that the building was of little or no moment as an incident of value to this property, either in halves or as a whole. As to the aggregate value of the two halves as compared with the value as a whole they were hopelessly divided. The trial court and the three referees were obviously of the opinion that the difference was slight, since the court found and the referees reported that a division in kind could be made as it was made without prejudice. Though the trial here is one de novo and the findings of the trial court are not binding upon us (Rem. Code, § 1730), they are nevertheless entitled to great weight. This is especially true when, as here, they are supported by the report of the referees. Freeman, Cotenancy & Partition (2d Ed.) § 525; Lang v. Constance (Ky.) 46 S. W. 693; Garth's Guardian v. Thompson (Ky.) 72 S. W. 782; Parrott v. Barrett, 81 S. C. 255, 62 S. E. 241. On the whole record we are unable to say that the court's findings are contrary to the preponderance of the evidence.

[14, 15] In the course of the trial the trial judge expressed the view that if he ordered a sale, he should not permit either party to the suit to become a bidder at the sale. In this he was in error, but the error is wholly immaterial, since no sale was ordered. Whether that view influenced him to favor a division in kind can make no difference. Under the law it was his duty to favor such a division in any event, since the evidence showed the division practicable and failed to show that great prejudice would result from it.

[16] Some complaint is made of the fact that one of the referees was also a witness at the original hearing. As an objection this is wholly untenable. Garth's Guardian v. Thompson, supra; Hellier v. Syck, supra. This fact was known when he was appointed, and no objection was made at the time. Moreover, all of the referees were men of unquestioned standing, and all testified that they were not influenced by the court's decree in reaching the conclusion that the property should be divided.

The decree is affirmed.

MORRIS, FULLERTON, MAIN, and CHADWICK, JJ., concur.

(96 Wash. 499)

MURPHY v. PROSSER. (No. 13733.)

(Supreme Court of Washington. May 23, 1917.)

1. Action 🔑48(3)—Causes of Action Arising Out of Same Contract or Transaction—Joinder.

To cover purchase price for plaintiff's share in land and for money advanced, defendant gave plaintiff three notes secured by a mortgage. Later defendant gave plaintiff a second mortgage upon the property to secure payment of $7,000 advanced by plaintiff for purpose of making improvements on property. In 1909, to cover the balance due upon the said transactions, defendant gave plaintiff a demand note for $1,500, unsecured, and a $15,000 note due in three years secured by a mortgage. *Held*, that on time note being due plaintiff could join the causes of action upon the $1,500 note and the $15,000 note and mortgage in view of Rem. Code 1915, § 296, providing that "plaintiff may unite several causes of action in the same complaint when they all arise out of—(1) contract, express or implied; or * * * (8) the same transaction."

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 500, 503, 504.]

2. USURY ⟹114—EVIDENCE—ADMISSIBILITY.

In an action to recover on two notes given for a balance due plaintiff on land sold and money advanced for improvements, defense being usury, evidence of the intrinsic value of property, its character, and the purpose for which it was adopted, was properly excluded.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 324, 325, 327.]

3. USURY ⟹117—EVIDENCE—SUFFICIENCY.

Where defendant agreed to pay $5,000 more for plaintiff's share in land than plaintiff had paid, including the $5,000 in mortgage note given for land would not be proof that it was a bonus for the $7,000 loan subsequently made.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328-340.]

Department 1. Appeal from Superior Court, King County; M. L. Clifford, Judge.

Action by George Murphy against Joseph V. Prosser. Judgment for plaintiff, and defendant appeals. Affirmed.

Douglas, Lane & Douglas, of Seattle, for appellant. Chas. D. Fullen and J. F. Roy Erford, both of Seattle, for respondent.

MAIN, J. In the complaint in this case, there are alleged two causes of action, separately stated, the first upon a demand note, unsecured, the second, upon a note secured by a mortgage upon real estate. To the complaint, a demurrer was interposed, upon the ground that the two causes of action were improperly united. The demurrer being overruled, the defendant answered and pleaded usury as a defense. The charge of usury was denied by a reply. The cause was tried to the court, without a jury, and resulted in findings of fact, conclusions of law, and a judgment in favor of the plaintiff. The judgment upon the first cause of action was for $1,471.40. Upon the second cause of action, the judgment was for $21,744.60, and for the foreclosure of the mortgage. The defendant appeals.

The facts are briefly these: Some time during the month of August, 1903, the appellant and respondent contracted to purchase from the then owner a certain tract of land on the western slope of the Cascade Mountains, referred to in the evidence as the Scenic Hot Springs property. The purchase price was $19,000 cash, one-half of which was advanced by each of the purchasers, and they became the owners of the property as tenants in common, with equal moieties. On January 27, 1904, the respondent sold his half interest in the property to the appellant for $14,500. Prior to this time, the respondent had advanced to the appellant $2,500. To cover this advancement and the purchase price, the appellant executed three notes, one for $7,000, and two for $5,000 each. These notes were not due until five or six years after date, and contained a renewal provision for five additional years, at the election of the maker. The interest rate provided in the notes was 6 per cent. per annum, and, in the case of renewal, 7 per cent. per annum. The notes were secured by a mortgage upon the Scenic Hot Springs property. On or about April 1, 1904, the appellant gave to the respondent a second mortgage upon the property to secure the payment of $7,000, which had been advanced by the respondent to the appellant for the purpose of making improvements upon the property. On February 8, 1909, there being a balance due the respondent upon the previous transactions between the parties of $16,500, to cover this amount two notes were given, one for $1,500 on demand, unsecured, and the other for $15,000, due three years after date, secured by a mortgage upon the property. The $1,500 note is the basis of the first cause of action. The second cause of action is predicated upon the $15,000 note and mortgage.

[1] It is first claimed that the demurrer to the complaint should have been sustained, because the two causes of action were improperly united. The answer to this contention is found in the statute. Section 296, Rem. Code, provides that:

> "The plaintiff may unite several causes of action in the same complaint, when they all arise out of—
>
> "1. Contract, express or implied; or * * *
>
> "8. The same transaction."

Under either of these subdivisions of the statute, the demurrer was properly overruled.

Each cause of action is based upon a contract, and arose out of the same transaction, and, when separately stated, could be pleaded in the same complaint.

[2] It is next claimed that the trial court erred in sustaining objections to offered testimony. The appellant offered testimony to the effect that the market value of the property had not increased between the time when it was purchased and the time when the respondent sold his half interest to the appellant, and also as to the physical character of the property, and to what use it could be adapted, as well as its intrinsic value. In making a ruling, the trial judge stated that he would assume that there had been no change in the value of the property, and sustained the objection to the other offered testimony. The defense, as above stated, was that of usury. Under this defense, the objection to the offered testimony was properly sustained. The intrinsic value of the property, its character, and the purpose for which it was adapted, were matters which would throw no light upon the question whether or not the transaction between the parties had been tainted with usury.

[3] Finally, it is contended that the contract is usurious, because it is claimed that $5,000 included in the $17,000 mortgage note, under date of January 27, 1904, was intended as a bonus for the $7,000 loan which was subsequently advanced and secured by the second mortgage under date of April 1, 1904. From

the facts stated, it will be remembered that the appellant, in purchasing the half interest of the respondent, agreed to give $5,000 more therefore than the respondent had paid cash for it. The appellant claims that this $5,000 was a bonus for the $7,000 loan mentioned. The respondent claims that the $5,000 had no reference to the $7,000 loan, and that the transaction was a bona fide sale of his interest in the property for $14,500. If the $5,000 was a part of the purchase price, the transaction was not usurious. The fact that the property was sold upon a long-time mortgage, with a moderate rate of interest, for $5,000 more than it was previously purchased for, for cash, would not indicate that the including of the $5,000 in the mortgage was colorable, and was intended as a cloak or cover for a bonus for a loan, or forbearance of money, which the law would not sanction. Rushing v. Worsham, 102 Ga. 825, 30 S. E. 541; Hogg v. Ruffner, 1 Black, 115, 17 L. Ed. 38.

What the transaction really was is a question of fact. The trial court found that the contention that the $5,000 was a bonus for the making of the loan was not supported by the evidence. Upon the record, it is plain that no other finding could properly have been made. Even the appellant's testimony, when read in its entirety, would hardly sustain a finding that the $5,000 was intended as a bonus.

The judgment will be affirmed

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(96 Wash. 516)

GOLDSMITH v. WINNER SHINGLE CO. et al. (No. 13730.)

(Supreme Court of Washington. May 26, 1917.)

1. BANKRUPTCY 🔑212 — CLAIMS AGAINST BANKRUPT—STATE COURTS—JURISDICTION.

Where one to whom a purchase-money mortgage had been assigned as collateral by one who afterwards became a bankrupt foreclosed mortgage in a state court, mortgagor, on payment of mortgage, could not direct clerk to retain amount in excess of plaintiff's claim for reimbursement of mortgagor for expenditures in defending title, as his claim was one against the bankrupt, and he could not compel trustee in bankruptcy to come into state court to determine mortgagor's right to a preferential lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236.]

2. BANKRUPTCY 🔑151—REDUCING PROPERTY TO POSSESSION—RIGHTS OF TRUSTEE.

The trustee takes the title of the bankrupt by operation of law, and it is his duty to reduce all of bankrupt's property to possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239.]

Department 1. Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

Action by the Citizens' Bank of Renton against the Winner Shingle Company, in which J. S. Goldsmith, trustee, filed a petition after decree. From the judgment on the petition, the Winner Shingle Company appeals. Affirmed.

Brown, Peringer & Thomas, of Bellingham, for appellant. McClure & McClure, of Seattle, and Coleman & Gable, of Sedro Woolley, for respondent.

CHADWICK, J. In the year 1908 the appellant purchased from one Pat Gibbons and wife certain property situated in Skagit county, Wash. One-half of the purchase price was paid in cash. Three notes were given for the remainder, each for the sum of $2,370, payable in one, two, and three years thereafter. These notes were secured by a mortgage on the property. Gibbons furnished an abstract which revealed a claim of title to the property by one E. G. English, and the pendency of an action instituted by English in the year 1902.

Thereupon Gibbons and wife entered into a contract with the appellant whereby they agreed to prosecute the English suit to a conclusion within two years, to protect appellant in the peaceable possession of the property, "and to pay all and every damage of every kind and nature whatsoever arising out of or connected with any claim to said premises by the said E. G. English, whether the said damage be in the nature of expenses incurred in litigation, a claim to improvements made or timber removed from said land, and in fact all and every damage of every character which may be sustained by the said [appellant] arising from any claim or action by the said English pertaining to the said property."

The first two notes were paid. Gibbons assigned the third note to the Citizens' Bank, the plaintiff herein, as collateral security for a loan. Gibbons was thereafter adjudged to be a bankrupt, and respondent J. S. Goldsmith, was appointed as his trustee in bankruptcy. In March, 1913, plaintiff began an action to foreclose the mortgage, and to satisfy the indebtedness of Gibbons out of the collateral security and mortgaged property. The action was defended by the appellant, but plaintiff prevailed, and judgment was entered in the full sum of $3,430.43. While the action to foreclose the mortgage was pending, appellant caused the case of English v. Gibbons, 79 Wash. 210, 140 Pac. 322, to be prosecuted to a conclusion in the superior court of King county and in this court. After judgment entered in this case, appellant paid the full amount found to be due in satisfaction of the judgment. Appellant expended in costs and attorney's fees in the defense of this action, and in the prosecution of the English Case, the sum of $1,032.88. When the appellant paid the money in satisfaction of the decree of foreclosure, it directed the clerk to pay to plaintiff $2,944.16 and accumulated interest, and to retain the remainder, the difference between the principal judgment and the amount due upon the collateral note, being $526, in the registry of the court until the respective rights thereto could be determined as between appellant and the trustee in bankruptcy. This amount the court ordered retained in the registry of the court pending its further order.

The trustee in bankruptcy filed a petition claiming the money as the property of the bankrupt. To this petition the appellant made answer, claiming a lien upon the fund; that the trustee in bankruptcy had full knowledge of the foreclosure proceeding; that he did not participate, but left the burden of the litigation to appellant; that by reason of its prosecution to a final judgment of the English Case it has conserved the estate at its own expense and cost, and is therefore entitled to the fund; and finally that the lower court had jurisdiction of the subject-matter of the action from the beginning, and hence has jurisdiction now of all matters incident thereto, including the issue joined by the petition of respondent and the answer of appellant.

[1, 2] The contentions of appellant rest primarily upon the assertion that the said court, having charge of the fund, has jurisdiction to try out conflicting claims. While there can be no question of the jurisdiction of a state court to hear all controversies or suits brought by a trustee in bankruptcy, it does not follow that it will retain possession of property which is primarily the property of the bankrupt within the rule of sequestration, the legal title to which is in the trustee, and upon which there is no specific lien. The right of appellant, if any, is that of a claimant or creditor. Upon its own theory it is a creditor of the bankrupt claiming a preference or an equitable lien for the preservation of the property. If it were claiming the property under some antecedent title, or as derived from some independent source, or under a prior lien, a different question would be presented. But here the legal title to the fund is admittedly in the trustee. The trustee takes the title of the bankrupt by operation of law, and it is his duty to reduce all of the property to possession. The right of appellant therefore depends upon the proof and merit of its claim.

The controversy in the state court as outlined in the principal action had ceased with the satisfaction of the judgment, and appellant could neither invite nor compel the trustee to come into the state court to try title to funds which prima facie belong to the bankrupt. If appellant had retained the fund, respondent could have sued in either court. The point we make is that the choice of forums under a record such as we have before us is in the trustee. The creditor cannot, by the mere act of paying a disputed fund into the registry of a state court, invest that court with either primary or exclusive jurisdiction, or create a lien in his favor upon it.

While state courts have jurisdiction to pass upon all suits and controversies affecting the property of the bankrupt, the allowance or disallowance of claims is peculiarly, if not entirely, within the jurisdiction of the bankruptcy court.

If appellant has a claim which ought to be paid out of the impounded funds, it may be heard in the other tribunal. The legal title to the money being in the trustee, there was no controversy of which the state court would take jurisdiction to the exclusion of the bankruptcy court.

Affirmed.

ELLIS, C. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

(96 Wash. 471)

LITZELL v. HART. (No. 13579.)

(Supreme Court of Washington. May 21, 1917.)

1. JUDGMENT 🔑335(4)—ACTION TO AMEND—FINDING IN TRIAL COURT—CONCLUSIVENESS.

In an action to amend and reform a decree to make it speak the actual decision of the court, a finding in the prior suit was conclusive; had either party felt aggrieved by the finding, the only way to avoid its legal effect was by suffering judgment to be entered upon it and appealing.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 660, 662, 663.]

2. HUSBAND AND WIFE 🔑267(2)—COMMUNITY PROPERTY—CONVEYANCE BY WIFE ALONE.

Assignments and deeds executed by a wife alone covering securities and lots which were community property conveyed no title to the assignee and grantee; they not having been made for a community purpose.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 931.]

3. HUSBAND AND WIFE 🔑276(9) — COMMUNITY PROPERTY—RIGHTS OF CLAIMANTS.

In an action between a deceased husband's administrator and the husband's deceased wife's administratrix to determine title to property, where the court ruled that the property was community property, no part of it should have been adjudged as belonging to the administrator individually, in severalty, or otherwise, and no part should have been adjudged to belong to the administratrix individually, in severalty, or otherwise.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1045.]

4. EXECUTORS AND ADMINISTRATORS 🔑85(2), 130(2)—POWERS—STATUTES.

Under Rem. Code 1915, §§ 1534, 1535, it is the duty of executors and administrators to take into possession all the estate, real and personal, and they are empowered to sue for the recovery of any property of decedent, real or personal, or for possession, and they are subjected to suits in all cases wherein such suits might have been maintained by or against their intestates or testators, the statutes in effect making them representatives of the estates of decedents, in actions both as to realty and personalty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 342, 344, 535, 538–540.]

5. JUDGMENT ⇨686—ACTIONS BY—PRIVIES TO JUDGMENTS.

In view of Rem. Code 1915, §§ 1534, 1535, in effect making executors and administrators representatives of decedents' estates in actions both as to realty and to personalty, heirs, legatees, and devisees are privies to judgments rendered in actions by administrators or executors, though they would not have been privies at common law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1209.]

6. JUDGMENT ⇨335(1)—ACTION FOR MODIFICATION—PLAINTIFF'S RIGHT TO SUE.

The legatee under the will of a deceased wife, who, as privy thereto, was bound by the judgment in an action between the administrator of the deceased wife's husband and the wife's administratrix to determine the ownership of securities, had the right to sue for vacation or modification of the decree within the statutory period of one year from its entry as if he had been a nominal party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647, 650–654, 659, 661.]

7. JUDGMENT ⇨305—MODIFICATION.

Where the original decree was not the decree actually rendered and intended to be rendered by the court, the court has the inherent power to modify the judgment entered to make it conform to the judgment actually rendered, a power which can be invoked by any person injuriously affected.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 596, 597.]

8. JUDGMENT ⇨335(1) — MODIFICATION — TIME OF APPLYING—DISCRETION OF COURT.

There was no abuse of discretion in entertaining a complaint, to amend and reform a decree to make it speak the actual decision of the court, filed within a year from entry of decree, where the equities were overwhelmingly in plaintiff's favor, more especially where he proceeded within a short time after he discovered the original decree did not embody the actual decision.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647, 650–654, 659, 661.]

9. JUDGMENT ⇨335(3)—REFORMATION—COMPLAINT.

In an action to amend and reform a decree, where the complaint showed that the real judgment which resulted from the trial was different from the judgment entered, such complaint presented a meritorious cause of action to reform the judgment entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 655–658.]

10. JUDGMENT ⇨335(4)—MODIFICATION—ACTUAL FRAUD.

Where a decree was entered which did not speak the actual judgment of the court and a party to the action seeks to use such decree for a fraudulent purpose, relief will be granted a party injured, regardless of failure to show actual fraud in the entry of the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 660, 662, 663.]

Department 1. Appeal from Superior Court, Okanogan County; R. B. Albertson, Judge.

Action by Charles W. Litzell against Linnie B. Hart, individually and as administratrix with the will annexed of the estate of Virginia A. Parkhurst, deceased. From a decree for plaintiff, defendant appeals. Affirmed, except as to the judgment for costs, which is ordered to be reduced.

H. M. Brooks, of Spokane, for appellant. Smith & Gresham, of Okanogan, for respondent.

ELLIS, C. J. This is an action to amend and reform a decree to make it speak the actual decision of the court. The facts are complicated and require a full statement.

The original action was brought by Alfred L. Parkhurst, as plaintiff, under a power of attorney from his father, W. A. Parkhurst, against the Bank of Oroville to recover possession of certain securities—notes, mortgages, assignments of mortgages, and deeds of real estate. It was claimed that the securities in question belonged to W. A. Parkhurst as his separate property and had been left with the bank to be returned to him on demand. Virginia A. Parkhurst, wife of W. A. Parkhurst, intervened, claiming that the securities were hers in her own right, and asked that they be delivered to her. The bank was a mere stakeholder. After the action was commenced, W. A. Parkhurst died. Still later, but before trial, the intervener, Virginia A. Parkhurst, died. Thereafter the action was prosecuted by Alfred L. Parkhurst individually and Alfred L. Parkhurst as administrator of the estate of W. A. Parkhurst, deceased, and the complaint in intervention was prosecuted by Linnie B. Hart, a daughter of the intervener, individually and as administratrix with the will annexed of the estate of Virginia A. Parkhurst, deceased. By the will, Virginia A. Parkhurst left her whole estate to her daughter Linnie B. Hart, and her son one A. L. Kitchen, share and share alike, subject to a prior legacy of $1,000 to her brother Charles W. Litzell, plaintiff in this action.

The original action was tried in the superior court of Okanogan county; Hon. William A. Huneke, of the superior court of Spokane county, visiting judge presiding. That cause was tried to the court on evidence which is not before us. Judge Huneke, on his return to Spokane, where principal counsel for both parties resided, decided the case in a memorandum decision, unsigned but in his own handwriting, which appears in the record now before us. The memorandum shows that at the trial the sole question of fact considered and determined was the ownership of the securities; that is, whether they belonged to W. A. Parkhurst in his lifetime in his separate right, or to Virginia A. Parkhurst in her lifetime in her separate right, or to the marital community consisting of these two as their common property. After a commendably lucid résumé of the evidence, Judge Huneke found, as a matter of fact, that all of the property in question in that action had been acquired during their marriage by the joint efforts of W. A. and Virginia A. Parkhurst, invoked the familiar presumption that all property acquired during the marriage is community property and that the burden is upon him who disputes it, further found that neither party had sustained that burden, and decided in substance that all of the property was community property of W. A. Parkhurst and Virginia A. Parkhurst, his wife, in their lifetime, and that one-half should go to her estate by operation of law. The decision concluded with a direction that "judgment may be prepared awarding half the property to the intervener and the rest to plaintiff."

Notwithstanding the explicit finding that this property was community property, and the necessary legal conclusion that it should go in equal parts to the two estates, the decree actually presented to and signed by Judge Huneke awarded a part of the securities to Alfred L. Parkhurst, as owner thereof, and the remaining part, by specific descriptions, to Linnie B. Hart individually and in her sole and separate right.

A few days before the expiration of one year after the entry of this decree, plaintiff herein, who is concededly a legatee in the sum of $1,000 under the will of Virginia A. Parkhurst, brought the present action. He contends that the decree was at variance with the findings of Judge Huneke and with the decree that Judge Huneke actually directed to be entered, and that Judge Huneke signed the decree in ignorance of such variance. He avers that the decree, by reason of this variance, is essentially in fraud of his rights, in that it leaves no property in the estate of Virginia A. Parkhurst, deceased, out of which his legacy can be paid. He charges that the entry of the decree was procured through fraud practiced upon the court. He seeks so to amend the decree that the property thereby awarded to Linnie B. Hart in her separate right shall be awarded to the estate of Virginia A. Parkhurst, deceased, to the end that it may be available for the payment of his legacy.

A demurrer to the complaint on nearly all of the statutory grounds was overruled. The cause was tried before the court, Hon. R. B. Albertson, of the superior court for King county, visiting judge, presiding. Judge Huneke was a witness, and testified, in substance, that before the entry of the decree he submitted his memorandum decision to the principal attorney for plaintiffs and to the attorney for the intervener in the original action, and that he entered the decree in that action assuming that it conformed to his findings, and that he would not have signed that decree if he had known that it did not so conform. Both of the attorneys to whom Judge Huneke submitted his memorandum decision as a guide in framing a decree, testified, in substance, that it was agreed between them that the interests of their clients would be best served by awarding to them individually specific moieties of the property so as to relieve it from the expense of administration. The attorney for plaintiffs in that action testified that it was agreed at the time that Linnie B. Hart should pay the plaintiff in this action his legacy of $1,000, but, as pertinently remarked by Judge Albertson in his decision in this case:

> "In what way the interest of her brother, who, under the will of Virginia A. Parkhurst, was a residuary legatee with herself, was to be protected, does not appear from the record."

[1, 2] There was evidence that, prior to the death of W. A. Parkhurst, his wife Virginia A. had executed to Linnie B. Hart assignments of some of the securities involved in the original action, and a deed purporting to convey to her certain lots in the town of Oroville also involved in that action. But Judge Huneke found that all of this was community property. That finding Judge Albertson held, and we think soundly, is conclusive in this proceeding. Had either party felt aggrieved by that finding, there was just one way to avoid its necessary legal effect. That was by suffering a judgment to be entered upon it and appealing from that judgment. In the face of that finding, it is manifest that the assignments and deeds above mentioned conveyed no title to Linnie B. Hart. They were not made nor joined in by the managing member of the community nor made for a community purpose. Furthermore, Linnie B. Hart, as intervener for herself and as administratrix with the will annexed of her deceased mother's estate, could hardly contend that at the same time she and her mother were separate owners of the property.

[3] Upon the evidence, Judge Albertson decided, and we think he was fully justified in so holding, that:

> "Under the ruling of Judge Huneke, no part of the property should have been adjudged to belong to the plaintiff Alfred L. Parkhurst, individually, either in severalty or otherwise, and that no part of the property should have been adjudged to belong to Linnie B. Hart individually, in severalty or otherwise."

But the plaintiff in the present proceeding does not ask an amendment of the decree so that it shall fully conform to the actual decision. He asks only that it be so amended in so far as it affects the estate of Virginia A. Parkhurst, deceased. There was never any administration upon the community estate, nor any administration or distribution of the property, either in the estate of W. A. Parkhurst or in the estate of Virginia A. Parkhurst. Neither does it appear that W. A. Parkhurst left any will devising all or any of this property to Alfred L. Parkhurst, though it does appear that he left other children. Though noticing these facts, the able trial judge did not feel warranted in going beyond the prayer of the complaint or in reforming the decree so as to protect persons not before the court who may or may not have any present interest to protect. He therefore entered a judgment ordering, adjudging, and decreeing that the original judgment be and is declared void, set aside, and held for naught in so far as it decrees that Linnie B. Hart individually is the owner of any of the property, real or personal, described in that decree, except to the extent of her interest under the will of Virginia A. Parkhurst, deceased. Specific paragraphs of the original decree are then in terms amended and reformed so as to award to the estate of Virginia A. Parkhurst, by specific descriptions, all of the real estate and securities by the original decree awarded to Linnie B. Hart individually. The decree as reformed further provides, in the event Linnie B. Hart has collected any of the notes, mortgages, or sums due, or in the event she has sold any of the real estate mentioned, that she be held accountable therefor to the estate of Virginia A. Parkhurst, and awarded plaintiff judgment for his costs against Linnie B. Hart. From this decree of reformation, Linnie B. Hart prosecutes this appeal.

It is first contended that, inasmuch as respondent was not a party to the original action, he is not a proper party to apply for a reformation of the judgment. It is argued that he stands in the relation of a mere creditor of the estate of Virginia A. Parkhurst. On that assumption, the decision of this court in Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182, is asserted as controlling. We think otherwise, for two reasons.

[4, 5] In the first place, our statute gives to executors and administrators powers which they did not possess at common law. It makes it their duty to take into possession all the estate of the deceased, real and personal. Rem. Code, § 1534. It empowers them to sue for the recovery of any property, real or personal, or for the possession thereof, and subjects them to suits, in all cases in which such suits might have been maintained by or against their respective testators or intestates. Rem. Code, § 1535. Such statutes, in effect, make them representatives of the estates of the decedents, in actions both as to real and personal property. Gibson v. Slater, 42 Wash. 347, 84 Pac. 648. Heirs, legatees, and devisees are therefore privies to judgments touching the estate rendered in actions by administrators or executors, though they would not have been privies at common law. As said by Freeman:

> "The courts have generally given to the judgments in such actions the same effect as if the heirs and all other parties in interest were nominal parties thereto." 1 Freeman, Judgments (4th Ed.) § 163a, p. 305; Cunningham v. Ashley, 45 Cal. 485.

[6] Respondent being as effectually bound by the original judgment, so long as it remains unmodified, as if he had been a nominal party thereto, the law would be lamentably deficient were it powerless to afford him a remedy. Being bound thereby as privy to the judgment, he has the same right to apply for its vacation or modification within the statutory period of one year from its entry as if he had been a nominal party. This, as a governing principle, is amply sustained by the authorities. Blodget v. Blodget, 42 How. Prac. (N. Y.) 19; McWillie v. Martin, 25 Ark. 556; First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461; Richardson v. Loree, 94 Fed. 375, 36 C. C. A. 301; 6 Pomeroy's Equity Juris. § 651.

[7] In the second place, the trial court found, and the evidence conclusively showed, that the original decree was not the decree actually rendered by the court. In such a case, the court has the inherent power to so modify the judgment entry as to make it conform to the judgment actually rendered. O'Bryan v. American Inv. & Imp. Co., 50 Wash. 371, 97 Pac. 241. It follows as of course that this power can be invoked by any person injuriously affected.

From the foregoing it follows, as held by the trial judge, that it makes no difference whether this action be regarded as a proceeding by petition under the statute (Rem. Code, §§ 467, 468), or as an original suit in equity. It was commenced within the year, the appellant was served with summons, appeared and defended, and the court acquired complete jurisdiction. No rights of innocent third persons are affected.

[8] It is next claimed that respondent has not proceeded with diligence. It is admitted that he did proceed within the statutory period of one year. In Kuhn v. Mason, supra, relied upon by appellant, it was merely held that under the facts of that case the refusal to grant a petition on the ground of lack of diligence within the year was not an abuse of discretion. This is a clear recognition of the principle that the question of diligence within the year is addressed largely to the discretion of the trial court. In the case before us, a bare statement of the facts presents equities so overwhelmingly in respondent's favor that we have no hesitancy in saying that there was no abuse of discretion in entertaining the complaint filed at any time within the year. Moreover, the only evidence upon the subject shows that respondent did proceed within a short time after he discovered the facts.

[9] The claim that the complaint did not state nor the evidence show a meritorious defense or cause of action as required by Rem. Code, § 469, is without merit. It is based first upon the ground that respondent was not a party to the original suit. What we have already said effectually disposes of this ground. It is next based upon the claim that the complaint does not show that a different judgment would result from a retrial of the original action. This is true, but it

does show that the real judgment which did result from the first trial was different from the judgment entered. It therefore presented a meritorious cause of action to reform the judgment entry.

[10] It is urged also that the judgment here should be reversed because there was no showing that fraud was practiced in obtaining the original decree, and because the trial court made no specific finding of fraud. True, it does appear that the attorneys who prepared and presented the decree intended no fraud in fact, but it does appear that they did not divulge to Judge Huneke the fact that it did not conform to his decision and that he was thus induced to sign a decree which he never intended to sign. That decree, if unmodified, will deplete the estate, and thus demonstrably operate as a fraud in law. Moreover, appellant herself, whatever the intentions of the attorneys, is now seeking to use that decree for a fraudulent purpose. She refuses to pay, or to recognize respondent's right to, his legacy rightfully payable out of the estate now in her hands. In such a case, relief will be granted regardless of the failure to show actual fraud in the entry of the decree. Benson v. Anderson, 10 Utah, 135, 37 Pac. 256.

Appellant attacks the costs bill on the ground that it taxed fees for the witness Huneke, including mileage from Spokane, at $53.33, whereas on the motion to retax an affidavit of Judge Huneke was presented showing that he actually received only $30, which he accepted in lieu of his mileage and per diem attendance as a witness. The above item of costs should be reduced to $30.

It is ordered that the judgment for costs be reduced in the sum of $23.33. In all other respects, the judgment is affirmed. Respondent may recover his costs on this appeal.

CHADWICK, MORRIS, MAIN, and WEBSTER, JJ., concur.

(96 Wash. 505)

FLESSHER v. CARSTENS PACKING CO.

(No. 13821.)

(Supreme Court of Washington. May 23, 1917.)

1. Judgment 🔑670—Res Judicata—Second Recovery.

Where plaintiff's minor daughter was injured by poisoning, and through plaintiff as her guardian ad litem sued for her own injuries, the mere fact that the petition contained an allegation of the amount spent for medical services, when nothing was recovered for such expenditures and the allegation was descriptive, would not estop plaintiff in his own action from recovering for the medical services.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181, 1185.]

2. Action 🔑50(3)—Joinder of Causes—Injuries to Minor Children.

When a minor is injured, two causes of action arise, one in favor of the minor for pain and suffering and permanent injury, and the other in favor of the parent for loss of services during minority and expenses of treatment, and the actions may be joined or tried separately.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 514-523.]

3. Judgment 🔑670 — Bar — Injuries to Minor Children.

Where a minor is injured through the negligence of another, and an action is brought by the parent as guardian ad litem, and in that action recovery is sought by the complaint, or there are litigated therein any items of damage which belong to the parent, a subsequent action cannot be waged by the parent for the same items, because, by including them in the action in which the parent is guardian ad litem, the minor was authorized to recover such item or items of damage, and the parent is estopped from subsequently recovering therefor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181, 1185.]

Department 1. Appeal from Superior Court, Kitsap County; Walter M. French, Judge.

Action by Charles Flessher against the Carstens Packing Company. Judgment dismissing the action, and plaintiff appeals. Reversed and remanded, with directions.

Garland & McLane, of Bremerton, for appellant. Kerr & McCord, of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damages alleged to have accrued to the plaintiff, because of the injury which his minor daughter had sustained through the negligence of the defendant. The issues were made up by the complaint, the amended answer (which will be referred to as the answer), and the reply. When the cause came on to be heard upon the merits, and after a jury had been impaneled and sworn, the defendant moved the court for a judgment upon the pleadings, which motion was sustained, and a judgment entered which operated as a dismissal of the action. From this judgment the plaintiff appeals.

The controlling question in the case is whether the trial court erred in sustaining the motion for judgment on the pleadings. The complaint alleges that the respondent, the Carstens Packing Company, is a corporation, and is engaged in the business of the selling of meats at retail in the city of Bremerton, Wash.; that on or about the 15th day of October, 1912, the respondent sold to the appellant a certain piece or parcel of diseased meat, which was unfit for food; that on or about the day mentioned Mabel Flessher, a minor daughter of the appellant, Charles Flessher, then of the age of 10 years, ate of said meat, and as a result of, and in immediate consequence of, the eating thereof became sick; and that her health has become permanently impaired by the eating of such meat. By the complaint, three items of damages are sought to be recovered: (a) Expense to the appellant for medical treatment for his daughter; (b) expense incurred in caring for, or nursing, his daughter; and (c) for loss of services. The answer denies all the allegations of the complaint, other than the formal allegation which appears in the first paragraph thereof, and pleads affirmatively that the appellant in this action, on or about the 14th day of October, 1913, as guardian ad litem for his minor daughter, Mabel Flessher, commenced an action in the superior court of the state of Washington for Kitsap county, entitled "Mabel Flessher, Plaintiff, by Charles Flessher, Guardian ad Litem, v. Carstens Packing Company, Defendant," and a copy of the complaint is set out in full. In this complaint, the purchase and eating of the meat is alleged in similar language to that contained in the complaint in the present action, and paragraph 6 thereof is as follows:

> "That plaintiff ate said meat on or about said day mentioned, and as a result of and immediate consequence of and because of her eating said meat as aforesaid the plaintiff became ill, was thrown into fits and spasms, and her life was endangered; that because of an immediate consequence of said eating as aforesaid plaintiff's health has become permanently impaired, that her digestive system has become so impaired as to render life a burden to herself, and that by and through eating said meat plaintiff has lost control of the functioning of her excretory organs; that as a result of the injury to the health of plaintiff by eating said meat as aforesaid, and as a part of said injuries, plaintiff is in a weakened bodily and mental condition, and has frequent fits and spasms and periods of unconsciousness, and is compelled to and does have frequent medical treatment by a duly qualified and licensed physician."

Following this allegation, there was an allegation of the injuries sustained by Mabel Flessher, included in which was reduction in earning capacity, or permanent injury. It is then alleged, in the affirmative defense, that the action there referred to was removed from the superior court for Kitsap county to the United States District Court for the Western District of Washington, Northern Division, and that thereafter an answer was filed in the action in the United States District Court, which answer was a general denial of the allegations of the complaint; that on the 28th day of May, 1914, the cause was tried upon the issue thus framed, and resulted in a verdict in favor of the plaintiff in that action, and against the defendant, for the sum of $1,250; that judgment was entered upon the verdict, and subsequently paid by the defendant to the plaintiff in the action; that the appellant in this action was the guardian ad litem of his daughter, Mabel Flessher, in the cause tried in the federal court. It is alleged, also, that the appellant is estopped from maintaining this action, because he is seeking here to recover the same items of damage for which recovery was had in the action tried in the federal court. The reply to the affirmative defense contains certain admissions and denials, and concludes with this paragraph:

> "That the question of the damages to Charles Flessher, on account of medical and drug store bills and nursing bills incurred by him because of the injury to Mabel Flessher, his minor child, was not set up in the pleadings, was not submitted to the court or to the jury, either by evidence adduced, by the court's instruction to the jury, or otherwise, and that all such questions and all causes of action based on expenses incurred by Charles Flessher were excluded from the consideration by the jury on and by the instructions of the court, which said instructions are hereto attached and made a part hereof and marked Exhibit A."

The first inquiry must be directed as to whether the pleadings in this case show that recovery is sought here for the same items of damages for which recovery was previously had in the action tried by the federal court. As already stated, the complaint claims three items of damages: (a) Expense for medical treatment; (b) expense for nursing or care; and (c) for loss of services. It is conceded by the appellant that the item for loss of services was included in the recovery in the other action, and that therefore he is estopped from recovering for that item in this action. This reduces the question to whether, in the action tried in the federal court, there were included the items of medical treatment and care or nursing.

[1] The answer nowhere alleges specifically that the item of care was recovered in the other action. The reply alleges specifically that the items for medical attendance and nursing were "not submitted to the court or to the jury, either by evidence adduced, by the court's instruction to the jury, or otherwise." A copy of the instructions is attached to the reply, and it appears therefrom that the items of expense for medical attendance and nursing were not submitted to the jury in that case, and the allegations of the reply, already referred to, are to the effect that these items were not submitted to the court or to the jury at any time. Referring to paragraph 6, above quoted from the complaint in the federal court action, and the concluding clause thereof, it is argued that this contains a claim for expense for medical attendance; but we do not so construe the pleading. In that paragraph of the complaint, there was an attempt to set out a description, and the extent of the injuries, and the reference therein to medical treatment was purely descriptive, and would not furnish the basis for an estoppel upon that item, unless testimony had been offered, or the question had in some form been submitted, in the federal court action.

[2] As we construe the pleadings, the items of medical attendance and expense for care and nursing were not included in the allegations in the complaint in the federal court action, and were in no form litigated in that action. The question then arises whether the appellant has a right to recover for these items in this action. The law is that, when a minor is injured, two causes of action arise, one in favor of the minor for pain and

suffering and permanent injury, the other in favor of the parent for loss of services during minority and expenses of treatment. These actions may be joined or tried separately. In Harris v. Puget Sound Electric Railway, 52 Wash. 299, 100 Pac. 841, upon this question it was said:

> "When a minor is injured, two causes of action arise, one in favor of the minor for pain and suffering and permanent injury, the other in favor of the parents for loss of services during minority or expenses of treatment. * * * These causes may be joined or tried in separate actions. * * *"

[3] Where a minor is injured through the negligence of another, and an action is brought by the parent as guardian ad litem, and in that action recovery is sought by the complaint, or there are litigated therein any items of damage which belong to the parent, a subsequent action cannot be waged by the parent for the same items, because, by including them in the action in which the parent is guardian ad litem, the minor was authorized to recover such item or items of damage, and the parent is estopped from subsequently recovering therefor. Daly v. Everett Pulp & Paper Co., 31 Wash. 252, 71 Pac. 1014; Donald v. Ballard, 34 Wash. 576, 76 Pac. 80; Hammer v. Caine, 47 Wash. 672, 92 Pac. 441. In Donald v. Ballard, supra, referring to the previous case of Daly v. Everett Pulp & Paper Co., it was said:

> "This court held that, when a suit is brought for damages arising from injuries to a minor, and when the action is brought in behalf of the minor with the father's consent, for damages which would otherwise be recoverable by the father, the latter cannot afterwards be heard to say that he has a demand of his own for the same items of damage which were included in the former suit. It was held that, under such circumstances, the father has emancipated his son in so far as the right to recover damages which were included in the son's suit is concerned. Such is the case here. That the father consented to this recovery by the son is manifest, since he himself caused the action to be brought in his own name as guardian ad litem, and specifically included the item of damage here under discussion. Under the case cited the minor was authorized to recover this item of damage, and the father cannot again, in his own behalf, recover for the same damage."

Applying the law to the facts in this case, it appears that the appellant, so far as the pleadings show, had a cause of action against the respondent for medical attendance, loss of services during the period of minority, and expenses for care or nursing; that the appellant, as the guardian ad litem for his minor daughter, waged the action in the federal court, and there was included in that action the item of loss for services; that there were not included in that action items of expense for medical attendance and care. Since these items were not litigated in any form in the federal court action, it cannot be said that the appellant authorized a recovery for such items therein, and is therefore estopped from maintaining the present action.

The judgment will be reversed, and the cause remanded, with direction to the superior court to proceed with the trial of the cause.

ELLIS, C. J., and MORRIS and WEBSTER, JJ., concur.

(96 Wash. 520)

KING COUNTY v. JOYCE et al. (No. 13747.)

(Supreme Court of Washington. May 26, 1917.)

1. Eminent Domain 🔑219 — Trial — Evidence—Map.

Where a map had been properly identified and admitted in evidence during the progress of a case of claimants for damages against a county seeking to condemn a right of way, and its accuracy was not questioned, it was properly admitted in evidence in the case of other claimants for damages against the county.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 556, 557.]

2. Evidence 🔑497—Opinion.

Opinion evidence may be permitted to fix damage, where the amount depends on the value of tangible property, and, in a county's proceeding to condemn a right of way, witnesses were properly permitted to state that in their judgment benefits to claimants for damages would outweigh any damages sustained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2285-2288.]

3. Evidence 🔑488 — Opinion — Value of Condemned Property.

In condemnation proceedings, qualified witnesses may give their opinion as to the value of land before and after the taking.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2273.]

4. Evidence 🔑471(28) — Conclusion of Law.

In a county's proceeding to condemn a right of way, where claimants of damages asserted that the condemnation would increase the cost of removing from certain land shingle bolts owned by them, the timber on the land having been previously sold to a corporation, which had the right to remove all merchantable timber by a certain date, the theory of claimants being that they were the owners of the shingle bolts by virtue of abandonment of the contract by the company, abandonment being a matter of intention, it was competent to inquire of the president of the company whether the company was the owner of the bolts, or whether it had abandoned its right to the property, so as to sustain claimant's right to claim damages, and the answer was not a conclusion of law; the ownership not depending on the contract alone.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2173; Witnesses, Cent. Dig. § 833.]

5. Eminent Domain 🔑221—Ownership of Property—Question for Jury.

In such proceedings, whether the logging company was the owner of the bolts, or whether it had abandoned its right to the property, *held* for the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 560, 561.]

6. Witnesses 🔑248(2) — Examination — Responsiveness of Answer.

In a county's proceedings to condemn a right of way, where damages were claimed on account of the increased cost of removing shingle bolts from certain land, the answer of the president of a lumber company, given in response to a question as to who owned the bolts, that the company owned them, rather than the claimants for damages against the county, did not involve a collateral inquiry.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 862.]

7. TRIAL 🔑412—OBJECTION TO EVIDENCE—WAIVER.

Where appellant's counsel made objection in the midst of testimony, and the court ordered the jury to retire pending argument, whereupon counsel for appellant stated, "Never mind; it is not competent, but we want to get through with this case"—counsel waived his objection to the testimony, though he later moved to strike it, where the intention of the witness to testify as he did after objection was evident when it was made and waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974–977.]

8. APPEAL AND ERROR 🔑231(5) — RESERVATION OF GROUNDS OF REVIEW — MOTION TO STRIKE TESTIMONY.

General motion to strike testimony did not reach the contention made on appeal that the testimony was hearsay.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 194.]

9. APPEAL AND ERROR 🔑1033(3)—HARMLESS ERROR—EVIDENCE.

In a county's proceeding to condemn land for right of way, testimony tending to sustain a theory of claimants for damages was not prejudicial to them; the jury finding in legal effect in accordance with the theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4054, 4055.]

10. WITNESSES 🔑268(13)—CROSS-EXAMINATION—TESTING TESTIMONY.

In a county's proceedings to condemn land for a right of way, a banker, called as a witness by claimants of damages to prove the value of their property, was properly asked, on cross-examination to test his testimony, the maximum amount of a loan he would give claimants with the property as security; the witness having fixed the value of the land at about $16,000, and stating that he would loan about 50 per cent. of its value, or $7,500, his testimony thus being consistent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 945.]

11. TRIAL 🔑29(3) — REMARKS OF TRIAL JUDGE.

In a county's proceeding to condemn a right of way, where claimants of damages called one of them to the stand, and the court stated, "You have had him three or four hours," there was no prejudice to claimants, or betrayal of a hostile attitude by the trial judge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 82.]

12. EMINENT DOMAIN 🔑203(1)—DAMAGES—EVIDENCE.

Testimony for claimants that on adjacent lands there was a large amount of timber, the natural outlet for which was through their gulch by means of an abandoned railroad grade, was properly stricken as remote, speculative, and not within the range of reasonable probability.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542.]

13. EMINENT DOMAIN 🔑203(1) — DAMAGES —EVIDENCE.

Where the condition of bottom land of claimants and its potential uses were not changed by the change in the county's road, the court properly rejected all testimony tending to show damages to the bottom lands.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542.]

14. APPEAL AND ERROR 🔑925(3)—PRESUMPTION—PROPER INSTRUCTIONS—ADMONISHING COUNSEL.

Where counsel's opening statement in argument and the proceedings at the time his offensive remark was made were not brought to the Supreme Court as part of the statement of facts, on the statement of the trial court that he had given the jury proper instructions, the Supreme Court must conclude that the jury was properly admonished at the time the alleged offensive remark was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3734.]

Ellis, C. J., dissenting.

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action to condemn a right of way by King County, wherein John Joyce and others claimed damages. From a verdict for less than the amount sought, the claimants Joyce appeal. Affirmed.

Jay C. Allen, of Seattle, for appellants. Alfred H. Lundin and Edwin C. Ewing, both of Seattle, for respondent.

CHADWICK, J. This action was brought to condemn a right of way for a county road. The county is seeking to put a road across a part of a large tract of land owned by appellants. The land is situate partly in the Snoqualmie valley. The valley land is level, cultivated farm land. The remainder is logged-off hill land. The road contemplated, while new construction, is in fact a change in the present road leading across the hill lands of appellants. Instead of following over the break of the hill, it is to start some distance back, and is to follow the course of a gulch, in which flows a small stream of water. The object of the change is to secure a more satisfactory grade from the hill to the valley below. There is no change of the highway where it traverses the valley.

Appellants set up damages for the increased cost of transporting shingle bolts, damages for the appropriation of a water power site, damages for the appropriation of a grade and right of way formerly occupied by a logging road, and damages for building of fences and for the value of the land taken, which is approximately 11 acres—in all aggregating the sum of $18,570. From a verdict in the sum of $275, claimants have appealed.

[1] The first error assigned is that the court permitted the witnesses to use a contour map or plat; that it went to the jury as an exhibit, without proof that it had been made by any of them, and without proof as to its correctness. Aside from the fact that we find no prejudicial error in permitting the use of the map, and in allowing it to go to the jury, we find that the map had been properly identified and admitted during the progress of the case of other claimants. Its accuracy was not questioned at the time. It was properly in the case, under

the rule of In re Jackson Street, 47 Wash. 243, 91 Pac. 970.

[2, 3] 2. It is assigned as error that certain witnesses were permitted to say that in their judgment the benefits to accrue to appellants would outweigh any damage sustained. It is insisted that this was an invasion of the province of the jury, the very question the jury was called upon to decide, and that it is contrary to many decisions of this court. This court has held, in common with all others, that a witness will not be permitted to fix the amount of damage, where a jury has been called upon to decide that issue. But there seems to be an exception to the rule. It is resorted to or rather allowed in condemnation cases, where the amount of damage depends upon the value of tangible property. This exception is noted in Jones on Evidence, §§ 387, 388. That qualified witnesses may give their opinions as to the value of land before and after the taking is so well understood that we do not feel put to the necessity of citing authority. This being so, we find the rule extracted from the authorities by Mr. Jones to be most plausible. It follows:

> "But in many states and with much reason it is held that opinions as to the damage sustained in such cases should be received in evidence. These decisions are based upon the reasoning that, inasmuch as the amount of damages in such proceedings depends entirely upon opinions as to the value before and after the condemnation, and as these opinions are competent, it can make no material difference whether the witness gives his opinion as to the amount of damages at once, or whether he is allowed simply to state to the jury his opinion as to values from which the opinion as to damages must necessarily follow by the processes of subtraction. The tendency of the later decisions seems to be in favor of this rule."

But were the question otherwise doubtful, it is not an open question in this state. In Seattle & Montana Ry. Co. v. Gilchrist, 4 Wash. 509, 513, 30 Pac. 738, 739, the court, in passing upon a like objection said:

> "It is also objected that one of the respondents was permitted to say how much, in his opinion, the land would be depreciated in value on account of the appropriation of the right of way and the construction of the railroad. It is conceded by appellant that it is competent for a witness, if properly qualified, to state his opinion as to the value of the land before and after the appropriation; but it is contended that it is for the jury to say what the damages are, and not the witness. While there is undoubtedly a conflict of authority upon this question, it seems difficult to perceive any substantial reason for rejecting such testimony. To admit evidence of the value of the land before and after the taking is to admit, in effect, the same thing to be done which appellant complains of, since the amount of the damages is then ascertained by the jury by the mere process of subtraction. And, this being so, we are unable to understand why the witness should not be permitted to state the result, as well as the facts from which such result is reached. In either case the amount of the damages is ultimately based on the opinion of the witness. The distinction here insisted on between the two methods is based on mere form, rather than substance. The facts upon which the witness bases his opinion may be shown on cross-examination, and when this is done the jury have all the means which can be afforded for forming an independent judgment as to the damages."

That case is cited and the doctrine adhered to in Johnson v. Tacoma, 41 Wash. 51, 82 Pac. 1092.

3. The next assignment rests in the fact that the court permitted the jury to pass upon the question of ownership of certain shingle bolts remaining upon the land after logging operations had ceased. It seems that some years ago claimants sold the timber on the hill land to one Wood, who, in company with others, organized a corporation which became the predecessor in interest of the Snoqualmie Logging Company. By the terms of the contract the timber was to be removed on or before April 16, 1916, and, if not so removed, to revert to the vendors. The company built a logging road across the valley and following the gulch up onto the hill land. Some two years before this action was begun the logging company ceased operations, tore up its track, and removed its equipment. The logging company was made a party to this action, but filed no appearance. This case was tried in January and February, 1916. The most persistent claim of appellants is that of damage for the increased cost of removing shingle bolts. The ownership of these bolts thus became material. P. C. Richardson, the president of the company, was called as a witness for the appellants. He testified to the contract, the logging, and that the work had ceased. He was then interrogated by counsel for respondent.

> "Q. Whose are these shingle bolts on this land now, yours or Joyce's? A. There might be a question there. I presume the fact that we have abandoned our project we are in the hands of Mr. Joyce in that way, but he has verbally told me that we could use the right of way, they would probably be his unless he wanted to give them to us; they are his. Q. They are whose? A. They are Joyce's, I suppose, in one sense of the word. In other words, we had the right to remove all merchantable timber by April, 1916, according to our contract. There might be a question of law there whether the fact that we have abandoned that for two years we have lost our right to remove all merchantable timber. Q. Outside of your opinion of it being a question of law, under the contract you have a right to sell any timber on Joyce's land? He gave you all the timber, didn't he?
>
> "Mr. Allen: That would not be the best evidence. He says he hasn't any claim to these shingle bolts.
>
> "The Court: He may state who owns the shingle bolts.
>
> "Mr. Allen: My objection is, that calls for a legal conclusion. He may state the facts. What rights the contract gave him or didn't give him is a question of law for the court.
>
> "A. This company owns the shingle bolts, the shingle-bolt timber that is there."

[4-6] It is contended that this testimony was prejudicial; that the ownership of the shingle bolts was a matter of law for the court, and not a question of fact for the jury. This would be true, if the ownership depended upon the contract alone; but it was the theory of the appellants that they were the

owners of the bolts in virtue of an abandonment of the contract. Abandonment is a matter of intention, and to that extent it was competent to inquire of the witness, and it was for the jury, having in mind the contract and the conduct of the logging company, to say whether it was the owner, or whether it had abandoned its right to the property, so as to sustain a right in appellants to claim damages. The answer was not a conclusion, as claimed by appellants. Neither was it a response to a collateral inquiry, as respondent insists. It went to the merit of the case, and was legally equivalent to a response that the company had not abandoned its interest. It will be remembered that the Snoqualmie Lumber Company had been made a party to the action and had made default. To aid its cause, counsel for respondent took the stand and detailed a conversation between Richardson, the attorney for the lumber company, and himself, to the effect that Richardson said the company would not appear or assert an interest, because it had other possible transactions with Joyce, and could not afford to antagonize him. An objection was made while the witness was in the midst of his statement. The court ordered the jury to retire pending argument. Whereupon counsel for appellant said:

> "Never mind; it is not competent, but we want to get through with this case."

After the witness had finished, the following colloquy occurred:

> "Mr. Allen: I move to strike that.
>
> "The Court: You want that stricken.
>
> "Mr. Allen: Not objecting to the conversation he had with Joyce. [It is evident that counsel meant Richardson, as no conversation with Joyce had been testified to.] I don't want it to appear that there was anything between him and Joyce [Richardson] to keep him from appearing on the stand.
>
> "The Court: I will let it stand. The jury may put their own construction upon that. (Exception noted.)"

[7-9] We think counsel waived his objection. The intention of the witness to testify as he did was evident when the objection was made and waived, and the motion to strike does not reach the contention now made that the testimony was hearsay. It was not made to appear that anything occurred that would suggest that the witness had influenced Richardson or prevented him from appearing as a witness. He had already testified. Furthermore, the testimony came in response to like hearsay testimony given immediately before by counsel for appellants. It was clearly not prejudicial, for it tended to sustain appellants' theory of an abandonment. But there was no prejudice in this testimony. Appellants requested that the question of abandonment be submitted to the jury as a question of fact. The court instructed the jury to determine the fact, and to divide the recovery between appellants and the logging company if it found it to be entitled to any damage. The jury found that the logging company was entitled to no damage. This was, in legal effect, a finding that they had abandoned their contract.

[10] 4. One Boyd, who is a banker at Duval, was called as a witness by appellants to prove the value of appellants' property. He testified that his bank was a state bank, and loaned money on land. He was then asked, "What is the maximum amount of a loan that you would give Mr. Joyce with this property as security?" He was compelled to answer. This is assigned as error. But we think this was legitimate cross-examination. We can conceive of no surer way to put the testimony of such a witness to the test. To illustrate: The witness, in his direct examination, had fixed a value for the land over which the road runs at about $16,650. He said he would loan about 50 per cent. of its value, or $7,500. His testimony was consistent. We find no benefit to respondent or detriment to appellants in this assignment.

[11] 5. Following Boyd's testimony, appellants called appellant John Joyce to the stand. The court said: "You have had him three or four times." Exception was taken, and error assigned. We find no prejudice, or any betrayal of a "hostile attitude" on the part of the trial judge.

[12] 6. Appellants sought to show that on adjacent lands there was a large amount of timber, the natural outlet for which was through the gulch by means of the abandoned railroad grade. This testimony was properly stricken, as remote, speculative, and not within the range of reasonable probability. The possible sale of a right of way or an abandoned railroad grade to one who may, at some future time, negotiate therefor, is a pleasing hope, but we find no reason or authority for holding it to be a convertible asset.

[13] 7. The court rejected all testimony tending to show damages to the bottom land. This was proper. No basis of recovery was shown. The condition of the bottom land and its potential uses are not changed by the change in the road. The new road leaves the old road at the head of the gulch, and comes into the old road at the bottom of the hill. So far as the testimony goes, the use of the bottom land will not be impaired in any way.

8. Appellants offered testimony to show that a small stream flowing in the gulch would, if impounded by a dam, furnish a limited water power. The question of its value, though but remotely established, was submitted to the jury under a proper instruction, and decided adversely to appellants.

[14] 10. It is assigned as error that counsel for the county was guilty of improper conduct. The record continues:

> "The Court: Address the jury. (Mr. Ewing addresses the jury.)
>
> "Mr. Allen: I desire to put in the record now that Mr. Ewing in his opening statement to the jury said to the jury that they were the final arbitrators of the question between Joyce and the county, and that they had the county's

treasury within their keeping; that any money that would be paid to Joyce by their verdict in this case would be their money, to which I object to the court, and ask the court to admonish counsel about making the statement, for the reason it is improper argument.

"The Court: Motion denied. Exception allowed. The court has given the jury proper instructions. Go ahead, Mr. Ewing."

The opening statement and the proceedings at the time the remark was made are not brought to us as a part of the statement of fact. Upon the statement of the court that it had given the jury proper instructions, we must conclude that the jury had been properly admonished at the time the alleged offensive remark was made.

Counsel makes 27 assignments of error. We have discussed all that are sustained by argument in his briefs, and will not pursue the inquiry, except to say that we find no error in the instructions given or refused, nor in the other assignments. Out of the abundance of the testimony, the jury has found that the benefits to appellants will approximate the damages which they will suffer. We find no reversible error.

Affirmed.

MORRIS and MAIN, JJ., concur.

ELLIS, C. J. It seems to me that the court erred in excluding all testimony tending to show damage to the bottom land. I therefore dissent.

(96 Wash. 480)

WASHBURN v. WILEN et al. (No. 13622.)

(Supreme Court of Washington. May 21, 1917.)

1. HOMESTEAD 🔑42, 55—ACQUISITION—STATUTE.

Laws 1895, p. 109, § 1, provides the homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this act provided. Section 30 provides in order to select a homestead a husband or head of the family or * * * the wife must execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record. Section 31 prescribes what the declaration must contain. Section 32 requires it to be recorded in the auditor's office of the county in which the land is situated. Section 33 provides that from the time the declaration is filed for record the premises constitute a homestead. *Held*, that a "homestead" can only be selected by the execution and filing of a homestead declaration, and the premises constitute a homestead only from the time the declaration is filed for record, so that a property owner acquires no homestead right by occupancy.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 60, 77–80.

For other definitions, see Words and Phrases, First and Second Series, Homestead.]

2. STATUTES 🔑225—CONSTRUCTION—RULE.

Statutes in pari materia must be construed together.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303.]

3. HOMESTEAD 🔑188 — DECLARATION OF HOMESTEAD — SALE UNDER MORTGAGE — RIGHT TO RETAIN POSSESSION DURING REDEMPTION PERIOD.

Laws 1895, p. 109 et seq., provides in effect that a homestead can only be effected by the execution and filing of a homestead declaration. Section 7 provides that the homestead can be abandoned only by a declaration of abandonment or a grant thereof executed and acknowledged. Section 8 provides that such abandonment shall be effectual only from the time it is filed. Laws 1899, pp. 93, 94, § 15, provides that the purchaser of real property sold on execution or under foreclosure shall have possession until the resale or redemption, and the redemptioner until another redemption, and saves the rights of tenants, and provides that, when the mortgage contains a stipulation to that effect, the mortgagor may retain possession during the redemption period, and that if the land is used for farming purposes the judgment debtor shall have the right of possession during the redemption period, subject to a lien for interest on the crops raised, and "that in case of any homestead occupied for that purpose at the time of sale the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation." *Held*, that the provisions of the act of 1899, making the right to retain possession of the homestead depend upon the occupancy thereof by the claimant at the time of the sale, were intended as a limitation upon, rather than an extension of, the homestead right, so that the premises must not only be occupied by the claimant at the time of sale, but must have been selected by him as a homestead prior to the sale by the filing of the declaration prescribed by law for such selection, to entitle the claimant to retain possession during the redemption period.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 357.]

Department 1. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by Henry Washburn against Inas Wilen and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John H. McDaniels, of Ellensburg, for appellants. E. K. Brown, of Ellensburg, for respondent.

ELLIS, C. J. This case presents a contest for the possession of real property sold on foreclosure of a mortgage during the period allowed by statute for redemption. In September, 1912, defendants mortgaged the premises to plaintiff for $3,000. The mortgage provided that, in case of foreclosure, the purchaser at sale should have immediate possession, and in terms waived any homestead right. The mortgagors defaulted in payment of interest and the mortgagee brought action to foreclose. Defendants were personally served, but made no appearance. An order of default was entered, and a judgment against them for the amount due and a decree foreclosing the mortgage and ordering a sale of the premises was rendered. At the sheriff's sale plaintiff purchased the property, bidding the full amount of his judgment. The sale was confirmed. Defendants refusing to surrender possession, plaintiff petitioned for a writ of assistance, setting out the pertinent provisions of the mortgage. Defendants resisted, claiming the right to retain possession during the redemption period on the ground that they occupied the premises as their homestead and for farming purposes. The matter was submitted to the trial court on a statement of agreed facts. From this it appears that the lands are two acres just outside the city limits of Ellensburg. Upon the premises is a brick house, in which defendants resided when the mortgage was given, and in which they have ever since resided and still reside. There is also a barn, a chicken house, and a well. The place is planted to fruit trees not yet bearing. Defendants have been raising wheat and potatoes between the rows. They have never filed any declaration of homestead in the auditor's office. The court ordered that a writ of assistance issue, directing the sheriff to put plaintiff in possession of the parts of the premises actually occupied by the house, barn, chicken house, and well, with access thereto, leaving the remainder of the tract, as farming land, in possession of defendants. Plaintiffs are content with this order. Defendants appeal.

[1] Several questions are discussed in the briefs, but as we view the case the order must be affirmed, upon the ground that no "homestead" in these premises within legal contemplation has ever been acquired, selected, or occupied as such by appellants. The homestead right is a purely statutory right. It is defined in and exists only by virtue of the act of 1895 (Laws 1895, p. 109 et seq.), entitled "An act defining a homestead, and providing for the manner of the selection of the same." Its provisions are found in Rem. Code, as section 528 et seq. Section 1 defines the homestead as follows:

> "The homestead consists of the dwelling house, in which the claimant resides, and the land on which the same is situated, selected as in this act provided."

Section 30 is as follows:

> "In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record."

Section 31 prescribes what the declaration must contain, section 32 requires it to be recorded in the auditor's office of the county in which the land is situated, and section 33 provides that:

> "From and after the time the declaration is filed for record the premises therein described constitute a homestead."

In Hookway v. Thompson, 56 Wash. 57, 105 Pac. 153, it is asserted, and we still think soundly, that the self-evident purpose of this statute is that a homestead shall "exist in virtue of the record only," and further:

> "It would seem that the meaning of the present law as to the time and manner of selection of a homestead, and as to when and how a homestead right is created, is so clear as to make it certain that a homestead can only be selected by the execution and filing of a homestead declaration, and that the premises constitute a homestead only from and after the time the declaration is filed for record. The words of the statute, 'from and after the declaration is filed,' mean that the homestead is brought into existence by the doing of the several statutory acts by the claimant, and that it exists and speaks from the date of the filing, and not otherwise. The appellant acquired no homestead right by occupancy. There is nothing in the statute which remotely suggests that occupancy even initiates the right."

Appellants argue, in substance, that since the exact issue there involved was one of exemption from execution of the homestead, and the issue here is one of possession of the homestead pending the redemption period, therefore the real question here involved was not decided in that case. It is true the occasion or purpose of the inquiry in the two cases was different, but the fundamental question is precisely the same—What is the "homestead," and when and how is it created or asserted? When that primary question is answered, as it must be by a reference to the quoted sections, other and different sections of the Code determine the two secondary or subordinate questions of exemption of the homestead from execution and possession of the homestead pending redemption. Counsel fails to note that the provisions of the act of 1895 which we have quoted contain no mention either of exemptions or of possession pending redemption. He insists on treating the entire act of 1895 as only an exemption statute merely because other parts of it treat of exemptions, whereas the quoted provisions define and create the homestead as a legal concept and are the only provisions in our statutes which do.

[2, 3] The statute governing the right of possession of real property sold on execution or under foreclosure during the redemption period was passed in 1899. Section 15, Laws 1899, pp. 93, 94; Rem. Code, § 602. It provides that the purchaser at such sale shall have possession until a resale or redemption, and the redemptioner until another redemption, saves the rights of tenants, provides that, when the mortgage contains a stipulation to that effect, the mortgagor may retain possession during the redemption period, provides that, if the land is used for farming purposes, the judgment debtor shall have the right of possession during the redemption period subject to a lien on the crops raised for interest at 6 per cent. per annum on the purchase price and for taxes and interest, and provides further:

> "That in case of any homestead occupied for that purpose at the time of sale, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation."

This section refers to other lands as well as the homestead. While it uses the term "homestead," it does not define it. Yet appellants tie their whole case to the last proviso above quoted, arguing that it creates by implication a homestead founded in possession alone, and independent of the act of 1895, which expressly creates and defines the homestead. In the Hookway Case this court held that the act of 1895 was passed for the very purpose of abrogating the prior law permitting the assertion of a homestead right founded in mere occupancy. To say that the subsequent act of 1899 recognizes a homestead, evidenced by the sole fact of possession, would be to create by implication a distinct kind of homestead, when that implication is not only not a necessary implication but is contrary to the elementary rule that statutes in pari materia must be construed together. By the definition in the act of 1895, occupancy by residence therein of the claimant is essential to the creation of the homestead; so also is its selection "as in this chapter provided." But continued occupancy, after selection by the filing of the written declaration, is not essential to the continued existence of the homestead right. This is manifest from the further provision that the homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged (Rem. Code, § 535; Act 1895, § 7), which shall be effectual only from the time it is filed (Rem. Code, § 536; Act 1895, § 8). Schoenheider v. Tuengel, 164 Pac. 748.

It is plain, therefore, that the provisions in the act of 1899, making the right to retain possession of the homestead dependent upon occupancy thereof by the claimant at the time of the sale, were intended as a limitation upon rather than as an extension of the homestead right. The conclusion is irresistible that, in order to retain possession of the premises, they not only must be occupied by the claimant at the time of sale, but must have been selected as a homestead prior to the sale by the filing of the declaration prescribed by law for such selection. We so held in State ex rel. Jakubowski v. Superior Court, 84 Wash. 663, 147 Pac. 408, and that holding was not dictum as appellants claim. In that case the mortgagors sought to retain possession under a declaration of homestead filed after the foreclosure sale. That question had to be decided independently of the question of res judicata, since it was based on facts arising subsequent to the decree of foreclosure, which decree was urged as res judicata. It is true that, in the case of North Pacific L. & T. Co. v. Bennett, 49 Wash. 34, 94 Pac. 664, this court held, in substance, that a declaration of homestead filed after sale retroactively created a homestead as of the date of sale by reason of a continued possession; but that view is in direct conflict with and is expressly overruled by the decision in the Hookway Case. But, even if we still adhered to the view expressed in the Bennett Case, it would not avail appellants here. They filed no declaration of homestead, either before or after the sale. For that reason, also, we find it unnecessary to decide whether a homestead declaration can be effectual for any purpose as against a prior mortgage containing, as does the mortgage here, a waiver of the homestead right and stipulating that the purchaser at sale shall have immediate possession.

The order appealed from is affirmed.

MORRIS, WEBSTER, MAIN, and CHADWICK, JJ., concur.

BARNES et al. v. BRUCE et al. (No. 7949.)

(Supreme Court of Oklahoma. Jan. 30, 1917. On Rehearing, May 15, 1917.)

(Syllabus by the Court.)

1. JUDGMENT 🔑341—OPENING OR VACATING—DISCRETION OF COURT DURING TERM.

For the purpose of administering justice, the district court has very wide and extended discretion in opening judgments and in setting aside, vacating, or modifying proceedings had before it, if it does so at the same term at which the judgment or proceedings were had, if all the parties are present in court, and no advantage is taken of either party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 667.]

2. NEW TRIAL 🔑165 — DENIAL OF MOTION FOR NEW TRIAL—VACATION AND GRANTING OF MOTION.

A trial court, after hearing a case and rendering judgment in favor of one of the parties and after the motion for a new trial has been filed, heard, and overruled, and extension of time granted to make and serve a case-made, at the same term at which all such proceedings and orders were rendered may in its discretion entertain a motion to set aside its former order denying a new trial and grant a new trial of said cause.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 334, 335.]

Commissioners' Opinion, Division No. 5. Error from District Court, Muskogee County; R. P. De Graffenreid, Judge.

Action by Clyde Barnes and another against Octavia Bruce and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Vernor & Vernor, of Muskogee, for plaintiffs in error. Bailey, Wyand & Broaddus and Howell Parks, all of Muskogee, for defendants in error.

JONES, C. This action was commenced by plaintiffs on the 24th day of February, 1914, by filing their petition in the office of the clerk of the district court of Muskogee county, for a temporary injunction asking that the sheriff of Muskogee county and the defendants be restrained from selling under execution certain lands, and on the 3d day of March, 1914, the district court granted a temporary injunction, and on the final hearing of said cause the temporary injunction theretofore issued was made permanent, and on a full hearing of said cause the court rendered general judgment in favor of the plaintiffs, plaintiffs in error herein. Thereafter, on the 19th day of June, 1915, defendants filed their motion for a new trial, and on the same day said motion was overruled and appeal allowed, an extension of 60 days from said date was allowed to make and serve case-made to the Supreme Court, and plaintiffs were allowed 10 days to suggest amendments and the case-made to be settled and signed on 5 days' notice by either party. Thereafter, on the 6th day of July, 1915, the defendants, instead of taking the necessary steps to perfect their appeal, filed a motion in the office of the clerk asking the court for an order vacating and setting aside the order theretofore made overruling the motion for a new trial; and thereafter on the 12th day of July, 1915, there was filed in the office of the clerk a response by plaintiffs to the motion of the defendants, asking that the court vacate the order overruling the motion for a new trial. The principal averments in said response being to the effect that the court was without jurisdiction to hear and determine the motion filed to vacate an order overruling a motion for a new trial and granting an appeal to the Supreme Court, for the reason it involved a re-examination of matters already presented and passed upon by the court and does not come within the statutes of Oklahoma giving the court power and authority to set aside judgments on the grounds enumerated in the statutes, and for the further reason that said motion asking that the former order overruling motion for a new trial be vacated and set aside, contained no question other than that which was passed upon on the presentation of the original motion, and the matter was therefore res adjudicata, and the court, upon the overruling of the motion for a new trial and giving an extension of time in which to make and serve case-made, had lost jurisdiction of the cause of action, and that said order overruling motion for a new trial was reviewable only upon appeal. Thereafter, on the 17th day of July, 1915, the court passed upon the last above-mentioned motion and allowed the same, and there was filed in the office of the clerk an order granting the motion and vacating and setting aside the order overruling the motion for a new trial, to which ruling of the court the plaintiffs then and there excepted. The order further provided that the judgment therefor rendered in favor of the plaintiffs be set aside, and the permanent injunction awarded them be dissolved, and the defendants granted a new trial. Thereafter on the 8th day of December, 1916, a new trial was had of said cause, and at this trial judgment was rendered in favor of the defendants, from which plaintiffs prosecute this appeal.

There are other facts which might be material to a just settlement of this case, but as plaintiffs in error have briefed the case and base their sole right to a reversal of this case on the one assignment of error, to wit, the right of the court to entertain a motion to set aside its order overruling a motion for a new trial, and having granted an extension of time in which to make and serve case-made, it had no further jurisdiction, and therefore no right to pass upon any judgment or order made in the case, although all of the judgments and orders and proceedings were had at the same term of said district court.

[1] We would not commend the practice as pursued in the trial of this case; but we think that the law of this case has been decided heretofore by our Supreme Court, and we find it to be in conformity with the general rule of law governing the right of courts to vacate, set aside, modify, or annul its judgments and orders during term time as laid down in 23 Cyc. 901.

In the case of Georgia Home Ins. Co. v. Halsey, 37 Okl. 678, 133 Pac. 202, the court uses this language:

> "A court has control of its judgments during the term at which they are rendered and may set them aside of its own motion, if they are erroneous."

In the case of Shallenberger v. Brady, 37 Okl. 440, 131 Pac. 1096, we find this language:

> "The judgment was set aside at the same term at which it was rendered. A court has control of its proceedings during the term and may set aside a judgment upon motion or upon its own motion, in proper cases, at any time during the term. When a court sets aside a judgment during the term at which it was rendered, the only question upon appeal is whether the judgment should have been set aside, not whether the court had jurisdiction to set it aside. Of course, in order for a party to take advantage of the court's refusal to set aside a judgment, he must have complied with the statute with reference to motions for new trials; but his failure to do so does not affect the jurisdiction of the court to act."

The court further states in Philip Carey Co. v. Vickers, 38 Okl. 643, 134 Pac. 851, that:

> "It is a general rule of law that all the judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court."

[2] In the case of Hogan v. Bailey, 27 Okl. 15, 110 Pac. 890, which is a case very similar to the one at bar, we find this language:

> "It is insisted on the part of counsel for movant that, the court having once acted on the motion for a new trial, its power over the case and the order thus made was final and conclusive, and that the ruling made on the motion filed to vacate and set aside such order was error. The rule obtaining in all courts of general jurisdiction, except where restricted by some statute, is that during the whole term at which a judgment or order is rendered it remains subject to the plenary control of the court, and, where the administration of justice will be conserved thereby, it may be vacated and set aside, modified, or annulled. This power over the judgments and orders of such a court is not dependent upon any statute, but is inherent in the court itself."

There is apparently a conflict of Oklahoma authorities on this question. The case of

Lookabaugh v. Cooper, 5 Okl. 102, 48 Pac. 99, is very much in point, and the learned justice very concisely lays down the rule that, in the absence of a showing of irregularity, fraud, unavoidable casualty, or misfortune, the district court has no power to set aside its order overruling a motion for a new trial upon a reconsideration of the same motion already passed upon, and a reversal of such order can be had only by proceedings in error in the Supreme Court. While we are inclined to feel this would be a good rule of practice and procedure in the trial courts, it occurs to us to be in conflict with the later decisions of our Supreme Court, and also in conflict with the general rule of law governing the question involved here.

Finding no error in the action of the trial court in entertaining the motion to set aside and vacate its former order refusing to grant a new trial, and none of the other assignments in error being pressed or called to our attention by the brief of either plaintiffs in error or defendants in error, we therefore affirm the judgment of the trial court.

On Rehearing.

SHARP, C. J. Except in so far as the opinion prepared by the learned commissioner commends the rule contained in Lookabaugh v. Cooper, 5 Okl. 102, 48 Pac. 99, it is approved. The rule announced in that case is in conflict with the principle involved in a number of later decisions of this court, including those cited in the commissioner's opinion. That opinion proceeds upon the theory that, before the trial court can vacate or modify its own order granting or denying a motion for a new trial, even though at the same term, some statute must be found authorizing such procedure; that, when the court has acted upon a motion for a new trial, it is without power, though at the same term of court, to reconsider its action, however erroneous it may be. The opinion in Lookabaugh v. Cooper, it will be seen, wholly overlooks the well-recognized rule that the judgments, decrees, and orders of a court of general jurisdiction, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered, and that they may be then set aside, vacated, or annulled by that court. Nor does the difference between the facts involved in the Lookabaugh Case and those in Hogan v. Bailey, 27 Okl. 15, 110 Pac. 890, authorize the application of a different rule of law. In each case, the trial court undoubtedly had the power to make the second order, as is true in the case at bar. In Todd et al. v. Orr, 44 Okl. 459, 145 Pac. 393, the rule was announced that courts of general common-law jurisdiction have the inherent power, upon their own motion, to set aside a verdict and grant a new trial on account of prejudicial error, when done at the same term of court at which the verdict was returned or judgment rendered; and it was said that the power would not be deemed to have been taken away by statute, unless the intention to do so was clear. We there overruled the opinion of the territorial Supreme Court, in Long v. Board of County Com'rs, 5 Okl. 128, 47 Pac. 1063, handed down at the same term of the court as the opinion in Lookabaugh v. Cooper, and which case involves a question very similar to that in the latter case. The opinion in Todd v. Orr, supra, cites and reviews a number of English cases, as well as a large number of cases from the courts of other states, and in all of which the rule is recognized that a court of general jurisdiction has control over its orders or judgments during the term at which made, and for sufficient cause may modify or set them aside, and that when vacated the parties are remitted back to such rights and remedies as they formerly had, the same as though the judgment or order vacated had not been made in the first instance. We there said that:

> "The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed, not alone by their solicitude for the rights of litigants, but also by the considerations of justice to themselves as instruments provided for the impartial administration of the law"—and that any other view would so fetter and paralyze the power of the courts that they must frequently do wrong from mere inability to do right.

If, then, the court has the inherent authority upon its own motion to vacate or modify orders made by it during the term, a fortiori, should the power be exercised when invoked by one of the parties to the proceedings.

The same general principle is recognized in Philip Carey Co. v. Vickers, 38 Okl. 643, 134 Pac. 851, where Mr. Justice Kane, speaking for the court, announced the rule that all judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and may then be set aside and vacated or modified by the court. In that case a motion invoking the inherent equitable power of the superior court to vacate one of its own judgments was filed during the term at which such judgment was rendered, but was not ruled upon until the succeeding term, when it was sustained and the judgment set aside; and it was held that the discretionary power of the court was not lost by the continuance of the motion to the next term, and, when sustained at that term, the action of the court in the premises was the same in legal effect as if the ruling had been made at the term at which the motion was filed. As the rule announced in Lookabaugh v. Cooper is contrary to that contained in the opinion in Todd v. Orr and Philip Carey Co. v. Vickers, supra, and, further, is unsound in principle and opposed to

the great weight of authority, the same is expressly overruled.

The judgment of the trial court is affirmed.

BROWNELL v. MOOREHEAD. (No. 6369.)

(Supreme Court of Oklahoma. Jan. 2, 1917. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. WITNESSES 🔑75 — OBJECTION TO TESTIMONY—COMPETENCY OF WITNESS.

An objection to the competency of testimony does not raise the question of the competency of a plaintiff's wife to testify at all concerning the matter as to which inquiry is made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 189, 193, 194.]

2. PRINCIPAL AND AGENT 🔑99—POWERS OF AGENT—EMERGENCY.

A servant, acting in an emergency in the absence of his principal, and apparently for the protection of the interests of the principal, may frequently do things which transcend his usual authority, and they will be deemed to be authorized.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254–261.]

3. HUSBAND AND WIFE 🔑21—WITNESSES 🔑56(3) — WIFE'S AGENCY FOR HUSBAND—WIFE.

A wife was directed by her husband to answer the telephone. *Held*, that she was thereby constituted his agent for the purpose of hearing any message intended for him, and conveyed on such telephone call, and to repeat such message to him. *Held*, further, that the wife was a competent witness in a suit brought by her husband to testify concerning the fact of such conversation, and to detail the message received. Whether she was a competent witness, under the last clause of subdivision 3, § 5050, Rev. Laws 1910, to testify concerning any communication of such message by her to her husband not being raised, is not decided.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 139, 141; Witnesses, Cent. Dig. § 155.]

4. TRIAL 🔑76, 97—ADMISSION OF EVIDENCE—RESPONSIVENESS—MOTION TO STRIKE.

It is not permissible for counsel to be quiet and allow evidence to come out and take advantage of it, if favorable, and, if not, to ask that it be stricken out. Still less can a party complain of the court's refusal to sustain such a motion to strike when the testimony given is in direct response to one of his own questions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 172, 183–190, 237, 241.]

5. APPEAL AND ERROR 🔑1052(4)—HARMLESS ERROR — ADMISSION OF IMPEACHING EVIDENCE.

The admission of evidence, which is competent to impeach a witness, prior to any proper foundation therefor being laid, will not be held to constitute prejudicial error, where afterward, during the course of the trial, a proper foundation therefor is laid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4174; Eminent Domain, Cent. Dig. § 810.]

6. TRIAL 🔑255(4)—ADMISSION OF EVIDENCE—LIMITATION OF PURPOSE—REQUEST.

The general admission of evidence competent for purposes of impeachment, but otherwise incompetent, will not be held to be prejudicial error, where no request was made to limit the effect of the testimony to purposes of impeachment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632.]

7. APPEAL AND ERROR 🔑1046(5)—HARMLESS ERROR—REMARKS OF TRIAL COURT.

Remarks of the trial court examined, and *held* not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134.]

8. APPEAL AND ERROR 🔑1066, 1170(9)—COURTS 🔑90(1) — HARMLESS ERROR — INSTRUCTION—PRECEDENT.

Whether or not an instruction, correct as an abstract statement of the law, but inapplicable to the facts of the case, was prejudicial to the rights of plaintiff in error must be determined by this court upon the whole facts in each particular case, and the determination will ordinarily not serve as a precedent for any other case, since the same instruction may be prejudicial in one case and not in another, depending upon the facts of each case and the circumstances under which it is given. A cause ought not to be reversed for misdirection of the jury in this regard, unless this court can say that such misdirection constituted a substantial violation of a statutory or constitutional right or probably resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Courts, Cent. Dig. §§ 313–315.]

9. PRINCIPAL AND AGENT 🔑20(2)—CONTINUING AGENCY — PROOF — SUBSTANTIAL EVIDENCE.

A continuing agency may be proven by facts and circumstances tending to show the existence of such agency both prior and subsequent to the date of the transaction. Such facts and circumstances may properly include specific instances of conduct when such instances are sufficiently numerous to base thereon an inference of systematic conduct under substantially similar circumstances so as to be naturally accountable for by a system only and not a casual recurrence. The range of time preceding and subsequent to the event in question, within which such instances should have occurred in order to be admissible in evidence, is generally a matter in the judicial discretion of the trial court. Such circumstantial evidence is admissible even though there be direct testimony denying the existence of the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 38.]

10. PRINCIPAL AND AGENT 🔑24, 194(1)—AGENCY—QUESTION FOR JURY—EVIDENCE.

Proper circumstantial facts tending to prove the existence of an agency being in evidence, and the agency being denied, the trial court was not in error in submitting the question of the existence of the agency to the jury, and in instructing them that they might take such facts and circumstances, as well as those surrounding the particular transaction, into account in determining whether or not an agency existed.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 722, 723, 727.]

Commissioners' Opinion, Division No. 2.

Appeal from District Court, Cleveland County; Robert McMillan, Judge.

Action by L. M. Moorehead against J. A. Brownell, for damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Dudley, of Oklahoma City, Hutchin & Burke, of Lexington, and Gray & McVay, of

Oklahoma City, for plaintiff in error. Williams & Luttrell and T. W. Mayfield, all of Norman, and McAdams & Haskell, of Oklahoma City, for defendant in error.

BURFORD, C. This action arose out of an accident occurring upon the Purcell-Lexington bridge, caused by the breaking of a buggy in which one Albert Brownell was transporting the plaintiff, Moorehead, from Lexington in an endeavor to board an outgoing train at Purcell. Plaintiff alleged and introduced evidence tending to prove that Albert Brownell was the agent of his father, J. A. Brownell, who conducted a bus or hack line running from Lexington to Purcell, and who was a common carrier of passengers for hire; that plaintiff, being desirous of going to Purcell, called by telephone the Brownell establishment and ordered a conveyance; that when the conveyance did not come, he again called; later the telephone rang, and he requested his wife to answer it; that she did so, and was advised by Mrs. Brownell, acting as agent for her husband, to have plaintiff walk down the street, and that she would send a buggy to meet him and carry him to Purcell; that plaintiff did so, and met Albert Brownell, who took him in, and, in the course of the trip, in an endeavor to meet the approaching train, drove so recklessly that the buggy broke, throwing plaintiff against the bridge and breaking his hip. It was alleged as negligence that the buggy was old, worn, and unsafe; that the horse was wild and unsafe, that Albert Brownell was "an unsuitable and improper person to have charge of said conveyance," and was a "willful and reckless driver," and that the horse was driven at a "high and reckless" speed. Defendant denied, and introduced evidence to support his denial, that Albert Brownell was his agent for any purpose; that Mrs. Brownell had authority to furnish a buggy for use in the transfer business; that she, in fact, did furnish or direct the furnishing of such buggy; that she had the telephone conversation above referred to with Mrs. Moorehead, and that there was negligence on the part of the defendant or his agents. Defendant also pleaded contributory negligence on the part of the plaintiff. The cause was tried to a jury, resulting in a verdict for plaintiff in the sum of $1,800. The resulting judgment is now before us for review upon numerous assignments of error.

So far as the testimony is concerned, it cannot be reviewed without coming to the unfortunate conclusion that it cannot, in any way, be reconciled, and that not only one, but several witnesses upon this trial committed willful and corrupt perjury. Upon which side this occurred was for the jury to determine. We are satisfied that the testimony would have reasonably supported a verdict for either party, and therefore does support the verdict rendered. Other assignments are considered seriatim.

[1] Error is alleged in that Mrs. Moorehead, wife of the plaintiff, was allowed to testify concerning certain statements made by Albert Brownell on the evening after the accident occurred. The objection made was "incompetent, irrelevant, and immaterial, no proper foundation having been laid." The objection to the competency of the testimony does not, under our practice, raise the question of the competency of the wife of plaintiff, under section 5050, Rev. Laws 1910, to testify at all concerning the matter as to which inquiry is made. Muskogee Electric Traction Co. v. McIntire, 37 Okl. 684, 133 Pac. 213, L. R. A. 1916C, 351; Hartzell v. Hartzell, 42 Okl. 390, 141 Pac. 772, Ann. Cas. 1916D, 1191; Bell v. Territory, 8 Okl. 80, 56 Pac. 853; Williams v. Joins, 34 Okl. 733, 126 Pac. 1013; Butler v. Wilson, 153 Pac. 823. As to the competency of the testimony itself, we think it clearly admissible, not as a statement of the agent to bind the principal (Chickasha Cotton Oil Co. v. Lamb, 28 Okl. 275, 114 Pac. 333), but as impeachment of the witness, Albert Brownell. He had previously been asked upon cross-examination, without objection, concerning certain alleged statements made at the home of plaintiff, and had denied making such statements. Thereafter on rebuttal Mrs. Moorehead was asked concerning the same statements, and allowed to testify that such statements, in substance, were made by Albert Brownell, at the plaintiff's home on the evening of the accident. There was no request to the court to limit the effect of the testimony, to purposes of impeachment (A., T. & S. F. v. Baker, 37 Okl. 48, 130 Pac. 577) and, as tending to impeach, the testimony itself was competent.

[2, 3] The next error alleged is as to the admission of the testimony of Mrs. Moorehead concerning a telephone conversation with Mrs. Brownell shortly prior to the accident. It appears that plaintiff, after telephoning for a conveyance, was awaiting its arrival, when the telephone rang. He directed his wife to answer it, which she did. Mrs. Brownell was on the wire and, according to Mrs. Moorehead, told Mrs. Moorehead that she had turned in the call to two of the drivers and did not understand why they did not respond, but to tell Mr. Moorehead "to start this way, and I will send a single rig after him, and maybe—I think we can make the train all right." Objection was made to the competency of the testimony, and to that of the witness to relate it. As to Mrs. Brownell it suffices to say that we hold that there was sufficient testimony to establish that she was the agent of her husband for the purpose of receiving orders for conveyances and in directing his employés to execute such orders, and that at least the apparent authority was broad enough to cover the sending of the single rig in the emergency which is shown to have arisen, even though single rigs were not used in the defendant's general transfer business. St. L. & S. F. R. v. Bagwell, 33

Okl. 189, 124 Pac. 320, 40 L. R. A. (N. S.) 1180; St. L. & S. F. R. Co. v. Nichols, 39 Okl. 522, 136 Pac. 159; Kali Inla Coal Co. v. Ghinelli, 155 Pac. 606.

> "In every business and employment there are exigencies which are not anticipated and which require a servant to act, in the absence of the principal, for the immediate protection of his interests, and he may do things in his interest when the emergency arises which transcend his usual authority, and they will be deemed to have been authorized." Marks v. Rochester Railway Co., 146 N. Y. 181, 40 N. E. 782.

This much being determined it seems that it must be held that Mrs. Moorehead was competent to relate the conversation. We can draw no other conclusion than that when her husband directed her to answer the telephone she was constituted his agent, at least for the purpose of hearing any conversation intended for him, and of relating to him such conversation. Defendant says she was but the "ear" of plaintiff. But what is the purpose of an ear but to hear and convey what is heard, to the understanding? Surely it cannot be said that when I send one to the telephone for me to hear a message intended for me, my purpose is that my messenger shall receive the message then not repeat it to me, but shall retain it only in his own consciousness. Such is not the ordinary course of human affairs. The conclusions reached in Fish v. Bloodworth, 36 Okl. 586, 129 Pac. 32, are not in conflict with the decision here. In that case a husband was held incompetent to testify concerning a conversation where he "accompanies his wife to hear a conversation between her and a third party, particularly when this conversation is not with the adverse party, and does not concern the vital issue in the case." Here the wife did not relate a conversation which her husband also heard. The conversation was with the agent of the adverse party, and concededly concerned the most vital issues in the case, to wit, the agency of Albert Brownell. The question raised in the brief is as to the competency of Mrs. Moorehead to testify concerning the conversation which she heard. No question is made as to her competency to testify that she related such conversation to her husband, and, not being raised, is waived. We are not therefore to be taken as passing upon the competency of the witness in that regard under the final clause of subdivision 3 of section 5050, Rev. Laws 1910.

[4] The next error assigned is that Mrs. Moorehead was allowed to testify concerning a conversation had with Mrs. Brownell after the accident, and in relation to her having sent Albert Brownell with the single rig to get the plaintiff. Here again the objection was to the competency of the testimony, and not to the competency of the witness. The trial court was not in error in admitting this testimony, for two reasons: First, the testimony was elicited upon cross-examination by defendant's counsel and the objection made was by motion to strike. In Ardmore Milling Co. v. Robinson, 29 Okl. 79, 116 Pac. 191, this court said:

> "It is not admissible for counsel to be quiet and allow the evidence to come out and take advantage of it, if favorable, and, if not, to ask that it be stricken out and not considered"

—and quoted the expression used in State v. Efler, 85 N. C. 585:

> "Still less can he complain when it comes out in response to his own inquiries."

Counsel for defendant urges that the answer of the witness was not responsive to the question asked, and that therefore a motion to strike was his only remedy. After a review of the whole course of the examination, immediately preceding the question which brought out the answer complained of, we are convinced that such answer was directly responsive to the question asked, taken in the meaning which any ordinary person would draw from its language.

[5, 6] Second. The testimony was admissible as an impeachment of Mrs. Brownell. Although admitted in advance of any proper foundation having been laid therefor, and though improper as an impeachment at the time admitted, still when the proper foundation was afterward laid by cross-examination of Mrs. Brownell, the error in admitting the testimony was cured, there being no request to limit the effect of the testimony to purposes of impeachment. A., T. & S. F. R. Co. v. Baker, 37 Okl. 48, 130 Pac. 577; Rounsavell v. Pease, 45 Wis. 506; Roux v. Blodgett & Davis Lbr. Co., 94 Mich. 607, 54 N. W. 492.

[7] The next error alleged relates to certain remarks made by the trial court. Mrs. Moorehead, being recalled to the witness stand, was being questioned in relation to whether it was in the morning conversation or later that Mrs. Brownell had told her that Albert was directed to go after plaintiff. The following colloquy then took place:

> "Defendant objects as incompetent, irrelevant, and immaterial, and for the reason that this witness is the wife of the plaintiff. For the further reason that it is a form of question which is leading and suggestive and attempting to correct the witness' former testimony by suggesting to her what he wants her to testify at this time, which is directly opposite to what she testified before.
>
> "The Court: I heard her say when she answered that question that afterwards she said that: I remember noticing it at the time, and I don't think there is any opposition in her testimony, the way the court remembers, but I presume that the stenographer has got a record of it.
>
> "Counsel: I desire to except to the remark as to the court's recollection."

This court has said that the trial court ought not to express opinions upon the weight of the evidence or credibility of witnesses. Newkirk v. Dimmers, 17 Okl. 525, 87 Pac. 603; Wilson v. Territory, 9 Okl. 331, 60 Pac. 112; Kirk v. Territory, 10 Okl. 46, 60 Pac. 797; Hicks v. U. S., 2 Okl. Cr. 626, 103 Pac. 873. The Criminal Court of Appeals has said (Cochran v. State, 4 Okl. Cr. 390, 1111 Pac. 978) that:

> "Where such remarks are made, and it is clear that they could not have injured the de-

fendant, they will not constitute ground for a new trial."

An examination of the record showing the former testimony of the witness reveals that the court's remarks were in all respects true. There was no opposition in her testimony upon this point, and no reasonable ground for contending that there was. The remark of the court did not go to any question of fact which, under the record, could be before the jury for determination. He did not indicate that he believed her testimony upon any point to be true or untrue. He did not express confidence in the credibility of the witness, or indicate his opinion as to any of the merits of the case. Under such circumstances, we think the remarks made ought not to be held to constitute error. First National Bank v. Yoeman, 17 Okl. 613, 90 Pac. 412; Morgan v. Coleman, 139 Ga. 459, 77 S. E. 579; Norfolk, etc., Co. v. O'Neill, 109 Va. 670, 64 S. E. 948.

[8] The next assignment relates to an instruction in which the court told the jury that:

> "When one with full knowledge allows another to represent him as his agent and remains silent when occasion arises for him to speak, he may be held as principal."

There was no testimony upon which to base an instruction of this sort, and it should not have been given. Was it prejudicial? This court has frequently said that the giving of an instruction which correctly states an abstract principle of law, but which is inapplicable to the facts, is error, but we have variously held that such an instruction was not prejudicial "unless it is apparent that such instruction misled the jury" (Chickasha Compress Co. v. Bow, 149 Pac. 1166; Pearson v. Yoder, 39 Okl. 105, 134 Pac. 421, 48 L. R. A. [N. S.] 334, Ann. Cas. 1916A, 62; Weller v. Dusky, 151 Pac. 606); that giving such an instruction is prejudicial when it is "calculated to mislead the jury" (C., R. I. & P. R. Co. v. Beatty, 42 Okl. 528, 141 Pac. 442; Obenchain & Boyer v. Roff, 29 Okl. 211, 116 Pac. 782); when it will "probably tend to confuse the jury" (St. L. & N. S. F. Co. v. Bruner, 156 Pac. 649); when it is "strongly calculated to confuse and mislead the jury" (Kingfisher Nat. Bank v. Johnson, 22 Okl. 228, 98 Pac. 343); when it appears that "the jury were misled thereby" (Oklahoma Portland Cement Co. v. Brown, 45 Okl. 476, 146 Pac. 6), etc. The sum of all these expressions is that the instruction is prejudicial when we can fairly say that its necessary effect upon the jury was such that in the language of the statute (section 6005, Rev. Laws 1910) it "probably resulted in a miscarriage of justice." Whether or not the instruction had such effect must necessarily be determined by this court, according to our best judgment, upon the whole record in each particular case and each case will largely stand as a determination only of itself. As was said by the Criminal Court of Appeals in Dooling v. State, 3 Okl. Cr. 491, 106 Pac. 982:

> "An instruction harmless in one case may be prejudicial in another, depending upon the facts of each case."

In the case at bar the connection in which the language used was given—as a part of a long instruction—in fact the whole record, leads us to conclude that the giving of this instruction was not prejudicial.

The same reasoning applies to an instruction upon exemplary damages, for which there was no foundation in the evidence. It is clear from the record that plaintiff suffered an impacted fracture of the thigh bone; that he was confined in a hospital for a long period with his leg in a cast, with weights suspended therefrom; that he suffered such pain that he was kept for many days largely under the influence of opiates; that he had incurred bills of considerable size for doctors' fees, medicine and hospital fees; that his leg was permanently shortened about two inches, that he was compelled, because of the injury, to give up a position paying $100 per month, and had changed his occupation. The verdict was for $1,800.

Assuming that he was entitled to recover at all—and this was in this case a question of fact and for the jury to determine—we cannot say that there is even a probability that exemplary damages were included in a verdict of this amount; unless we can so say the instruction was prejudicial. Many of the authorities sustaining the view we take here are collected by Mr. Justice Turner delivering the opinion of this court in Great Western Coal & Coke Co. v. Coffman, 43 Okl. 404, 143 Pac. 30, and the principles there adduced are reiterated in Planters' Cotton & Ginning Co. v. Penny, 155 Pac. 516. It is unnecessary for us to further review them.

[9, 10] The next assignment of error is to the following instruction:

> "If you find from the evidence in this case that the party, Albert Brownell, had acted as agent for his father previous to the alleged injury, and shortly after said alleged injury he began to act for his father again in carrying on the livery and transfer business, you may look to all these as well as to all other surrounding circumstances to determine as to whether or not the said Albert Brownell was really acting for his father at the time of the alleged accident, and among these circumstances you may look to see as to where and how he got his information and what phone was used, if any, and whose team he used, and from what place said team was taken, as well as any and all circumstances appearing in the evidence."

To this instruction counsel object upon the ground that the fact that Albert Brownell was formerly in the employ of the defendant does not tend to show that he was his agent at that time. It is too remote, too speculative; evidence of a foreign fact not within the issues. And even if evidence of such former employment was admissible, its only effect was a remote inference or presumption, and the inference or presumption could not be indulged in the face of the positive evidence that Albert Brownell was not the agent of the defendant on the day of the injury or in the transaction in question. Counsel cites in support cases holding that evidence of similar transactions as principal and agent long before the particular event involved, and evidence of isolated acts of agency not connected with the transaction in question, is not admissible to establish agency, especially where positive evidence is available. In this case, however, the proof of both parties showed that Albert Brownell was driving in the transfer business for his father up until about ten days before the injury to plaintiff, and that he was in the same employment a short time after the injury. His alleged agency upon the day of the injury was the very fact in controversy. To say that because one witness or a dozen positively denied the agency on the particular day involved, the opposite party was thereby precluded from showing facts and circumstances to disprove such positive testimony is, we think, beyond the range of reason. Positive, direct testimony as to the authority or employment of an agent is generally available only to the alleged principal and agent. As a general rule, they are the only ones who can testify positively to the arrangement, or lack of arrangement, between them, but the facts and circumstances regarding and surrounding the acts and conduct of such parties are available to the opposite party. If he be denied the right to produce evidence of such facts and circumstances, he is entirely at the mercy of his adversary, the alleged principal who, with the alleged agent, alone can swear positively as to the existence or nonexistence of the employment. The law gives a party, therefore, the right to show acts and conduct tending to establish agency, but limits the extent of testimony of that character to acts and conduct in relation to transactions of the same nature as that involved and reasonably proximate in time to the transaction involved in the cause being tried. The cases cited by counsel consider, as above stated, acts held to be too remote. Had the evidence in this case been confined to showing that Albert Brownell once drove a hack for his father a year or so before this accident the cases cited would have been applicable and the testimony incompetent. But where a general course of employment in the same business as that in controversy in the action up to within a short time before and commencing again a short time after the accident, is shown, supplemented by acts and conduct upon the very day of the accident tending to show a continuance of that same general employment, then we think such testimony all becomes competent and material, and was properly defined in the court's instruction. That Albert Brownell drove a buggy upon the day of the accident instead of a hack or automobile we regard of little importance, for the reasons given under our previous discussion in relation to the apparent scope of authority of Mrs. Brownell. Cases of this sort are not infrequent. Greenleaf says (volume 2, § 65):

> "The most numerous class of cases of agency is that which relates to affairs of trade and commerce where agency is proven by inference from the habit and course of dealing between the parties."

Mr. Wigmore has given a very able discussion of the principles applicable to the class of evidence here involved. He says (Wigmore on Evidence, § 375) that of the modes "of evidence circumstantially a human quality or condition, two only are practically here available, namely, specific instances of conduct, exhibiting the habit or custom, and the prior or subsequent existence of it" (section 376):

> "In general, when habit of conduct is to be evidenced by specific instances, there is no reason why they should not be resorted to for that purpose. The only conditions are: (a) That they should be numerous enough to base an inference of systematic conduct; and (b) that they should have occurred under substantially similar circumstances so as to be naturally accountable for by a system only, and not as casual recurrences. As to the first condition convenience requires that the discretion of the trial court should control in order to avoid the objection of unfair surprise and confusion of issues. * * * As to the second condition, it may be said that the courts are apt to require too much, ruling often as if it were their function to require incontrovertible demonstration from each piece of evidence, instead of merely to declare it relevant to be considered by the jury."

The principles are applicable to proof of agency (section 377—1). So, too, he says (section 382):

> "It has already been seen that the prior subsequent existence of a quality or condition is evidential of its existence at a given time. * * * The prior or subsequent existence of such fact is always evidential to show its existence at a time in issue, upon the general experience that such facts involve a human attitude more or less continuous and permanent."

Without entering into a discussion of the many cases from the different states upon the subject, it is sufficient to refer to Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 Pac. 577, St. Louis Cordage Mills v. Western Supply Co., 154 Pac. 646, Wrought Iron Range Co. v. Leach, 32 Okl. 706, 123 Pac. 419, and Reeves Co. v. Phillips, 156 Pac. 1179, where it was held generally that:

> "The apparent authority of an agent is to be gathered from all the facts and circumstances, and is a question of fact for the jury."

And in Reed v. Scott, 151 Pac. 484, where this court said:

> "A jury may, if they so decide, accept circumstantial evidence upon one side, and reject positive testimony presented on the same point by the other side."

Having determined that the evidence referred to in the instruction was admissible to prove agency, it must follow that, there being conflict upon that point, the court did not err in submitting the question of agency to the jury and in advising them that they might consider such facts and circumstances in determining the existence or nonexistence of the agency.

It is next contended that there was error in the admission of testimony tending to prove that Albert Brownell had been fined for automobile speeding, and had an automobile accident subsequent to the accident here in question. The testimony of which complaint is made is not set out in the brief, and we are not therefore required to search the record to discover it. Rule 25 [137 Pac. xi] and numerous decisions of this court.

Other errors are alleged, but, owing to the necessary, but regrettable, length of this opinion, we dispose of them by saying that we have examined each and find no reversible error.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

MAURMAIR v. NATIONAL BANK OF COMMERCE OF TULSA. (No. 6700.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. Banks and Banking 🔑148(1)—Check—Knowledge of Depositor's Signature.

A bank upon which a depositor therein draws a check is charged with knowledge of the depositor's signature.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 439, 446, 451.]

2. Banks and Banking 🔑148(1)—Forged Check—Right to Payment.

Where a signature to a bank check is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 439, 446, 451.]

3. Trial 🔑251(1)—Instructions—Irrelevant Issue.

It is error for the trial court to instruct the jury upon an irrelevant issue, not raised by the pleadings or of which there is no evidence, when the instruction is calculated to mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587, 588, 594.]

Error from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Action by Louis Maurmair against the National Bank of Commerce of Tulsa, Oklahoma. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Former opinion (158 Pac. 349) withdrawn.

Sherman, Veasey & O'Meara, of Tulsa, for plaintiff in error. Randolph, Haver & Shirk, of Tulsa, for defendant in error. J. R. Cottingham and S. W. Hayes, both of Oklahoma City, amici curiæ.

SHARP, C. J. This action was brought by Louis Maurmair to recover $1,170.30 from the National Bank of Commerce of Tulsa, Okl.; it being alleged that plaintiff deposited such sum in the bank and the bank refused to pay the same upon demand. An answer was filed charging payment, except the sum of $130.30, which it was alleged was on deposit in defendant bank subject to plaintiff's check. Plaintiff replied by general denial.

The question presented at the trial related to the payment of three checks of $90, $440, and $510, which were paid by the bank, and the signatures to which the plaintiff claimed were forgeries. The primary issue before the trial court was whether the signatures were genuine or forgeries. There was no claim either by plaintiff or defendant that the signatures were obtained by fraud or trick practiced upon the plaintiff, and no evidence to support such a claim. A witness for the plaintiff sought to show the signatures to have been made from a common signature by tracing over plaintiff's signature, using transfer or carbon paper, so as to obtain his apparent signatures on the checks alleged to be forgeries. By instruction No. 6, which the court gave to the jury over plaintiff's objection, the law was said to be that if the signatures to the checks for $400 and $510 were made by plaintiff, either by directly affixing his signature thereto, or by affixing his signature thereto without his knowledge or consent by means of a deception practiced upon him, by third parties placing carbon papers between the paper on which he knowingly affixed his original signature and the checks thereunder, thereby obtaining carbon copies of his original signature, such copies of his signature would be considered as his original signature, binding upon him; and, further, that if the bank paid such checks in good faith, believing the signatures thereto were genuine, the plaintiff would not be allowed to recover thereon. The instruction is outside of the issues framed by the pleadings and is not authorized by the evidence. Throughout the trial, plaintiff testified that the signatures were not his. Southwell, the handwriting expert, expressed the opinion that the signatures were not genuine, but had been made by the use of Maurmair's signature upon some piece of paper and the genuine signature, thus secured, used in imprinting his signature upon the checks by the use of carbon sheets. We find no testimony in the record that the signature to the checks was made by the plaintiff, either by the intentional or unintentional use of carbon sheets. On the other hand, the testimony was to the effect that plaintiff had never used carbon paper in his check book, or in any otherwise. In short, there was no evidence to support the contention that plaintiff's signatures to the checks were affixed thereto by means of imposition practiced upon him by a third party placing a carbon paper under some other paper "on which he knowingly affixed his original signature." The evidence on the part of the bank was that the signatures to the three controverted checks were the genuine signatures of the plaintiff.

Obviously, therefore, there is no basis for the instruction complained of; it is wholly outside the issues and without evidence to authorize its submission. The plaintiff, as the bank's creditor, sued to recover for the amount of his deposit; the bank answered pleading payment except as to the sum of $130.30, then on deposit. Plaintiff replied denying that his deposit had been paid him. The burden was then upon the bank to prove payment. This it sought to do by showing that the checks drawn by Maurmair were his genuine checks; not that, because of plaintiff's negligence in and about the making of the checks, he was estopped from urging payment thereto. No question of negligence was raised by the pleadings, nor was it claimed by the bank that the plaintiff was precluded from setting up his claim of forgery because of any conduct on his part that would estop him from asserting his right to payment.

Furthermore, the instruction is opposed to section 4073, Revised Laws 1910, which provides:

> "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

[1] A bank is bound to know the signatures of its depositors. Kenneth Investment Co. v. National Bank of Republic, 96 Mo. App. 125, 70 S. W. 173; First Nat. Bank v. Bank of Cottage Grove, 59 Or. 388, 117 Pac. 293; First Nat. Bank of Belmont v. Barnesville First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 448; North British & Mercantile Ins. Co. v. Merchants' Nat. Bank, 161 App. Div. 341, 146 N. Y. Supp. 720; Timbel v. Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. Supp. 497; Havana Cent. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12, L. R. A. 1915B, 720; Redington v. Woods, 45 Cal. 406, 13 Am. Rep. 190; Morse on Banks and Banking (3d Ed.) vol. 2, par. 480; Daniel on Neg. Inst. (5th Ed.) par. 1654A.

[2] If, in the course of business, a bank pays a forged check, it must be considered as making the payment out of its own funds, and cannot charge the amount against the depositor, unless it shows a right to do so on the ground of estoppel, or because of some negligence chargeable to the depositor. In such circumstances, the depositor must suffer the consequences of his own conduct, and the amount may be charged to him. Harter v. Mechanics' Nat. Bank of Trenton, 63 N. J. Law, 578, 44 Atl. 715, 76 Am. St. Rep. 224; Morgan v. U. S. Mortgage, etc., Co., 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741. Ann. Cas. 1914D, 462; Hardy v. Chesapeake, 51 Md. 562, 34 Am. Rep. 325.

[3] While this court has on numerous occasions held that instructions not responsive to the pleadings and evidence will not require a reversal of the case if not calculated to confuse or mislead the jury, we cannot conscientiously say that the instruction complained of did not have that effect. On the contrary, from an examination of the record it appears that the instruction was strongly calculated to confuse the issues before the jury to the prejudice of plaintiff, so as to necessitate the reversal of the case. Kingfisher Nat. Bank v. Johnson, 22 Okl. 228, 98 Pac. 343; St. L. & S. F. R. Co. v. Bruner, 156 Pac. 649: Obenchain v. Roff, 29 Okl. 211, 116 Pac. 782; Chicago, R. I. & P. R. Co. v. Beatty, 42 Okl. 528, 141 Pac. 442.

The judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

AMAZON FIRE INS. CO. v. BOND.

(No. 6508.)

(Supreme Court of Oklahoma. Jan. 16, 1917. Rehearing Denied May 29, 1917.)

(Syllabus by the Court.)

1. PLEADING 🔑369(2)—INCONSISTENT ALLEGATION—SELECTION.

Where one of the issues to be determined was agency, and the petition alleged in one paragraph that the agency existed, and in another paragraph that the act of the party assuming to act as agent had been ratified, the court properly refused to require the plaintiff to elect upon which he would stand.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1139.]

2. APPEAL AND ERROR 🔑959(3)—DISCRETION OF LOWER COURT—TRIAL—AMENDMENT.

Amendment during the progress of the trial is discretionary with the trial court, and, unless same is an abuse of discretion, it will not be disturbed here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830.]

3. EVIDENCE 🔑135(1)—FRAUD—ADMISSIBILITY OF OTHER MISREPRESENTATIONS.

In an action for fraud, representations made by the supposed agent to other parties, about the same time and place, as to the value of the stock sold, are competent, for the same tend to show a definite plan or system to defraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 405.]

4. FRAUD 🔑58(1)—FRAUDULENT REPRESENTATIONS — ACTION — SUFFICIENCY OF EVIDENCE.

Upon an examination of this record, we cannot say that this evidence, and the proper inferences to be drawn therefrom, do not support this verdict.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 55.]

(Additional Syllabus by Editorial Staff.)

5. PRINCIPAL AND AGENT 🔑163(1)—"RATIFICATION" OF ACTS OF AGENT.

"Ratification," as it relates to the law of agency, is the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another, who at the time assumed to act as his agent in doing the act or making the contract without authority to do so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 619.

For other definitions, see Words and Phrases, First and Second Series, Ratification.]

Commissioners' Opinion, Division No. 3. Error from Superior Court, Pittsburg County; W. C. Liedtke, Judge.

Suit by Robert I. Bond against the Amazon Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Stanard, Wahl & Ennis, of Shawnee, for plaintiff in error. W. J. Hulsey, of Hartshorne, and Clayton & Clayton, of McAlester, for defendant in error.

HOOKER, C. The defendant in error sued to rescind a contract, and for damages for fraud and deceit alleged to have been caused him by reason of false and fraudulent representations and statements having been made to him by the agents of the Western & Southern Fire Insurance Company, as the result of which he purchased from the company through its agents 100 shares of stock in said company at $25 per share, in payment of which he executed two notes, for $1,500 and $1,000, respectively, due in one year, with 5 per cent. interest, payable to himself and indorsed by himself. The defendant company denied the authority of the parties making the sale to act for it in any capacity, and denied that it had sold to plaintiff any stock or had any transaction with him. Upon this issue, under proper instructions of the court, this cause was presented to the jury, and a judgment was rendered in favor of plaintiff, to reverse which the company has appealed, assigning the following errors:

(1) That the court erred when it refused to require the plaintiff to submit his cause upon one theory.

(2) That it was error to permit plaintiff below to amend his petition in the progress of the trial, so as to state a cause of action.

(3) The refusal of the court to give requested instructions, and likewise error in giving certain instructions.

(4) No evidence to support the verdict of the jury.

(5) The admission of incompetent evidence over its objection.

The evidence here discloses: That in the summer of 1909 one Edmund Dwyer and one Blanchard, representing themselves to be agents of the Western & Southern Fire Insurance Company, solicited plaintiff to purchase stock in said company, but he was not at the time interested. That about December 1, 1909, they again visited him for said purpose, but were unsuccessful. About January 27, 1910, they again visited Dr. Bond and sold to him 100 shares at $25 per share, in payment of which he executed and delivered his two notes as stated above. That said notes, at the instance of Dwyer, were drawn payable to Dr. Bond, and indorsed by him, and delivered to Dwyer. At this time Dwyer gave to Dr. Bond the following receipt:

"Receipt for Stock Settlement.
"Western & Southern Fire Insurance Company,
Shawnee, Oklahoma."
"Book No. 130.
"Application and Receipt No. 12.

"Received of Dr. Robert Bond ($2,500.00) twenty-five hundred dollars, in payment for 100 shares of the capital stock of the Western & Southern Fire Insurance Company of Shawnee, Oklahoma. This receipt is issued subject to the contract of purchase of duplicate number. Only salesman No. 9, whose signature appears on the inside front cover of this book, has authority to countersign this receipt.

"Signed this 27th of January, 1910.
"Western & Southern Fire Insurance Co.,
"By Edmund Dwyer."

And indorsed upon the back of said receipt was the following:

"Should the purchaser of the stock indicated on this application, and for which he has given his notes for $2,500.00 and due in 12 months from date, desire to renew all or part of his notes, he has the right to do so at 5 per cent. per annum. Edmund Dwyer, Agt.
"Jany. 27, 1910."

Dwyer and Blanchard took the $1,500 note and discounted the same to the McAlester Trust Company, along with other notes, and they stated to the president of the bank at the time they were agents of the Western & Southern Fire Insurance Company, and the president of the bank in payment of said notes caused some certificates of deposit in the name of the company to be given to Dwyer and Blanchard. These certificates of deposit were all later indorsed by the Western & Southern Fire Insurance Company and paid by the McAlester Trust Company. The $1,000 note, a short time after its execution, was in the possession of and owned by the company, and was so owned by it at the time of the institution of this suit, and also its property when renewed in January, 1911, and interest paid thereon. The evidence further shows that Dwyer and Blanchard held in their possession at the time of the sale to plaintiff—

"various forms of contract of the Western & Southern Fire Insurance Company and various reports and other literature of the company, such as any agent engaged in the sale of stock would have."

Plaintiff paid the larger note at maturity, and procured in January, 1911, a renewal of the $1,000 note, and paid the interest thereon, and when this note was about due he wrote the company, and requested it to send same to the bank at Hartshorne and he would pay it, but changed his mind and instituted this suit to recover the sums paid out by him,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and to cancel the outstanding note, claiming he had just ascertained the fraud; that is, that in 1912 he first ascertained that the statements made in 1909 by Dwyer and Blanchard as to the Western & Southern Fire Insurance Company having purchased or acquired the interest of the Shawnee Mutual Fire Insurance Company was false, and that as soon as he discovered the same he brought this suit. It is asserted that said parties stated that the Western & Southern Fire Insurance Company had acquired the business of the Shawnee Mutual Fire Insurance Company, which was then a going concern, and there is some evidence supporting the theory, had this been true, the stock in the Western & Southern Fire Insurance Company would have been more valuable.

The evidence also discloses that, while these negotiations were being made by Dwyer and Blanchard with Dr. Bond for the sale of said stock, they conversed with other parties in Hartshorne, and stated to them that they were agents of the company for the purpose of selling the stock, and that they sold some of the stock to other parties and took notes in part payment, and that these notes later were in the possession of the company and claimed by it. The company asserted that one J. C. Chrisney had subscribed for a large number of its shares and had not paid therefor, nor had said stock been issued to him, and that he employed Dwyer and Blanchard, as his agents, to sell stock, and that when the stock was sold by him, and notes taken therefor and delivered by Chrisney, he would transfer said notes to it, and it would credit his account therefor, and that in this way it acquired the ownership of the various notes, etc., involved here.

Upon this evidence this cause was presented to the jury, and it, after hearing the evidence, found that Dwyer and Blanchard were the agents of the company, and that they had made the statements claimed, and same were false.

The petition alleges that the company is liable for two reasons: First, because Dwyer and Blanchard were specifically authorized to act for it; second, if not specifically authorized, the company ratified the acts of Dwyer and Blanchard by accepting the benefits of the transaction. These are not inconsistent causes of action.

[1] The Western & Southern Fire Insurance Company was acquired after this transaction by the Amazon Fire Insurance Company, but the stock purchased by plaintiff was never delivered to him at any time. In the case of Austin Mfg. Co. v. Decker, 109 Iowa, 277, 281, 80 N. W. 312-314, the Supreme Court of Iowa said:

> "The whole doctrine of election is based upon the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexistent remedies."

In the instant case the fact to be established was the agency of Dwyer and Blanchard on behalf of the company, or subsequent ratification, and the cause of action of Dr. Bond can be maintained, if he can establish they were the agents in the first instance, or that they assumed to act for the company, and that the company subsequently ratified their acts. In either event, the court did not commit any error in refusing to require the defendant in error to elect in this case.

[2] Under our Code the amendment of the pleadings is discretionary with the trial court, and unless the same constitutes an abuse of discretion this court will not interfere with the action of such trial court in permitting an amendment. It is true that here, during the progress of the trial, the court permitted the defendant in error to amend his petition so as to make the same state a cause of action. The plaintiff in error did not show, nor attempt to show, the trial court where this was prejudicial to its interests, nor did it claim in the court below that it was surprised by this amendment, and a full consideration of the record does not disclose that there was an abuse of discretion in this respect. Section 4790, Revised Laws 1910, affords abundant authority to sustain the action of the trial court in permitting such amendment.

[3] Upon the trial the court permitted the defendant in error to show that the purported agents of the company, Dwyer and Blanchard, had made other sales of its stock to parties in the locality of Hartshorne about the time of the sale to the plaintiff below, and also permitted said parties to testify to the representations made by said purported agents at the time. This was objected to by the plaintiff in error in the trial below, and is assigned here as one of the reasons why this judgment should be disturbed. In 17 Cyc. 287, it is said:

> "An attendant circumstance of highly probative value may in some cases be found in the existence of such a series or system of co-ordinated or correlated facts as lead to the inference that the particular act which is under investigation must have been done as a necessary part of a general plan to attain a definite object, and that it was done by the person to whose real or supposed interest the particular act would redound. The acts or other facts constituting such an attendant circumstance may be shown, to indicate the existence of a systematized plan or comprehensive design, and they may be shown, notwithstanding the fact that the various acts cover an extended period of time."

This rule seems to be well supported by the authorities cited in the note to the text above given. It seems to us that this testimony was competent to show a wholesale system on the part of Dwyer and Blanchard to sell the stock of the company, and clearly evidences a total disregard of the truth, and indicates a settled conviction upon their part to sell stock, regardless of the representations necessary so to do.

In Mechem on Agency, vol. 1 (2d Ed.) 188, it is said:

> "So evidence of agency is also found in the facts that the alleged principal has acquiesced in, recognized, or adopted similar acts done on other occasions by the assumed agent. Where the acts so adopted are so closely connected as to constitute a course of dealing or to establish a custom, there can usually be but little difficulty; neither can there be where the acts are so numerous or so closely related as to reasonably lead to no other conclusion than that of a general agency of the doing of the acts of that character."

[4] If there is any evidence supporting this judgment we cannot disturb the same. The question of agency is one of fact, to be decided from all the facts and circumstances surrounding the transactions. It is often quite difficult to establish positive authority, and the power of the agent can only be determined by a critical examination of the entire transaction. When one starts out in an enterprise to defraud, often almost every known effort is resorted to in order to conceal and hide the fraudulent conduct. If liability can be averted, or suspicion shifted to others, it is a perfect defense. In the instant case, the company by its own admission permitted Chrisney to subscribe for a large number of its shares, knowing full well that before he could pay therefor he would have to sell the same to others, and that he was selling same as rapidly as possible, and that he was turning to it money and notes to be applied in settlement for stock for which he had subscribed.

Dwyer traveled over the country, assuming to be its agent, executed contracts in its name, sold stock, and represented he was selling same for the company, and if for a private individual he concealed the same from the purchasers, accepted notes in payment therefor, and these notes afterwards were in the possession of the company; he had contracts and other literature of the company in his possession, such as a stock salesman would have, and in some instances the stock sold by Dwyer was delivered to the purchaser by the company, and Dwyer also discounted notes and accepted certificates of deposit in the name of the company therefor, which the company afterwards indorsed and collected, and some of which were indorsed by Dwyer, as agent of the company, and some of same deposited in the bank to the credit of the company, and afterwards paid to the company.

The company did not fully inform the purchasers from Dwyer as to its condition when requested, and it is apparent that any efforts upon the part of the company would have fully discovered the representations made by Dwyer in making his sales. It appears the company diligently sought to avoid knowledge, content to revel in the wickedness of Dwyer and others and profit by their iniquity. This court in the following cases: Port Huron Co. v. Ball, 30 Okl. 11, 118 Pac. 393; Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 Pac. 577; Mullen v. Thaxton, 24 Okl. 643, 104 Pac. 359; Allen v. Kenyon, 30 Okl. 536, 119 Pac. 960—said that the apparent authority of an agent is to be gathered from all the facts and circumstances in evidence, and is a question of fact for the jury. Also in U. S. F. & G. Co. v. Shirk et al., 20 Okl. 576. 95 Pac. 218, this court said:

> "One who, by his conduct, has led an innocent party to rely upon the appearance of another's authority to act for him, will not be heard to deny the agency to that party's prejudice."

And that:

> "One who voluntarily accepts the proceeds ot an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own, with all its burdens, as well as all its benefits."

In Midland Savings & Loan Co. v. Sutton, 30 Okl. 448, 120 Pac. 1007, it is held:

> "1. The question of agency and the extent and scope of the agent's authority are to be determined by the jury, as other facts, from the evidence.
>
> "2. The apparent authority of an agent is to be gathered from all the facts and circumstances in evidence, and is a question of fact for the jury.
>
> "3. One who leads an innocent party to rely on the appearance of another's authority to act for him will not be heard to deny the agency to the party's prejudice. * * *
>
> "6. Where there is evidence reasonably tending to sustain the issues on the part of the plaintiff, and the evidence on the part of the defendant conflicts therewith, the determination thereof is for the jury."

And in Fant v. Campbell, 8 Okl. 586, 58 Pac. 741, it is said:

> "The act of one who assumes to act for another, though without authority, may be ratified by the one for whom he assumes to act voluntarily accepting the proceeds or profits of such unauthorized act. * * *"

This court also in Minneapolis Threshing Machine Co. v. Humphrey, 27 Okl. 697, 117 Pac. 203, 204, said:

> "As the question of ratification or confirmation was submitted to the jury, and they found in favor of the defendant Burke on that question, if there is any evidence reasonably tending to support their finding, it will not be disturbed by this court. It is a general rule that evidence of any conduct on the part of the principal recognizing the acts of the agent is admissible. * * * There was evidence to the effect that, immediately upon the execution of the release by Davies, the threshing machine was turned over to Humphrey, and remained in his possession until taken from him by the threshing machine company. * * * All these circumstances, we think, tend to contradict the evidence of the president to the effect that the actions of Davies in executing the contract of release were never ratified or confirmed by the company, and join an issue of fact for the jury. It is true that evidence of knowledge of these facts by the company is essential to a ratification, but such knowledge may be presumed when the acts of the agent are of such a nature that the principal must have known of them. * * * Ratification of an unauthorized act of an agent may be presumed from long-continued silence of a principal who has knowledge of the facts constituting such ratification. * * * In Hatch v. Taylor, 10 N. H. 538, it was held that evidence of conduct may be admitted, and be sufficient to establish ratification, notwithstanding the prin-

> cipal expressly declared he would not sanction the contract. In Patterson v. Van Loon, 186 Pa. 367, 40 Atl. 495, the court said: 'The evidence necessary to establish such relation is very different from that required to prove an express agency. In the former greater latitude must necessarily be allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may be legitimately inferred. From the nature of the case, evidence that would tend to prove an implied agency, or subsequent ratification, would be admissible as proof of an express agency."

In Iowa Separator Co. v. Sanders, 40 Okl. 658, 140 Pac. 406, 407, this court said:

> "Counsel takes the position that all the evidence on the part of the defendant regarding agency was incompetent, and therefore, if his objections had been sustained to the introduction of such evidence, there was no other evidence sufficient to authorize the submission of the issues to the jury. While it is true, as a general rule, that, until some evidence of agency has been introduced, declarations of an assumed agent, seeking to establish agency, are incompetent. There are exceptions to this rule, however, and one of the exceptions is that, where the suit is based upon a contract entered into by the alleged agent, the declarations of the agent are admissible and competent testimony. * * * In the case at bar, in addition to the fact that the suit was based upon a contract entered into by Hustin, the alleged agent, there were other circumstances and testimony tending to prove agency. * * * In view of these facts, we are of the opinion that the court did not err in admitting the testimony complained of, and that there was sufficient testimony, warranting the submission of the issues to the jury. Where there is any controversy about the facts, the question of agency is an issue for the determination of the jury."

[5] Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another, who at the time assumed to act as his agent in doing the act or making the contract without authority to do so. And it is stated that as a general rule, in order that a ratification of an unauthorized act or transaction of an agent may be valid and binding, it is essential that the principal have full knowledge of all material facts and circumstances relative to the unauthorized act or transaction, or that some one authorized to represent the principal, except the agent, have such knowledge, unless the principal is willfully ignorant or improperly refrains from seeking information.

The lack of full knowledge does not protect a principal, who is willfully ignorant and deliberately chooses to act without such knowledge, as where, knowing that he is ignorant of some of the facts, he has such confidence in his agent that he is willing to assume the risk and to ratify the act without making inquiry for further information that he at the time possessed, or where he intentionally and deliberately ratifies without full knowledge under circumstances which are sufficient to put a reasonable man upon inquiry, and the principal cannot ratify that part which is beneficial to himself and reject the remainder, for with the benefits he must take the burden, and if the circumstances are sufficient to put a man of reasonable prudence upon inquiry, the principal should make every reasonable effort to discover whether another has assumed to act in his behalf. In Blakley v. Cochran, 117 Mich. 394, 75 N. W. 940, it is held:

> "It is contended that, before ratification can be shown, it must appear that the principal has full knowledge of the transaction. *This knowledge may be inferred from the circumstances proven.*"

In the case of Lee v. Kirby, 80 Ark. 366, 97 S. W. 298, the Supreme Court of Arkansas said:

> "A partnership dissolution agreement, releasing plaintiff from all debts of the firm, was signed by L., defendant's brother, for himself and for defendant. In an action to compel reimbursement for debt paid by plaintiff after dissolution, defendant claimed that L. had no authority to bind him by such contract, but testified that they both signed the contracts for the firm as they desired; that L. had charge of the business, so far as the interest of both in the partnership was concerned, and frequently signed the name of L. Bros. to notes, the validity of which was never disputed, but was expressly recognized. Defendant also knew that plaintiff had been released from the partnership on some terms, but made no inquiry as to what such terms were. Held, that defendant had ratified his brother's act, and was bound by the contract of dissolution."

And in the body of the opinion the court said:

> "He was thereupon put upon inquiry as to the terms of the dissolution, and by failing to inquire, or object to the terms, is deemed, under the circumstances, to have assented to and affirmed the contract made in his name by his brother."

In the case of McDermott v. Jackson, 97 Wis. 64, 72 N. W. 375, the Supreme Court of Wisconsin said:

> "The principle that a person cannot retain the avails of an unauthorized contract made for his benefit by another, assuming to act as his agent, and repudiate the responsibilities of such contract, and that any attempt so to do, with full knowledge of the facts, constitutes a ratification of the unauthorized act, and creates a liability on the part of such person to the same extent as if such contract were originally authorized, is familiar. * * * This principle applies where the agent, in excess of his authority, borrows money on the credit of his principal and with it discharges debts of the principal in the business in which such agent is engaged. * * * The facts upon which the first case [Perkins v. Boothby, 71 Me. 91] turned are stated in the opinion of Symonds, J., as follows: 'The duty of the agent was to have charge of the store, sell the goods, and from time to time make such purchases of goods as might be necessary in his judgment, subject to the oversight of the directors. In the conduct of the business of the company, he assumed to borrow for them and to pay their debts for goods that had been purchased.' * * * In discussing the general principle before stated, the court quoted with approval from Green's Brice, Ultra Vires, 618, as follows: 'There appears to be no substantial reason whatever for not extending the principle here involved to all analogous cases. If liable in one case, why should a corporation not be always liable to re-

> fund the property or money of a person, which it has obtained improperly, or without consideration, or, if unable to return it, to pay for the benefit obtained thereby.' The conclusion reached was that such principle was applicable to the facts of that case, and that plaintiff was entitled to recover the money borrowed, as for money had and received. We perceive no good reason why the principle should not be held to apply here. Defendant had the full benefit of plaintiff's property. To the amount of such property he was relieved from liability to others, which, but for such property, he would have been obliged to pay. A refusal to return the money, with knowledge of the facts, or with notice and sufficient time, with reasonable diligence, to discover the facts, would constitute in law a ratification of the unauthorized dealing and render him liable."

In the case of Tabor v. Kelly, 109 Iowa, 544, 80 N. W. 520, the Supreme Court of Iowa said:

> "It is elementary that if the bank, with knowledge of the terms on which Coats received the Baldwin note, took and retained the same without objection, it will be held to have ratified what Coats did. Indeed, there is authority for saying that the bank, when it received this paper, was under obligation to inquire and ascertain the facts of the transaction with Coats, and is bound by the knowledge which such an inquiry would have given."

In the case of Ballard v. Nye, 138 Cal. 596, 72 Pac. 159, the Supreme Court of California said:

> "Now, upon the matter of ratification: Appellant contends in this connection that payment to Hayford by the company was not payment to her, unless he had authority to represent her. There is no doubt of this as a legal proposition. Of course, authority must be shown; but it need not be express authority. It may be implied, and one of the recognized legal methods of proving authority is by ratification. From such proof the law implies previous authority to the same extent as if in the first instance it had been expressly conferred. The doctrine of ratification proceeds upon the theory that there was no previous authority, and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and, when so implied, is equivalent to previous authority, and results as effectively to establish the relation of principal and agent as if the agency had been authorized in the beginning. But the general doctrine of ratification is so well understood as to need no further reference to it. While on the subject, however, it may be said, as to the character of proof from which ratification may be inferred, that it is the most frequently established by implication from the conduct and acts of the party in whose behalf the unauthorized agency was assumed, inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it. * * * With all these facts directly and strongly showing that Hayford had no right to the possession of this money—facts which should have suggested investigation and inquiry as to how he acquired it—the appellant made none. We are mindful of the general rule that a party must have full knowledge of all the material facts before the doctrine of ratification can be applied. 'Ignorance of such facts, however, can avail nothing where it is intentional and deliberate, or where the circumstances are such as reasonably to put the principal upon inquiry.' Mechem on Agency, § 148. This general rule is intended to protect the vigilant, not to aid those who, advised by the situation and surroundings that an inquiry should be made, make none; and ignorance of the existence of facts which might have been ascertained with ordinary diligence is no protection. Where the situation naturally and reasonably suggests that some inquiry or investigation should be made, and none is made, the person failing to make it will be deemed, in law, possessed of such facts as the inquiry would have disclosed."

Upon investigation of the record before us we cannot say that the inferences which the jury was justified in drawing from this evidence do not justify the conclusion reached by them in the consideration of this case. We realize that agency is often a difficult fact to directly establish, and that frequently, on account of the inability to show specifically the true relation between parties, resort must be had to the details and circumstances surrounding the transaction, in order to gather from them such deductions as would justify a conclusion. The facts here upon which the jury found adversely to the company are largely circumstantial, but this court is committed to the doctrine that facts may be established from circumstances, and in fact in everyday life we all draw conclusions and reach opinions from circumstances that are presented to us. Sov. Camp, Woodmen of the World, v. Teubner, No. 4520, 165 Pac. ——, not yet officially reported.

It is unnecessary for us to comment upon the conduct of the parties here, and it is sufficient for us to say that we cannot see our way clear to molest the verdict in this case as it comes to us, for the verdict of the jury met with the approval of the conscience of the trial court, and we think it is right.

There being no prejudicial error in the instructions, this cause is affirmed.

PER CURIAM. Adopted in whole.

(63 Okl. 285)

STATE ex rel. FREELING, Atty. Gen., v. LYON, Secretary of State. (No. 9071.)

(Supreme Court of Oklahoma. May 15, 1917.)

(Syllabus by the Court.)

1. COURTS 🔑207(4)—MANDAMUS IN APPELLATE COURT—MATTERS OF PUBLIC RIGHT—DELIVERY OF NOTARIES' COMMISSIONS.

The delivery of commissions to notaries public throughout the state and the refusal of the secretary of state to deliver such commissions to the persons appointed by the Governor is publici juris, and this court will entertain an original action brought by the state, upon relation of the Attorney General, for mandamus directing the secretary to deliver the commissions.

2. MANDAMUS 🔑77(2)—PUBLIC OFFICERS—MINISTERIAL DUTIES.

It is the duty of the secretary of state to deliver the commissions to the notaries public appointed by the Governor of the state, and this duty is ministerial. Upon the refusal of the secretary to perform this duty, a writ of mandamus may issue from this court to compel him to do so.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 164.]

3. MANDAMUS ⚷71—PUBLIC OFFICERS—MINISTERIAL DUTIES.

A writ of mandamus may lawfully issue from a court having jurisdiction to compel an executive officer to perform a mere ministerial act which the law imposes upon him the duty to do.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 133.]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"PUBLICI JURIS"—"PUBLIC"—"RIGHT"—"PUBLIC INTEREST."

"Publici juris" means "of public right," and the word "public" in this sense means "pertaining to the people, or affecting the community at large; that which concerns a multitude of people," and the word "right," as so used, means "a well-founded claim; an interest; concern; advantage; benefit," and the term "public interest" means more than a mere curiosity, and means something in which the public has some pecuniary interest, or some interest by which their legal rights or liabilities are affected.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public; Public Interest; Right; Rights.]

Original action for a writ of mandamus by the State of Oklahoma, on relation of S. P. Freeling, Attorney General, against J. L. Lyon, as Secretary of State. Peremptory writ of mandamus awarded.

S. P. Freeling, Atty. Gen., and Jno. B. Harrison, Asst. Atty. Gen., for relator. Warren K. Snyder, E. G. McAdams, and Norman R. Haskell, all of Oklahoma City, for respondent.

OWEN, J. This is an original action in this court for a writ of mandamus, instituted by the state of Oklahoma, upon the relation of S. P. Freeling, Attorney General, against J. L. Lyon, secretary of state.

It appears from the petition and response that Hon. R. L. Williams, Governor of the state, appointed certain persons notaries public, and the respondent, acting as secretary of state, attested the commissions as required by law, but refused to deliver them to the various persons appointed by the Governor and named in the commissions. In his response the secretary of state says, as his reasons for not delivering the commissions, the amount of money appropriated for his contingent fund for the fiscal year ending June 30, 1917, will not cover all the necessary expenditures of his office properly chargeable against that fund, and if he uses the necessary amount of that fund to defray the expenses of postage to deliver these commissions, he will not have a sufficient sum to meet the other expenses of his office which will arise before the expiration of the fiscal year. Further, he says he delivered, through the United States mail, commissions to the persons named in five cities and towns of the state, and that it appears from a tabulated statement (attached to his response) of the population of the towns in which the other persons reside there are already a sufficient number of notaries public residing in these places to properly serve the public interests, and therefore there exists no necessity to deliver the commissions in question.

[4] Counsel for the respondent, in opposing the issuance of the writ, group their objections under four propositions: First, they challenge the jurisdiction of the court because, as they say, it appearing from the allegations of the response, and the tabulated statement attached, there is no public need for these additional notaries, the question presented to this court is not publici juris, and therefore the court ought not exercise its original jurisdiction to hear and determine the case. We agree with counsel that this court should not grant the writ unless some interest of the public is involved, or, in other words, unless the public has some right involved in the question before the court. To determine this we must consider the meaning of the terms under discussion. By "publici juris," we understand, is meant "of public right." The word "public," in this sense, means "pertaining to the people, or affecting the community at large; that which concerns a multitude of people." Webster's New International Dictionary; Greenl. Ev. 152; Stockton v. Williams, 1 Doug. (Mich.) 546; Morgan v. Cree, 46 Vt. 773, 14 Am. Rep. 640. The word "right," as used here, is defined in Bouvier's Law Dictionary as "a well-founded claim; an interest; concern; advantage; benefit." We understand "public interest" to mean more than a mere curiosity; it means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as the interests of the particular localities which may be affected by the matters in question.

[1] The question presented here is furnishing notaries public throughout the state commissions authorizing the discharge of their duties. If the secretary of state can determine the need for notaries in any particular locality and withhold 70 commissions, as it appears in this instance he has done, what is there to prevent his withholding all the commissions issued to notaries public in the state? When we consider the office of notary public in relation to the transaction of public business—the business of the whole people of the state—and that all conveyances of real estate to be recorded, including deeds, mortgages, satisfaction of mortgages, leases, powers of attorney, affidavits, and contracts, must be acknowledged before a proper officer and authenticated by his seal of office, and that officers other than notaries authorized to take such acknowledgments are accessible to a very small per cent. of the people, we must conclude the duties of a notary public affect the pecuniary interests, legal rights, and liabilities of the public. The discharge

of the duties of that office materially affect the legal rights not only of the parties to the instruments acknowledged, but also the public at large. In the proper exercise of those duties and the easy access to these officials the public is concerned and has a right, to the end that business may be dispatched without unnecessary delay and inconvenience. The respondent cannot be heard to say there is no public need for these notaries whose commissions he refuses to deliver. The law gives him no voice in the appointment. The law does not lodge with him the power or authority to determine what localities do require and what localities do not require notaries public. That power is lodged with the Governor, under section 4240, Rev. Laws 1910, which is as follows:

> "The Governor shall appoint and commission in each county as occasion may require, one or more notaries public who shall hold their office for four years."

[2, 3] Second, counsel urges that this court is without authority to grant the writ in this case for the further reason to do so would be to direct the discretion of the secretary of state in the expenditure of the contingent fund of his office, and, not having what he considers sufficient funds to meet the expenses of his office, he has the right to direct what expenditures will be made from the fund. We recognize the well-settled rule that courts will not undertake to control the discretion of a public officer by a writ of mandamus. But that rule has no application here. Section 4242, Rev. Laws 1910, reads as follows:

> "Blanks for bonds and oath of office shall be furnished with the commission by the secretary of state."

This statute makes it the duty of the secretary to furnish the commission to the person appointed by the Governor. This is a mere ministerial duty placed upon the secretary by the law, and in the performance of which he has no discretion. The courts universally hold a writ may issue to compel an officer to perform a ministerial duty. Norris v. Cross, 25 Okl. 287, 105 Pac. 1000. It is no answer to the commands of the statute to say it will require some postage to deliver the commissions through the mail, and, postage being one of the expenses for which the contingent fund was appropriated, the secretary has a discretion as to how and when it will be used. The law imposes the duty to furnish these commissions. The performance of this duty being ministerial, the secretary should perform it when the occasion arises, as any other of the duties of his office. In holding this duty under the statute to be ministerial, we are not without authority. The case of United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167, is one in which the Secretary of the Interior refused to deliver a patent to certain land to one McBride after the patent had been duly issued and attested. In that case the court said:

> "The next objection to issuing the writ which we are called to consider is that the Secretary, in deciding whether he would deliver the patent to McBride or not, was called upon to exercise a judgment and discretion on the case presented to him which were not merely ministerial, but which were rather judicial in their character, and in regard to which many matters were to be considered, such as the validity of the title conferred by the patent, the circumstances under which it was signed, sealed, and recorded, and the conflicting rights of other parties to the lands covered by it. * * * No further authority to consider the patentee's case remains in the Land Office. No right to consider whether he ought, in equity or on new information, to have the title or receive the patent. There remains only the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus."

To the same effect is Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 118; Kendall v. United States, 12 Pet. 524, 9 L. Ed. 1181. The last-named case was one in which, under an act of Congress, the Postmaster General was directed to credit to Stokes, on a certain contract with the Post Office Department, whatever sum of money the Solicitor of the Treasury, after examination, should decide to be due. The Solicitor of the Treasury certified the parties were entitled to credit for a certain sum. The Postmaster General entered credit for a smaller sum than that found by the solicitor to be due. A writ of mandamus was applied for, and there, as here, counsel for respondent contended that it was an effort to enforce and control an official duty; an infringement upon the executive department of the government; the court was without authority to control the Postmaster General's discretion in the matter. The Supreme Court of the United States in that case said:

> "We do not think the proceeding in this case interferes in any respect whatever with the rights and duties of the executive, or that it involves any conflict of powers between the executive or judicial departments of the government. The mandamus does not seek to direct or control the Postmaster General in the discharge of his official duty, partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act which neither he nor the President had any authority to deny or control. * * * The act required by the law to be done by the Postmaster General is simply to credit S. & S. with the full amount of the award of the Solicitor of the Treasury. This is a precise, a definite, act, purely ministerial, and about which the Postmaster General had no discretion whatever. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of the court, pursuant to an order of the court, is an official act. There is no room for the exercise of discretion, official or otherwise. All that is shut out by the direct and positive command of the law; and the act required to be done is in every just sense a mere ministerial act."

Counsel for respondent, in urging this proposition, rely upon the case of Farris et al., School Board, v. State ex rel. Murphy, 46 Neb. 857, 65 N. W. 890. The question in that case arose upon the failure of the school board to appropriate the necessary money to purchase school books. The board alleged there had been no levy for that purpose, and that the contingent fund provided for would be exhausted by claims already incurred and not paid. The court in the opinion says:

> "It is very clear that no portion of the state apportionment could be appropriated to any other purpose than the payment of teachers' wages. Com. St. subd. 5, c. 79, par. 8. In any view of the resources of the district as disclosed by the pleadings, it is perfectly clear that there were no funds available, after paying salary of teacher, fuel bills, and necessary incidentals, wherewith to buy text-books."

Had the secretary, by his response in this case, shown that he was at this time without funds, or for any reason it was impossible for him to comply with the statute, a different question would be presented.

Third, counsel urges that to require the secretary's compliance with the statute in this instance is, in effect, to require him to incur the necessary expense for the postage necessary to deliver each commission, and that constitutes an expenditure of public funds, and the action is therefore one against the state, and cannot be maintained on this application. In support of this contention counsel cite the case of Lovett v. Lankford, 145 Pac. 767. That case was one in which Lovett and the other commissioners of Creek county sought, by mandamus to control the actions of the bank commissioner in determining whether certain moneys deposited in a bank should be paid out of the depositors' guaranty fund upon the failure of the bank. The law made it the duty of the bank commissioner to determine upon the facts presented whether the depositor was protected by the guaranty fund. The court properly held in that case such duty requires the exercise of judgment and discretion, and this court would not control that discretion by mandamus.

Fourth, counsel insist that the allegations in the response present a question of fact as to whether the secretary has sufficient funds and clerks at his disposal to deliver the commissions through the mail without neglecting some of the other duties of his office. Holding, as we do, the facts alleged in the response do not constitute a defense to the writ, the duty of the secretary being purely ministerial, there is not such an issue of fact presented here that requires a trial by jury. The law makes it the plain ministerial duty of the secretary to deliver these commissions. This court is not concerned at this time as to the method of delivery.

The peremptory writ of mandamus is therefore awarded. All the Justices concur.

(175 Cal. 144)

WILSON v. CALKINS et al. (L. A. 3813.)

(Supreme Court of California. May 16, 1917.)

MORTGAGES 🔑74 — FORECLOSURE — SUFFICIENCY OF EVIDENCE.

In suit to foreclose a mortgage given to secure payment for shares of stock, evidence that stock was delivered to defendant, who signed a receipt and voted proxies for it but allowed the issuing bank to retain it as security for an indebtedness due it, sustains a finding that the shares were delivered.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 172.]

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Mortgage foreclosure action by John W. Wilson, trustee, against C. C. Calkins and Kate A. Calkins. Judgment for plaintiff, and defendants appeal. Affirmed.

Waterman & Green, of Los Angeles, for appellants. Shankland & Chandler, of Los Angeles, for respondent.

HENSHAW, J. In 1908 the defendants delivered to the Columbia Trust Company (which afterward by change in corporate name became the Oil & Metals Bank & Trust Company) their promissory note for $3,750 for the purchase of 30 shares of the stock of the trust company. Thereafter, and while a renewal note for this indebtedness was held by the trust company, the defendants executed a new note to the company for the sum of $800, and at the same time executed a mortgage in form a deed absolute to certain real property which they owned. They covenanted that the mortgaged property should also be security "for any and all other debts or claims held against the promisors by said company which may be outstanding and unpaid at any time." The Oil & Metals Bank & Trust Company, successors to the Columbia Trust Company, became financially involved. John W. Wilson was made trustee for the purposes of liquidation. The defendants' obligations and the security were transferred to him. He brought this action to foreclose the mortgage under pleadings declaring the mortgage to be security for the debts evidenced by both promissory notes. The defendants answered, admitting that it was security for the $800 note, but denying that it was security for the note given by them in payment of the stock of the trust company, which, of course, had become of greatly depreciated or of no value.

The court found a delivery to and receipt by defendants of the 30 shares of the stock of the trust company for which their note was given. The one question argued upon this appeal goes to the insufficiency of the evidence to sustain this finding, the defendants testifying that they never received the stock. The testimony in support of the finding, however, shows that the 30 shares of stock were actually issued to the defendants, and the stub of the certificate in the stock book shows a receipt for it by defendant C. C. Calkins. The former president testifies that the stock was actually delivered to defendant, that he had possession of it, and that because of his indebtedness to the bank it was permitted to remain in the custody of the bank, apparently for purposes of security; but that Mr. Calkins recognized his ownership of the stock by giving proxies authorizing the voting of it at stockholders' meetings on more than one occasion.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(175 Cal. 149)

HORTON v. WINBIGLER. (L. A. 3862.)

(Supreme Court of California. May 17, 1917.)

1. REFORMATION OF INSTRUMENTS 🔑36(2) — PLEADING—AGREEMENT BETWEEN PARTIES.

To invoke the authority of equity to reform a contract to incorporate therein provisions claimed to have been omitted in its execution, though intended by the parties to have been inserted, it must be pleaded as a fact that there was an agreement between the parties that the provision or term omitted should have been contained in the executed instrument.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 142.]

2. REFORMATION OF INSTRUMENTS 🔑36(2) — PLEADING—AGREEMENT BETWEEN PARTIES.

In suit to reform a contract to incorporate provisions which it is claimed the parties agreed to incorporate therein, it is not necessary that it shall be alleged in direct terms that such an agreement was made, but it is sufficient if it appears reasonably and fairly from matters stated in the complaint and the language used representing them that in effect such an agreement is alleged.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 142.]

3. REFORMATION OF INSTRUMENTS 🔑36(2) — PLEADING—"INTENTION."

Where, in suit for reformation of a contract and deed to limit the estate of defendant's intestate therein to a life interest, the remainder on her death to pass to plaintiff, the complaint alleged that the purchase was made pending the administration of an estate, with the funds of the estate, the use of one-half of which defendant's intestate was to have only for life, with absolute property therein to pass to plaintiff upon her death, and alleged also that "it was intended at the time between" defendant's intestate and the plaintiff "that the contract should contain," etc., it sufficiently alleged the agreement between plaintiff and defendant's intestate as to what such instruments should contain, for whether the word "intention" is equivalent to an "agreement" depends on the connection in which it is used.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 142.

For other definitions, see Words and Phrases, First and Second Series, Intention.]

4. PLEADING 🔑52(2) — JOINDER OF CAUSES OF ACTION.

A complaint to reform a contract and deed, which were only parts of one transaction consisting of purchase of land, the mutual mistake alleged applying to the entire transaction, was not demurrable as stating two separate causes of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 113.]

5. Reformation of Instruments 🔑44—Evidence—Admissibility.

In suit for reformation of a contract and deed to make the estate therein of defendant's intestate only a life interest in an undivided half and at her death the same to pass to plaintiff, it appearing that defendant's intestate had only a life interest in the use of the money which went into the purchase of the property, plaintiff having the remainder, testimony of plaintiff as to his intention relative to the interest which the respective parties should have in the property was admissible, since defendant's intestate, by consenting to the investing in the property of the money in which she had only a life interest, could not acquire a greater interest therein than her interest in the funds entitled her to, unless it was the intention of the plaintiff that she should take it.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 155, 156.]

6. Evidence 🔑158(11)—Parol Evidence.

In action for reformation of contract of purchase and deed, where the respective interests of the parties under a prior will was material to the issues, the court's action in allowing the attorney for plaintiff in the settlement of such testator's estate, who prepared a contract between plaintiff and defendant's intestate as to the interest they should take upon the distribution and also prepared the decree of distribution, to testify as to what was intended by the terms of these various instruments was error, since the will and the contract and the decree of distribution all spoke for themselves, if the two former were entitled to be considered at all in construing the decree of distribution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 488.]

7. Appeal and Error 🔑1052(2)—Harmless Error—Admission of Evidence.

Error in admitting evidence as to what was intended by a will and a contract between the beneficiaries thereof as to the interest they should take upon distribution was harmless, if the will and contract were properly admitted by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4172.]

8. Evidence 🔑236(3)—Declarations by Deceased.

In action for reformation of contract and deed to limit the estate of defendant's intestate therein to a life estate and give plaintiff the remainder after defendant's intestate's death, evidence was properly admitted of declarations of defendant's intestate after the execution of the deed in question and while she and plaintiff were both in possession of the property that the property would belong to plaintiff after her death, that she often spoke of her interest in it being simply a life interest, and similar declarations; such declarations being admissible under Code Civ. Proc. § 1870, subds. 2, 4, as declarations of a deceased person against her interest in respect to her real property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 878.]

9. Executors and Administrators 🔑315(1)—Decree of Distribution—Incorporation of Provisions of Will.

In making a decree of distribution, a court may incorporate therein the provisions of the will, or an agreement entered into between the heirs, which is called to the attention of the court with a view of having it incorporated in the decree, and the court may, by express terms or by apt reference thereto, incorporate said will or agreement in the decree so as to constitute it a portion of its distributive terms.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1302.]

10. Evidence 🔑386(2) — Extraneous Evidence.

Where the will and a contract between the heirs were by express reference incorporated in a decree of distribution, they were admissible as part of the decree in an action involving a consideration of the decree, and were not inadmissible as matters extraneous to the terms of the decree and modifying or changing it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1699.]

11. Deeds 🔑211(2)—Evidence.

In an action to reform a contract of purchase and a deed and to quiet plaintiff's title to the land, evidence *held* to support the court's finding that the parties intended to have the instruments show that defendant's intestate had only a life interest in an undivided half, the same at her death to pass to plaintiff.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 648.]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Charlie L. Horton against Theodore A. Winbigler, administrator. From judgment for plaintiff and order denying a new trial, defendant appeals. Affirmed.

F. O. Spencer, of Anaheim, and A. J. Mitchell, of Los Angeles, for appellant. Tipton & Callor, of Los Angeles, for respondent.

LORIGAN, J. This action was for a decree reforming a contract of purchase and a deed to 30 acres of land in Orange county made and executed to plaintiff and the intestate in her lifetime, and further quieting the title of plaintiff to said land against the estate of said decedent.

There was no conflict in the evidence in the case. It was all produced by plaintiff. Certain facts are as follows: Plaintiff is the only son, and decedent was the mother of Minnie W. Horton. Mrs. Horton died testate September 23, 1909, several years before her mother, and by her will bequeathed to the latter certain personal effects, a monthly allowance to be charged against certain described real estate, and also "one-half of all the money * * * of which I may die possessed to have and enjoy for and during her life." The plaintiff was bequeathed the other half of the estate absolutely, and was also the residuary devisee on the death of his grandmother of the half of the estate in which she was left a life interest. The will of Mrs. Horton was admitted to probate and administered upon by the plaintiff. Pending the administration, and on December 19, 1909, the plaintiff and said Lucy J. Brown, his grandmother, entered into a written contract with one William Wagner to purchase from him the 30 acres of land here in question for $8,500, payable in certain installments, the last of which was to be paid on January 1, 1911, when they were to receive a deed to the property. While the administration of the estate of Mrs. Horton was still pending, and on September 12, 1910, said Lucy J. Brown and plaintiff, as beneficiaries under the will of said Mrs. Horton, made an agreement which was filed in the estate, whereby it was mutually agreed between them that said Lucy J. Brown should take under the said will one half of the moneys of the estate "to use and enjoy during her life," all the furniture and personal effects absolutely, and that her claim to $50 a month should be waived; that plaintiff should take the other half of the moneys his mother died possessed of and certain real property in the city of Los Angeles and in the state of Washington. Within the same month that this agreement between plaintiff and Mrs. Brown was made, a decree of distribution in the estate of Mrs. Horton was entered, whereby there was distributed to Mrs. Brown one-half of $10,395.71 cash in the hands of plaintiff, as executor, and certain personal effects, and the rest of the estate was distributed to the plaintiff. The particular terms of this decree of distribution will be subsequently referred to when we are discussing a question respecting its effect which is involved on this appeal. After the entry of the decree of distribution, and on February 24, 1911, in consummation of the contract with him, Wagner made a deed to plaintiff and Mrs. Brown, of the 30 acres involved in this action (the installment payments having been completed under the contract). It was an ordinary grant, bargain, and sale deed running to both said grantees, their heirs and assigns, and expressing a nominal consideration of $10. It further appears that Mrs. Horton, Mrs. Brown, and plaintiff came from Texas, and lived together at the home of Mrs. Horton until her death. Thereafter Mrs. Brown lived with plaintiff and his family. Mrs. Brown had no property when she came to California, and all she acquired subsequently (eliminating for the present the interest from Wagner to herself and plaintiff) was what she received by virtue of the will of Mrs. Horton—principally the life interest in this money. The purchase of this 30 acres was negotiated for by plaintiff while he was executor of the estate of his mother, pending the administration and after a conference with Mrs. Brown about its purchase, at which time Mrs. Brown told him to do as he saw fit and use his own judgment. He thought it advisable to purchase, and both himself and Mrs. Brown made the contract with Wagner to do so, and the payments aggregating $8,500 were made solely from the funds of the estate of Mrs. Horton in the hands of plaintiff as administrator of her estate.

Mrs. Brown died October 27, 1911, intestate. Letters of administration were issued to the defendant, who is asserting in behalf of her estate a claim to an undivided half interest in the 30 acres of land. Plaintiff brings this action, his complaint being based on two counts; upon one he seeks a reformation of the contract of purchase and deed; on the other to quiet title to the property. In that relating to the reformation of the instruments, after alleging the facts above recited as far as pertinent to the cause of action, plaintiff further alleged that the contract of purchase of this land made between Wagner and himself and Mrs. Brown did not, in truth or in fact, state the real intention of the parties, in that no mention is made therein that said Lucy J. Brown was to have but a life estate only in said property, and that it was intended at the time between plaintiff and Mrs. Brown that said contract should contain a stipulation, in substance, "that as to Lucy J. Brown a life interest only in the undivided one-half of the property herein described and on her death the same to pass to Charlie L. Horton"; that said stipulation was omitted by the mutual mistake of said plaintiff and said Lucy J. Brown, deceased. It is then further alleged as to the deed from Wagner to himself and Mrs. Brown that the same mistake was made by the mutual mistake of said parties; that in the said deed to plaintiff and Mrs. Brown there was omitted the same stipulation as aforesaid.

The other count, as stated, contained allegations under which plaintiff seeks to have his title to said premises quieted. The prayer is for a reformation of the contract and deed to conform to the alleged intention of the parties and for a decree quieting title. Defendant demurred generally and specially to the complaint, and, his demurrer being overruled, answered, denying the principal allegations of the complaint. The court made findings and a decree in favor of plaintiff, reforming the contract and deed and quieting the title of plaintiff, and this appeal is from the judgment and an order denying the motion of defendant for a new trial.

As grounds for a reversal appellant claims that the court erred in overruling his demurrer to the complaint; erred also in the admission of evidence; and it is further asserted that the evidence does not sustain certain of the findings.

[1-3] As to the demurrer the only points urged by appellant in presenting his demurrer in the trial court which we think call for any consideration are that there is no allegation in the complaint of an agreement entered into between plaintiff and Mrs. Brown in her lifetime when the contract and deed were made that there should be inserted therein a clause limiting the interest of said Mrs. Brown to a life interest with remainder over to plaintiff. The argument is that if there was no such agreement, then there could be no mutual mistake upon which a reformation of the instruments could be

based. It is further contended that the reformation of the contract and deed were separate causes of action which should have been separately stated, but were not, and hence the demurrer which made this particular point should have been sustained on that ground. As to the first claim that there is no allegation that plaintiff and Mrs. Brown did agree to any terms or stipulations to be inserted in the deed as to their interest in the land, it is quite apparent that there is no specific allegation to that effect. The most direct allegation is that, when the property was purchased—

"it was intended at the time between the said Lucy J. Brown and the plaintiff that the said contract should contain the following stipulation 'that as to Lucy J. Brown a life interest only in and to the undivided one-half of the property herein described and at her death the same to pass to Charlie L. Horton.'"

When a court of equity is authorized to reform a contract at all, so as to incorporate therein provisions claimed to have been omitted in its execution though intended by the parties to have been inserted, in order to invoke such jurisdiction it must be pleaded as a fact that there was an agreement between the parties that the provision or term omitted should have been contained in the executed instrument. But it is not necessary that it shall be alleged in direct terms that such an agreement was made. The requirement of pleading will be met if it appears reasonably and fairly from matters stated in the complaint and the language used representing them that in effect such an agreement is alleged. The complaint here alleged that the purchase of the property was made pending the administration of the estate of Mrs. Horton with the funds of her estate, the use only of one-half of which Mrs. Brown was to have for life, with absolute property therein to pass to plaintiff upon her death. This limitation in the interest of Mrs. Brown in such funds of the estate was not one of agreement between plaintiff and herself, but was imposed by the will of her testator. Her interest in it could not extend further, and when she with plaintiff invested the funds of the estate in the property in question, it would only be natural that as part of the agreement in purchasing the property it should be agreed and understood that the interest of Mrs. Brown therein would be limited by the interest which she had in the funds which she was investing therein, a life interest in one-half. We refer to these allegations, not as assuming that they amount to an allegation of an explicit agreement between plaintiff and Mrs. Brown when the property was purchased as to the interest each should take therein and the stipulations respecting it to be inserted in the instrument, but as bearing on the language of the allegation quoted above "that it was intended at the time between the said Lucy J. Brown and the plaintiff that the contract should contain," etc. It is contended that "intention" is not equivalent to an "agreement." But whether it is or not depends on the connection in which it is used. Such use will often make the one word equivalent in meaning to the other. So it is here. The allegation is not that there was an intention simply on the part of plaintiff or Mrs. Brown that the contract should contain a certain stipulation, but that an intention had been reached between them at the time of the contract that the contract should contain such stipulation. An alleged intention between them that a specified provision should be placed in the contract could only mean, giving the language its ordinary meaning, that as a result of a consideration of the matter between the parties it was agreed or understood that the contract should contain the specified provision, and that construction sufficiently meets the objection of appellant.

[4] On the other point that there were two separate causes of action for reformation of instruments—one for reformation of a contract; one of a deed—which were not separately stated. There was but one cause of action, based upon mutual mistake. The contract for the purchase of the property supplemented by a deed thereto were only parts of the one transaction, namely, the purchase of the land. There was but one set of facts, and these as to this mutual mistake alleged in the complaint applied to this entire transaction. It constituted one mutual mistake, consisting of an omission from the written instruments of a provision agreed on to be inserted as to the extent of the interest the parties should take under the instruments.

[5] As to the alleged errors in the admission of evidence. It was proper for the court to admit in evidence the answer of the plaintiff as to his intention relative to the interests which the respective parties should have in the property and which should be inserted in the contract and deed. Mrs. Brown had only a life interest in the use of the money which went into its purchase price. The ownership of the fund subject to such life use was in the plaintiff. Mrs. Brown, by consenting to the investing of the money in which she had only a life interest in this land, could not acquire a greater interest therein than her interest in the funds entitled her to, unless it was the intention of the plaintiff that she should take it. While it is true that the intention of the plaintiff alone is not a controlling factor in the case, but that it must appear that some agreement or understanding existed between himself and his grandmother disclosing a mutual intention on their part to have the written instrument contain the alleged conditions which it is claimed were omitted, still, when one of the questions in the controversy was whether Mrs. Brown was to have a greater interest in the land to be purchased than she had in the purchase money to be invested in it, we think it was proper to allow the evidence of the intention of plaintiff on that point, as his intention was necessary to effect a gift, and to be con-

sidered in connection with all the other evidence tendered to show mutual intention and a mutual mistake. Appellant contends that this intention of the plaintiff was the only evidence relied on by him as showing mutual mistake, but whether it was or not is not the question here to be considered, but only the admissibility of the evidence. Whether there was any further evidence or not to sustain the finding will be considered further along in its place.

[6, 7] It is further claimed that the court erred in allowing the attorney for plaintiff in the settlement of the estate of Minnie W. Horton, deceased, and who prepared the contract between plaintiff and Mrs. Brown as to the interests they should take upon the distribution, and who further prepared the decree of distribution, to testify as to what was intended by the terms of these various instruments. He testified, over the objection of defendant, that the contract was not intended to change the disposition under the will, nor did the decree of distribution intend, to distribute to Mrs. Brown a greater estate or to plaintiff a lesser estate than was given by the terms of the will. This evidence was not admissible. The will and the contract and the decree of distribution all spoke for themselves, if the two former were entitled to be considered at all in construing the decree of distribution. There was nothing ambiguous or uncertain in any of the terms of these instruments which required extraneous evidence to explain them. But while it was error to admit this testimony, it was harmless error if the will and contract were properly admitted by the court in connection with the decree of distribution. This is a question for later consideration.

[8] Evidence was admitted, over the objection of defendant, of declarations made by Mrs. Brown after the execution of the deed to plaintiff and herself, and while they were both in possession of the property, that the property would belong to plaintiff after her death; that she often spoke of her interest in it being simply a life interest, and similar declarations. Such declarations were clearly admissible under subdivisions 2 and 4 of section 1870 of the Code of Civil Procedure as declarations of a deceased person against her interest in respect to her real property.

The last point made by appellant is that the evidence is insufficient to sustain certain of the findings which relate to the decree quieting title of plaintiff to the land. The court found that:

> Plaintiff "now and ever since the death of Lucy J. Brown has been the owner in fee of the real property described in plaintiff's complaint, and that the estate of Lucy J. Brown is not the owner of an undivided one-half interest therein."

Further:

> "That said estate of Minnie W. Horton was distributed in accordance with said will and the contract entered into by the plaintiff and said Lucy J. Brown, and provided by its terms that said Lucy J. Brown should take a life interest only in and to one-half of said real estate distributed to her * * * and that by the terms of said will and contract and decree of distribution the said Lucy J. Brown, now deceased, acquired a life estate only in and to said real property described herein."

This claim of appellant is based solely on the construction which he claims must be given to the decree of distribution in the estate of Minnie W. Horton. His claim is that the only distributive language in the decree provides for a plain, distinct and unequivocable distribution "of one-half of all the moneys on hand to the said Lucy J. Brown, * * *" that no limitation to the use of such moneys for life is prescribed in the decree as to the interest or share given to said Lucy J. Brown in said money, but that it is given to her absolutely; and with much insistence appellant asserts that the clause above quoted must be taken segregated from other parts of the decree and considered by itself, and that, so considered, it must be construed as declaring an absolute ownership in Mrs. Brown of one-half of said money. But the error in the contention of appellant lies in placing undue stress on this particular distributive clause and ignoring other provisions of the decree intimately connected with and constituting an important part of its distributive terms. As we have shown, the will of Mrs. Horton gave Mrs. Brown the use of one-half of the moneys she died possessed of and the subsequent contract between plaintiff and Mrs. Brown, after extinguishing some right under the will to which she would otherwise be entitled, declares that she, Mrs. Brown, "selects and elects to take under said will one-half of the money for life" and certain other personal effects of the deceased absolutely.

Now, in the petition for a decree of distribution the terms of the will are set forth, and the agreement between plaintiff and Mrs. Brown aforesaid as to the method in which the estate should be distributed to them is also set forth, and distribution is then asked to be given under said will and agreement, and in the decree of distribution it is recited "that in pursuance of, and according to the last will of said deceased, the agreements of the heirs and legatees, and deeds and conveyances on file herein, the said property is distributed as follows, to wit," followed by the distributive clause in favor of Lucy J. Brown of one half of the money of the estate in the terms relied on by appellant and the other half of the money to plaintiff, together with certain real estate.

[9, 10] In making a decree of distribution a court may incorporate the provisions of the will therein or a contract or agreement entered into between the heirs and which is called to the attention of the court with a view of having it incorporated in the decree; and the court may, by express terms or by apt reference thereto, incorporate said will or contract in the decree so as to constitute it

a portion of its distributive terms. This is what was done in the decree of distribution under consideration. The court incorporated the will and the contract between plaintiff and Mrs. Brown as to the respective interests which each should take on distribution, and pursuant thereto made distribution accordingly. When a necessity arose thereafter to construe said decree, the court was not limited to a consideration of the particular provision of it, as claimed by appellant, but it was the duty of the court to look to the will and the contract which were made a part of the decree, together with the other terms, in order to ascertain just what the terms of the distribution were, because the distribution as declared by the court was in accordance with the provisions of the will and the agreement of the heirs. This declaration and reference to the will and agreement made them a part of the decree as effectually as though set forth in it. The court was not, as appellant asserts, allowing the admission of the will and contract as matters extraneous to the terms of the decree for the purpose of modifying or changing the decree of distribution. The court was admitting these instruments, which were in effect part of the decree of distribution because referred to therein and declared to be the basis of the decree itself, not to modify it or change it in any particular, but for the purpose of construing it in its entirety and determining just what was meant by all its distributive provisions. The right of the court to incorporate provisions of a will or agreement by express reference in a decree of distribution and thereafter in an action involving a consideration of the decree to resort to said will and agreement as part of the decree in construing its terms, as was done in this case, is well settled in this state. Goldtree v. Thompson, 79 Cal. 613, 22 Pac. 50; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333.

[11] An attack is made also on a finding respecting the second cause of action. It is alleged in the complaint and found by the court that when the contract of purchase was entered into and the deed to the property subsequently made it was the intention of the parties to have the said instruments show that as to Lucy J. Brown she was to have only a life estate in an undivided half interest thereof, the same at her death to pass to plaintiff. Appellant claims that this finding is not sustained by the evidence. The only evidence on the subject was that produced by the plaintiff. It was not voluminous, and, the matter being of a private nature in which the plaintiff and Mrs. Brown were alone interested and she dead, it would hardly be expected to be otherwise. But even under these conditions we are satisfied there was sufficient warrant for the finding. When this transaction took place Mrs. Brown had no means of her own. All she had was a life interest in the money which on her part went into the purchase of her half interest in the property. Upon the investment of such funds she could not, without the consent of plaintiff, have acquired any greater interest in the land than a life interest, with a right in the plaintiff to take the property on her death. This was true because her interest or the money invested by her or its proceeds, together with the ultimate right of the plaintiff thereto on her death, was fixed by the terms of the decree of distribution under which she received the money for her use during her natural life. No action on her part could enlarge her interest in those funds or in the property purchased thereby. So that, in the absence of any evidence that the plaintiff and Mrs. Brown intended to hold the real property purchased under any other or different terms than they held the money derived from the estate of Mrs. Horton which went into its purchase, the inference would naturally be that they did not. Add to this the testimony of the plaintiff that it was the intention of himself and his grandmother when they bought the property to act in accordance with his mother's will; that the grandmother have a life estate or a life legacy in it, and at her death it was to revert to plaintiff; that plaintiff did not intend to make a gift to his grandmother of any interest in it; that his grandmother's intention and his intention, as he declared, were that she should have only a life interest in the same. After the purchase of the property, and while both parties were in possession on several occasions, the grandmother declared that on her death the property would belong to plaintiff; that she often spoke of her having but a life interest in it; that it did not make any difference as to expenditures made by him on the ranch, as the property would all go to him on her death. Taking into consideration that the grandmother only had a life interest in the fund invested in the real property, that she never claimed any other or different interest in it than a life estate, together with the testimony of plaintiff as to what was intended by himself and his grandmother as to the interest she should take in the property, the court was warranted in finding that it was the intention under the contract and deed to convey to her a life interest only, and that the omission to have said conveyances so declare was a mutual mistake.

We have examined all the points made for a reversal which we think merit attention, and, finding no reason for disturbing the order and judgment, they are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(175 Cal. 141)

BROWN v. SUPERIOR COURT, LOS ANGELES COUNTY, et al. (L. A. 5149.)

(Supreme Court of California. May 16, 1917.)

1. Appeal and Error 🔑607(1)—Transcript—Time.

Filing of a notice within the time prescribed by Code Civ. Proc. § 953a, is essential to one's right to have prepared a stenographic transcript for use in support of an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

2. Appeal and Error 🔑607(1)—Transcript.

Under Code Civ. Proc. § 953a, providing that when appellant desires to have the record presented other than by printed record he shall file with the clerk a certain notice within ten days after entry of the judgment, order, or decree, or if a proceeding on motion for new trial be pending within ten days after notice of decision denying said motion or of other termination thereof, although no written notice was given petitioner of the decision denying a motion for a new trial, if he had actual knowledge of the decision at the time it was made, he would have only ten days from decision to file his motion for preparation of stenographic transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

3. Appeal and Error 🔑607(1)—Transcript—Time.

Minutes of the court, reciting that motion for new trial came on regularly to be heard, Y. appearing as attorney for plaintiff and V. for defendant, followed by order denying motion, was insufficient to show that defendant's attorney had actual notice of decision, and defendant's time for filing notice for preparation of transcript did not begin to run until notice of the decision was served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

4. Appeal and Error 🔑165—Estoppel—Election of Remedies.

That petitioner contemplated an appeal upon a bill of exceptions under Code Civ. Proc. § 650, and took steps to obtain an extension for the preparation thereof could not deprive her of the right given by section 953a to bring up the record in a different manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 995–1001.]

In Bank. Original application by Edna A. Brown for a writ of mandate against the Superior Court, Los Angeles County, and John M. York, Judge thereof. Granted.

Arthur C. Vaughan, of Los Angeles, for petitioner. Milton K. Young, of Los Angeles, for respondents.

ANGELLOTTI, C. J. This is a proceeding in mandate to compel the certification by a trial judge of the stenographic reporter's transcript, as provided in section 953a, Code of Civil Procedure, for use in support of an appeal prosecuted by petitioner from a judgment rendered against her in a case entitled Tropical Investment Company v. Edna A. Brown.

The principal ground for the refusal of the trial judge to certify the transcript was that the notice for the preparation of the same was not filed with the clerk of the superior court within the time prescribed by law. The law requires such notice to be filed "within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof." Section 953a, Code Civ. Proc.

[1] It is settled that the filing of this notice within the time prescribed is essential to one's right to have such a transcript prepared and settled. Estate of Keating, 158 Cal. 113, 110 Pac. 109. The notice was not filed within ten days after notice of entry of the judgment. There was a motion for a new trial, which was heard and denied on July 17, 1916. Written notice of this decision was served on petitioner on July 29, 1916, and within ten days after such service, viz. on August 8, 1916, petitioner filed the requisite notice with the clerk. As will be observed, this was more than ten days after the decision denying the motion was actually made. It is claimed that petitioner had actual notice of the decision on the motion for a new trial at the time it was made, and that where such is the case written notice is not made essential by the language of this particular statute, with the result that her time for filing the notice for preparation of the transcript commenced at once and expired July 27, 1916.

[2] It was held by the court in bank in Estate of Keating, 158 Cal. 109, 110 Pac. 109, after a most exhaustive discussion, that, in view of the language of this statute, "actual notice established by *satisfactory evidence of record* will start the statute in motion without the service of a formal written notice." (The italics are ours.) In that case the filing of a notice of appeal from the order sought to be reviewed was held to be conclusive evidence that the party knew of the entry of the order, and this notice was taken as satisfactory "evidence of record." The same conclusion upon similar facts was reached by the court in bank in Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611. While written notice is not required where actual notice exists, as is established by these decisions, it appears to be equally well settled that the actual notice must be clearly shown by facts appearing in the records, files, or minutes of the court, such for instance as the filing by the party of a notice of appeal or a notice of intention to move for a new trial, or an application for a stay of execution, etc. In such cases it has sometimes been said by the court that by such acts the party must be held to have waived written notice of the decision. Such acts clearly show the *actual* notice of the decision which, it is established, renders the service of written notice unnecessary under the particular statute here involved.

[3] In the case at bar, the only material record evidence is furnished by the minutes

of the court, which show the following entry, viz.:

> "Tropical Investment Co., Plaintiff, v. Edna A. Brown, Defendant. The defendant's motion for a new trial coming on regularly to be heard, M. K. Young, Esq., appearing as attorney for plaintiff and A. C. Vaughn, Esq., for defendant. It is ordered that the motion be and the same is hereby denied."

There is nothing in the entry or on the records or files to indicate that petitioner or her attorney did any act showing actual notice of this decision until, in pursuance of the written notice subsequently served, the notice for preparation of the transcript was filed. We do not think that it may fairly be held that the minute entry clearly shows actual notice of the decision to her attorney. It is entirely consistent therewith that he did not have such notice. While it shows that he appeared on the *hearing* of the motion, it does not show whether or not he was actually present when the decision was rendered. So far as the record shows, he may or may not have been present at that time. The records failing to show clearly that he did have such actual notice, we are of the opinion that it must be held that time for filing notice for preparation of transcript did not commence to run until the notice of decision was served, viz.: on July 29, 1916, and that the notice filed on August 8, 1916, was in time.

[4] As to another objection made, we are entirely satisfied with what was said by the District Court of Appeal of the Second Appellate District, in the decision in this proceeding, as follows:

> "It appears that on August 2d the court, upon petitioner's application, made an order extending the time within which to prepare a bill of exceptions to be used on appeal; and this fact is urged as a further ground for the refusal of the court to certify the reporter's transcript prepared in lieu thereof. The fact that on August 2d petitioner contemplated an appeal upon a bill of exceptions, as prescribed in section 650, Code of Civil Procedure, and took steps to obtain an extension of time for the preparation thereof, could not deprive her of the right given by section 953a in bringing up the record in the manner there prescribed."

There is no other point requiring notice.

Let the peremptory writ of mandate issue as prayed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 136)

SMITH-BOOTH-USHER CO. v. LOS ANGELES ICE & COLD STORAGE CO.

(L. A. 3867.)

(Supreme Court of California. May 16, 1917.)

1. EVIDENCE 🔑400(3)—REDUCTION TO WRITING—MERGER.

Where a contract for the sale of a pump was reduced to writing, nothing not found in the writing, except that which is presumed by law from that which is written, can be considered as a part of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1787, 1791, 1793.]

2. SALES 🔑273(1)—SALE FOR PARTICULAR PURPOSE—WARRANTY OF FITNESS—STATUTE.

The warranty created by Civ. Code, § 1770, providing that one who manufactures an article, under an order, for a particular purpose, warrants by the sale that it is reasonably fit for that purpose became part of the contract for sale of a pump by plaintiff acting as agent for the manufacturer; the article being supplied for a particular specified purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 772.]

3. SALES 🔑273(1)—WARRANTY OF FITNESS FOR PARTICULAR PURPOSE—BREACH.

Where plaintiff furnished a pump, under Civ. Code. § 1770, warranting that it was fit to work in a normal well of designated size and depth, and to lift and discharge 500 gallons of water per minute, and the pump would not do the work satisfactorily simply because the conditions were abnormal, and the well was filled with loose sand, which the operation of the pump disturbed, there was no breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 772.]

Department 2. Appeal from Superior Court, Los Angeles County; N. D. Arnot, Judge.

Action by the Smith-Booth-Usher Company, a corporation, against the Los Angeles Ice & Cold Storage Company, a corporation. From a judgment for defendant and an order denying plaintiff's motion for new trial, plaintiff appeals. Judgment and order reversed.

William M. Hiatt and Edward M. Selby, both of Los Angeles, for appellant. Sidney J. Parsons and C. W. Pendleton, Jr., both of Los Angeles, for respondent.

HENSHAW, J. Plaintiff sold a pump and pumping apparatus to defendant under circumstances hereinafter related. It was paid a part of the purchase price, the pump was installed, and failed to give good service. Defendant so notified plaintiff, demanded a return of its money, and requested a removal of the pump, in order that it might install one which would perform the desired service. Thereupon plaintiff brought this action to recover the unpaid part of the purchase price, and defendant answered, averring that it purchased the pump under a warranty that it would deliver 500 gallons of water per minute, and that the pump in fact would not deliver to exceed 100 gallons per minute. It counterclaimed, seeking a return of the amount of the partial payment which it had made on the purchase price of the pump and compensation for expenditures to which it had been put in its efforts to overcome the imperfections of the pump. The court found that the agreement between the parties was that the plaintiff would deliver a pump "which would furnish to said defendant not less than 500 gallons of water per minute"; that the pump was unable to furnish more than 100 gallons per minute; that by its written contract plaintiff warranted to the defendant that the pump would be reasonably fit for the particular purpose for which it was ordered, "but that the pump manufactured or caused to be manufactured by plaintiff and by plaintiff delivered to defendant was not reasonably fit for said purpose"; that in executing the contract defendant relied upon the warranty of fitness; that plaintiff warranted that the pump which it would manufacture and deliver "would have a capacity of delivering to defendant at least 500 gallons of water per minute from a well of defendant located in accordance with the specifications in said written contract contained." Following these findings, judgment was given against plaintiff and in favor of defendant on its counterclaim.

The question advanced by appellant for determination is twofold: First, did it give such a warranty as the court found, and, second, if it did, did the pump which it furnished fail to conform to the requirements of the warranty. The facts are that defendant in its business used water from several wells upon its premises. In the pumping of these wells it had been using air-lift pumps. It was represented to it that a pump known as the Weber subterranean pump would furnish a larger supply of water at less expense. The Weber subterranean pump was manufactured by the Weber Subterranean Pump Company of New York, but plaintiff represented that company as a selling agent. The Weber subterranean pump operated by compressed air. The result of conversations was a contract in writing, which, of course, measures the rights, duties, and obligations of the parties. The well in which the Weber pump was to be used had not at the time been dug by defendant, so that the specifications referred to in the findings could only go, as will appear from the contract itself, to such matters as its location and depth. The plaintiff submitted to defendant in writing the following:

> "As per your request, we have submitted to the Weber Subterranean Pump Company of New York, three propositions as follows: Well to be 18 inches inside diameter; 250 feet deep; location of well 50 feet from (air) compressor; capacity 500 gallons per minute."

Then followed proposal A, based on the water level lowering during the pumping to a depth not exceeding 120 feet below the surface of the ground. Upon this the offer continued with a list of materials, being manifestly the necessary and component parts of the pump itself, concluding with:

> "All cut to proper lengths and fitted complete, ready to erect, delivered to your plant, and one competent man furnished to superintend and assist in the erection of same; all for the sum of $2,085.90."

Then followed proposal B:

> "Based on water level receding when pumping 500 gallons per minute not to exceed 150 feet below surface of ground, the equipment would remain the same (as under proposal A) with the exception of necessarily added casing to place the valves at the greater depth, the total addition of cost of material for this purpose being $118.60. There would be required for this service approximately 615 cubic feet of free air per minute delivered from the compressor at about 65 pounds gauge pressure."

This proposal B was formally accepted in writing by defendant. In due time the well was dug and the pump installed. From the outset of the operations of the pump there was trouble, and this trouble clearly arose, not from any defect in the pump itself, but from the fact that the well ended in water-bearing sand, and that the action of the compressed air disturbed this sand and forced it into the pipes and clogged the valves. Upon the first occasion when the pump, after installation, was removed, there were 30 feet of loose sand in the bottom of the well and 4 feet of sand in the pump casing and valves. The pump itself worked perfectly saving for this impediment to its successful operation. The Weber pump, which in the principle of its operation forced the water upward by compressed air at the bottom of the well, created a much greater disturbance of this sand than did the straight air lift pumps which defendant theretofore had used and which, while they would furnish a less supply of water, created much less disturbance of the sand itself. This fairly presents the conditions as shown by the evidence.

[1] Since this contract was reduced to writing, nothing which is not found in the writing (except that which is presumed by law from that which is written) can be considered as a part of the contract. Johnson v. Powers, 65 Cal. 179, 3 Pac. 625. The writing did contain an express warranty of capacity of the pump, that is to say, it declared that the pump, working in a well of designated diameter and depth, and within a fixed distance from the air compressors, would deliver 500 gallons of water per minute. Respondent, in addition to this, invokes the application of section 1770 of the Civil Code, which declares that:

> "One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose."

[2] It may be said that this warranty, erected by law, also becomes a part of the contract under the circumstances here shown; the plaintiff being considered as an agent for the manufacturer, and the manufacturer having supplied an article for a particular purpose, thereby warranting that it is reasonably fit for that purpose.

[3] What then precisely was the purpose which measures the warranty? It could be no more than that, working in a normal well of the designated size and depth, the pump would lift and discharge 500 gallons of water per minute, and the evidence leaves no doubt that this pump would do this thing. It was called upon to work, however, under abnormal conditions—in a well filled and filling with loose sand. Plaintiff's warranty

certainly cannot be extended to include this condition, nor could plaintiff know that such condition would exist, since in fact the well had not been dug. It was as much without the contemplation of the warranty, whether it be regarded as express or implied, as it would have been if the well, dug to the size and capacity, had not contained a sufficient quantity of water to furnish 500 gallons a minute. Moreover, while the rights of the parties are to be found in the terms of their written contract, to which are to be added such warranties as the law itself creates under proven circumstances, the parol evidence itself does not show that the plaintiff intended to warrant, or was ever called upon to warrant, the operation of its pump in a heavily sanded well. Defendant's manager testifies that he explained to plaintiff "our whole situation as to the wells we had and the trouble we had with the pumps we had in them." He testifies further as to one well that the defendant was afraid to longer pump it lest the sand removed might cause a cave in the surface soil, but nowhere does it appear that it was in contemplation that the well to be dug would be overloaded with sand and that the pump which plaintiff was to furnish was to have a 500-gallon per minute capacity working in such sand. The article furnished was reasonably fit for pumping an ordinary well of the size and capacity specified. If defendant desired a warranty that it would so pump under any condition which might be developed after the digging of the well, it should have seen to it that this warranty was expressed in the contract, as clearly it is not. Whatever may have been the conversations touching this matter, the terms of the written agreement may not be extended because of them. Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 Pac. 496; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; United Iron Works v. Outer Harbor Dock and Wharf Co., 168 Cal. 81, 141 Pac. 917.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(175 Cal. 81)

STEINBERGER v. YOUNG et al.

(L. A. 3852.)

(Supreme Court of California. May 9, 1917. Rehearing Denied June 7, 1917.)

1. SPECIFIC PERFORMANCE 🔑86—ORAL CONTRACT TO DEVISE.

An oral contract to devise may, under proper conditions, be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224.]

2. WILLS 🔑58(1) — ORAL CONTRACT TO DEVISE—VALIDITY.

Prior to amendments of 1905 and 1907 to Civ. Code, § 1624, and Code Civ. Proc. § 1973, an agreement to devise was not required to be in writing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 164.]

3. SPECIFIC PERFORMANCE 🔑121(7) — CONTRACT TO DEVISE—PROOF.

To warrant specific performance of a contract to devise, the proof must be clear, definite, and certain.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391-393.]

4. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDING—CONFLICTING EVIDENCE.

A finding made upon conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

5. TRIAL 🔑382—QUESTION OF LAW—SUFFICIENCY OF EVIDENCE.

The sufficiency of evidence to establish a given fact, even when the law requires clear and convincing proof, is primarily a question for the court in trial without jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 898.]

6. APPEAL AND ERROR 🔑1010(1)—REVIEW—FINDING—EVIDENCE TO SUPPORT.

If there is substantial evidence supporting the trial court's finding, it will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981, 4024.]

7. SPECIFIC PERFORMANCE 🔑121(7) — ORAL CONTRACT TO DEVISE—SUFFICIENCY OF EVIDENCE.

Evidence of oral declarations of decedent supported by other evidence and legitimate inferences therefrom *held* sufficient to warrant specific performance of an oral contract to devise.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391-393.]

8. HUSBAND AND WIFE 🔑182—WIFE'S SEPARATE PROPERTY — CONTRACT TO DEVISE — "CONCERNING OR RELATING."

A married woman's agreement to devise is one "concerning or relating" to her separate property within meaning of St. 1850, p. 254, § 6, as amended by St. 1858, p. 22, and St. 1862, p. 518, requiring such contracts to be executed in a particular manner.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 714, 715, 719.]

9. HUSBAND AND WIFE 🔑199—WIFE'S SEPARATE ESTATE — RATIFICATION OF CONTRACT TO DEVISE—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to support finding that after removal of restrictions relating to wife's separate estate by Civ. Code, § 167, as amended by St. 1873-74, p. 193, deceased ratified previous oral contract to devise.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 734.]

10. HUSBAND AND WIFE 🔑199 — WIFE'S SEPARATE PROPERTY—RATIFICATION OF CONTRACT TO DEVISE—VALIDITY.

A married woman's oral contract to devise was not absolutely void under St. 1850, p. 254, § 6, as amended by St. 1858, p. 22, and St. 1862, p. 518, requiring such contracts to be signed by husband and separately acknowledged, so as to make it incapable of ratification after removal of disability by Civ. Code, § 167, as amended by St. 1873-74, p. 193, although such contract was not enforceable when made.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 734.]

11. HUSBAND AND WIFE 🔑181 — MARRIED WOMAN'S PROPERTY ACTS—OPERATION.

The statutory limitations upon wife's disposition of her property were designed mainly for her own protection, and not to deprive her of power over her estate, in view of Const. 1849, art. 11, § 14, defining the wife's separate property and providing that "laws shall be passed more clearly defining" such rights; and such statutes merely prescribe the mode in which the wife shall exercise her rights.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 713, 730.]

12. SPECIFIC PERFORMANCE 🔑105(3) — ORAL CONTRACT TO DEVISE—LACHES.

Plaintiff was not guilty of laches, where her action for specific performance of oral contract to devise was brought within a reasonable time after she became aware that decedent left no will in her favor, although more than two years had elapsed since decedent's death.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327-341.]

13. LIMITATION OF ACTIONS 🔑127(4) — AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.

Amendment to complaint asking specific performance of married woman's oral contract to devise, to show her ratification after statutory removal of disability to make such contract, did not set up a new cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 544.]

14. WILLS 🔑58(1)—CONTRACTS TO DEVISE—VALIDITY—PARTIES.

Contract to devise property to a child upon stepfather transferring custody to promisor was not void because the stepfather had no legal control over child, since the child was the real party in interest and the stepfather stood in a relation authorizing him to act in her behalf.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 164.]

15. EVIDENCE 🔑276—BY DECEDENT AGAINST INTEREST—STATUTE.

In action for specific performance of oral contract to devise, evidence of decedent's declarations in plaintiff's favor were admissible under Code Civ. Proc. § 1853, relating to decedent's declarations against pecuniary interests, although such declarations in favor of defendant were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1135.]

Department 1. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Maggie G. Steinberger against Milton K. Young, administrator of the estate of Elizabeth B. Ross, deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

H. M. Barstow, Milton K. Young, Davis, Kemp & Post, Joseph Scott, A. G. Ritter, and Taylor & Forgy, all of Los Angeles, for appellants. J. H. Merriam, of Pasadena, and Joseph L. Lewinsohn, John A. Powell, and Hunsaker & Britt, all of Los Angeles, for respondent.

SLOSS, J. Elizabeth B. Ross died intestate on January 5, 1910, leaving an estate of considerable value. This action was brought against her heirs and the administrator of her estate to obtain specific performance of an agreement alleged to have been made in September, 1865, between one Halbert, plaintiff's stepfather, and plaintiff herself, on the one hand, and Elizabeth Ross, on the other, whereby Elizabeth Ross agreed that she would adopt the plaintiff, take her into her home, and treat her as her own daughter, and that said plaintiff should be the heir of said Elizabeth, and on her death should be entitled to receive her property. The stipulated consideration for these promises consisted of the surrender by Halbert to Mrs. Ross of the control and custody of the plaintiff, and the rendition by plaintiff to Mrs. Ross of the obedience, affection, and services of a daughter. The complaint contained the necessary allegations of performance on the part of Halbert and the plaintiff, and of adequacy of consideration. At the close of the trial, the plaintiff, by leave of court, filed an amended complaint alleging, in effect, the recognition and ratification of the agreement by Elizabeth Ross at various times. This amendment, made "to conform to the proof," was designed to meet the claim of the defendants that Elizabeth Ross, the alleged promisor, was a married woman at the time of the making of the alleged agreement, and that she was, under the provisions of our statutes then in force (Stats. 1850, c. 103; Stats. 1858, p. 22; Stats. 1862, p. 518), precluded from making a valid contract concerning her real property, except by an instrument in writing, executed by the husband and wife, and acknowledged by the wife. The ratification relied upon was claimed to have been made after the disability had been removed by a change in the statute. A renewed promise, made after the death of her husband, was also set up. The court found in accordance with the plaintiff's allegations, and entered judgment declaring her to be the equitable owner of all of the property owned by Elizabeth B. Ross at the time of her death, and requiring the heirs to make conveyance to her. The defendants appeal from the judgment.

[1-6] One of the contentions strongly urged by the appellants is that the evidence is insufficient to sustain the finding that the contract set up in the complaint was made. It is well settled in this court that an oral contract to dispose of property upon death in a particular way may, under proper conditions, be specifically enforced, and that, prior to the amendment, in 1905 and 1907, of our Codes (Civ. Code, § 1624; Code Civ. Proc. § 1973), it was not required that an agreement to this effect should be in writing. The subject was very recently under consideration in this court in Monsen v. Monsen, 162 Pac. 90, and we need only refer to the opinion in that case, and the earlier decisions there cited, for a statement of the rules of law governing the enforcement of contracts like the one here set up. The opinion in the Monsen Case emphasizes the rule, often laid down in earlier decisions, that, to warrant specific enforcement of a contract to make a certain will, or to make a person one's heir, the proof of such contract must be clear, definite, and certain. Applying this rule, it was held that

the contract there sought to be enforced had not been established by proof filling the measure of these requirements. We think however, that the evidence in the case at bar is materially stronger than that presented in the Monsen Case, and that, under the settled rule regarding the binding effect of findings made upon conflicting evidence, the determination of the trial court that a contract, as alleged, had been made, cannot be assailed here. The sufficiency of the evidence to establish a given fact, even where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court (Couts v. Winston, 153 Cal. 686, 96 Pac. 357; Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. [N. S.] 1092), and, if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal.

[7] In September, 1865, Elizabeth B. Ross was living with her husband, Robert Ross, in Sierra county, in this state. Plaintiff was then a child of the age of five years. Her mother had died two months before, leaving surviving a husband, J. C. Halbert, plaintiff's stepfather. The evidence is abundant and undisputed to the effect that, at this time, the plaintiff, with the consent of her stepfather, was taken into the family of Mr. and Mrs. Ross, and that, until her marriage, which took place in 1883, she lived in that family as a member thereof. She took the name of Ross, and was treated by Robert and Elizabeth Ross as a daughter. She gave them the service and the affectionate devotion due from a child to its parents, and received from them care and nurture, as well as the best educational advantages available. On each of two occasions, when plaintiff was receiving attentions from young men, Mrs. Ross exercised a parent's right of opposing the proposed marriage, and each time her objections were heeded. When plaintiff married Mr. Steinberger, Mr. and Mrs. Ross were present, the former "giving her away." In 1884, Robert Ross died, and thereafter, until the death of Mrs. Ross, the most affectionate relations continued between the latter and the plaintiff. Gifts of real and personal property of considerable value were made by Mrs. Ross to the plaintiff. It is not contended that any formal adoption was ever made. In fact, at the time of plaintiff's entry into the Ross family, there was in this state no statutory provision for adoption. But Mrs. Ross made many statements showing that she and her husband had intended to adopt the plaintiff. There were but two witnesses who could testify directly to the occurrences of September, 1865, when Halbert gave the child to the Rosses. One of these was the plaintiff herself. She could not, of course, recall in detail what took place at this early period of her life and did not testify to the making of any agreement. Will T. Ross, who was present on the occasion in question, testified that Mrs. Ross had asked Halbert to give her the little girl. Halbert assenting, Mrs. Ross asked her husband whether he was willing, stating that she would assume the responsibility, to which the husband replied, "All right." Halbert handed the child over to Mrs. Ross, saying, "Maggie, here is your new mama and papa." On the same day Mrs. Ross said to other persons, "We have taken Maggie for our own." It is true that in this there is no statement in words of an agreement to make any particular provision for the child. But this witness did not claim to have heard the entire conversation, and, under the circumstances, some arrangement to this end would naturally form a part of the transaction. Mrs. Arrowsmith, who had been acquainted with Mrs. Ross from 1869, said that in that year, and in 1870, Mrs. Ross had frequently told her:

> "That she and Mr. Ross had adopted the plaintiff and made her their sole heir. She told me on one occasion that they had taken the plaintiff and had agreed with her stepfather, Mr. Halbert, I think his name was, that they would adopt her and make her their sole heir."

Again in 1884, after Mr. Ross's death, Mrs. Ross had said to this witness in plaintiff's presence, referring to the failure of Ross to leave a will giving his estate to plaintiff:

> "There will be no such mistake as that in regard to my property. We agreed with Maggie that she should have our property, and she shall have it."

In addition to this, many witnesses testified to declarations of Mrs. Ross to the effect that Maggie (the plaintiff) would be her sole heir, "that she should receive their property whenever they died the same as if she was their own child," and the like. The testimony of Mrs. Arrowsmith was evidence tending to show that Mrs. Ross and her husband had agreed with Halbert and the plaintiff to make the plaintiff their sole heir, and to leave her all of their property. Whatever may be said of the weight to be given to testimony of oral declarations of decedents, it cannot be said that such testimony, supported, as it is in this case, by other evidence and by the inferences which may fairly be drawn from the entire conduct of the plaintiff and her foster parents, is not sufficient to warrant the finding of the court below.

[8] But, as we have suggested above, it is argued by the appellant that in September, 1865, the date of the alleged contract, a married woman could not bind her separate estate, except in a particular manner prescribed by statute. The statute in question was entitled, "An act defining the rights of husband and wife," and was enacted in 1850. Section 6 of the act was amended in 1858 (Stats. 1858, p. 22), and again in 1862 (Stats. 1862, p. 518). Under the last amendment, the section provided that the husband should have the management and control of the separate property of the wife during the continuance of the marriage; "but no alienation, sale, or conveyance, of the real property of the wife, or any part thereof, or any

right title or interest, therein, and no contract, or power of attorney, concerning or relating to the same, and no lien or incumbrance created thereon, shall be valid for any purpose, unless the same be made by an instrument in writing, executed by the husband and wife, and acknowledged by her, as provided for in the Acts concerning conveyances," etc. It further provided that personal property should not be sold, assigned, or transferred, unless both husband and wife joined in the sale, assignment, or transfer. The acknowledgment referred to in section 6 was one made upon an examination apart from, and without the hearing of, the husband. Stats. 1850, c. 101, § 22. The decree appealed from covers real estate of large value. Clearly, an agreement by which a married woman agrees to devise all of her estate, real and personal, or to have it pass upon her death to a given person, is, so far as it affects her real property, a contract "concerning or relating to the same." In September, 1865, Mrs. Ross could not, therefore, make a contract which should form the basis for an assertion of rights against her separate real estate, unless such contract were executed and acknowledged in conformity with the requirements of the statute to which we have referred. The contract here set up was oral merely.

[9] But, in 1874 (St. 1873-74, p. 193), the amendment of section 167 of the Civil Code removed the last restriction upon the power of the wife to contract with respect to her separate property, with the single exception that an acknowledgment of her conveyance of real estate was still required to be made as provided in sections 1093 and 1181 of the Civil Code. Marlow v. Barlew, 53 Cal. 456. The appellants do not dispute the proposition that, from and after this time, a married woman had the power, without any writing or acknowledgment, to make the kind of contract here involved. By the amendment to her complaint, the plaintiff alleged that, after the change of the law in 1874, Mrs. Ross recognized the validity of the agreement, and "for the continuing consideration to her rendered by the plaintiff, as in this complaint alleged and shown, she approved, ratified, and adopted said agreement," and continued to receive from plaintiff the benefit of the performance by plaintiff of the obligations on her part to be performed. The court found these allegations to be true, and the finding has sufficient support in the evidence. The testimony of Mrs. Arrowsmith shows a recognition by Mrs. Ross of the binding force of the agreement of 1865, and there is abundant other evidence to show that plaintiff continued to give Mrs. Ross the obedient service and devotion of a daughter, and that Mrs. Ross accepted such performance.

[10, 11] But, say the appellants, the contract of 1865 was void in its inception, and was therefore not capable of ratification. This contention, we think, cannot be sustained. While the statute of 1850, as amended in 1862, prohibited a married woman from making such a contract, except in the prescribed mode, the restrictions went rather to the mode of exercising her power of dealing with her separate estate than to the existence of such power. The Constitution of 1849 itself (article 11, § 14) defined the separate property of the wife, and provided that:

> "Laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband."

Under this provision, as was said in an early case:

> "The capacity of the wife to hold her separate property being equal to that of the husband, or of any other individual, the same incidents necessarily attach to her capacity, as to that of the husband." Selover v. American Russian Commercial Co., 7 Cal. 266.

The statutory limitations upon the wife's disposition of her property were designed mainly for her own protection.

> The statute "does not prohibit her from disposing of, or incumbering, all or any part of her separate estate upon such terms as to her may seem proper. It does not in the slightest degree interfere with her free will. It only prescribes the mode in which she shall manifest that will. It was undoubtedly the object of the statute to provide a mode of alienation and of incumbering her estate, uniform, simple, and conclusive, which should protect both the wife and the purchaser; one that should secure entire freedom of will and action to the wife, and afford the least possible opportunity for subverting her interest through the medium of undue influence, threats or fraud. It is a beneficent provision intended for her benefit, and not as an encroachment upon her rights. And we think its obvious tendency is to throw a safeguard around without in any degree impairing, the jus disponendi." Maclay v. Love, 25 Cal. 367, 382, 85 Am. Dec. 133.

So, in Love v. Watkins, 40 Cal. 547, 560, 6 Am. Rep. 624, the court says that:

> "The object of requiring the contracts of married women to be executed with certain formalities has been often held to be for her protection, and not to deprive her of any power over her estate."

The contract was therefore one which Mrs. Ross had the power to make, although it was not, in the then state of the law, valid and enforceable unless executed in the prescribed manner. But, when the restrictions upon her mode of contracting were removed, we see no reason why she could not, by a ratification of her contract, coupled with the receipt and enjoyment of the continuing consideration, bind herself and her property. Brown v. Bennett, 75 Pa. 420. See, also, Jourdan v. Dean, 175 Pa. 599, 34 Atl. 958, 964; Pettus v. Gault, 81 Conn. 415, 71 Atl. 509. The contrary is held in two cases strongly relied on by the appellants. Austin v. Davis, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456; Thompson v. Minnich, 227 Ill. 430, 81 N. E. 336. We shall not stop to inquire whether these cases are distinguishable from the one before us. It will suffice to say that, if they are not, they proceed upon a theory of the relationship of a married woman to her estate which is not in harmony with the view taken by this court of the effect of the Constitution of 1849, and the statutes passed thereunder.

If these conclusions are correct, the findings of ratification are sufficient to sustain the judgment without regard to the further finding that, after the death of Robert Ross, Mrs. Ross, upon a new consideration, agreed to leave all of her property to the respondent. We need not, therefore, inquire whether the evidence is sufficient to support this additional finding, nor need we go into the various questions which arise in connection with it, such as the applicability of the statute of limitations to an action upon the new contract.

Some further points are made, and may be briefly discussed.

[12, 13] It is claimed that the plaintiff was guilty of laches, in that she did not bring her action for over two years after the death of Mrs. Ross. There is evidence, however, that the plaintiff believed that Mrs. Ross had left a will giving the entire estate to her, and that she commenced her action within a reasonable time after it became clear that no such will could be found. Furthermore, the court below was justified in concluding that the delay had not prejudiced the opposing parties. Nor was the action barred by limitation. The complaint was filed within the period fixed by any of the sections of the Code of Civil Procedure relied upon by the appellants. The amendment to the complaint, in so far as it alleged ratification of the original contract, did not set up a new cause of action.

[14] We see no force in the contention that the contract was invalid because made with the stepfather, Halbert, who, it is claimed, had not legal control over the child. The contract was made primarily for the benefit of the child herself. She was, if not the formal party, the real party in interest, and Halbert stood in a relation which authorized him to act in her behalf.

[15] The appellant assigns as error certain rulings on the admission and rejection of evidence. The only ones which call for particular notice are those relating to the declarations of Mrs. Ross. The declarations offered by the plaintiff, as a part of her case, were properly admitted as the declarations of a decedent against her pecuniary interest. Code Civ. Proc. § 1853. On the other hand, the court was right in rejecting evidence offered by the appellants to show declarations of Mrs. Ross in favor of the position assumed by the appellants, who claim under her in this litigation. It is sufficient, in support of the correctness of both classes of rulings, to refer to Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 131)

STIEGLITZ v. SETTLE et al. (L. A. 3806.)

(Supreme Court of California. May 16, 1917.)

1. TRIAL 🔑165—MOTION FOR NONSUIT—INFERENCES.

In passing upon motion for nonsuit, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374.]

2. BROKERS 🔑41—EMPLOYMENT—RATIFICATION—POWER OF ATTORNEY—AUTHORITY.

A general power of attorney from a widow, sufficient to authorize the holder to agree on her behalf to pay the usual commission for a sale of her land, authorized, after consummation of the sale, a reduction of the agreement to pay commission to writing, thus curing the defect of the parol agreement, under Civ. Code, § 2307, providing that an agency may be created by ratification.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 41.]

3. ATTORNEY AND CLIENT 🔑123(1)—RIGHT TO DEAL WITH CLIENT—CONTRACT TO PROCURE PURCHASER.

An attorney is under no actual incapacity to deal with or purchase from his client, all required being a clear showing that there has been no abuse of confidence and no advantage taken; and an attorney who had acted for a widow in a partition suit had the right to contract with her to sell other land, if he could procure a purchaser, for the usual commission, particularly where he did not see her personally, and the explanation of the contract was made by, and her assent given to, her trusted agent and man of business.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239, 245, 248, 249.]

4. BROKERS 🔑85(1)—REALTY BROKER—RIGHT TO COMMISSION—EMPLOYMENT THROUGH AGENT—UNFAIR DEALING BY AGENT.

The legal rights of an attorney, who, through a widow's man of business, contracted to procure a purchaser for her realty for the usual commission, were not affected by evidence, in his suit for the commission, tending to impeach the fair dealing of the widow's man of business with her.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 108–110, 113, 115.]

Department 2. Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by Henry Stieglitz against Maria Encarnacion de Sepulveda Settle and another. From a judgment for defendants, plaintiff appeals. Reversed.

William A. Alderson, of Los Angeles, for appellant. E. H. Bantzer and Davis, Kemp & Post, of Los Angeles, for respondents.

HENSHAW, J. Plaintiff sued defendant Maria Encarnacion de Sepulveda Settle to recover his commissions as broker for services which he had rendered in the sale of certain of defendant's land. The other defendant is the husband of Maria Encarnacion, married to her after the consummation of the transactions forming the basis of this litigation. At the conclusion of plaintiff's evidence defendants moved for a nonsuit upon "the general broad ground of insufficiency of the evidence to justify the decision and that the plaintiff's evidence showed moral turpitude." The court granted the nonsuit upon the ground that "the plaintiff had failed to prove a sufficient case for the jury, and the evidence introduced was insufficient to support a judgment for the plaintiff."

[1] The court's power to grant a nonsuit has been so often discussed, and the limitations of that power so often declared, that it should be necessary to do no more than refer to Estate of Arnold, 147 Cal. 583, 82 Pac. 252, Estate of Chevallier, 159 Cal. 161, 113 Pac. 130, and Estate of Caspar, 172 Cal. 147, 155 Pac. 631. In passing upon such a motion "every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the" plaintiff. Estate of Arnold, supra. The evidence discloses that defendant Maria Encarnacion was a widow. She owned a one-half interest in 860 acres of land, a part of the Rancho Palos Verdes, and had other large property interests and land holdings. This particular land had come to her from her former husband, Sepulveda. She did not speak English. Apparently she could not write. Her trusted business manager and man of affairs was Richard Mahar, whom she had known long and well, and with whom she could converse in Spanish. Mahar held her general power of attorney. The plaintiff is, and for many years has been, an attorney at law. In the past he had been in several matters Mrs. Sepulveda's attorney at law. At the time of the transactions here questioned he was her attorney at law in a partition suit to divide the lands in the Rancho Palos Verdes above referred to. This action had been instituted some time before. It was the only pending matter in which plaintiff was acting as Mrs. Sepulveda's attorney at law. He was not her general counsel. She had never consulted him at his office. He had never been to her house more than three times, and she had never sought his advice upon her general affairs. Mrs. Sepulveda, as is not unusual with ladies in her position, needed money. While owning much land, she had no fixed income, and taxes and her personal expenditures were burdening her with debts. She told her attorney in fact, Mr. Mahar, that she wanted to sell her undivided interest in the Rancho Palos Verdes. The partition proceedings affecting this land had not been completed by final judgment, but had been practically closed. Mrs. Sepulveda talked many times to Mr. Mahar about selling the land and urged him to make and he did make efforts so to do, all of which he reported to his principal. A number of real estate agents became active in their efforts to secure purchasers. The bids and offers which he received he duly reported. As a result of all of these efforts, the highest and best offer which was obtained for the land was $250 an acre. Mr. Mahar talked this offer over with plaintiff, and both agreed that the price offered was too low, and Mr. Mahar so reported to his principal.

Then Mr. Stieglitz told Mr. Mahar that if he, with the approval and assent of Mrs. Sepulveda, would give him permission to sell the ranch on commission, he would use his endeavors to secure a purchaser. Mr. Mahar consulted Mrs. Sepulveda, and duly informed Mr. Stieglitz that he could go ahead and sell the ranch, and if he succeeded Mrs. Sepulveda would pay him the usual commission. Mr. Mahar, as does Mr. Stieglitz, testifies to this effect, and further that he did consult Mrs. Sepulveda, did explain to her that Mr. Stieglitz would endeavor to sell the ranch, upon the payment of the usual commission if he succeeded, asked her if she was willing to pay the commission under these circumstances, to which she replied, "Por supuesto"—of course. At this time Mr. Stieglitz had no particular purchaser in mind. He not only had not seen George Peck, who became the purchaser, but did not even think of him. After this agreement and understanding, which, because of the relations existing between the parties, plaintiff did not think necessary at the time should be in writing, Mr. Stieglitz used his best efforts to find a purchaser, and succeeded in the person of George Peck. Mr. Peck, after many negotiations with Mr. Stieglitz and Mr. Mahar, all of which were reported to Mrs. Sepulveda, finally purchased the land for $400 an acre; this purchase price being approved by Mrs. Sepulveda before the contract of purchase was entered into on her behalf by her attorney in fact. After the sale had been consummated, Mr. Stieglitz asked for payment of his commissions; but, owing to Mrs. Sepulveda's immediate need for money, that which was received from the first payment had been expended, and Mr. Mahar so explained to Mr. Stieglitz, saying that he would have to wait until July for his money, the sale having been effected on March 19th. Then, because of this delay, Mr. Stieglitz, expressing a willingness thus to wait for his compensation, and expressing also the natural apprehension that "something might happen to me or to him, thought it would be no more than right that an agreement be prepared, and that he sign the agreement with me." Mr. Stieglitz then prepared an agreement, dated March 17th (antedating by two days the sale of the land), which agreement authorized him to sell the land upon "the regular or customary commission for making said sale as fixed by the Realty Board of the City of Los Angeles." This was signed by Maria Encarnacion, by her attorney in fact, Richard Mahar, and bore also the signature of Mr. Stieglitz over his acceptance. Both understood the reason why the contract bore a date before its actual writing, and both understood and agreed that no concealment should be made of this circumstance, and none in fact was made. Thereafter and in the same year defendant Maria Encarnacion married defendant George Settle, and in September he called upon Mr. Stieglitz and asked him whether he had any claims against his wife. Mr. Stieglitz asserted that he did have such a claim in the matter of his commissions in the sale of this land, to which Settle replied that he would never get the commission, and that he would see that he did not.

[2] Touching briefly upon the law, no question arises but that the power of attorney held by Mr. Mahar was amply sufficient to authorize him to do everything which in fact he did do. But in addition to this is the evidence (unnecessary to establish the legality of Mr. Mahar's conduct, but standing undenied, as it does, persuasive of fair dealing) that Mrs. Sepulveda was fully advised of and fully assented to the principal transaction. Mr. Mahar, under his power of attorney, had the authority to enter into the contract with Mr. Stieglitz for the payment of this commission. The uncontradicted evidence is that he did so enter into it with the knowledge and approval of his principal. It was equally within his power to cure the defect of the parol agreement by subsequent ratification in writing, which was done and made. Civ. Code, §§ 2307, 2310.

[3] Touching Mr. Stieglitz' position and conduct there is absolutely nothing shown in the evidence which would forbid him, on either legal or ethical grounds, from entering into a contract with Mrs. Sepulveda which had no bearing on or relation to his position as her attorney at law in the partition suit, especially so as in the making of the contract he did not even personally see her, and so could not have personally influenced her, and the explanation of the contract was made by, and her assent given to, her trusted agent and man of affairs. An attorney is under no actual incapacity to deal with or purchase from his client. All that is required, where the relation of confidence exists, and where the questioned transaction has a bearing upon that relationship, is a clear showing that there has been no abuse of confidence and no advantage taken. Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192; 1 Story, Jur. § 313. "There is no authority establishing, nor was it ever laid down, that an attorney cannot purchase from his client what was not in any degree the object of his concern as attorney. * * * Under such circumstances he is not the attorney in hac re." Montesquieu v. Sandys, 18 Ves. 313.

[4] In support of this judgment, given on nonsuit, respondents seem to place reliance upon certain testimony given by Mr. Mahar to the effect that he understood that he and Mr. Stieglitz were to divide the commission, and that he thought he and Mr. Stieglitz might as well make a commission upon the sale of the property as anybody else, and also upon the fact that after the sale Mr. Peck insisted on giving him—Mr. Stieglitz—$500, which he refused to take, telling Mr. Peck that, if he wanted to give this money, to draw his check for that amount to Mr. Mahar, which Mr. Peck did, and that subsequently Mr. Mahar insisted upon Mr. Stieglitz taking half of the amount. As against this, however, is the positive testimony of Mr. Stieglitz that there had been no previous agreement between himself and Mr. Peck, or between himself and Mr. Mahar, concerning the $500, and that he never had any agreement with Mr. Mahar by which he—Mr. Mahar—was to receive any part of the commissions for the sale of the land. To sustain the nonsuit it would have to be said as matter of law that this evidence to which we have last adverted absolutely destroys all the force and effect of the rest of the evidence in the case. But this manifestly is not so. The most that can be said of it is that it is evidence tending to impeach the fair dealing of Mr. Mahar with his principal. It does not at all affect the legal rights of plaintiff as above set forth.

The judgment appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(175 Cal. 146)

SMALLEY v. GEORGE C. PECKHAM CO., et al. (L. A. 3841.)

(Supreme Court of California. May 16, 1917.)

1. APPEAL AND ERROR 🔑1011(1)—REVIEW OF FINDINGS—CONFLICTING EVIDENCE.

Where the court's findings are supported by conflicting evidence, they will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

2. APPEAL AND ERROR 🔑882(2)—RULING IN APPELLANT'S FAVOR—VENUE.

Appellant cannot complain on appeal of a ruling relating to change of venue consistent with his view of the matter in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3592.]

3. VENUE 🔑5(2)—CHANGE OF—CANCELLATION OF CONTRACT OF SALE.

Motion to change venue of action to rescind contract of sale for misrepresentation, from county where contract and representations were made to county where land was located, was properly denied.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 6.]

4. APPEAL AND ERROR 🔑236(1) — NECESSITY OF ASKING CHANGE OF VENUE.

Appellant cannot complain of court's refusal to allow a change of venue, where he filed no motion therefor, under Code Civ. Proc. § 396.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1384.]

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. EQUITY ⚷39(1)—RETENTION OF JURISDICTION ACQUIRED.

A court of equity, having once obtained jurisdiction, will decide the whole case, leaving nothing for future litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–109, 111, 114.]

6. COSTS ⚷13—EQUITY — DISCRETION OF COURT.

Awarding of costs in an equitable action is discretionary with the court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25.]

Department 2. Appeal from Superior Court, Los Angeles County; N. A. Hawkins, Chas. Wellborn, Judges.

Action by M. E. Smalley against the George C. Peckham Company and others. From a judgment for defendants, and from orders denying motion for new trial and taxing costs, plaintiff appeals. Affirmed.

William Freeman, of Los Angeles, for appellant. Fred W. Morrison, of Los Angeles, for respondents.

HENSHAW, J. Plaintiff sued to rescind a contract into which he had entered for the purchase of several acres of land in the county of San Bernardino on the 21st of November, 1910. He served a notice and demand for rescission on January 27, 1912. The right to rescind is based upon the asserted fraudulent misrepresentations made by defendants to plaintiff to induce him, and under which he was induced, to enter into the contract of purchase. These false statements are declared to be representations that the land was of superior quality and especially adapted to the cultivation and production of orange trees and their fruit; that it was situated in the "orange belt," and was free from frost, and that the climatic conditions were especially favorable for the cultivation and production of citrus fruits; further, that the purchaser of each 10 acres would be entitled to $^1/_{10}$ of the water and water rights and pumping plant appurtenant to the tract free of charge, except for the expense of upkeep, and that the water supply was adequate to irrigate the land properly; that defendants "prevented and persuaded plaintiff not to make any inquiry for himself as to the truth of said conditions of climate and water"; that plaintiff did not read the agreement, nor consult any one about it, but relied solely on the defendants' representations; that after the execution of the agreement he discovered that "said land in quality, and said water, water rights, and pumping plant in quantity, were not as represented," and he so informed defendants, and plaintiff believes "that the demands for money for water by said defendants, their officers, agents, and employés were and are in excess of the pro rata expense provided by said agreement and contrary thereto"; that plaintiff paid in cash on account of the purchase of the land $1,000 and other smaller sums amounting to $180; and "that the consideration for his obligation under said agreement has failed in part and in whole, and has become entirely void through the fault of the said defendants, to the damage of the plaintiff in the sum of $1,180." The defendants answered, and for cross-complaint set up the contract, plaintiff's breach of it, and sought a decree giving plaintiff a reasonable time within which to be relieved from his default or suffer foreclosure of all his right and interest in and to the land. Judgment passed for defendants, and plaintiff appeals from the judgment, the order denying his motion for a new trial, and also from the order of the court taxing costs in the action.

[1] The brief quotations which we have made from the complaint will suffice to show its inartificiality as a pleading, and respondents argue with much force: First, that no damage is shown, and that fraud without damage furnishes no ground for action (Holton v. Noble, 83 Cal. 7, 23 Pac. 58); and, second, that nowhere in the pleading is it made to appear what injurious difference the plaintiff discovered between the land and the water right which he received and the land and water right for which he contracted, and that, therefore, there is an utter failure to show a difference in value, and, consequently, that the allegation that the consideration for the agreement "has failed in part and in whole and has become entirely void" is wholly unsupported by any allegation in the complaint. We need not, however, pause to discuss this, for a consideration of the evidence of plaintiff, even when it is upon a material matter, is sharply in conflict with the evidence of the defense, and the findings of the court, therefore, are supported, and will not here be disturbed.

[2, 3] The action was commenced in the county of Los Angeles. The defendants served notice that they would move for a change of venue to the county of San Bernardino, upon the ground that the real property affected by the litigation was situated in that county. An affidavit of merits was filed in support of this, and the motion was opposed by plaintiff, and was denied. The defendant Merchants' Bank & Trust Company had brought its action in San Bernardino county against this plaintiff for the enforcement of this contract, and the complaint in that action was identical with the cross-complaint filed in this. Before the court in San Bernardino county plaintiff's counsel represented that the action pending in Los Angeles county would determine all the questions involved in the San Bernardino county action, and the trial of the latter action was upon this ground postponed. Appellant here seemingly complains of the action of the trial court in concurring with his view that the place of the trial of the action should not be changed from Los Angeles county. Aside from the

fact that it does not lie in his mouth thus to argue, the court's ruling was sound. Grocers', etc., Union v. Kern, 150 Cal. 476, 89 Pac. 120.

[4, 5] But if appellant's objection is that the court retained jurisdiction of the action after the filing of the cross-complaint and should not have done so, the answer is twofold—that he made no motion for a change of venue (Code Civ. Proc. § 396), and that it is a familiar rule of equity that when the court has once obtained jurisdiction it will do complete justice by deciding the whole case and leaving nothing for future litigation (Booker v. Aitken, 140 Cal. 473, 74 Pac. 11).

[6] The defendants, prevailing in the litigation, filed a cost bill. The action was in equity, and the award of costs discretionary with the court. On motion of defendants it taxed the costs in the sum of $119.10, and judgment was entered accordingly. Appellant states that his bill of exceptions specifies the points and reasons so clearly that the error of the court in so taxing the costs will plainly appear without argument or authorities; but an examination of this bill of exceptions thus unnecessarily forced upon us shows that the court in no respect erred.

The judgment and orders appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(175 Cal. 124)

FIRST CONGREGATIONAL CHURCH OF CHRIST IN CORONA v. LOWREY et al. (L. A. 3681.)

(Supreme Court of California. May 12, 1917.)

1. PRINCIPAL AND SURETY 🔑100(3)—DISCHARGE—MATERIAL ALTERATIONS.

Relative to discharge of a building contractor's surety, alterations and omissions in work aggregating over $500 made on oral agreement of owner and contractor, while the contract provided that they should be made only after agreement in writing, were material.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 163.]

2. PRINCIPAL AND SURETY 🔑97—DISCHARGE—INJURY.

Under Civ. Code, § 2819, providing that a guarantor is exonerated if by any act of the creditor without consent of guarantor the principal's original obligation is altered in any respect, and section 2840, applying the same rule to sureties, a material change of principal's obligation without surety's consent discharges the surety without regard to the surety being injured by the alteration.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146–168.]

3. PRINCIPAL AND SURETY 🔑97—DISCHARGE—SURETY COMPANY.

Civ. Code, §§ 2819, 2840, making a material change of principal's obligation without surety's consent discharge the surety, without regard to injury, apply to a corporation engaged in the business of suretyship.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146–168.]

In Bank. Appeal from District Court of Appeal, Second District.

Action by the First Congregational Church of Christ in Corona, California, against C. L. Lowrey and another. Judgment for plaintiff, and defendants appeal. Reversed.

Ben Goodrich and Goodrich & Martinson, all of Los Angeles, for appellants. G. R. Freeman, of Willow, and Purington & Adair, of Riverside, for respondent.

HENSHAW, J. [1] This is an action brought against the surety on a contractor's bond. Defendant Lowrey had entered into a contract with the plaintiff for the construction of a church. He abandoned his contract, and plaintiff brought its action against him and against the surety to recover the amount of damages which it sustained by reason of this abandonment. The contract between the owner and the contractor made provision for alterations, deviations, additions, or omissions in the work to be done, and provided that the reasonable value should be added to or deducted from the contract price, "provided, however, that the character and valuation of any or all of said changes, omissions, or extra work should be agreed upon and fixed in writing, signed by the owner and the said contractor prior to the commencement of the work of making such alterations, deviations, additions or omissions." The court found that certain alterations and omissions were made and were agreed to between plaintiff and the defendant Lowrey. It found the value of these, item by item; one item amounting to $164.25, another to $209, and a third to $204. It further found that the character and value of these changes, omissions, and extra work were agreed upon between the owner and contractor, but were not agreed upon and fixed in writing or signed by the owner and contractor, prior to the commencement of the work, or at all. It still further found:

> "That none of such alterations, deviations, or omissions were detrimental to the interests of the defendant Pacific Surety Company, and did not materially alter the terms or conditions of said contract or bond, or change the contract between the plaintiff and said Lowrey or said Pacific Surety Company."

That the alterations, changes, and omissions were material, within the meaning of the decisions, there can be no doubt. Alcatraz, etc., Ass'n v. U. S. Fidelity & Guaranty Co., 3 Cal. App. 338, 85 Pac. 156; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. 856; O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409; Beers v. Wolf, 116 Mo. 179, 22 S. W. 620.

Because of this finding that these changes were neither material nor detrimental to the surety, the trial court gave judgment for plaintiff, and this appeal has followed.

[2, 3] Appellant here contends that under

our statute law, and under our decisions, since the agreement between the owner and the contractor, the terms of which agreement measure the surety's rights and liabilities under its contract, were changed in a material respect without the consent of the surety, he is released from his obligation. Respondent contends that the trend of modern decision no longer favors those sureties who enter into such contracts for compensation and as a business; that as to them the rule of law permitting a guarantor to stand upon the letter of his contract is no longer in force; that the law governing insurers is the law which should be applied to them; and that in applying such law, to be relieved, they must not only show a variation, and a material variation, of the terms of the contract upon which their own contract of surety was based, but must further show that such material variation was injurious. Undoubtedly, there is authority for such a view, and many of the cases so holding will be found collated and discussed in the note to Cowles v. U. S. Fidelity & Guaranty Co., 98 Am. St. Rep. 838, and in Frost Guaranty Insurance, § 4 et seq. It would serve no profitable purpose to analyze these decisions, nor to search the laws of the states which have rendered them to determine whether or not the courts were, as this court is, bound by positive statutory declaration upon the subject, for in view of our own Code provisions such a discussion could have no value. It would be but a declaration by this court as to what it might think the law should be, but it could in no wise control our law as it actually is written. Our Code speaks with absolute finality upon the subject. Section 2819 of the Civil Code provides that a guarantor "is exonerated, * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect." See, also, Civ. Code, § 2840, applying the same rule to sureties. Our decisions construing these sections uniformly hold that, if there has been such a change in the contract in any (material) respect, the inquiry there ends and the guarantor is exonerated, and that it is not a subject of inquiry whether the alteration has or has not been to his injury. Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. 765; Tally v. Parsons, 131 Cal. 516, 63 Pac. 833; Davisson v. East Whittier Land Co., 153 Cal. 85, 96 Pac. 88; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; Dunne Investment Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 Pac. 405, 411. It is to be noted, then, that neither our statute law nor our decisions under it have ever recognized that there is any distinction between a compensated and uncompensated surety or guarantor, nor between a corporate surety and an individual surety, nor between a corporation or an individual engaging in the business of suretyship or guarantyship for compensation and a corporation or individual who enters into a like contract without compensation. To impose such distinctions, while sections 2819 and 2840, Civil Code, read as they now read upon the books, would not be to interpret and to enforce the written law, but to make new law in hostility to it. It is for the Legislature, and not for the courts, to modify our statute law, if the lawmaking body shall believe that its former declarations touching the rights and liabilities of sureties and guarantors should be modified in respect to those sureties and guarantors who become such for compensation.

The judgment appealed from is therefore reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.

(175 Cal. 127)

EELLS v. EELLS. (L. A. 4036.)

(Supreme Court of California. May 12, 1917.)

APPEAL AND ERROR 🔑1010(1) — REVIEW — FINDINGS OF FACT.

In action by wife to cancel deed made to her husband, *held*, under evidence, that finding that conveyance was duly delivered to defendant in accordance with plaintiff's agreement so to do at the time she acquired title will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

Department 1. Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Edith Eells against George Eells. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

Edith D. McKinley, for appellant. Williams & Rutan, of Santa Ana, and George P. Adams, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff sought a decree quieting her alleged title to certain real property described in the complaint, and also asked that a deed which purported to convey the same property to defendant be canceled and annulled. The court denied her the relief sought, and gave judgment in favor of defendant, from which, and an order denying her motion for a new trial, plaintiff appeals.

The action grows out of the following facts: The parties are husband and wife. At the time of the marriage in 1909 defendant, the husband, owned 19½ acres of land, upon which, at the request of plaintiff, he declared a homestead. He exchanged 9½ acres of this land for property in the city of Los Angeles, consisting of a house and lot, constituting the subject of suit, which was owned by one Susan A. Hobbs, who on December 17, 1912, conveyed the same to plaintiff as her separate estate. On February 12, 1913, plaintiff signed and acknowledged a deed conveying to defendant this property so acquired from Hobbs. The chief question involved concerns the delivery or nondelivery of this deed of conveyance, wherein defendant was named grantee.

The contention of plaintiff, supported by her testimony, is that the deed was so executed by her, not with the intention of a present delivery thereof to her husband, but with the purpose, in case of her death, of saving her estate the expense of administration, and that he secured possession of the deed by wrongfully abstracting the same from where she had placed it, between the mattresses of her bed. On the other hand, it was alleged in the answer, and testimony was offered in behalf of defendant which clearly tended to prove, that he was inexperienced and unfamiliar with legal instruments and their effect, while plaintiff was an attorney of several years' experience in the laws of conveyancing and familiar with matters relating thereto, and during her marriage had acted for defendant in the conduct and management of all such matters; that at the time of the exchange of the properties she assumed charge thereof, and stated to defendant that, if the title to the Hobbs property was placed in her name, she could manage the same and collect the rents thereof to better advantage, and, if so conveyed to her, she would, for his protection, immediately execute and deliver to him a deed to the property; that defendant, relying upon his wife's representations, and having implicit confidence in her expressed purpose to convey the property to him, consented to the lodgment in her of the title to the Hobbs property; that in compliance with her agreement so to do she, on February 12, 1913, made and delivered the deed to him, at the same time advising that no record thereof be made until after her death; that thereafter she took the instrument from a drawer, where he had deposited it for safe-keeping, and secreted it between the mattresses, from where he, upon finding it, took the same and had it recorded; and that the property so conveyed by Hobbs to plaintiff with defendant's consent in exchange for the 9½ acres of land was never intended by him to be the subject of a gift to plaintiff. All of these facts the court found to be true, in accordance with the evidence so offered on behalf of the defendant.

Appellant, who appears in propria persona, devotes much of her brief in an endeavor to show that the findings above referred to, and particularly that as to the delivery of the deed, are not supported by the evidence. The contention is wholly without merit. The most that can be said is that there is a sharp conflict between the testimony of the parties touching the matters, and the court, as it was fully warranted in doing, gave the greater weight to the testimony of defendant than it did to that of plaintiff. It thus appears that defendant's ownership of the property, as found by the court, is based upon a conveyance thereof duly executed and delivered by plaintiff to defendant in accordance with her agreement so to do, made at the time when in her own name she acquired title to the Hobbs property. This being true, it is immaterial whether or not other findings relating to plaintiff's alleged fraudulent acts in procuring the deed, and want of consideration paid therefor by her, are supported by the evidence. Conceding the absence of fraud on her part, and that her abandonment of the homestead declared by the husband constituted a part of the consideration for the Hobbs deed, it could not, under the circumstances shown, affect the judgment. Appellant has filed a voluminous brief devoted to a discussion of abstract questions of law not here involved, and to matters proper for the consideration of the trial court, and which it is presumed to have considered in determining the weight to be given the conflicting evidence.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; SHAW, J.

(175 Cal. 118)

PEOPLE v. HADLEY. (Cr. 2043.)

(Supreme Court of California. May 11, 1917.)

1. CRIMINAL LAW 🔑1130(2)—APPEAL AND ERROR—BRIEFS.

Where brief merely charged error in admission of evidence without pointing out error or the resulting prejudice, the matter will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2966, 2968.]

2. CRIMINAL LAW 🔑650—EVIDENCE—EXPERIMENTS.

Experiments touching ability of witness to have recognized accused on the night of the crime, as she testified, need not be carried out under absolutely identical conditions, even to the condition of leafage of trees existing at time in question; the experiment being later in the year.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1457.]

3. HOMICIDE 🔑66—DURING ATTEMPT TO COMMIT BURGLARY—ACCIDENTAL KILLING.

The fact that homicide committed by one while attempting burglary was accidental is immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 85.]

4. CRIMINAL LAW 🔑781(6)—INSTRUCTIONS—CONFESSIONS.

Instructions that the fact that confession was obtained by police officers "presents an important item" in considering its voluntary character was erroneous as being an instruction regarding the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1868.]

5. **Homicide** 🔑286(1) — **Evidence** — **Intention.**

An instruction that the intention of accused at time of homicide is manifested by circumstances connected with the offense, and the accused's sound mind and discretion and the means used to accomplish the killing may be considered, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 586.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Lon Hadley was convicted of murder, and appeals from judgment and from order denying motion for new trial. Affirmed.

Wellington W. Judd, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

HENSHAW, J. Defendant, a colored man, was charged with the murder of John McGovern. He was found guilty, and the death penalty was imposed. He has taken his appeal from the judgment and from an order denying his motion for a new trial.

[1] Certain rulings of the court in admitting and rejecting evidence are complained of. We are aided by no discussion of counsel pointing out either the error or the injury of these rulings. The brief limits itself to the bare statement that "the court erred" in sustaining this objection or in overruling that objection. This court has in numerous instances declined to consider objections so presented. People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; People v. McLean, 135 Cal. 306, 67 Pac. 770; People v. Creeks, 141 Cal. 529, 75 Pac. 101. Nevertheless, owing to the gravity of the case, we have examined the record with care, and in none of the instances complained of do we find a ruling which would justify, much less demand, a reversal of the case. Some of these rulings were eminently sound. Others were rulings on evidentiary matters of trifling consequence. One only calls for specific consideration. The facts of the crime are that the defendant, about 20 minutes past 8 o'clock of the evening of April 3d, was in the act of burglarizing the home of the deceased, who at the time was absent. The deceased returned to his residence while the defendant was endeavoring to effect an entrance. He went to an outbuilding and picked up an axe and walked toward his house. This act of the deceased is explained by witnesses, who said that such was his practice, as McGovern thought that by taking the axe into his house at night burglars would have a less ready means of forcing an entrance. However, as he approached his door the defendant shot him twice and fled. His dead body was found in his yard the next day. Mrs. Young, a neighbor, who heard the shots, went to her window and saw a colored man, whom she identified as this defendant, "sneaking along the front of McGovern's house." This man climbed the fence and made his escape by a devious route. These were the circumstances of the homicide as testified to by Mrs. Young, though she did not know until the next day, after the body had been discovered, that McGovern had in fact been killed. The defense offered the testimony of one Compnext, for the purpose of showing that under the conditions existing upon the night and at the time of the homicide Mrs. Young could not have identified the defendant. It is extremely difficult to follow this examination from the record; as frequent references are made to a map showing the position of shrubbery, trees, and fences. It is therefore impossible in many instances to pass upon the pertinency of the evidence and the soundness of the rulings. Thus, as exemplars, the witness is asked, "Do these trees extend in such a way as to completely shadow, and did they at the time that this crime was alleged to have been committed, did they extend so as to completely shadow this down here?" The objection was sustained upon the ground that the question called for a conclusion of the witness. Of course, if the witness in fact knew, it was no more an objectionable conclusion than if he had been asked whether it were light or dark. Again he is asked, "Is there any point at which to your knowledge the electric light shines in there?" This would seem to call for a mere declaration of fact. But an objection was sustained to it as calling for a conclusion of the witness, and "no foundation laid." "Is Bay street a dark street?" is another question that was objected to as calling for a conclusion, and the objection upon that ground was sustained. Throughout the whole examination of this witness great stress seemed to be laid upon the fact that "no foundation was laid," though it does not appear that defendant's counsel was enlightened, nor yet is this court enlightened, as to precisely what was meant by this. Thus the court said:

> "Counsel, you will have to lay a foundation before you can ask any of these questions."

However, later in the examination the matter is illuminated by this statement of the prosecuting attorney:

> "Mr. Helms. At this time, perhaps, it would be well to state that counsel is apparently attempting to lay a foundation—I do not know, but I assume, that he is attempting to lay a foundation—I do not know, but I assume, that he is attempting to lay a foundation to show that either this witness or some other witnesses some time this month performed or attempted to perform some sort of an experiment down in the vicinity, or in the premises indicated, and that the purpose of that experiment would be to show that either this witness or some other witness with a similar group of facts, possibly as accurately reproduced as they could at that time reproduce them, undertook to determine whether or not some person, this witness or somebody else, located in the premises of Mrs. Young or approximately a similar position to that which Mrs. Young, according to her testimony, must have occupied on the night of the shooting—
>
> "The Court. Capt. Helms, I do not see how you can expect to stop counsel from putting on his evidence. * * *

> "Mr. Helms. The point of the objection on that question, your honor, is that at this season of the year, as is well known, a tree may be in full leaf, it may be in full leaf six weeks or two months ago but where a period of two months has elapsed the leafing of a tree in the spring of the year, and especially of a deciduous tree such as those trees evidently are, and not being citrus fruit trees, without any question there is a continual variation from week to week in the condition of the leafage. A sprout that will be that long will sometimes in three or four days become a foot long, a tender green sprout, the new growth, especially in the spring season. Objects that could perhaps be seen through the tree two months earlier in the spring could not at all be discerned through the leafage of the same tree, although at both times the tree might be in full leafage. For that reason, I was about to make the remark before, I think counsel will see that it is impossible to reproduce the conditions the same where we are dealing with growing matter. If the matter were a stone wall or wooden walls even that could be shown to be in the same condition, there might be a possibility of reproducing conditions, but suppose he reproduces physical conditions, then he has to reproduce a person with exactly the same capacity of vision that Mrs. Young had before he has the conditions the same as her observation."

[2] The court did not rule upon this statement, but it is quite apparent that the prosecuting attorney believed that unless the "experiment" touching the ability of one person to recognize another was carried out under identical conditions, even to the last leaf on the tree, with those which obtained when the witness Mrs. Young testified that she identified the defendant, the evidence was inadmissible. Of course such is not the law. Nor did the court rule that such was the law. And while it might well have shown a greater liberality in permitting counsel for the defense, manifestly inexperienced, to introduce his evidence, it cannot be said that the stringency of the court's rulings worked any hardship to appellant.

[3] Counsel next complains of all the instructions which the court gave and of all which it refused to give. But specifically complaint is made that the court instructed the jury that, if the death of a person results from the act of another while such other "was engaged in perpetrating or attempting to perpetrate robbery, burglary, or mayhem, in which case the fact that the killing was accidental is immaterial." The objection to this instruction is that it "called to the attention of the jury the fact that the defendant was charged with murder during an attempt to commit burglary." Such in fact was the case, and such in fact was the evidence, and that the instruction is sound in point of law is beyond doubt. People v. Milton, 145 Cal. 171, 78 Pac. 549; People v. Jones, 160 Cal. 370, 117 Pac. 176; People v. Witt, 170 Cal. 104, 148 Pac. 928.

[4] The defendant confessed the crime. The court refused to give the following instruction:

> "You are instructed that the fact that the questioning was done by police officers presents an important item for consideration in determining whether or not the confession was of a free and voluntary character."

In People v. Quan Gim Gow, 23 Cal. App. 507, 138 Pac. 918, the Court of Appeal in its general discussion quotes from Bram v. United States, 168 U. S. 557, 18 Sup. Ct. 192, 42 L. Ed. 568, to the following effect:

> "Whatever be the rule in this regard in England, however, it is certain that, where a confession is elicited by the questions of a policeman, the fact of its having been so obtained it is conceded may be an important element in determining whether the answers of the prisoner were voluntary."

An effort was here made to have this embodied into the form of positive law for the instruction of the jury. There is no warrant in the court's so doing. People v. Siemsen, 153 Cal. 387, 95 Pac. 863; People v. Luis, 158 Cal. 189, 110 Pac. 580. To have done so would have been a dangerous invasion of the rights secured to litigants against instructions by a court to a jury upon matters of fact. People v. Hawes, 98 Cal. 648, 33 Pac. 791; People v. Keith, 141 Cal. 686, 75 Pac. 304; Estate of Blake, 136 Cal. 311, 68 Pac. 827, 89 Am. St. Rep. 135.

[5] The following instruction which the court gave is complained of:

> "In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused."

This precise instruction, however, has been declared to be a sound exposition of the law in People v. Besold, 154 Cal. 369, 97 Pac. 871, and People v. Wilkins, 158 Cal. 530, 111 Pac. 612.

The judgment and order appealed from are therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.

(33 Cal. App. 386)

L. W. BLINN LUMBER CO. v. COHN et al.

(Civ. 2214.)

(District Court of Appeal, Second District, California. April 5, 1917.)

1. MECHANICS' LIENS 🔑164(2) — BUILDING CONTRACT—EXECUTION IN WRITING.

Building contract, after describing work to be done, provided that all should be performed conformably to drawings and specifications by named architects, signed by parties, which were intended to be filed therewith, and which were identified by signatures of the parties. The document was filed in recorder's office, and three sets of specifications were filed with it, general specifications referring to construction of building in general, not referring to electric wiring or garage, specifications for electric wiring, and specifications for garage. The general specifications bore initials of the contractor, placed by him on each sheet, but did not have signature of the owner, except she wrote her initials on the fifth page. The same initials were placed on other sheets of the general specifications by one not the owner, but having the same initials, without authority from her and not in her presence. Wiring and garage specifications were neither signed nor initialed by the owner or contractor, but the owner's initials had been placed thereon by party with same initials acting under no authority from owner. When the several specifications were initialed they were not attached to the signed contract nor to each other. Later they were fastened together and filed for record by some person other than contractor. *Held*, that the contract was void because not in writing as required by law, so that materialman was entitled to have lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 289.]

2. Appeal and Error ⟹925(2) — Presumptions Favoring Court Below — Setting Aside Stipulation.

In suit to enforce a materialman's lien, where the parties stipulated on trial that the contract was in the form required by the lien law and recorded prior to commencement of the work, evidently in order to place before the court facts about which there was no controversy, and later plaintiff was allowed to amend by adding to its complaint a statement of the facts regarding the form of the contract on account of which plaintiff sought to attack its validity, and it was agreed that the court should first hear and dispose of the invalidity of the contract, the appellate court must assume, nothing appearing to the contrary, that the conduct of the trial under the amended pleadings, and the actual receiving and considering of evidence on the new issues, was understood by parties and court as having set aside the stipulation, and that the court was no longer bound thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3730–3733.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Suit by the L. W. Blinn Lumber Company, a corporation, against Alice B. Cohn, L. B. Cohn, and John Rebman. From a judgment limiting its lien, plaintiff appeals. Judgment so far as appealed from reversed, and trial court directed to amend the judgment to enforce plaintiff's lien as claimed for the full amount of the balance due as shown by the findings.

E. S. Williams, of Los Angeles, for appellant. W. O. Morton, Harry A. Hollzer, and C. B. Morton, all of Los Angeles, for respondents.

CONREY, P. J. On December 5, 1910, the defendant Alice B. Cohn as owner, and defendant John Rebman, as contractor, signed a document purporting to be a contract for the construction of an apartment building and garage on land of Mrs. Cohn in the city of Los Angeles. The writing provided that the whole of the work to be performed thereunder should be completed by the 1st day of April, 1911. This was not done, and on the 12th day of September, 1911, the buildings were not yet completely constructed. The owner took possession and proceeded to complete them, and they were fully and actually completed on the 30th day of October, 1911. Pursuant to a contract made with Rebman, the plaintiff furnished lumber to be used and which was used in the construction of those buildings, and on account thereof there became due to the plaintiff the sum of $9,180.61, balance unpaid of the value of the materials thus furnished. The court granted judgment against Rebman for that sum, with interest thereon at 7 per cent. per annum from October 3, 1911, together with $1.90 for cost of verifying and recording its claim of lien and its costs of suit herein. Plaintiff's claim of lien enforceable against the owner's property was allowed in the sum of only $5,962.65, with costs. The plaintiff has appealed from that part of the judgment which thus limits the extent of its lien.

Appellant claims that the building contract between Mrs. Cohn and Rebman was invalid because it was not in writing as required by law, and that therefore the plaintiff was entitled to have a lien for the full value of the materials furnished by it. The contract, after describing the work to be done, provided as follows:

> "All of which work shall be done and performed conformably to the drawings and specifications by Messrs. Neher & Skilling, architects, and signed by the parties hereto, which are intended to be filed herewith in the office of the county recorder of said Los Angeles county, and which are identified by the signatures of the respective parties hereto."

On December 10, 1910, that document was filed in the recorder's office of Los Angeles county, and at the same time there were filed with it three sets of specifications: (1) General specifications referring to the construction of the apartment building in general, but not including any reference to electric wiring or to any garage; (2) specifications for electric wiring; (3) specifications for garage. The general specifications bore the initials of John Rebman, placed by him on each sheet thereof. They did not have the signature of Mrs. Cohn, except that she wrote her initials, "A. B. C.," on page 5 thereof. The same initials, "A. B. C.," were placed on the other sheets of the general specifications by one A. B. Cohn, not the owner, Alice B. Cohn, without authority from her and not in her presence. The electric wiring specifications and the garage specifications were neither signed nor initialed by the owner nor by Rebman, but the initials "A. B. C." had been placed thereon by the said A. B. Cohn acting under no authority from Alice B. Cohn. At the time when the several specifications were initialed as above stated, they were not attached to the signed contract nor to each other. Afterwards they were fastened together and filed for record by some person other than and in the absence of John Rebman. Rebman did not sign or initial the specifications, except as above stated, and he never examined the same before they were recorded or after they were fastened together or after he signed and initialed the same as above stated.

Under decisions heretofore made and which fully state the rule and its reasons, it must be held that the purported contract is "wholly void," and the contention of the plaintiff must be sustained. Donnelly v. Adams, 115 Cal. 129, 46 Pac. 916; Donnelly v. Adams,

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

127 Cal. 24, 59 Pac. 208; West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533; San Francisco Lumber Co. v. O'Neil, 120 Cal. 455, 52 Pac. 728; Howe v. Schmidt, 151 Cal. 436, 90 Pac. 1056; Hartwell v. Ganahl Lumber Co., 8 Cal. App. 733, 97 Pac. 901. Respondents also rely upon Hartwell v. Ganahl Lumber Co., supra, and claim that the facts of this case are substantially like that case in which the validity of the contract was sustained. But the analogy does not hold. In that case the court upon the evidence before it held it as a presumption that the contract was signed by the owner and contractor in the condition in which it came to the court, to wit, with the plans and specifications attached thereto; and there was oral evidence that it was so signed. In that case also the specifications contained a statement describing them as specifications relating to a building to be erected for the named owner, together with a description of the lot on which the building was to be constructed. In the case at bar the findings of the court declare, as above stated, that the specifications and contract were not together when the contract was signed. It further appears that the electric wiring and garage specifications, although they contain the name of the owner and the names of the architects, do not contain any reference to the location of the land upon which the work was to be done.

[2] Respondents endeavor to avoid an adverse decision upon this branch of the case by suggesting that at the trial it was stipulated that the contract was in form required by the lien law and recorded prior to commencement of the work as required thereby, including the specifications and plans attached. It is true that such stipulation was made at the opening of the trial. The complaint at that time consisted of two counts, neither of which attacked the validity of the contract. The stipulation, therefore, evidently was made in order to place before the court facts about which there was no controversy, but which were necessary in order to present in connection therewith the facts about which controversy then existed. At a later time in the trial the plaintiff was allowed to amend its complaint by adding thereto a statement of the facts to which we have referred and on account of which the plaintiff sought to attack the validity of the contract. Since nothing appears to the contrary, we must assume that the further conduct of the trial under the amended pleadings, and the actual receiving and considering of evidence upon the new issues thus framed, was understood by the parties and by the court as having set aside the above-mentioned stipulation, and that the court was no longer bound thereby. Indeed, the bill of exceptions states that:

> "Thereupon it was agreed that the court should first hear and dispose of the issue of the invalidity of the contract."

The other principal ground of appeal presented by counsel for plaintiff assumes the validity of the building contract. In view of our decision against the validity of that contract, it becomes unnecessary to pass upon other questions.

That portion of the judgment from which the plaintiff, L. W. Blinn Lumber Company, appealed is reversed, and the trial court is directed to amend its judgment so as to recognize and enforce the lien of the plaintiff as claimed by it for the full amount of the balance due to it, as shown by the findings of fact.

We concur: JAMES, J.; SHAW, J.

(33 Cal. App. 385)

GABBS v. COUNTRYMAN et al. (Civ. 2044.)

(District Court of Appeal, First District, California. April 5, 1917. Rehearing Denied by Supreme Court June 4, 1917.)

MORTGAGES ⚷25(3)—CONSIDERATION.

Plaintiff held defendant's note, secured by pledge of stock. Such note having matured without payment, it and the pledge were returned, and a note and mortgage executed and delivered by defendant to plaintiff. *Held*, that the cancellation of the previous note and return of the pledge were sufficient consideration for the note and mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 34.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Suit by Milton F. Gabbs against R. H. Countryman and others, in which the defendant filed a cross-complaint. From judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

Walter M. Willett and R. H. Countryman, both of San Francisco, for appellants. Chickering & Gregory, of San Francisco, for respondent.

PER CURIAM. This is a suit to foreclose a mortgage given to secure a promissory note executed by the defendants. Foreclosure was ordered against the mortgaged property, and defendants appeal from the judgment and from an order denying their motion for a new trial.

There is no merit in the first point, that the case was improperly or irregularly transferred from the department of the superior court to which it was originally assigned to the department of the court in which it was heard and determined.

Equally without force—savoring even of frivolity—are the objections to the rulings of the court on the admission and rejection of evidence.

The defendants in their answer and cross-complaint pleaded that there was no consideration for the execution of the note and mortgage, and they now contend that the finding of the trial court against them on that issue is not sustained by the evidence. This position is not well taken. The record shows that the plaintiff gave to the defendant R. H. Countryman the sum of $13,000 in consideration for a certain interest in the rentals of two buildings—the Delbert block and Countryman building—to be erected on the west side of Van Ness avenue in San Francisco shortly after the fire in April, 1906. Thereafter plaintiff became dissatisfied with the investment, and sold his interest in said rentals or buildings to said defendant, taking in exchange therefor the latter's promissory note for $14,072.50, secured by a pledge of 42 shares of the capital stock of the R. L. Radke Company. The note matured March 26, 1909. Nothing was paid upon it, and thereupon the note and the stock pledged as security for its payment were returned to Countryman, and the note and mortgage in suit were executed and delivered to the plaintiff. The consideration therefore for this note and mortgage, it is obvious, was the cancellation of the previous note and the return of the pledge, and the consideration for the first note was the relinquishment by plaintiff of any interest in the buildings, and the consideration for his interest in the buildings was the payment by him of the sum of $13,000 in cash to Countryman for such interest.

The judgment and order are affirmed.

(33 Cal. App. 390)

POHLMANN v. PATTY, County Clerk.

(Civ. 2348.)

(District Court of Appeal, Second District, California. April 6, 1917.)

1. Elections 🔑115—Registration of Voters—Formal Defects in Affidavits.

Where county clerk of county, in making affidavits of registration of qualified voters, failed and neglected to enter fact that person being registered could read the Constitution in English, and could write his or her name, which was in fact the case, and failed to enter in other affidavits the number of the room and the floor or number of the room or floor occupied by the affiants, by receiving such affidavits and accepting them for registration purposes more than 30 days prior to an election to be held in a city, and by holding them in his office, together with the other affidavits of registration constituting the great register of the county, without objecting to their sufficiency when they were presented, and when he received them, the county clerk makes the certificates a part of the great register, and, having done so, he is without power to cancel the certificates or to withhold them from use in the election, and is without power thereby to deprive the registered voters of the right to vote at the election, since the clerk's acceptance of the certificates amounts to a judgment making them a part of the great register, though they are formally defective.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 110.]

2. Elections 🔑108—Affidavits of Registration—Cancellation—Statutes.

The instances specified in Pol. Code, § 1106, setting forth the instances in which it is made the duty of the county clerk to cancel entries of registration of voters, do not include the cancellation of affidavits of registration on account of defects of form, or on account of failure of the affidavits to contain answers to questions as to whether affiant could read the Constitution in English, etc., which, under section 1097, should have been answered; the provisions of the latter section being directory and not mandatory.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 105.]

3. Elections 🔑106—Affidavit of Registration—Refusal to Receive—Formal Defects—Statute.

County clerk might refuse to receive an affidavit of registration of a qualified elector defective in that it does not contain answers to questions as to whether affiant can read the Constitution in English, etc., required by Pol. Code, § 1097. In determining the sufficiency of affidavits, the clerk's acts are of a judicial nature, and, before accepting them, it is his duty to pass upon the certificates and see that they are sufficient in form.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 103.]

4. Elections 🔑108—Affidavits of Registration—Alteration by Clerk to Supply Formal Defects—Statute.

After accepting affidavits of registration of qualified voters so that they have become a part of the great register, the county clerk is without authority to change the affidavits by supplying omitted entries as to whether affiants can read the Constitution in English, etc., matters which, under Pol. Code, § 1097, should have been answered.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 105.]

Petition for mandamus by Frank Pohlmann against L. R. Patty, as County Clerk of San Bernardino County. Peremptory writ of mandate ordered to issue.

Ralph E. Swing and Frank T. Bates, both of San Bernardino, for petitioner.

PER CURIAM. On petition of Frank Pohlmann, an alternative writ was issued to L. R. Patty, as county clerk of the county of San Bernardino, requiring him to appear and show cause why a peremptory writ of mandate should not issue directing him to transmit, as part of the great register of the county of San Bernardino, certain affidavits of registration to the boards of election appointed to hold and conduct an election called to be held in the city of San Bernardino on the 9th day of April, 1917. Without any formal return, the respondent appeared personally before this court and stated that he is ready and willing to submit to such order as the court shall make; it being understood that the decision will be made upon the facts alleged in the petition.

For more than 30 days prior to the 9th day of April, 1917, the petitioner, and each of the other persons whose names are set forth in two certain exhibits attached to the petition, registered as qualified electors of the city of San Bernardino by subscribing and swearing to the affidavit of registration provided for that purpose by the respondent county clerk, and then and there answered each and every question asked of them. At the time of so registering, each of said petitioners was a resident of the precinct from which he registered. At said time, respondent failed and neglected, and has since failed and neglected, to enter in the affidavit of registration of each of the persons named in Exhibit A the fact that such person being registered could read the Constitution in the English language and could write his or her name. In fact, each of said persons could read the Constitution in the English language and could write his or her name. Respondent failed and neglected to enter in the affidavit of registration of each of said persons whose names appear in Exhibit B the number of the room and the floor or number of the room or floor occupied by said persons. Prior to the filing of this petition, the petitioner demanded that the respondent make the omitted entries in each and all of such affidavits of registration, but respondent refused to make such entries or correct such affidavits of registration. The respondent contends that each of said registrations is void and illegal, and that it forms no part of the great register of said county, and threatens to take and remove each of said affidavits of registration from the great register of said county, and threatens to withhold said affidavits of registration and not send or transmit the same or any of them to the boards of election appointed to conduct an election to be held in the city of San Bernardino on the 9th day of April, 1917. The petitioner maintains this proceeding for and on behalf of himself and the numerous persons whose names appear in said exhibits.

The affidavits in question showed all the qualifications of the electors as required by sections 1096 and 1097 of the Political Code, except as above stated. They have been regularly received and are in the hands of the clerk as affidavits of registration made by qualified electors. It is not contended that any reason exists why they should not be transmitted to the boards of election of the several precincts, except on account of those formal defects.

[1-3] It is our opinion that by receiving said affidavits of registration and accepting them for registration purposes at the times when presented and holding them in his office, together with the other affidavits of registration constituting the great register of San Bernardino county, without objecting to their sufficiency at the time when they were presented and when he received them, the county clerk made those certificates a part of the great register of said county. Having done so, he is without power to cancel those certificates or to withhold the same from use in the election to be held, and is without power thereby to deprive those registered voters of the right to vote at the election. Section 1106 of the Political Code sets forth the instances in which it is made the duty of the clerk to cancel entries of registration of voters. The instances there specified do not include the cancellation of an affidavit of registration on account of any defects of form, or on account of failure of the affidavits to contain answers to questions of the character hereinabove specified which, under the provisions of section 1097 of the Political Code, should have been answered. The provisions of the statute affecting the matters in question are directory and not mandatory. We do not doubt that the clerk might refuse to receive a defective affidavit, and it might be his duty to so refuse. The law places in his hands the business of receiving affidavits of registration and making up the great register. In determining the sufficiency of the affidavits, his acts are of a judicial nature, and before accepting them it is his duty to pass upon the certificates and see that they are sufficient in form. His acceptance of the certificates amounts to a judgment making them a part of the great register. Thereupon the qualified voter becomes entitled to have his name upon the great register, and the clerk is not vested with authority to thereafter remove it therefrom. If subsequently there should occur any facts of the description contained in section 1106 of the Political Code, that section states that the clerk must cancel the registration, or, if any facts occur which result in a judgment of cancellation of a registration, it may be eliminated thereby as provided by section 1109 of the Political Code. In the absence of any of those conditions, the clerk may not interfere with the legal effect of any registration of a voter, and it is his duty to send the affidavits of registration to the boards of election as provided by law.

[4] Referring to the complaint of petitioner that respondent has refused to alter the affidavits of registration referred to in the petition by supplying the omitted entries therein, we are of the opinion that the county clerk is without authority to change them after they have been accepted and have become a part of the great register. The statements contained in such affidavits are the evidence furnished by the voter upon which the clerk has acted in receiving the voter's name for registration.

It is ordered that a peremptory writ of mandate issue to the respondent, directing that he furnish and transmit to the boards of election appointed to hold and conduct said election in the city of San Bernardino, as part of the great register of said county, the affidavits of registration referred to in the petition.

(25 Wyo. 91)

REECE et ux. v. RHOADES et ux. (No. 870.)

(Supreme Court of Wyoming. June 11, 1917.)

1. ACCOUNT 🔑7—PROSPECTIVE PARTNERSHIP—MISAPPROPRIATION.

Where parties entered into an agreement to form a partnership at a later time, and some of the parties furnished money for the use of the prospective partnership, and the other parties misappropriated the funds, it was not essential to an accounting that the partnership have been actually formed regardless of the erroneous naming of the relationship in the petition as a partnership.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 20, 21.]

2. ACCOUNT 🔑7—EQUITABLE RELIEF.

Where parties entered into an agreement to form a partnership and some of them furnished money which the others used in purchasing cattle to be owned by the partnership, and later they sold the cattle under a claim of sole ownership, the parties furnishing the money were entitled to equitable relief.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 20, 21.]

3. JOINT ADVENTURES 🔑1—WHAT CONSTITUTES.

A joint adventure partakes of the nature of a partnership and is governed substantially by the same rules of law, the principal distinctions being that a joint adventure usually relates to a single transaction, though it may comprehend the business continued for a period of years, and that one party may sue the other at law for a breach of the contract or a share of the profits or losses or for contribution for advances without precluding a suit in equity for an accounting or for a dissolution, and a joint adventure contract need not be express.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 1.

For other definitions, see Words and Phrases, First and Second Series, Joint Adventure.]

4. APPEAL AND ERROR 🔑273(9) — SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS.

A mere general exception to findings of fact and conclusions of law made in accordance with a request therefor will not present for consideration an objection that the findings are imperfect or their sufficiency as a compliance with the statute upon a request for a separate statement in writing of findings of fact and conclusions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1606, 1620, 1621; Trial, Cent. Dig. § 965.]

Error to District Court, Park County; Carroll H. Parmelee, Judge.

Suit by C. J. Rhoades and wife against Arthur Reece and wife. Judgment for plaintiffs, and defendants bring error. Affirmed.

E. E. Enterline, of Billings, Mont., W. L. Walls, of Cody, and W. E. Mullen, of Cheyenne, for plaintiffs in error. W. L. Simpson and J. H. Van Horn, both of Cody, and Lonabaugh & Wenzell, of Sheridan, for defendants in error.

POTTER, C. J. This action was brought in the district court by the defendants in error, C. J. Rhoades and B. A. Rhoades, seeking equitable relief, including an accounting, the appointment of a receiver, and a judgment for the amount found to be due the plaintiffs to be paid out of certain property referred to in the petition as partnership property. There was a general denial of the material averments of the petition, and a trial by the court resulted in granting some of the relief prayed for. The case is here on error, but without the evidence; the errors assigned relating to the sufficiency of the petition and findings of fact to sustain the conclusions of law and judgment or authorize the relief demanded or granted.

The petition alleges and the court found that on the date thereof the plaintiffs and defendants entered into the following written agreement:

> "Livingston, Mont., April 25, 1912.
>
> "This an article of agreement for and between Arthur Reece and Alice Reece, his wife, parties of the first part and C. J. Rhoades and B. A. Rhoades his wife, parties of the second part, wherein the parties of the first part are owners or controllers of a body of land held under different grants, namely, homestead desert claims and leases, etc., controlling mountain range and water filings and rights (as per description attached) do hereby bargain and agree to become and entertain parties of the second part as full and one half interest copartners in all lands grants leases and holdings real estate and personal property for a consideration of six thousand dollars ($6,000.00) to be paid by parties of the second part, in installments best suited to all parties on or before October 1, 1915; one thousand dollars ($1,000.00) of this amount to be paid on or before June 1, 1912, of which shall be used to pay all outstanding acts, and debts of first parties: the remaining $5,000.00 to be invested on the ranch or in live stock and improvements and shall become a part of this said whole property as controlled by this agreement under the same agreement (copartnership) as herein afore mentioned. Parties of the second part further agree to share equally in expenses or all moneys actually expended for ranch improvements and stock purchased."

After setting forth this agreement, the petition refers to it as a partnership agreement and alleges due performance by the plaintiffs of everything required of them thereby, that they had paid to defendants thereunder various sums of money and turned over to them cattle of the value of $1,700, and contributed under the agreement, with the knowledge and consent of defendants, in money and cattle an amount in excess of $6,000; that the defendants had failed and refused and were unable to perform the same and had made default therein, except that they had delivered to the plaintiffs a relinquishment of a certain land entry made under the laws of the United States; that on or about October 15, 1915, in disregard of the agreement, the defendants took exclusive possession and control of the real and personal property "of said copartnership," and ever since have claimed sole ownership thereof, and the right to sell, dispose of, and incumber the same, and divert the money so acquired to their own use; that they have failed and refused to account to the plaintiffs "for any part of the partnership" property or effects or for moneys furnished them by the plaintiffs and expended by the defendants or converted to their own use, and have converted to their own use moneys furnished by the plaintiffs for carrying out the objects mentioned in the agreement; that the defendants threaten and are about to sell the cattle aforesaid and appropriate the proceeds thereof to their own use, in disregard of the rights of the plaintiffs; that defendants have failed and neglected to expend any money in the improvement of the ranch, except a small amount furnished by plaintiffs, or to expend for stock any of the money furnished by the plaintiffs; that the cattle aforesaid were purchased by the plaintiffs and turned over to the defendants "under said copartnership agreement"; that by reason of said acts and omissions of the defendants the plaintiffs have and are greatly and irreparably damaged; that defendants and each of them are insolvent, and the plaintiffs have no plain, speedy, or adequate remedy at law.

Relief is prayed substantially as follows: That the partnership be dissolved, and a receiver appointed of all the personal property of the partnership; that the defendants be required to deliver to such receiver all books of account, checks, and memoranda in their possession relating to the business, dealings, or transactions of the partnership; that an account be taken of all the partnership business, dealings, and transactions, and of the moneys paid by the plaintiffs in relation thereto; that the live stock be decreed to the plaintiffs; that the defendants be enjoined from interfering with the partnership property and effects; that upon an accounting the amount due the plaintiffs be found and the same paid out of the partnership property, and the remainder of such property, if any, be apportioned between the parties according to their respective interests as may be found by the court, and such other relief as may be just and equitable in the premises.

It appears that on the same day that the petition was filed, January 8, 1916, a receiver was appointed and he was directed to take possession of all property belonging to the parties to the action, including all books of account and papers bearing upon the partnership transactions of the parties, and the parties were ordered to deliver to the receiver all of the property of the partnership or claimed by either party as partnership property. There is no report of the receiver in this record, but it appears from the findings that he had taken possession of certain personal property, and directions are given thereby and by the judgment for disposing of the same.

As above stated the evidence is not before us, but the court stated in writing its findings of fact and conclusions of law, pursuant to a request therefor. Owing to the length and narrative form of such findings and conclusions a recital of the facts as found will be confined to the essential or more prominent facts, but deemed sufficient to show generally the relation and conduct of these parties, omitting several merely incidental matters important only as part of the history of the business relations of the parties following the making of the agreement aforesaid, and as tending to explain the continuance thereof without a more definite understanding.

It is recited in the findings as a preliminary statement that it is conceded by counsel that the case "is a remarkable one in many respects, particularly in regard to the very crude methods of doing business exhibited by the parties." The case is a remarkable one. Although the written agreement aforesaid recites that the defendants (described in the agreement as parties of the first part) "are owners and controllers of a body of land held under different grants, namely, homestead desert claims and leases, etc., controlling mountain range and water filings and rights," the court finds that the only land owned or controlled by the defendants was a homestead entry of one of them, Arthur Reece, indefinitely marked on account of defective surveys, upon which he had not been able to make final proof because of the failure of the government authorities to file amended plats showing the definite location of the same, but that immediately prior to the date of the agreement said Arthur Reece and C. J. Rhoades, one of the plaintiffs and a dentist by profession residing in Kansas City, Kan., met and visited the former's ranch in Park county, who then pointed out to the latter the land claimed by him, and other land which he had in mind to acquire title to through desert and other entries, the location of mountain range, and other advantages for running stock; whereupon propositions were discussed for entering into a partnership, and with that in view that they went to Livingston, Mont., where the defendant Alice Reece then was, and entered into the written agreement aforesaid. It is also found that, outside of said homestead entry, a permit for the use of a reservoir site, and a rejected desert application of Alice Reece, there were no filings, entries, or rights of any kind by either of the defendants to any land in the vicinity of the ranch.

It is found, however, that the plaintiffs learned of such condition in the spring of 1914, and then ceased to expect or require a conveyance to them by defendants of any rights under the land laws or of any lands, but made unsuccessful efforts to enter land originally believed to be part of defendants' holdings, to acquire a home thereby and further the contemplated project of engaging in the stock business in that locality; that C. J. Rhoades also after that time applied for and obtained a reservoir permit to irrigate his contemplated homestead, upon the same site covered by the permit of Arthur Reece which had expired by limitation.

Notwithstanding this situation as to the lands claimed by defendants to have been owned or controlled by them, the plaintiffs, as the court finds, made the payments provided for in the agreement, the specific finding in that respect being as follows:

> "That payments had been made to the defendants by the plaintiffs in cash or in goods furnished to them or bills paid for them by the plaintiffs in the total sum of $5,901.26; that the plaintiffs claim payments in excess of the sum of $6.000, the chief difference in accounts being in this, that the plaintiffs allege the furnishing of one horse in the amount of $140, and a sulky plow in the amount of $31.75, the receipt of which the defendants deny. The property above referred to is at hand and in the hands of the receiver and can be returned to the plaintiffs. Other charges not acquiesced in by the defendants are of slight amount and can be rejected by the court, thus accepting as correct the statement of the defendants as to the amount of the property furnished and received. The above amount included $1,700 paid by the plaintiffs for the purchase of some cattle on August 27, 1914, from John Dahlem and branded in the brand then owned by Arthur Reece, to which he subsequently, on the 4th day of September, 1914, transferred a one-half interest to Charles J. Rhoades, one of the plaintiffs herein."

The court further finds that at least $1,000 was paid and applied for the purpose mentioned in the written agreement, viz. toward the discharge of the debts of the defendants, "but that said sum was insufficient to pay all of said debts, and that the defendants constantly importuned plaintiffs for more money to be applied to that purpose," and that numerous other sums were furnished by the plaintiffs for such purpose, and a large portion paid after the payment of the $1,000 aforesaid "was furnished to the defendants in compliance with their repeated requests and demands for living expenses, for the support and education of their children, for excursions, medical treatment, and various other purposes aside from any matters contemplated by the original agreement, with the full knowledge of the plaintiffs of the purpose for which the money was solicited, and of the fact that it was being applied for purposes entirely different from those contemplated in the agreement." But the court also finds that the plaintiffs frequently remonstrated with the defendants for such diversion of the money and protested against its being done; that these protests and remonstrances were met by explanations, importunities, and promises that when the present object should have been accomplished the defendants would then be in a better position to carry out the original purpose of their contemplated partnership, and that both parties would profit thereby; that the plaintiffs accepted such promises and acquiesced in the delays and diversion of said money, believing, however, that the total amount of their payment would in the end inure to their benefit and enable the partnership business to be carried on to better advantage; that they did not agree to the ultimate and complete appropriation by the defendants of the right and benefit of all such payments, without expectation of return to themselves.

It also appears from the findings that during the period of such payments the defendants gave the plaintiffs their notes for some of the money so advanced, viz. one note for $800 dated June 28, 1912, one for $800, dated December 5, 1912, and one for $1,600, dated November 18, 1913, securing the note of June 28, 1912, by a chattel mortgage upon a team and other farm property of the defendants; that on or about September 4, 1914, at or about the time of the transfer to the plaintiffs of a half interest in the cattle brand of defendants, the plaintiffs returned to the defendants the chattel mortgage aforesaid and the note for $1,600, with the intention of canceling and releasing the same, and retained the other two notes; that in January, 1915, the plaintiffs purchased hay paying $100 therefor, which was used for feeding the cattle purchased as aforesaid, and in June and July, 1915, other stated amounts for grazing the cattle on the forest reserve and for putting up hay for the cattle, and that during that summer C. J. Rhoades and Arthur Reece each worked in the hayfield in putting up hay for the use of said cattle; that the written agreement aforesaid does not seem to have been regarded by either of the parties as establishing a partnership relation between them at the time, but that they apparently expected to become associated as partners in the future, having in view large schemes for conducting a live stock, tourist, and guide business; the tourist and guide business having been considered by them after entering into the written agreement; that Arthur Reece frequently wrote to C. J. Rhoades during the period aforesaid describing the condition of affairs at the ranch and in the county, suggesting projects for investment, "and portraying in gorgeous terms the future and profitable progress of their business"; that in one letter, in August, 1912, suggesting the purchase of horses and saddles which would be needed in the tourist business, he wrote:

> "Everything I buy will be partnership stuff. I'll give you credit for one-half and note also as we talked."

And in another:

> "Well, pard, tell Mrs. Rhoades for me that I think you folks are making fifty per cent. on every dollar invested up here so far. Our place will sell for double what I let you in for, as soon as it is proved up on."

During the season of 1915, the findings state, there were more acute contentions between the parties, the defendants demanding that plaintiffs furnish more cattle to be run with those previously purchased, and a bill of sale to them for a one-half interest in the latter, the plaintiffs complaining of the diversion by defendants of a large part of the money paid them from the purpose intended by the written agreement, and of the branding of the cattle with the brand of defendants, but that until the latter part of the summer or early autumn of 1915 the cattle that had been purchased as aforesaid were treated by the parties as the property of both plaintiffs and defendants, with equal interest therein, and that such was the intention of both parties when the cattle were purchased; that finally, some time in the fall of 1915, the defendant Arthur Reece informed the plaintiffs that said cattle belonged to him, and that the plaintiffs had no interest therein, that he had sold some of them and the proceeds belonged to him. And the court finds that said Reece had sold five head of the cattle and converted the proceeds ($245) to his own use, and had butchered one head.

In substance, the material conclusions of law of the trial court are as follows: That the written agreement aforesaid was not one constituting a partnership at the time, but was an agreement to enter into a partnership; that the parties did not become partners at the time of signing the agreement, and at that time did not own or possess any property as a partnership, but their agreement was for a partnership in the future when there might be property to come under it; that none of the property in the receiver's possession can be considered as partnership property, except the cattle and hay; that whatever copartnership existed between the parties at any time "existed only by virtue of the purchase of property to be held in the contemplation of the parties as partnership property, and embraced in such agreement as might be made for the handling of such property"; that until the purchase of the cattle aforesaid no property had been bought by defendants as contemplated by the original agreement, but all moneys paid them by plaintiffs had been converted to their own use until, on August 27, 1914, through the joint efforts and negotiations of the plaintiffs and defendants, and through the payment of money by the plaintiffs, the cattle aforesaid were purchased "as and for partnership property, and that said cattle, together with the increase thereof, constitute the only property purchased and owned and acknowledged by both parties to be partnership property; that as a matter of law, the said property having been purchased through the efforts of both parties with the intention that such property should become partnership property, and that purchase having been made from the proceeds of moneys provided by the said agreement of April 25, 1912, to be paid by the plaintiffs to the defendants for the purpose of investment in partnership property, a partnership was then and there as a matter of law created between the parties hereto with respect to said cattle in which each party had and has an undivided one-half interest, saving and excepting, however, that the said partnership so as above formed in contemplation of law by the acts of the parties in pursuance of the previous agreement to enter into a partnership may have acquired as partnership property the ownership of certain hay heretofore fed and now being fed to said cattle and designed by both parties for that purpose"; that, the court having jurisdiction for one purpose will determine all issues submitted to it, and the mutual claims of the parties, particularly the claim of plaintiffs for money paid pursuant to the written agreement, though not an equitable matter, having been submitted to the court, with evidence thereon on behalf of both parties, the same may be determined and settled in this action; that the plaintiffs are entitled to an account as to the application of their payments under the agreement; that of the total amount paid by the plaintiffs, viz. $5,901.26, the following sums, amounting to $3,111.74, were applied as contemplated by the agreement: $1,000 toward the discharge of the debts of defendants; $250 expended in real estate improvements; $1,700 expended in the purchase of cattle; $161.74 expended for labor, hay, and taxes; that the balance, $2,789.52, was misapplied by the defendants, and appropriated to their own use; that defendants are accountable to the plaintiffs for that amount, in which, if it had been properly applied, plaintiffs would have been entitled to a one-half interest; that defendants are also chargeable for the money received for the five head of cows sold by them, in which plaintiffs are entitled to a one-half interest, making the total amount due the plaintiffs from the defendants $1,517.26.

The court then concludes by finding generally for the plaintiffs; that the receiver was properly appointed to take charge of the partnership property; that certain personal property in his hands belonged to the plaintiffs and should be returned to them; that certain other personal property in his hands is the individual property of defendants and should be returned to them; that 57 head of neat cattle, as described by the receiver, and the hay mentioned by him, as well as the cattle brand, are partnership property, and should be sold by the receiver in the manner provided by law for the sale of property upon execution; that the receiver care for the cattle until the sale, and be authorized to incur all necessary expense for feeding and handling them; that the two notes of defendants for $800 each, being merged in the judgment, be canceled; and that the proceeds of the sale of the cattle be divided equally, one-half to be set aside for the plaintiffs, and the remaining one-half applied: (1) To payment of the costs of the action, the receiver's costs and expenses incident to the care and sale of the property, and his compensation; (2) to the payment of the sum of $1,517.26 found due to the plaintiffs; (3) the balance, if any, to be delivered to the defendants. Judgment was thereupon entered in favor of the plaintiffs for the said sum of $1,517.26 and costs, and ordering the sale of the cattle in the receiver's hands and distribution of the proceeds as aforesaid, and that the partnership then existing be dissolved. There was a general exception by defendants to each and all the findings of fact, conclusions of law, and the judgment.

[1] The principal contention of the defendants, plaintiffs in error here, seems to be that the facts found by the trial court do not show a partnership between the parties, and therefore furnish no ground for an accounting, the appointment of a receiver, or other equitable relief. It was not necessary for the plaintiffs below to show the existence of a partnership to give them a right to an accounting and the other relief granted as to the money paid by them and misapplied by the defendants and the property jointly owned. The petition alleges the making of the written agreement aforesaid and the performance thereof by the plaintiffs on their part, the payment of the money thereby required, including the purchase of cattle of the value of $1,700 with the knowledge and consent of defendants, the conversion by the defendants to their own use of the money so paid without accounting therefor, and their taking exclusive possession and claiming sole ownership of the joint property. It is true that the petition refers to the agreement as a partnership agreement and to the relation between the parties as a partnership. But if upon the facts alleged and found by the court the plaintiffs would be entitled to an accounting and the other relief asked and granted as to the money and property involved, it is immaterial that the relation between the parties may have been erroneously named in the petition or alleged to be a partnership. 1 Cyc. 437; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147; Marston v. Gould, 69 N. Y. 220; Kahn v. Central Smelting Co., 102 U. S. 641, 26 L. Ed. 266; Valdes v. Larrinaga, 233 U. S. 705, 34 Sup. Ct. 750, 58 L. Ed. 1163; Shirley v. Goodnough, 15 Or. 642, 16 Pac. 871. And we think it clear that, whatever the effect of the written agreement or the subsequent conduct and transactions of the parties as to providing for or creating a partnership, and if it be conceded that said agreement was for a partnership at some future time only, a fiduciary relationship was established by the payment of money by the plaintiffs under the agreement and the circumstances stated in the findings entitling them to an accounting; the court having found that the greater part of the money was not applied by the defendants as provided or contemplated by the agreement. 6 Pomeroy's Eq. Juris. §§ 931-933; 1 Cyc. 427; Darrah v. Boyce, 62 Mich. 480, 29 N. W. 102; Petrie v. Torrent, 88 Mich. 43, 49 N. W. 1076; Wilson v. Kennedy, 63 W. Va. 1, 59 S. E. 736; Templeton v. Bockler, 73 Or. 494, 144 Pac. 405; King v. Barnes, 109 N. Y. 267, 16 N. E. 332.

[2] But the court found that certain cattle had been purchased by the parties with money furnished by the plaintiffs under the agreement, with the intention of both parties at the time of the purchase that such cattle should be the property of plaintiffs and defendants with equal interests therein, that the cattle were thereupon treated and cared for by said parties as their joint property, and that Arthur Reece, one of the defendants, transferred to C. J. Rhoades, one of the plaintiffs, a half interest in the brand belonging to him with which the cattle were branded. And the court found as a conclusion of law that a partnership was created as to said cattle. We do not construe that finding as holding that the partnership was created or existed merely by operation of law without an agreement of any kind, but that a partnership was to be inferred from the intention and conduct of the parties in connection with the written agreement providing for the investment of a greater part of the money to be paid thereunder in live stock and improvements. We think it unnecessary to consider very closely whether the findings of fact are sufficient to justify that conclusion. The parties were at least co-owners of the cattle, and the plaintiff had expended money, and both of the parties' time and labor jointly, in caring for and providing feed for them; and such joint ownership, under the circumstances of the case and the claim of defendants of sole ownership and their threat to sell and retain the proceeds for their own benefit, would, we think, authorize equitable relief. Freeman on Cotenancy, § 321; 1 Cyc. 417; 6 Pomeroy's Eq. Juris. § 933.

[3] If not strictly a partnership the relation between the parties as to the cattle might not improperly be considered and treated as a joint adventure, and it would be immaterial that the court called it a partnership, for a joint adventure partakes of the nature of a partnership and is governed substantially by the same rules of law; the principal distinctions being that a joint adventure usually relates to a single transaction, though it may comprehend a business to be continued for a period of years, and that one party may sue the other at law for a breach of the contract or a share of the profits or losses, or for contribution for advances, without, however, precluding a suit in equity for an accounting, or for dissolution. And the contract need not be express, but may be implied from the conduct of the parties. 23 Cyc. 453, 455, 461; Goss v. Lanin, 170 Iowa, 57, 152 N. W. 43; Saunders v. McDonough, 191 Ala. 119, 67 South. 591; McRee v. Quitman Oil Co., 16 Ga. App. 12, 84 S. E. 487. The principles controlling the relation are stated on pages 455 and 456 of 23 Cyc., and in Goss v. Lanin, supra. In such a joint venture fiduciary relations are created between the parties, as in a partnership; and neither of the parties is authorized to appropriate the common property to his own use, without the consent of all his associates, or to deal therewith so as to

secure an unfair advantage over those interested with him.

[4] The statement is made and repeated several times in the brief of plaintiffs in error that the trial court found that the written agreement had been abandoned by the parties. We do not so understand the findings. We suppose such statement to be based upon one paragraph to the effect that soon after the agreement was entered into the parties began a course of conduct apparently inconsistent with the agreement. But that must be read and considered in connection with the other findings, which plainly show that the trial court regarded the agreement as continuing in force and as having been complied with on the part of the plaintiffs. Several of the conclusions of law are criticized as a finding of fact rather than of law, or containing findings of fact. But we find in the record no specific exception to the findings or conclusions on that ground. There was merely a general exception. It was held in Hilliard v. Douglas Oil Fields, 20 Wyo. 201, 122 Pac. 626, that a mere general exception to findings of fact and conclusions of law made in accordance with a request therefor will not present for consideration an objection that the findings are imperfect or their sufficiency as a compliance with the statute upon a request for a separate statement in writing of findings of fact and conclusions of law. But we do not regard the fact that some findings of fact may have been blended with the conclusions of law as prejudicial to the plaintiffs in error. Indeed, in some of such instances referred to in the brief the matters complained of as a finding of fact rather than a conclusion of law is but a restatement, though in somewhat different language, of facts found and stated in the findings of fact.

We think it necessary only to say in conclusion that, in our opinion, the facts found by the court clearly present a case for equitable relief and support the relief granted. The judgment will therefore be affirmed. Affirmed.

BEARD, J., concurs. SCOTT, J., did not sit.

(53 Mont. 526)

B. F. GOODRICH RUBBER CO. v. HELENA MOTOR CAR CO., et al. (No. 3764.)

(Supreme Court of Montana. May 19, 1917.)

CORPORATIONS ⚷342—DIRECTORS—LIABILITY FOR DEBTS—SUFFICIENCY OF RESIGNATION.

Notwithstanding Rev. Codes, § 3852, authorizing any director or officer of a corporation to resign by delivering or mailing his written resignation to the secretary or president and filing with the county clerk and recorder a duplicate of the resignation, with an affidavit of delivery or mailing, and by publishing notice of such resignation, where a director and secretary of a corporation delivered his written resignation to the president, and thereafter refrained from acting as an officer or director, he was not liable for the debts of the corporation subsequently incurred, because of the subsequent failure of the other directors to file an annual statement, since such resignation would have been sufficient at common law, and the statute does not prescribe an exclusive method.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1486-1488.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by the B. F. Goodrich Rubber Company against the Helena Motor Car Company and others. From a judgment for plaintiff, defendant Herman A. Freyler appeals. Reversed and remanded, with directions.

A. P. Heywood and Edward Horsky, both of Helena, for appellant. Wight & Pew, of Helena, for respondent.

SANNER, J. On October 11, 1913, Herman A. Freyler, R. A. De Witt, and Claud Robinson became directors of the corporation, Helena Motor Car Company. Freyler continued to act as such director until December 1, 1913, at which time he entered into a contract for the sale of all his stock in the company and delivered to its president the following writing:

> "Helena, Montana, Dec. 1, 1913.
>
> "Board of Directors of Helena Motor Car Co., City—Gentlemen: I hereby tender my resignation as secretary and a director of the Helena Motor Car Company, the same to take effect at once.
>
> "Yours truly, Herman A. Freyler."

Thereafter, and on January 31, 1914, the company became indebted to the respondent in the sum of $173.57, which upon demand it failed to pay, whereupon the respondent brought this action against the company, Freyler, De Witt, and Robinson—joining the latter three because as directors they had failed to file the annual statement required by law and due on January 20, 1914. Freyler resisted the suit, but judgment was entered against him according to the complaint, and from that judgment he prosecutes this appeal.

The contention of the appellant was and is that by virtue of his resignation he had ceased to be a director of the company before the duty to file the annual statement accrued, and therefore cannot be held to answer for the failure in that respect; while the respondent insists that the writing above quoted was ineffective, under section 3852 of the Revised Codes, and therefore Freyler is responsible. The section referred to provides:

> "Any director, trustee or other officer of a corporation may resign his office by delivering to the secretary or president of the corporation, or depositing in the post office, * * * addressed to the corporation, at its principal place of business, his written resignation, and filing in the office of the clerk and recorder of the county where the principal office or place of business of the said corporation is situated, a

> duplicate of the said resignation, together with an affidavit of the delivery or mailing of said resignation, as above specified, or an acknowledgment of service thereof and by publishing in two consecutive issues of the official paper of the county where said company may be doing business, a notice of said resignation, and the director, trustee, or other officer shall upon such filing and publication no longer be responsible for any act or default of the corporation, or of the other officers thereof, occurring after the date of said filing: Provided, however, that any director, trustee, or other officer, shall also comply with the by-laws of the corporation relating to resignations of directors or officers. This act shall apply to resident directors of foreign corporations having a place or places of business in this state, as well as to directors and other officers of domestic corporations."

The corporation had no by-laws on the subject, and it is conceded that Freyler did nothing more than to deliver the writing above mentioned to its president and thereafter to refrain from acting as an officer or director of the company. At the common law, however, this would have sufficed (3 Thompson on Corporations, §§ 3886, 4358; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662), and therefore was sufficient here, unless the section just quoted prescribes an exclusive method for resigning a directorship. We do not believe that such is its effect. Its language does not clearly indicate an intention to prescribe an exclusive method, but rather indicates a mode which is permissive, designed primarily for cases where the ordinary method may not be available or where positive proof of the resignation may be desired. The section forms no part of the law imposing the duty of filing annual statements (chapter 63, Tenth Session Laws), and there is no special reason to believe that its provisions were enacted for the benefit of creditors. Counsel for respondent suggests that:

> "It prevents a man of great financial prominence, who has become a director in a corporation, from secretly resigning, and permitting creditors to make contracts with the corporation upon the strength of his supposed connection therewith, and using his previous secret resignation as a shield from liability."

But we do not understand that directors are personally liable at all events for the debts of the corporation, or that the creditors deal with a corporation upon the contingent liability of its directors, effective only in case the latter fail to see that annual statements are filed. Least of all can creditors be especially concerned in the mode by which some one, on whose responsibility they could not have relied, has severed his relations with the corporation before their debt accrued or the annual statement was due.

In our opinion, the resignation of the appellant Freyler from the board of directors of the Helena Motor Car Company was sufficient. He had ceased to be a director of the company before the debt evidenced by this judgment was incurred and before the annual statement was due. Failure to file that statement, or cause it to be filed, is therefore not a wrong which can be imputed to him; and as this is the only ground on which the claim of his liability is based, it follows that the right result was not reached in this case.

The judgment appealed from is reversed, and the cause is remanded, with directions to enter judgment for the appellant.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(53 Mont. 531)

BROCKWAY v. BLAIR. (No. 3768.)

(Supreme Court of Montana. May 19, 1917.)

1. APPEAL AND ERROR 🔑757(3)—BRIEFS—SPECIFICATIONS OF ERROR.

As expressly provided by Supreme Court Rule 10, subd. "b" (123 Pac. xii), where the admission of evidence is specified in the brief as error, the full substance of the evidence admitted should be quoted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092.]

2. CONTRACTS 🔑169—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

If the language of an agreement is clear and expresses the intention of the parties explicitly, it needs no interpretation; but, if it is not clear and free from ambiguity, the attendant circumstances under which it was made may be examined to ascertain the intention of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752.]

3. EVIDENCE 🔑442(1), 461(1)—PAROL EVIDENCE—AMBIGUITY—INCOMPLETE WRITING.

Under Rev. Codes, §§ 5018, 7873, providing that when the terms of an agreement have been reduced to writing no evidence of the terms thereof is admissible other than the contents of the writing itself, a written agreement between plaintiff and defendant, whereby defendant agreed to furnish automobiles for plaintiff to sell in certain counties for 15 per cent. of the sales, all automobiles to be furnished on deposit of $100, and all orders and specifications to be in Lansing, 10 days prior to shipment, was not unambiguous so as to exclude evidence that it was understood that plaintiff was not expected to complete sales by his own unaided efforts but was to have the assistance of defendant's agents in closing sales, as the writing appeared to be nothing more than a brief memorandum of certain points of the agreement, specifying no prices or terms of sale and not making it clear whether cars were to be ordered from defendant or directly from the factory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1882, 2129.]

4. APPEAL AND ERROR 🔑757(4)—BRIEFS—SPECIFICATIONS OF ERROR.

The Supreme Court would be justified in refusing to consider an assignment of error complaining of the giving of an instruction not set out as required by Rule 10, subd. "b" (123 Pac. xii), with respect to specifications of error in the briefs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092.]

5. TRIAL 🔑296(2)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for commissions on sales of automobiles under an agreement whereby plaintiff was to receive assistance from defendant's agents in closing sales, an instruction, authorizing recovery if plaintiff was instrumental in making any sale, though too indefinite standing alone, was not misleading, where the court further charged that in order for plaintiff to recover the jury must find that he was the moving cause of the sale being effected, and that the sale would not have been made had it not been for his solicitation and efforts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708.]

6. TRIAL 🔑295(1) — INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

Every paragraph of the charge is to be read with the context, and all the instructions considered together as constituting a single charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by B. G. Brockway against H. B. Blair. Judgment for plaintiff, and defendant appeals. Affirmed.

Miller & O'Connor, of Livingston, for appellant. Nichols & Wilson, of Billings, for respondent.

HOLLOWAY, J. In this action, plaintiff seeks to recover commissions alleged to be due upon the sale of three automobiles, under the following written agreement:

"This agreement made and entered into this 5th day of May, 1913, by and between H. B. Blair, of Livingston, and B. G. Brockway, of Billings, Montana, as follows: The said first party agrees to furnish Reo automobiles for the said second party to sell in Yellowstone and Carbon counties in the following manner: The said second party to get fifteen per cent. (15) of sales. Said first party to furnish all automobiles on deposit of one hundred dollars ($100.00) each, at time of order. All orders and specifications to be in Lansing ten days prior to shipment. H. B. Blair, First Party,
"By R. H. Bishir.
"B. G. Brockway, Second Party."

The circumstances under which a car was sold to Allard, one of the purchasers, will illustrate the three sales involved in this controversy. Cettergren was Brockway's agent at Laurel, and Bishir and Green were Blair's agents who worked to some extent in that vicinity. Cettergren testified that he made several trips to see Allard concerning the sale to him of a Reo car; that he demonstrated the car to Allard several times; that he took Bishir to Allard, and Bishir demonstrated the car to him; that afterwards and on the day Allard expressed his intention to purchase a car he introduced Green to Allard; that a sale was then completed by Green, who delivered the car to Allard. On cross-examination, the witness said:

"I know that Mr. Green would not have sold the car if it hadn't been for me, and I think I would have sold the car if it hadn't been for Green. Mr. Allard said he was ready to buy a car before Mr. Green spoke to him."

From the fact that a general verdict was returned in favor of plaintiff, we must assume that the jury accepted this testimony as true, so far at least as it tends to disclose the part which Brockway's agent played in effecting the sale. It is apparent that the efforts of Cettergren alone did not produce the sale, neither did the unaided efforts of Blair's agent effect it. The sale resulted from their combined efforts.

[1] Upon the theory that the agreement does not in terms expressly cover the case, the court permitted evidence to be introduced to the effect that it was understood by both parties, at the time the contract was executed, that Brockway was not expected to go out and complete the sales by his own unaided efforts; that, if it was necessary for him to have the assistance of Blair's agents in the community to close or complete a sale, such assistance would be furnished as a part of Blair's obligation under the contract; and that this understanding was carried into effect in making the sales which furnish the foundation for this controversy. The admission of this evidence is specified as error—as violating the provisions of sections 5018 and 7873, Revised Codes, which, so far as applicable here, are to the effect that, when the terms of an agreement have been reduced to writing by the parties, no evidence is admissible of the terms of the agreement other than the contents of the writing itself. "The full substance of the evidence admitted" is not quoted as required by Rule 10, subd. "b," of the rules of this court (123 Pac. xii), and the attention of counsel is directed to the fact that these rules are to be honored by their observance—not by their breach.

It is the contention of appellant that, under the terms of the agreement, Brockway was not entitled to any commission unless and until he made a sale complete in itself or made a contract of sale under which Blair could maintain an action for damages in case the prospective purchaser failed or refused to take the car. In other words, it is appellant's contention that the terms of the contract are explicit; that they interpret themselves and leave no room for the application of rules of construction or the introduction of evidence explanatory of the circumstances under which the agreement was made.

[2, 3] If the sale had been made by the unaided efforts of Brockway or his agent, there could not be any question of plaintiff's right to the commission. If the sale had resulted from the unaided efforts of Blair's agents, Brockway could not lay claim to the commission, for the contract did not give him exclusive territory. But what are the rights of the parties under the contract as they apply, or can be made to apply, to the Allard sale? Sections 5018 and 7873, above, refer to contracts complete in themselves and free from ambiguity and uncertainty. Sections 5025, 5030, 5036, and 5038 provide rules of

interpretation where the terms of the agreement fail to explain themselves fully or are ambiguous or uncertain. If the language of the agreement is clear and expresses the intention of the parties explicitly, it needs no interpretation (Ming v. Pratt, 22 Mont. 262, 56 Pac. 279); but, if it is not clear and free from ambiguity, then the attendant circumstances under which the contract was made may be examined to furnish a key to the intention of the parties (Alywin v. Morley, 41 Mont. 191, 108 Pac. 778; Quirk v. Rich, 40 Mont. 552, 107 Pac. 821). We are not prepared to agree with counsel for appellant that the meaning of the language of this agreement is so far free from doubt that it can be said as a matter of law that it furnishes its own interpretation. That the writing does not contain all the terms of the agreement is apparent at once. Neither the price at which the cars were to be sold nor the terms of sale are specified. Certainly, it was not intended that Brockway might fix any price upon the cars or any terms which would suit him or better enable him to sell them. It is uncertain, too, whether Brockway was to order cars from Blair or directly from the factory. Indeed, the writing appears to be nothing more than a brief memorandum of certain points of their agreement, and the court ruled correctly in admitting the evidence.

Upon the facts found, Brockway was entitled to his commission upon these sales, for the parties had agreed that such assistance as was given him was due to him under the contract.

[4-6] The second assignment is that the court erred "in giving defendant's instruction No. 2½." The instruction is not set out as required by Rule 10, subd. "b." The defendant below is the appellant here, and we would be justified in refusing to consider the assignment because of this violation of the rule, or we might content ourselves with saying that a party will not be heard to complain of the action of the court in giving an instruction which he requests; but waiving the failure to observe the rule, and assuming, from the argument presented, that fault is found with plaintiff's offered instruction No. 1, given as instruction No. 4, and that the reference to defendant's instruction No. 2½ is merely an error, it is to be observed that, if instruction No. 4 stood alone and was the sole criterion for determining the circumstances under which plaintiff would be entitled to commission upon a sale in the making of which he received assistance from defendant, then there would be ground for appellant's complaint. The phrase, "was instrumental in making any sale," conveys practically no meaning. It is too indefinite to be of service to the jury in applying the evidence, but one particular paragraph of the entire charge cannot be segregated from the rest. Every paragraph is to be read with the context, and all the instructions considered together as constituting the single charge of the court. Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45; Michalsky v. Centennial Brewing Co., 48 Mont. 1, 134 Pac. 307.

At the instance of defendant, the court gave the following instruction:

> "You are instructed that, in order for the plaintiff to recover by reason of any sale being made by him, you must find that the plaintiff was the moving cause of the sale being effected, and that the sale would not have been made had it not been for the solicitation and efforts of the plaintiff."

The court intended, and the jury must have understood, that these two instructions should be considered together as stating the circumstances under which the plaintiff would be entitled to the commission even though he received assistance from the defendant or his agent in completing the transaction. The two instructions are not incongruous or contradictory. The term "instrumental" is defined by the court to mean such contribution by the plaintiff as that, without it, the sale would not have been made. In other words, the plaintiff must have been the moving cause which produced the sale or the procuring cause of the sale. Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345, approved in Shober v. Blackford, 46 Mont. 194, 127 Pac. 329. We think the jury could not have been misled, and that the evidence is sufficient to make out a case under the rule thus announced.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(53 Mont. 519)

KANE v. KANE. (No. 3767.)

(Supreme Court of Montana. May 15, 1917.)

1. DIVORCE 🔑303(1), 309—CUSTODY AND SUPPORT OF CHILDREN—MODIFICATION OF DECREE.

Under Rev. Codes, § 3678, providing that in an action for divorce the court may give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same, where a husband applied for modification of a decree making no mention of a child so as to permit him to see the child, and the wife asked that the decree be modified so as to require the husband to contribute to the child's support, the welfare of the child should have been the paramount consideration with the court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793, 803.]

2. DIVORCE 🔑297—CUSTODY AND SUPPORT OF CHILDREN—AGREEMENTS OF PARTIES.

Where on the same day on which a decree of divorce was granted a wife, making no mention of a child, the husband and wife entered into a separation agreement by which the wife was given the custody of the child and agreed to support it, though such agreement was binding upon the parties, it was not binding upon the child or the court, and, notwithstanding such agreement, the court might require the husband to contribute to the child's support, and might permit him to visit the child if the interests of the child would be thereby promoted.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 780.]

3. DIVORCE 🔑303(3)—CUSTODY OF CHILDREN —MODIFICATION OF DECREE—EVIDENCE.

On an application for modifying a divorce decree, the evidence did not support the wife's contention that by a separation agreement the husband relinquished his right to see the child, or that she understood that he agreed to do so, and that such understanding on her part was a substantial inducement to her to enter into a separation agreement, where she testified that, though the terms of the agreement were fully discussed beforehand, she did not know she was to have the custody of the child until the agreement was finally submitted for her signature.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 794.]

4. DIVORCE 🔑303(1)—CUSTODY OF CHILDREN —MODIFICATION OF DECREE.

On a husband's petition to modify a divorce decree to permit him to visit a child of the parties, the time, place, and duration of the visits, his conduct during them, and the extent to which he might have the child in his custody were all proper subjects for regulation by the court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 793.]

5. DIVORCE 🔑309—SUPPORT OF CHILDREN—MODIFICATION OF DECREE.

Where a husband petitioned the court to modify a divorce decree so as to permit him to see a child of the parties under such regulations as the court might impose, he would be in no position to complain if the court should require, as a condition precedent to his right to visit the child, that he contribute to the child's support.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803.]

6. DIVORCE 🔑303(1), 309—CUSTODY AND SUPPORT OF CHILDREN—MODIFICATION OF DECREE.

Where a husband petitioned the court to modify a divorce decree so as to permit him to see a child, and the wife asked that the husband's petition be denied, and that the decree be modified so as to require the husband to contribute to the child's support and it appeared that a separation agreement, giving the wife the custody of the child and requiring her to provide for its support, did not adequately provide for the child's welfare and secure to the parties the rights to which they deemed themselves entitled, the court should have made some appropriate order to meet these ends, instead of merely denying the husband's petition and taking no action on the wife's petition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793, 803.]

7. DIVORCE 🔑299—CUSTODY OF CHILDREN—MODIFICATION OF DECREE.

On a husband's petition for the modification of a divorce decree so as to permit him to see a child, unless he is morally unfit to associate with the child, he should be granted the right asked.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 788.]

Appeal from District Court, Valley County; Frank N. Utter, Judge.

Divorce suit by Margaret A. Kane against Richard H. Kane. From an order denying a petition to modify the decree, defendant appeals. Reversed and remanded, with directions.

Norris, Hurd & McKellar, of Glasgow, for appellant. Slattery & Kline, of Glasgow, for respondent.

HOLLOWAY, J. On April 10, 1915, Richard H. Kane and Margaret Kane, his wife, entered into a separation agreement which, among other things, provided that the wife, in consideration of $1,500 paid to her, relinquished all claims against the husband and his property, and agreed to support, maintain, and educate the minor child, the issue of the marriage, at her own proper expense and without further cost or expense to the father. On the same day the wife was awarded a decree of divorce on the ground of extreme cruelty, but no mention whatever was made of the child. The father undertook to visit the child, but was prevented by the mother, and on May 20, 1915, he petitioned the court to modify the decree so as to permit him to see the child under such regulations as the court might impose, and to prohibit the mother from removing the child from Glasgow, where both parents then resided. In response to an order to show cause the mother answered, pleading the settlement agreement and alleging that it was understood by both parties to it that the mother was to have the exclusive custody of the child, and that the father was not to enjoy the privilege of visiting it; that the father's visits are intended to and do annoy and vex the mother, and that the father is not a fit or proper person to associate with a child of such tender years. The answer concludes with a prayer that the father's petition be denied, that the decree be modified so as to require the father to contribute to the support of the mother and child, and that the father be compelled to pay an attorney fee on account of the supplemental proceedings At a hearing had, the father and mother testified at length. The court denied the father's petition, but made no order upon the counterpetition of the mother. From the order made, this appeal is prosecuted.

There is not any controversy over the rules of law applicable, and practically no dispute as to the facts developed at the hearing. While there is some evidence which reflects unfavorably upon the father, it seems reasonably certain that it could not have been deemed sufficiently prejudicial of itself to warrant the order which, in effect, denies the father the right to see or communicate with his child altogether. As we understand the testimony, the mother's objection to the father's visits is not grounded upon the latter's moral unfitness to associate with the child, but rather upon the fact that such visits annoy her and interfere with her work, and particularly upon the theory that, since under the separation agreement she is compelled to support the child, the father has no right to visit it so long as he does not contribute to its maintenance, and it must have been this theory which found favor with the court.

[1] We are unable to agree with counsel for respondent as to the character of the proceeding instituted by the father in filing his petition in the court below. Whatever may have been his intention in the premises, what he actually did was to invoke the jurisdiction of the court to modify the divorce decree so as to provide for the custody, control, and education of the child (subjects omitted altogether from the decree as originally rendered), as authorized by section 3678, Revised Codes. It would be difficult to conceive of a legal proceeding to regulate the father's visits to the child, independently of an order providing for its custody and control. Likewise the counterpetition of the mother, in legal effect, had the like purpose in view. It invoked the jurisdiction of the court to modify the decree so as to provide for the support and maintenance of the child. Under these circumstances the welfare of the child should have been the paramount consideration with the court. Brice v. Brice, 50 Mont. 388, 147 Pac. 164.

[2] Though the separation agreement is binding upon the parties to it and regulates their rights and obligations inter sese, it is not binding upon either the child or the court. If its provisions for the care of the child are inadequate or become inadequate, the father may be called upon to supplement them by further contributions, notwithstanding the agreement by the mother releasing him from further costs or expenses. The child is the ward of the court, and, even if the parents agreed that the father should not enjoy the privilege of seeing his offspring, the court may nevertheless authorize him to visit it if the interests of the child will be thereby promoted.

[3] The evidence does not support the mother's contention that the father relinquished his right to see the child, or that she understood that he agreed to do so, and that such understanding on her part was a substantial inducement to her to enter into the separation agreement. She testified that though the terms of the agreement were discussed fully beforehand, she did not know that she was to have the custody of the child until the agreement was finally submitted for her signature.

[4, 5] The conditions under which the father's visits may be made, the time, place, and duration of them, his conduct during such visits, and the extent to which he may have the child in his custody are all proper subjects for regulation by the court. It cannot be said that by the modification sought, the father gains a distinct advantage without any concomitant burden. When he submitted to the jurisdiction of the court, he was there for any proper order the court might make, and if the court requires him, as a condition precedent to his right to visit his child, that he make further reasonable contributions to its support, he will not be in any position to complain.

[6, 7] Since both father and mother applied for such modification of the decree as would provide for the child's welfare as well as secure them in the rights to which they deem themselves entitled, and since it is apparent that the provisions of the contract are inadequate for either purpose, we think the court was called upon to make some appropriate order to meet those ends. Unless it can be said with reasonable certainty that the father is morally unfit to associate with the child, the dictates of humanity call for such regulations as will permit him to see his own offspring. "It must be borne in mind that the tie between parent and child is one of the most binding in human life, one which the law of nature itself has established. No legislation, no judicial interpretation of legislation, should lightly disregard the reciprocal duties of this relationship." State ex rel. Giroux v. Giroux, 19 Mont. 149, 47 Pac. 798.

In our judgment, this record presents a case wherein the court failed to exercise its discretion when it should have done so, rather than a case wherein it abused its discretion.

While the court might, with propriety, forbid the mother to remove the child from the jurisdiction of the court, there was no such showing made, if indeed there could be, which would justify the court in compelling the mother to reside permanently in the same city as the father may choose as his place of residence.

The order is reversed and the cause is remanded, with directions to the trial court to take such further proceedings as will result in a proper modification of the decree, in conformity with the views herein expressed. Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(53 Mont. 494)

HALEY v. HOLLENBACK. (No. 3759.)

(Supreme Court of Montana. May 15, 1917.)

1. ATTORNEY AND CLIENT ⟹147—COMPENSATION—CONTINGENT FEES—VALIDITY OF CONTRACT.

Rev. Codes, § 6422, provides that the compensation of an attorney is governed by agreement, express or implied, which is not restrained by law. Section 7153 declares that the measure of compensation of attorneys is left to the agreement of the parties. Sections 6397 and 6398, imposing certain restraints on attorneys, do not mention a contract contingent upon the success of the litigation. *Held*, that the effect of the provisions of sections 6422 and 7153 is to abolish the common-law doctrine of champerty and maintenance as to contracts for compensation between attorney and client, except as it is retained and modified in sections 6397 and 6398, so that a contract between an attorney and client for a fee contingent upon the success of the litigation, which would necessarily include a search for proper evidence and bona fide witnesses, is valid.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 351.]

2. Contracts 🔑129(3)—Validity—Legality of Object.

A litigant may also employ a layman to search for legitimate evidence and bona fide witnesses for a compensation contingent upon the success of the litigation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 617, 618.]

3. Contracts 🔑103—Construction—Legality.

The fact that the obligee may abuse a contract and make it operate to the public injury does not in itself invalidate it, and parties are entirely free to contract as they please so long as the particular agreement is not prohibited by law and does not contemplate the doing of any illegal act.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 468–476.]

4. Contracts 🔑153—Construction—Rule.

In construing contracts the obligation is upon the courts to give them such interpretation as will make them lawful if this can be done without violating the intention of the parties, and a contract will be upheld unless it must receive such interpretation as will compel the conclusion that it contravenes public policy or some express provision of law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by Andrew J. Haley against Matilda Hollenback. Judgment for plaintiff, and defendant appeals. Affirmed.

Odell W. McConnell, A. J. Galen, and E. G. Toomey, all of Helena, for appellant. Carleton & Carleton, of Helena, for respondent.

BRANTLY, C. J. In this action plaintiff recovered a verdict for $500 and costs. Defendant has appealed from the judgment entered thereon and from an order denying her a new trial. The ground of recovery alleged is a breach of contract.

On April 29, 1910, defendant's son, John Hollenback, was electrocuted by coming in contact with a wire heavily charged with electricity. Hollenback was then in the employ of the Stone & Webster Engineering Corporation, which was engaged in the construction of a dam in the Missouri river, in Lewis and Clark county. Defendant thereafter brought an action against the corporation to recover damages for the death of her son, alleging that it was caused by the culpable negligence of the corporation. This was determined in her favor, the jury awarding her a verdict for $18,000. After reciting the foregoing facts, the complaint herein alleges:

"III. Plaintiff avers that during the prosecution of said action of Matilda Hollenback v. Stone & Webster Engineering Corporation it became and was necessary in order to properly prepare said cause for trial that this defendant, plaintiff in the aforesaid cause of Hollenback v. Stone & Webster Engineering Corporation, should employ some one to hunt up the legitimate and proper evidence which would show how the accident occurred, also to show the negligence of the defendant, if such evidence in fact actually existed, as this plaintiff alleges that it did.

"IV. Plaintiff avers that in view of all the foregoing, and on or about the month of ——, 1910, he made and entered into a contract with this defendant under and by virtue of which he was to search for bona fide witnesses and to hunt up such bona fide, competent, and legitimate testimony as he might be able to obtain to be produced upon the trial of the defendant's said case, and to properly advise and to assist in all reasonable and proper ways this defendant generally in the prosecution of said cause, and that, in consideration of the same, defendant promised and agreed with plaintiff that, if she should recover in her said suit, she would pay plaintiff well for such services.

"V. That in pursuance of the aforesaid agreement plaintiff entered upon the due performance of his said contract with this defendant and devoted a large amount of time in finding and endeavoring to find witnesses who were conversant with the aforesaid facts and who would testify as to the true facts regarding the same upon the trial of said cause; that plaintiff spent considerable sums of money in traveling around and going from place to place in search of evidence. That at one time plaintiff in the due performance of his said duties under said contract made a trip to the city of Butte, in the state of Montana, incurring considerable expense on account of the same. * * *"

It is then alleged that the plaintiff fully performed the contract on his part; that upon recovery of the judgment in her action defendant became indebted to him for the reasonable value of his services; that she had failed and refused to recognize the contract or to pay plaintiff any sum whatever; and that there is due plaintiff the sum of $1,500, with interest and costs. Defendant's general demurrer having been overruled, she answered, joining issue upon all the material allegations of the complaint.

[1, 2] Counsel for defendant assail the integrity of the judgment on the grounds that the contract is void because it contravenes public policy, and that the court erred in admitting and excluding evidence. The validity of the contract was questioned by the demurrer, and, during the trial, by motion for nonsuit and for directed verdict. The contention is that, while a suitor may lawfully employ a layman to search for and find witnesses who know the facts relevant and material to the issue which is or will be brought in controversy, for compensation to be paid without regard to the result, if the obligation to pay compensation becomes binding only upon the event of the suitor's success, the contract is illegal and void, in that it has a tendency and opens a strong temptation to procure perjury. They insist that the agent so employed, realizing that he will receive nothing unless the suitor is successful, will naturally produce or secure witnesses whose testimony will win the suitor's case. Hence the contract alleged comes within the

class of those denounced by this court in Quirk v. Muller, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647, and Hughes v. Mullins, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209.

In the first of these cases the plaintiff had obligated himself to furnish such evidence as would win the suit. In the second the plaintiff had undertaken to furnish evidence which would produce results favorable to the suitor in one or both of two pending suits, viz.: (1) Win one or both of them upon trial; or (2) put the plaintiff in such a position that he could force a favorable settlement of one or both of them. All the courts, so far as their decisions have been called to our attention, or we have examined them, hold such contracts void. Mr. Justice De Witt, in Quirk v. Muller, supra, quoted with approval the rule as stated by Mr. Bishop, as follows:

> "The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts." Bishop on Contracts, § 476.

In 6 Cyc. at page 864, it is said:

> "By the common law, and in most of the states which have adopted the common law or enacted statutes on the subject, an agreement by a third person other than an attorney to defray the expenses of a suit in which he has no interest, or to give substantial support in aid thereof in consideration of a share of the recovery, is champertous."

On the same page it is further said:

> "An agreement to furnish such evidence as shall enable the party to recover a sum of money, or other thing, by action, and to exert influence for procuring evidence to substantiate the claim on condition of receiving a portion of the thing recovered, is champertous."

The contract under consideration in this case, however, does not fall within the class of those considered in Quirk v. Muller or Hughes v. Mullins, supra, nor within any of the cases cited in support of the text quoted from Cyc. Plaintiff did not agree to furnish evidence that would establish defendant's claim, nor was he to have any portion of the possible recovery. No authority has been called to our attention, nor have we been able to find any, which holds such a contract open to objection because it contravenes public policy. Under the common law in England, a contract by an attorney to conduct an action for compensation contingent upon recovery is champertous and void. Hilton v. Wood, L. R. Eq. 432; Earle v. Hopwood, 7 Jur. N. S. 775. In some of the states this rule has been recognized and enforced. Ware v. Russell, 70 Ala. 174, 45 Am. Rep. 82; Lafferty v. Jelley, 22 Ind. 471; Roberts v. Yancey, 94 Ky. 243, 21 S. W. 1047, 42 Am. St. Rep. 357; Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586. In some of these cases the contract of the attorney included also a stipulation that he would pay the costs of the litigation. This element, however, does not seem to have been regarded as determinative of the invalidity of the contract. Other authorities hold that such a stipulation is invalid. Croco v. Oregon Short Line Ry. Co., 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285. As the contract in this case does not include such a stipulation, the question whether it would be lawful in this state is not here considered or determined.

By the current of authority a contract for contingent compensation is held valid. Smits v. Hogan, 35 Wash. 290, 77 Pac. 390, and citations in note to this case in 1 Ann. Cas. 299. In this state, except in so far as they are prohibited by statute, attorneys are free to enter into such contracts with their clients for compensation as they choose. Section 6422 of the Revised Codes declares:

> "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. * * *"

Section 7153 declares:

> "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. * * *"

When we come to look for the restraints imposed by law, we find that, aside from those enumerated in sections 6397 and 6398, among which is not mentioned a contract contingent upon the success of the litigant, we do not find any. The effect of the broad provisions found in sections 6422 and 7153 is that they abolish the common-law doctrine of champerty and maintenance in this state relating to contracts for compensation between attorney and client, except in so far as it is retained in modified form in the other sections cited. The Code of the state of Washington contains a provision identical with section 7153 (Ballinger's Code, § 5165). In Smits v. Hogan, supra, the court, after expressing a doubt that the doctrine of champerty ever was in force in Washington, said that, as far as this doctrine relates to the compensation between attorney and client, it must have been repealed by the statute. The same conclusion was reached by the Supreme Court of Utah as to the scope of a similar provision in the Code of that state. Croco v. Oregon Short Line Ry. Co., supra. If such a contract may be made between an attorney and his client, the inquiry arises: Why should it be held unlawful for the client to contract upon the same basis with a layman for such services as the latter may lawfully perform? An action usually cannot proceed without the aid of an attorney. It cannot proceed at all unless the witnesses are found who can testify in support of plaintiff's suit. It cannot be questioned that it is lawful for a litigant to employ another layman at a stipulated compensation, to be paid in any event, to do for him what he could do for himself, viz.: To find the witnesses and to ascertain what the character of their testimony will be. Quirk v. Muller, supra. The physical condition of the suitor may render this course necessary, as where he has been wholly disabled by a personal injury. Add to this that he is penniless and cannot pay for such needed services unless he succeeds in establishing his claim for damages, and the making of such a contract is necessarily the only means by which he can gain assistance. The attorney employed on a contingency in the same case may not have the time nor the disposition to find the witnesses and thus prepare the case for trial. Unless the suitor may employ a layman upon a contingency, he is effectually barred of his right. Does the contract in the latter case have any greater tendency to promote unlawful acts than it has in the other? The attorney may, and frequently does, include in his employment the service of finding witnesses. Does this fact render his contract illegal? We apprehend that no one would assert this. Though the attorney is an officer of the court, he is not for this reason immune from the temptations to which the average man is subject. Besides this, his position affords him greater opportunity to make use of "base appliances" than does that of the average layman. Again, take the case of the penniless suitor. If he employs a stranger to find the evidence and promises compensation in any event, he is within the law. Yet the stranger knows very well that he will not receive any compensation unless the suit is won. This contract in final analysis is in no respect different in its tendency than the one based upon a contingency. In our opinion, no cogent reason can be assigned why, if the one is valid, the other is not equally valid, or why, if the attorney's contract is unobjectionable, that of the layman is not also. The latter has no greater tendency to taint the administration of justice than has the former. The obligation assumed in either case is to perform a legitimate service.

[3] The fact that the obligee may abuse the contract and make it operate to the public injury does not itself invalidate it. Greenhood on Public Policy, p. 27. Parties are entirely free to contract as they please, so long as the particular engagement is not prohibited by law and does not contemplate the doing of any illegal act. That an engagement may be made by its abuse to operate to the public injury is no reason that it should be declared void.

[4] The obligation is upon courts always, in interpreting contracts, to give them such an interpretation as will make them lawful, if this can be done without violating the intention of the parties. In any event a contract will be upheld unless it must receive such an interpretation as will compel the conclusion that it contravenes public policy or some express provision of law. Lawson v. Cobban, 38 Mont. 138, 99 Pac. 128; Dallas v. Douglas, 45 Mont. 114, 122 Pac. 275; Finley v. School Dist. No. 1, 51 Mont. 415, 153 Pac. 1010. The contention of counsel is overruled.

We have examined the other assignments, but find none of them of sufficient merit to deserve special notice.

The judgment and order are affirmed. Affirmed.

SANNER and HOLLOWAY, JJ., concur.

(50 Utah. 35)

FARMERS' & STOCKGROWERS' BANK v. PAHVANT VALLEY LAND CO. et al. (No. 2978.)

(Supreme Court of Utah. May 8, 1917.)

1. Bills and Notes 🔑190—Conditional Indorsement—Validity.

Indorsement of a note before delivery to payee may be conditional.[1]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 454, 455.]

2. Bills and Notes 🔑290—Conditional Indorsement—Validity.

Where the indorsement of a note before delivery is conditional, such conditions, to be binding upon the payee, must be accepted by him, made with notice to him, or acknowledged on his part before or accompanying delivery.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 659.]

3. Bills and Notes 🔑489(6)—Defenses—Conditional Indorsement—Pleading and Proof.

Where a conditional indorsement is relied on as a defense, the fact that the conditions were accepted by or made with notice to or acknowledged on the part of the payee before or accompanying delivery must be pleaded and proved with common certainty.[2]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1611-1616.]

4. Alteration of Instruments 🔑25—Pleading—Answer—Sufficiency.

In an action on a note, allegations of the defendant guarantors in their answer that they had signed the note in blank, and that the note had subsequently been altered by means of a stamp by the words, "Notice and protest waived, and for value received payment of the within note guaranteed by," and that such stamp was placed upon the note fraudulently subsequent to the signing without knowledge of such defendants, did not sufficiently state such defense, since it is not alleged when or by whom the alleged wrongful stamping is done, and, in view of the fact that plaintiff specifically alleged interest payments by the defendants since the maturity of the note, it was material for the defendants to allege in their answer that the alteration complained of was made not only without defendants' consent or knowledge, but with privity or knowledge on the part of the plaintiff before delivery, and that defendants had not since ratified the alteration.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 216-229.]

5. Alteration of Instruments 🔑27(1)—Evidence—Presumptions.

Where a stamping complained of by defendants as an alteration of a note set forth in plaintiff's complaint appears to be regular on its face, without erasures, interlineations, or improper action indicating that it was not fully authorized, the presumption is that the stamping was properly made on the note before the delivery to the plaintiff.

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[1] State Bank of Utah v. Burton-Gardner Co., 14 Utah, 420, 48 Pac. 402.

[2] Flint v. Nelson and Others, 10 Utah, 261, 37 Pac. 479; State Bank of Utah v. Burton-Gardner Co., 14 Utah, 420, 48 Pac. 402.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230–239.]

6. ALTERATION OF INSTRUMENTS ⇐25—RATIFICATION—ACTUAL KNOWLEDGE.

Although a party must have actual knowledge of the alteration of a note before payment to constitute a ratification thereof, where payment is pleaded in the complaint and admitted in the answer without alleging that it was made without defendants' knowledge or consent, ratification is sufficiently implied.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 216–229.]

7. ALTERATION OF INSTRUMENTS ⇐25—PLEADING—STATUTE.

The general rule of pleading alteration of a written instrument under the Code requires that, where the instrument is declared upon in its altered form, the answer should be in the form of a general denial of all the material allegations of the complaint, or a specific denial of the execution of the instruments sued on, or a specific statement of the facts relied upon for a defense.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 216–229.]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by the Farmers' & Stockgrowers' Bank against the Pahvant Valley Land Company and others and Charles A. Welch and others. From a judgment for plaintiff upon the pleadings, defendants Charles A. Welch and others appeal. Affirmed.

Evans, Evans & Folland and Walton & Walton, all of Salt Lake City, and P. H. Neeley, of Coalville, for appellants. Stewart, Bowman, Morris & Callister, of Salt Lake City, for respondents.

CORFMAN, J. This was an action brought in the district court of Salt Lake county by the plaintiff on a promissory note against the defendant Pahvant Valley Land Company, a corporation, as maker, and the 19 other defendants, as guarantors thereof. The complaint is in the usual form, alleging: Execution of the note on the part of the defendant Pahvant Valley Land Company, as maker, and the indorsement thereof by the other defendants guaranteeing payment and waiving notice and protest; that demand was made at maturity upon Pahvant Valley Land Company and the other defendants; that the note has not been paid, except the interest in part; that the plaintiff is the owner and holder of the note; that the note provides for reasonable attorney's fees; and that $1,000 is a reasonable fee to be paid in the suit. Judgment is prayed for $10,000, the principal sum, $761.89, interest, $1,000, attorney's fees, and costs. A copy of the note with indorsements is attached to and made a part of the complaint.

The answer of the defendants here appealing was as follows:

"(1) That prior to the execution and delivery of the said note plaintiff held three certain instruments purporting to be promissory notes executed by the defendant Pahvant Valley Land Company, representing an alleged indebtedness in a sum less than $10,000, and that the plaintiff, for the purpose of enhancing the value to it of the said alleged indebtedness, agreed to advance to the said defendant Pahvant Valley Land Company an additional sum, which, together with the original sum, should amount to $10,000, upon condition that the $10,000 note should receive the indorsements of certain persons among whom were these defendants: that in pursuance thereof, and without any consideration whatever moving to these defendants, they and each of them were induced to, and did, write their names on the back of said note before its delivery to the plaintiff, and that the plaintiff, through its officers and agents, by representations and persuasions induced these defendants to become indorsers on said notes; that at the time of the indorsement of said note by these defendants, as aforesaid, it was represented to each of them that the signatures of certain parties other than those who actually did indorse, to the total number of approximately 30, would be obtained in the same manner as were the signatures of these defendants, and on condition that all such other indorsements should be obtained, and with that distinct understanding, and relying upon said promise and representation, each of these defendants did write his name upon said note as aforesaid, but the said promissory note was not indorsed by the number, nor by the persons whose signatures were to have been thus obtained before these defendants should in any event become liable as indorsers upon said note.

"(2) That these defendants, if bound at all upon said note, were liable as accommodation indorsers, and not otherwise, but that plaintiff did not give notice of nonpayment by the defendant Pahvant Valley Land Company to any of these defendants, and therefore none of these defendants are indebted in any sum whatever to the plaintiff.

"(3) These defendants further allege that an examination by them of the original note upon which they wrote their names in blank as aforesaid has, since they so wrote their names thereon, been altered by the placing thereon of the following words by means of a stamp: 'Notice and protest waived, and for value received payment of the within note guaranteed by'—and that said stamp was placed upon said note fraudulently subsequent to their signing as aforesaid, and without the knowledge or consent of these defendants."

A rely was filed by the plaintiff to the answer.

Before proceeding to a trial, on the day set for hearing in the district court a motion was made by the plaintiff for a judgment on the pleadings, which motion was sustained by the court with the proviso that defendants have until the following day to propose amendments to their answer. Defendants declined to amend their answer, whereupon the court rendered judgment on the pleadings in favor of the plaintiff and against the defendants, from which judgment this appeal is prosecuted. The only question for this court to determine therefore, is whether or not the trial court committed error in sustaining plaintiff's motion for a judgment upon the pleadings.

It is conceded that, in a proper case, courts have the inherent power to grant such motions; and it is likewise conceded that, if the answer of the defendants presented a single material issue to be tried, the court erred in granting the motion in question.

It is contended by appellants that their answer presented and raised four material issues, viz.: (1) Conditional indorsement of note; (2) alteration of indorsement; (3) correctness of note; (4) ownership of note. It is affirmatively alleged in the answer of the appellants that their indorsement of the note in question was obtained with the understanding and their reliance upon the representation and promise that others than themselves were to indorse the note whose signatures were never obtained.

[1-3] It has been held by this court in the case of State Bank of Utah v. Burton-Gardner Co., 14 Utah, 420, 48 Pac. 402, cited and relied upon by appellants in their brief, that such a defense, when properly pleaded, of course, is sufficient; and we think the rule of law as in that case enunciated is the proper one, and is in harmony with the great weight of authority. The difficulty, however, presented by the appellants' pleading in the case at bar is whether or not they have stated facts sufficient to enable the trial court to permit them to go to trial upon such an issue. Before a defense can be successfully made that an indorsement in blank of a promissory note was conditional, it must be shown that the conditional indorsement was accepted by, or was made with notice to, or acknowledged on the part of, the payee before or accompanying the delivery; and it necessarily follows that before proof of such a defense can be offered the facts constituting the defense must be pleaded with common certainty. Flint v. Nelson et al., 10 Utah, 261, 37 Pac. 479; State Bank v. Burton-Gardner Co., supra; Carter v. Moulton, 51 Kan. 9, 32 Pac. 633, 20 L. R. A. 309, 37 Am. St. Rep. 259; Humphreys v. Crane, 5 Cal. 173; Dunham v. Travis, 25 Utah, 65, 69 Pac. 468.

Appellants also made the contention that the note in question has been materially altered since the placing of their names thereon by the words, "Notice and protest waived, and for value received payment of the within note guaranteed by," being written above their signatures, and that said words were stamped upon said note fraudulently and without the knowledge and consent of the appellants.

[4] Again, we are confronted with the question: Have the appellants by their answer stated facts sufficient to entitle them to proceed to the trial of the issue sought to be raised by the allegations of their answer? It is to be observed that appellants' answer signally fails to state when or by whom the alleged wrongful stamping of the words complained of was done. It may be conceded that, under all the authorities, and the statutory law of this state as well, the defense claimed by appellants, when sufficiently pleaded, raised an issue to be tried and submitted to the trial court or the jury properly determining the facts from the evidence submitted; but in the case at bar we think the court was amply justified in ruling that the appellants here had not sufficiently stated such a defense by their answer to the plaintiff's complaint.

In view of the fact that plaintiff specifically alleged in its complaint that interest payments had been made by the defendants at divers times and for stated amounts since the maturity of the note in question, it then became material for the appellants to say in effect by their answer, before they could rely upon it as a defense, that the alteration complained of was made, not only without appellants' knowledge and consent, but that the alteration had been made by the plaintiff, its privity, or with knowledge on the part of plaintiff, before delivery, and, further, that appellants have not since acquiesced in or ratified the alteration. These matters were material allegations, without which the answer of the appellants was insufficient and did not constitute a defense to the plaintiff's complaint.

[5] The stamping complained of by appellants as an alteration of the note set forth in plaintiff's complaint appears to be regular on its face, without erasures, interlineations, or improper action indicating that it was not duly authorized. Therefore the presumption, as held by the great weight of authority, is that the stamping was properly made on the note before delivery to the plaintiff. Towles v. Tanner, 21 App. D. C. 530; Galloway v. Bartholomew, 44 Or. 75, 74 Pac. 467, 1 R. C. L. p. 1041, and cases cited in note.

[6] Assuming that the note was materially altered, also the facts stated in the answer when and by whom the alteration was made, it further appears from the plaintiff's complaint that interest payments were made from time to time covering a period of approximately six months after the maturity of the note, thus in effect pleading ratification on the part of the appellants, as held by the great weight of authority. Tiedeman on Commercial Paper, § 396; Joyce, Defenses to Commercial Paper, § 150; Holyfield v. Harrington et al., 84 Kan. 700, 115 Pac. 546, 39 L. R. A. (N. S.) 131; Divide Canal & Reservoir Co. v. Tenney, 57 Colo. 14, 139 Pac. 1110. Of course, the rule is, as stated in appellants' brief, that a party must have actual knowledge of the alteration before payment would constitute a ratification; but when, as here, payment is set forth in the complaint, and admitted in the answer, without alleging it was made without appellants' knowledge or consent, ratification, to our minds, is sufficiently implied. 2 C. J. p. 1258.

[7] The general rule of pleading alteration of a written instrument under the Code requires that, where the instrument is declared upon in its altered form, as here claimed by appellants, the answer should be in the form of a general denial of all the material allegations of the complaint, or a specific denial of the execution of the instrument sued on,

or a specific statement of the facts relied upon for a defense. 2 C. J. p. 1261. The answer of the appellants in the case at bar did not meet these requirements.

We have carefully reviewed the authorities cited by appellants in their brief, and, after doing so, we do not think they support their contention that the trial court erred in sustaining the plaintiff's motion for a judgment on the pleadings, especially after affording the appellants the opportunity to propose amendments to their answer and their declining to do so. Therefore the judgment of the trial court must be affirmed, with costs to respondent.

It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

(49 Utah, 536)

TANNER v. BEERS, State Engineer.

(No. 3004.)

(Supreme Court of Utah. May 5, 1917.)

MANDAMUS 🔑64—APPROPRIATIONS—POWERS OF STATE ENGINEER.

Under Comp. Laws 1907, § 1288x10, providing that the state engineer shall approve applications for water rights not conflicting with prior applications or where the proposed use will not impair existing rights, a landowner was not entitled to mandamus to compel the engineer to grant the right to perfect the irrigation ditch of a third person so as to avoid waste of water by seepage and to permit the landowner to use the water saved.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 128, 129.]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by Freeman Tanner against W. D. Beers, as State Engineer. Judgment for defendant, and plaintiff appeals. Affirmed.

Booth & Booth, of Provo, for appellant. Dan B. Shields, Atty. Gen., and O. C. Dalby and Jas. H. Wolfe, Asst. Attys. Gen., for respondent.

FRICK, C. J. The plaintiff commenced this action against the defendant as state engineer of the state of Utah. In the complaint it is, in substance, alleged that the plaintiff, on the 23d day of July, 1908, made an application to the defendant, as state engineer, pursuant to the laws of this state to appropriate 10 second feet of the unappropriated waters of the Provo river; that notice of the application was published as required by our statute on the 23d day of January, 1914, and the publication was completed on the 23d day of February following; that a protest against the granting of said application upon various grounds was duly filed with the state engineer by the Provo Bench Canal & Irrigation Company, hereinafter called the company, on the 9th day of March, 1914; that on the 16th day of June, 1915, the state engineer "without sufficient reason rejected the application of the plaintiff"; that by reason of the rejection of said application the plaintiff is "deprived of a substantial right." The plaintiff prays judgment:

> "That the said defendant, as state engineer aforesaid, be ordered by the court to grant the application to plaintiff to appropriate said water, and that the plaintiff be granted general relief in the premises."

A copy of the application filed with the state engineer is attached to and made a part of the complaint. The application is too long to be inserted here. It must suffice to say that it was made to appear therefrom that the plaintiff sought to appropriate 10 second feet of water which he alleged was being lost and wasted by seepage by reason of the imperfect condition of a certain ditch owned and used by said company of the length of about 7,000 feet, and which water, plaintiff alleged, he intended to save by puddling and improving the bottom and sides of the ditch aforesaid, and by that means to save said 10 second feet of water from being lost and wasted and to use the same for a beneficial purpose. What plaintiff proposes to do in that regard is stated in his application in the following words:

> "From the point of diversion of the Provo Bench Canal described on page 1 the Provo Bench Canal & Irrigation Company conduct a stream of water, which fluctuates during the irrigation season from an extreme low flow of 30 cubic feet per second to an extreme high flow of 116 cubic feet per second. This stream of water for a distance of approximately 7,000 feet runs along the step sloping east border of Provo Bench, over coarse boulders and gravel, through which much of the water seeps and is wasted. It is the intention of the applicant to improve the grade of the canal so that the depth of water in the canal section will be uniform and puddle the bottom and sides of said canal so as to reduce seepage waste to a minimum. The water saved by these improvements the applicant claims the right to appropriate and use on the lands heretofore described. In order to determine the losses in that portion of the canal that is to be improved, a record of canal flow at the entrance and exit of said portion is now being made, and will be continued for such length of time as the state engineer may deem sufficient to determine the seepage losses in said portion."

The action was originally commenced against the state engineer alone. The company was, however, permitted to intervene upon its own application. Both the state engineer and the company filed general demurrers to the complaint. The district court sustained the demurrers and dismissed the complaint. The plaintiff appeals.

The only ruling that is assailed by the assignments of error is the one relating to the demurrer interposed by the state engineer, and hence we shall confine our remarks to that demurrer.

The state engineer rejected the application for the reasons stated by him, which, giving them in his own language, are as follows:

> "I am herewith returning your application 1976, which calls for ten second-feet of water

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

from Provo river, the granting of which was protested by the Provo Bench Canal & Irrigation Company on March 9, 1914, the application having been this day rejected. The application contemplates saving water by improving the Provo Bench Canal, by improving the grade of the canal and puddling the sides and bottom. The state engineer has not the power to grant an applicant a right to go onto a private canal and improve it for the purpose of saving the water lost by seepage, and therefore he has no jurisdiction over an application of this nature; hence its rejection."

The law defining the duties of the state engineer, which was in force when plaintiff made his application, is found in Comp. Laws 1907, § 1288x10, which reads as follows:

> "All applications which shall comply with the provisions of this title and with the regulations of the state engineer's office shall be filed and recorded in a suitable book kept for that purpose; and it shall be the duty of said engineer to approve all applications made in proper form and which are not in conflict with prior applications, or where the proposed use will not impair the value of existing rights. But, where there is no unappropriated water in the proposed source of supply, or where the proposed use will conflict with prior applications, or with existing rights, it shall be the duty of the state engineer to reject such application."

The rights of the applicant, in case he is dissatisfied with the action of the state engineer, are defined by Comp. Laws 1907, § 1288x14, which at the time of plaintiff's application read as follows:

> "Any applicant or protestant who is dissatisfied with the action of the state engineer may bring an action in the district court of the county in which the point of diversion of the water proposed to be appropriated is situated, for the purpose of adjudicating the questions involved between the applicant and protestant. Such action must be brought within sixty days of notice of the action of the state engineer, and if not brought within that time, the engineer shall proceed in accordance with the action taken thereon by him. But if such action be brought within said time, notice thereof shall be filed with the state engineer, and thereafter he shall take no further action upon such application or protest until the rights of the parties shall be determined by mutual agreement among themselves or by the courts. Upon the final determination of the case by the courts, a copy of the decree shall be filed with the state engineer, and thereupon he shall proceed in accordance with such decree."

Both of the foregoing sections have since been amended, and, as amended, will be found in Laws Utah 1911, pp. 4 and 143. The amendments or changes are, however, not material to this action.

When plaintiff's application and what he proposed to do are read and considered in connection with the foregoing statutory provisions, it seems clear that neither the state engineer nor the district court had power to grant what plaintiff demanded. To our minds it is equally clear that this court is powerless to grant his prayer to which we have hereinbefore referred. While plaintiff's purposes to save water and to apply the same to a beneficial use are to be commended, yet there is no power vested in the state engineer to grant plaintiff's application in view that there is no unappropriated water unless and until plaintiff succeeds in preventing the loss by seepage as proposed by him. We cannot find any power in the statute whereby the state engineer may permit the plaintiff to enter upon the company's ditch and to improve the same so as to prevent the alleged waste through seepage. If the company is unnecessarily wasting water to the detriment of the plaintiff, it may well be that he may go into court and commence a proper action, and, if he can, in such action, establish the fact that the company is unnecessarily wasting water to his detriment or damage that the court will require the company to cease its unnecessary wasting of water. It may also be the case—yet we know of no precedent to that effect, and plaintiff has cited none—that in case a water claimant shows that water in substantial quantities is unnecessarily lost or wasted through seepage or otherwise by reason of an imperfect condition of a prior appropriator's ditches, that such loss or waste can be prevented by making the bottoms and sides of such ditches impervious, and that the claimant, at his own cost and expense, and at a proper time, is able and willing to so improve and repair said ditches as to prevent the loss or waste of water, if he be permitted the right to appropriate and use the same, the court, in a proper action, may have the power to make such order as will be necessary to give the claimant the right to enter upon the ditches and to repair and improve them so as to prevent the loss and waste of water, and to give him the right to appropriate such water and to apply it to some beneficial use. But, even though such power be deemed to exist in a court under our statute, respecting which we express no opinion, yet it is very clear that no such power is vested in the state engineer. If, therefore, no such power is vested in that officer by law, neither the district court nor this court can require him to do that which the law does not authorize.

The district court therefore committed no error in sustaining the demurrer.

The judgment is therefore affirmed, with costs to respondent.

McCARTY and CORFMAN, JJ., concur.

(50 Utah, 23)

TANNER v. JOHNSON. (No. 2992.)

(Supreme Court of Utah. May 8, 1917.)

1. CONTRACTS 🔑350(1)—BREACH OF CONTRACT TO THRESH GRAIN—EVIDENCE.

In an action to recover damages for breach of an oral executory agreement under which plaintiff was to thresh defendant's grain, evidence and admissions of pleadings *held* to make a prima facie case for plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819, 1822, 1823.]

2. CONTRACTS 🔑313(1) — CONTRACT TO THRESH GRAIN—RIGHT TO TERMINATE.

That defendant had notified plaintiff of the termination of contract before the time fixed for its performance did not preclude recovery.[1]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279.]

3. DAMAGES 🔑124(3) — RENUNCIATION OF CONTRACT TO THRESH GRAIN.

The measure of damages for renunciation of a contract to thresh grain was the net profit thresher would have realized had he been permitted to do the threshing.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 332-334, 337, 338.]

Appeal from District Court, Tooele County; Geo. G. Armstrong, Judge.

Action by J. J. Tanner against Henry Johnson. From a judgment of nonsuit and from an order denying his motion for a new trial, plaintiff appeals. Remanded, with directions to grant a new trial.

Evans, Evans & Folland, of Salt Lake City, for appellant. L. L. Baker and W. S. Marks, both of Tooele, for respondent.

CORFMAN, J. Plaintiff brought this action against the defendant in the district court of Tooele county to recover damages alleged to have been sustained because of the renunciation of an oral executory agreement. Briefly stated, the complaint alleges that an agreement was entered into between the plaintiff and the defendant whereby the defendant employed the plaintiff to thresh the grain raised upon defendant's farm for the season of 1915; that the grain was to be threshed on or about October 1, 1915, in consideration of which the defendant was to pay to plaintiff a reasonable toll of 8½ bushels for each 100 bushels or fraction thereof threshed; that on or about the 14th day of September, 1915, the defendant repudiated the contract thus entered into, to plaintiff's damage in the sum of $300, for which sum plaintiff prayed judgment and costs.

The answer, in substance, admits the agreement, and affirmatively alleges that plaintiff represented to defendant he would thresh his grain in a first-class manner, and with a machine that would do first-class work so that there would be little, if any, loss, and that the grain would be threshed at the agreed time without unnecessary delay; that defendant canceled and terminated the contract on or about September 10, 1915, on receiving information from various sources that the machine with which plaintiff intended to do the threshing did not do satisfactory work, in that it did not thresh grain clean, and that large losses were being sustained by various persons for whom plaintiff had threshed and was threshing; that great delays were continually occurring which caused great expense and annoyance for any person for whom plaintiff attempted to thresh grain; and that plaintiff sustained no loss whatever by reason of defendant not permitting plaintiff to thresh his grain.

At the trial, which was to the court without a jury, the defendant, in brief, testified, when called as a witness for the plaintiff, that he employed plaintiff to thresh the grain raised in 1915, and afterwards canceled the employment; that the grain raised by him in 1915 was threshed by another than the plaintiff, and that the value of the toll for the threshing would have amounted to $194 at the price fixed under his agreement with plaintiff; that it was the understanding that if the plaintiff was to do the threshing he was also to do the threshing for others in the vicinity; that plaintiff threshed for defendant in 1914, and had inquired how the defendant liked the job. "I told him it was very good. He then asked me, he says, 'Could I have your threshing for 1915.' I said, 'Yes; if your job is as good as it has been this year you can have it.'"

The plaintiff testified in his own behalf that the net profit to him would have amounted to $122, and that there was no understanding between him and the defendant that he was to do the threshing for others in the vicinity.

At the conclusion of plaintiff's evidence a nonsuit was granted on the application of the defendant. A motion for a new trial was made and denied. Plaintiff appeals.

[1] The only question for this court to determine is whether the plaintiff, when he rested at the trial, had, under the admissions of the pleadings and the evidence, established a prima facie case. It is to be observed that the answer of the defendant admits the contract sued upon with some slight qualifications; that while it was still in force and effect he "canceled and terminated" it before performance "believing" that the plaintiff's machine would not do satisfactory work; and that prior to the date plaintiff was to have threshed the grain the former notified the latter that he would not permit him to thresh the grain. It is also to be observed from the record that the plaintiff's evidence clearly established the value of the tolls for the threshing of defendant's grain for the season covered by the contract at the contract price agreed upon between plaintiff and the defendant to be $194, and that the plaintiff's net profit, after deducting the expenses of doing the threshing, would have amounted to $122.

[2, 3] It is contended by the defendant that the contract in question was purely an executory contract subject to termination at any time by either party, and because of the defendant having notified the plaintiff of its termination before the time fixed by its terms for performance the plaintiff was precluded from recovering in his suit for damages. With this contention we cannot agree. We think the plaintiff's proof, coupled with the

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[1] Holland-Cook Mfg. Co. v. Con. W. & M. Co., 161 Pac. 922.

expressed admissions of the defendant's answer in the case, absolutely preclude a judgment of nonsuit. The plaintiff here sued to recover damages for breach of an executory contract. The theory on which the case was tried, and what was clearly established by the plaintiff's evidence, when defendant interposed a motion for nonsuit, was that the plaintiff had sustained a net loss of $122, after deducting all legitimate expenses, by reason of the defendant's refusing to permit the plaintiff to perform the contract. The rule of law applicable in such cases, as laid down by all the text-writers and clearly established by the adjudicated cases, may be best stated in the language of 1 Suth. Dam. 66, cited in plaintiff's brief, as follows:

> "Where a party has contracted to perform labor from which a profit is to spring as a direct result of the work done at the contract price and is prevented from earning this profit by the wrongful act of another party, its loss is a direct and natural result which the law will presume to follow the breach of the contract; and he is entitled to recover it without special allegations in his declaration; the amount of damage may be established by showing how much less than the contract price it will cost to do the work or to perform the contract."

The authorities cited by defendant in his brief (Davis & Rankin v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783; Danforth v. Walker, 37 Vt. 239; Moline Scale Co. v. Beed, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272; and Thomas v. Clayton Piano Co., 151 Pac. 543) are not in point. These cases simply hold that under an executory contract one party has the power to stop performance by subjecting himself to the payment of such damages as will compensate the other party for being stopped in the performance on his part, the same theory under which the plaintiff was seeking to recover from the defendant in the case at bar when defendant's motion for nonsuit was interposed. In the Utah case above mentioned the cases cited by defendant herein were referred to. In that case the plaintiff sought to recover from the defendant the full stipulated contract price after notice of repudiation, and this court, speaking through Mr. Justice Frick, said:

> "But where, as here, it is made to appear that the contract was renounced before the time for performance had arrived, the plaintiff cannot sue upon the theory that he had fully performed, and is therefore entitled to recover the amount stipulated in the contract. Ordinarily, under such circumstances, the plaintiff can only recover the damages he suffered by reason of the renunciation of the contract up to time of notice of renunciation. * * * It is true that the damages may equal the amount stipulated in the contract under certain circumstances."

Again in a late case, Holland-Cook Mfg. Co. v. Con. W. & M. Co., 161 Pac. 922, this doctrine is fully sustained by this court. In that case suit was brought for the recovery of damages for breach of contract by reason of the defendant refusing to receive three carloads of silos which it had ordered from plaintiff, the defendant having breached the contract by renouncing the same before performance. The opinion in that case says:

> "Where, as here, the article contracted for is not in esse, but is to be manufactured, and the purchaser refuses to comply with his contract, the seller is not bound to manufacture the article and tender it to the purchaser, but he may sue the purchaser for damages for breach of contract, and the measure of damages and of his recovery is the difference, if any, between the cost of manufacturing the article or property purchased and the price agreed to be paid therefor by the purchaser; in other words, the profits that the seller would have derived from the contract in case the purchaser had fully performed the same is the measure of damages."

We are therefore of the opinion that the contention of the plaintiff that the trial court committed error in entering a judgment of dismissal of plaintiff's case on motion of defendant for nonsuit is fully sustained under the authorities and the record here, and that the case should be remanded to the district court of Tooele county, with directions to grant a new trial.

It is so ordered; appellant to recover costs.

FRICK, C. J., and McCARTY, J., concur.

(50 Utah, 27)

SMITH v. BROWN. (No. 3030.)

(Supreme Court of Utah. May 8, 1917.)

1. BILLS AND NOTES 🔑489(3)—ISSUES, PROOF, AND VARIANCE.

Answer *held* sufficient to permit proof that note sued on was delivered upon condition, and that there was want and failure of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1590–1595.]

2. EVIDENCE 🔑444(6) — CONDITION PRECEDENT TO EXECUTION OF NOTE.

Under the Negotiable Instruments Act (Laws 1899, c. 83), as between original parties, defendant could prove allegations of his answer that note sued on was delivered upon condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1943, 2049.]

3. BILLS AND NOTES 🔑452(3) — DEFENSE — WANT OR FAILURE OF CONSIDERATION.

In payee's action on a note, evidence was admissible to substantiate answer alleging want and failure of consideration in view of Comp. Laws 1907, § 1580, allowing such defense, as against any person except a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1367–1376.]

4. CORPORATIONS 🔑76—SUBSCRIPTIONS—VALIDITY—PROFITS FROM CORPORATE STOCK.

Agreement that plaintiff would look to profits from stock in payment for such stock purchased for himself and defendant in consideration of defendant managing the business was neither illegal nor unreasonable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197–209, 213–218.]

5. BILLS AND NOTES 🔑92(1)—WANT OF CONSIDERATION.

If plaintiff agreed to look to profits of stock in payment for such stock purchased for himself and defendant in consideration that defendant manage the business, he had no personal claim against defendant, and there was no consideration for a note given by defendant to secure such payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 172.]

6. CONTRACTS ⟹75(2)—ADDITIONAL AGREEMENT—NECESSITY OF NEW CONSIDERATION.

Where a party is already bound to do a particular thing and refuses to perform until the other party enters into a new agreement, the latter is not binding in the absence of a new consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 280–285.]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Charles H. Smith against W. D. Brown. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to grant new trial.

Boyd, De Vine & Eccles, of Ogden, for appellant. Jno. E. Bagley, of Ogden, for respondent.

FRICK, C. J. The plaintiff brought this action to recover upon a promissory note. The complaint is in the usual form. The defendant, in his answer to the complaint admitted "the execution" of the note, but denied its delivery, and denied "the indebtedness therein alleged." Among other things, the defendant also averred in his answer that "said note was given without consideration"; that it was given "by reason of the fraudulent representations of the plaintiff," setting forth the circumstances in detail. The defendant also averred that several months prior to the execution of said note the plaintiff, by certain promises, induced the defendant to enter into the business of selling and handling grain and other farm products; that to accomplish the plaintiff's purpose in that regard a corporation known as the Western Grain & Brokerage Company was organized; that before said corporation was organized it was agreed that plaintiff would subscribe for 7,500 shares of the capital stock of said corporation of the par value of $1 each; that 3,750 shares of the said 7,500 shares should be issued in the name of the defendant; that the number of shares was thereafter increased so that both the plaintiff and the defendant each held 3,900 shares of the capital stock of said corporation; that it was agreed that the plaintiff should advance all the money to pay for said capital stock, and that the defendant should manage and conduct the business affairs of said corporation, and that plaintiff was to be repaid the amount advanced by him for said 3,900 shares of defendant's stock out of the first profits derived from said business, and "not otherwise"; that, in addition to the money plaintiff advanced for the stock as aforesaid, he also agreed to furnish such additional funds as might be necessary to carry on the business of said corporation; "that thereafter the plaintiff herein requested of the defendant the execution of some written agreement showing the conditions herein set forth, and under which this defendant accepted and held such stock, and that prior to the execution of the note herein the plaintiff turned over to the defendant, in pursuance of such agreement, all of said stock; that such an agreement was prepared, but never executed, and that after consideration the plaintiff desired and requested that the defendant herein execute a note for the amount, par value, of such stock, together with interest, the same being the note in question, but with the agreement and understanding between the parties hereto at such time that such note would simply be an evidence of the amount to be paid by the defendant from the profits of such business, and that, relying upon said representations of the plaintiff herein, and the further statement at such time by the plaintiff that unless such note was executed so that he would have some evidence of the amount due from the defendant to the plaintiff that he would not advance further and necessary funds to carry on such business, that, relying upon such representations, and not otherwise, the defendant executed such note; that thereafter the plaintiff absolutely refused to advance sufficient and necessary funds to successfully and properly carry on said business, as agreed upon by all of the parties in interest, and as a result thereof said company become indebted and insolvent, and its affairs were entirely closed up, and that there were not sufficient assets to pay any of the stockholders therein any distributive share or dividend above the indebtedness of said company"; that the defendant, relying on plaintiff's said promises, entered into the business relations aforesaid, and thereafter managed said business and executed said note for the reasons stated, and not otherwise. While the answer contained other averments, yet the foregoing are sufficient to show the nature of the defenses relied on. While the plaintiff filed a reply, yet, under our statute, no reply was either necessary or proper. It is therefore unnecessary to make further reference to the pleadings.

At the trial the defendant assumed the burden of proof and opened the case. When he attempted to establish the averments of his answer by the testimony of the defendant and other witnesses plaintiff's counsel, as appears from the bill of exceptions, interposed the following objection:

"Mr. Bagley: I object to that. I object to it on the grounds that it is immaterial, irrelevant, and incompetent and as an attempt to vary and contradict the terms of a written instrument.

"The Court: Objection sustained."

The defendant duly excepted.

The foregoing objection was interposed and sustained to every question asked by the defendant's counsel and to all offers to prove the averments of the answer made by them. The defendant was thus not permitted to introduce any evidence in support of the averments of his answer, and the court directed the jury to return a verdict in favor of the plaintiff for the amount of the note with accrued interest. Judgment was entered accordingly, and the defendant appeals.

[1] Defendant's counsel contend that the court committed manifest error in excluding the proffered evidence. They insist that, in view of the averments contained in the answer, they were entitled to show that the note in question was delivered upon an express condition and that it was given without consideration. While the answer is somewhat inartificially drawn and several defenses are intermingled, yet, when the averments contained therein are considered and are given the liberal construction required by our statute, the answer is sufficient to permit the defendant to prove the following state of facts: That long prior to the making of the note the plaintiff had induced the defendant to become a stockholder in a certain corporation which was organized for plaintiff's benefit; that the plaintiff was to subscribe and pay for a certain amount of the capital stock of said corporation, one-half of which was to be issued in the name of the defendant, and the defendant was to manage and conduct the business affairs of said corporation; that the plaintiff was to be repaid the amount he had advanced for the stock issued to the defendant out of the first profits derived from the business of said corporation, and not otherwise; that the plaintiff had also agreed to advance all further sums of money that might be necessary to carry on said business if any was necessary; that he afterwards refused to do so unless the note in question was made; that the note was made and delivered to the plaintiff as evidence of the amount of money he had advanced for the capital stock issued in the name of the defendant and partly because the plaintiff had refused to advance the money he had promised to advance to carry on the business, and which money the plaintiff continued to refuse to advance unless the note was executed by the defendant, and that, after the note was executed, plaintiff nevertheless refused to advance any money, with the consequences set forth in the answer. If, therefore, the jury should have found, as under the issues they might have found, if the evidence supported the averments in the answer, that those were the facts and the conditions upon which the note in question was actually made and delivered, we cannot conceive upon what theory the plaintiff should prevail in the action. Certainly not as a matter of law.

[2] Under the Negotiable Instruments Act (Laws 1899, c. 83), which is in force in this state, it is settled beyond controversy that as between the original parties it may always be shown that a promissory note was delivered upon condition, or that it was made without consideration, or that the consideration had failed in whole or in part. In 1 Daniel, Neg. Insts. § 68a, the prevailing rule under the Negotiable Instruments Act is stated thus:

> "The conflict of authority on the question whether a bill or note can be shown to have been delivered upon a condition precedent is settled in those states which have adopted the statute, whereunder the rule is recognized that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in præsenti of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the parties will have no validity as a binding contract till the condition shall have been satisfied."

The foregoing doctrine has been followed by this court in the very recent case of Martineau v. Hanson, 155 Pac. 432, and cases there cited. In addition to the cases cited in the foregoing opinion, we especially refer to the following as directly in point under the issues presented in defendant's answer: Oakland Cemetery v. Lakins, 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 559; Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841. In both of the cases last cited defenses in their nature similar to those set up in defendant's answer were held good as between the parties to the notes there in question. See, also, Julius Kessler & Co. v. Perelius, 107 Minn. 224, 119 N. W. 1069, 131 Am. St. Rep. 459, and Union Inv. Co. v. Epley, 164 Wis. 438, 160 N. W. 175. While the question of conditional delivery is not made as clear as it might be in the answer in this case, yet the question is, to some extent at least, involved, and the defendant had a right to have the jury pass upon the evidence to determine that question.

[3] The question whether there was any consideration for the note in question, or whether there was a failure of consideration in whole or in part, was, however, squarely presented by the averments contained in the answer. Upon that question our statute, Comp. Laws 1907, § 1580, provides:

> "Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise."

Referring again to 1 Daniel, Neg. Insts., in section 193 the author says:

> "Under the statute it is competent to show, under a plea of partial or total failure of consideration, that the purchaser was induced to execute the instrument sued on by false and fraudulent representations of the seller as to the quality, quantity, value, or character of the property which formed the consideration that moved the contract, as that is one mode of showing a failure of consideration, and the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and if the party so defrauded be relieved from liability thereon, it has been held that such fraud makes such paper voidable by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it."

[4] Now, under the averments in the answer, it was relevant to prove that in consideration that the defendant should manage and

conduct the business of the corporation he was not to become personally liable to the plaintiff for the purchase price of the capital stock issued in defendant's name, and that the plaintiff, in order to compensate himself for the amount he had advanced for that stock, should receive the profits until he was fully repaid the purchase price of that stock. Such an agreement, if entered into, certainly was not illegal nor unreasonable. Every person who subscribes for corporate stock must rely either upon the increase of the par value or price of the stock or on the dividends to be derived from the business as compensation for the money advanced for the stock.

[5] If the plaintiff, as averred by the defendant, therefore had agreed to advance the purchase price of the stock in consideration that the defendant should personally manage and conduct the corporate business, and had agreed to look to the profits of the business to compensate himself for the amount of money he had advanced for the stock which was placed in defendant's name, he had no personal claim against the defendant, and there was no consideration as between plaintiff and the defendant for the note in question.

[6] True, defendant has averred in his answer that plaintiff promised to advance additional money to carry on the corporate business, and that he would not advance any unless the defendant executed the note in question, and such advancements, if made, constituted part consideration for the note. We do not know what induced those averments in the answer, since from what had been averred before it was quite clear that there was no consideration for the note. We say this because the averments in the answer are clearly to the effect that plaintiff had promised to advance any further sums of money that might be necessary to conduct the business as a part of the original agreement between the parties. If that were true, then plaintiff was already bound to furnish such an amount of additional money as was reasonably necessary to carry on the business. As a matter of law, therefore, he could not impose new conditions upon the defendant. It is elementary that where a party is already bound to do a particular thing, but refuses to do it until the adverse party enters into a new promise without any additional independent consideration, the latter promise is not binding, since it is without consideration. If it be assumed, however, that the defendant executed the note in consideration that the plaintiff should furnish additional money to carry on the business, yet it is also averred in the answer that the plaintiff utterly refused and failed to comply with that promise. The consideration in that respect, if it constituted such, therefore wholly failed. We may therefore view the transactions set forth in the answer from any angle we wish, and if the facts pleaded are true, the defendant, and not the plaintiff, should prevail. As a matter of course we cannot say whether the facts pleaded are true or not true. All that we now pass on is that the defendant had the right to present the evidence in support of his averments to the jury whose province it was to determine whether they were true or not true.

The judgment is therefore reversed, and the cause is remanded to the district court of Weber county, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed; appellant to recover costs.

McCARTY and CORFMAN, JJ., concur.

(49 Utah, 611)

HOUGHTON et al. v. BARTON. (No. 2940.)

(Supreme Court of Utah. May 7, 1917.)

1. ADVERSE POSSESSION 🔑70—HOSTILE POSSESSION—SUFFICIENCY.

Where J., the purchaser of the north half of a lot, took possession of a strip which he believed to be such north half and constructed a dwelling house thereon, but about the time he moved away a purchaser of the south half of the lot took actual possession of such strip, collected rent from the tenants, made substantial and valuable improvements, erected a fence, and paid all water taxes and all taxes, general and special, assessed against the land and the improvements for 13 years, the owners of the north half being assessed with no improvements, he acquired title by adverse possession, as his conduct was not only consistent with the theory that he owned such strip, but inconsistent with the theory that his occupation was that of a trespasser or as agent of the owners of the north half.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394–414.]

2. BOUNDARIES 🔑37(3)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action involving a dispute as to the boundary between the north and south halves of lot 2 in a block of four lots numbered from the south, which contained more land than that shown on the official plat of the city, wherein defendant, owning lot 1 and the south half of lot 2, claimed that the surplus was a part of the street bounding the block on the south as originally surveyed and platted, evidence *held* to support findings in favor of defendant's claim as to the location of the line, and to show that plaintiffs thereby received the land they bought.[1]

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186–191.]

3. MUNICIPAL CORPORATIONS 🔑657(2)—VACATION OF PORTION OF STREET — PERSONS PREJUDICED.

The city did not exceed or abuse its power to the prejudice of plaintiffs by waiving whatever title or right it had to such surplus.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 1429.]

4. COSTS 🔑4 — STATUTORY PROVISIONS — STRICT CONSTRUCTION.

As costs were not recoverable at common law and the right to costs is purely statutory, statutes authorizing them are strictly construed (citing Words and Phrases, Costs).[2]

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[1] Leland v. Bourne, 41 Utah, 125, 125 Pac. 652; Moyer v. Langton, 37 Utah, 9, 106 Pac. 508; Young v. Hyland, 37 Utah, 229, 108 Pac. 1124; Binford v. Eccles, 41 Utah, 453, 126 Pac. 333.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 2, 3, 109.]

5. COSTS 🔑203—COST BILL—TIME FOR FILING AND SERVING.

Under Comp. Laws 1907, § 3350, providing that the party in whose favor judgment is rendered and who claims his costs must deliver to the clerk and serve upon the adverse party within five days after the verdict or notice of decision of the court or referee a memorandum of the items of his costs and necessary disbursements, the filing and service of the cost bill before the entry of the finding and decree was not a substantial compliance with the statute, and the cost bill should have been stricken.[3]

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 768–771, 779.]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by John A. Houghton and another against Lester U. Barton. Judgment for defendant, and plaintiffs appeal. Affirmed and remanded, with directions to modify.

This is an action to quiet title to a portion of lot 2, block 19, plat E, Salt Lake City survey, Utah. Block 19, of which the land in dispute forms a part, is bounded on the south by Third North street, formerly called Plum street; on the north by Fourth North street, formerly called Peach street; on the east by Wall street; and on the west by North Main street, formerly called Oak street. Block 19, as platted, consists of a tier of four lots. The lots, commencing at the south end of the tier, are numbered 1, 2, 3, and 4. According to the official plat of Salt Lake City, filed April 2, 1888, the width of each of the four lots north and south is as follows: Lot 1, 5 rods; lot 2, 7 rods; lot 3, 10 rods, and lot 4, $12^{4}/_{10}$ rods. It is conceded that block 19 in a northerly and southerly direction contains approximately 52 feet of surplus ground. The defendant contends that the 52 feet of surplus ground is the south end of the block and abuts on Third North street, and that the distance from the north side of the street to the north boundary line of lot 2 is approximately 250 feet. Plaintiffs, on the other hand, insist that the distance between these points is 198 feet—12 rods. And they, in effect, claim, if we correctly understand their position, that the 52 feet of surplus ground lies between the north boundary line of lot 2 and the south boundary of lot 4. That is, lot 3, which the maps and plats in evidence of block 19 show to be 10 rods only in width in a northerly and southerly direction is in fact a little in excess of 13 rods in width.

John A. Houghton, one of the plaintiffs, testified in part as follows:

> "I owned the north half of lot 2, and if there was any excess up there it was either in lot 3 or we had a quitclaim deed to it. * * * I don't know where the excess is. I said I owned everything between the south half of lot 2 and 4. Where the boundaries of lot 3 are I don't know. If there is any excess in there I claim it."

Plaintiffs allege in their complaint, and in their reply to defendant's counterclaim, that they and their predecessors for more than 7 years last past have owned and possessed all of the south half of lot 2 in said block 19, described as follows:

> "Commencing at a point 140.25 feet north, 28 deg. 8 min. west of the southwest corner of lot one (1) in said block, said southwest corner of said lot one (1) being 26.13 feet east and 22.5 feet north of the present monument located at the intersection of Main and Third North streets in Salt Lake City; running thence northwesterly along Main street 57.75 feet; thence east parallel with the south boundary line of lot one (1) to Wall street; thence southeasterly along Wall street to a point 57.75 feet northwesterly along said Wall street from the northeast corner of Margaret L. Taylor's land, and from the northeast corner of said lot one (1); thence west parallel with the south boundary of lot one (1) to place of beginning."

Defendant, in his answer and counterclaim, among other things, alleges that he and his predecessors, for more than 20 years next preceding the commencement of this action, have owned and have been in the actual possession of the following described property in block 19, plat E, Salt Lake City survey:

> "Commencing at a point 26.13 feet east and 22.5 feet north from the present monument located at the intersection of what is called Main and Third North streets, Salt Lake City, Utah, running thence north 24 deg. 8 min. west 192.12 feet; thence east on a line parallel with the monument line on Third North street aforesaid 216.78 feet; thence south 30 deg. 11 min. east 115.60 feet to the northeast corner of Margaret L. Taylor's land; thence west along the north line of Margaret L. Taylor's land and parallel with the monument line on Third North street aforesaid 81.55 feet to the northwest corner of said Margaret L. Taylor's land; thence south 75.4 feet to the southwest corner of said Margaret L. Taylor's land; thence west and parallel with the monument line on Third North street aforesaid 114.815 feet to the place of beginning."

It is further alleged:

> "That during all of said time defendant and his predecessors have occupied, cultivated, and improved said property and have subjected the same to ordinary use; that they have maintained and protected the same by substantial inclosures, and have paid all the taxes that have been levied and assessed against the same according to law; that such possession, during all of said time, has been continuous, perpetual, peaceable, and without interference or disturbance of any character, and has been open and notorious and adverse against these plaintiffs and all the world."

He also alleges that plaintiffs' cause of action is barred by the provisions of Comp. Laws 1907, § 2859, which reads as follows:

> "No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seised or possessed of the property in question within seven years before the commencement of the action."

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[2] Smith v. Alford, 31 Utah, 346, 88 Pac. 16.

[3] Smith v. Alford, 31 Utah, 346, 88 Pac. 16.

On the issues presented by the pleadings the trial court made the following findings of fact:

"(1) That in 1887, one Ezra Jarvis purchased and received an executed deed, transferring to said Ezra Jarvis, the north half of lot 2, block 19, plat E, Salt Lake City survey, situated in Salt Lake county, Utah; and the said Ezra Jarvis immediately took possession of certain property in said block, and believed by the said Ezra Jarvis to be the said north half of said lot and block, and upon which said Ezra Jarvis constructed a brick dwelling house consisting of two rooms.

"(2) That in about the year 1889 one Hyrum Barton entered into the possession of the following described property in Salt Lake county, Utah, to wit [describing the property above mentioned in defendant's counterclaim].

"(3) That upon the said property described, possession of which was taken by said Hyrum Barton, and near the northwest corner of the same, was situated the said brick house which was constructed by said Ezra Jarvis. That upon taking possession of the said property, including the said brick house, the said Hyrum Barton constructed fences around and inclosed the same, and that since about the year 1890 the defendant herein and his predecessor, Hyrum Barton, have been in the actual, open, undisturbed, peaceable, and notorious possession of the said property, claiming the same as owners thereof, and planted thereon rose bushes and trees, and constructed and maintained fences thereon and constructed and maintained buildings, and also the said Hyrum Barton constructed reservoirs and irrigation ditches to be used for the purpose of irrigating the vegetation on the said property; * * * and that during all of said periods, and up to the time of the trial of this action, defendant and his predecessors in interest have held continuous, perpetual, undisturbed, and peaceable possession of said property, and claim to be the owners thereof as against the plaintiffs in this action and all other persons whomsoever. * * *

"(5) That for a period of more than 7 years immediately preceding the commencement of this action the plaintiffs, nor either of them, nor their predecessors in interest, nor any of them, at any time, have been seised or possessed, or in possession, of the said property hereinbefore described, or any part thereof.

"(6) * * *

"(7) That in the year 1899 the property whereon the said house constructed by said Ezra Jarvis was situated, and which said land is hereinbefore specifically described, and which the said Hyrum Barton was then in possession of, together with the said house, was assessed to Hyrum Barton, and thereafter continuously and to and including the year 1909, the said property, together with the said house, was assessed to Hyrum Barton, and that he, the said Hyrum Barton, and his successors in interest paid the taxes on the said property for each and every year, and remained in possession thereof, claiming to be the owners thereof.

"(8) That in the year 1901 the said Hyrum Barton died, and that thereupon this defendant, together with the other heirs of the estate, entered into and held possession of the said property, claiming the same exclusively and by right of absolute ownership in fee, and paid all taxes assessed against the same, including taxes for sewer, water tax, and general tax; and that in the year 1912 the defendant laid cement sidewalks in front of the said property, both where the same abuts on Wall street and where the same abuts on Main street.

"(9) That the plaintiffs are owners of the north half of lot 2, block 19, plat E, Salt Lake City survey, Salt Lake county, Utah, and that the defendant is the owner and is entitled to the possession of the south half of lot 2, said block, plat, and survey, and that the dividing line between the said properties should be located as follows: Commencing at a point north 24 deg. 8 min. west 192.12 feet from the southwest corner of block 19, plat E, Salt Lake City survey as now claimed, and which said corner of block 19 is 26.13 feet east and 22.5 feet north of the present monument located at the intersection of what is known as Main and Third North streets. From said point of beginning running east 216.78 feet more or less to Wall street on a line parallel with the monument line on Third North street as now established."

The conclusions of law and the decree made and entered by the court are responsive to, and in conformity with, the findings of fact.

To reverse the judgment plaintiffs prosecute this appeal.

Booth, Lee, Badger & Rich and I. B. Evans, all of Salt Lake City, for appellants. Stokes & Bagley, of Salt Lake City, for respondent.

McCARTY, J. (after stating the facts as above). Numerous errors are assigned by appellants, but we do not think any of them contain sufficient merit to warrant discussion except those based on the alleged insufficiency of the evidence to sustain the findings of fact and the decree, and the assignment of error directed to the ruling of the court denying appellant's motion to strike out respondent's cost bill.

The record shows that one Margaret Thomas deraigned title through mesne conveyances to all of lot 2 from Daniel H. Wells, mayor of Salt Lake City, Utah, who obtained the patent from the United States government for the lands covered by and included within the aforesaid plat E, Salt Lake City survey. The patent of Mayor Wells bears date June 1, 1872. In the deed from Wells, and in all subsequent transactions conveying or incumbering the north half of lot 2, as shown by the abstract of title in evidence, the property is described by merely referring to it as "the north half of lot 2," etc. In fact, appellants, in their printed brief, say the "chain of title from the mayor's deed in 1873 to the deed to plaintiffs in 1909, the parcel of land here involved, is constantly designated as 'the north half of lot 2, block 19, plat E, Salt Lake City survey.'" And the same is true of the chain of title to the south half of lot 2, block 19. On June 20, 1887, Margaret Thomas conveyed to Ezra Jarvis, by warranty deed, the north half of lot 2, hereafter referred to as the Jarvis property. The evidence, without conflict, shows that at the time this deed was executed, and when Jarvis went in possession of ground in block 19 which he believed to be the land described in his deed, the south end of block 19, for a distance of 5 rods north of Third North street was inclosed by fence; that one Wahlquist was the owner of, and resided on, the land enclosed, that the balance of the ground in block 19 was vacant and unimproved, and that there were not stakes or monuments indicating the location of lot 2 other than the fence mentioned. Solomon F. Kimball, Wahlquist's grantor, testified that he owned lots 1 and 2 in 1875 or 1876; that in 1877 he sold lot 1 to Wahlquist; that at that time there were no houses, fences, or improvements of any kind, in block 19; that he and Wahlquist located the boundaries of lot 1; that the south boundary line, as located by them, was in line with the fence on improved property on the west side of Third North street, which was opposite lot 1. He also testified in part as follows:

> "I had a plat with me at that time: Lot 1 was five rods wide according to the plat. * * * In fixing [locating] the lot * * * we took no measurements at all from the north side of the property, or from the north end of block 19. We measured the south side and the west side."

On this point Wahlquist gave evidence which was substantially the same as that given by Kimball. He also testified that he erected a dwelling house on the property in 1878 and fenced it in 1879; that he erected the fence on the boundary lines as located by him and Kimball at the time he took possession of the lot; that he resided on the property from 1878 until 1888, a period of 10 years, when he disposed of it and moved away; that when he vacated the premises the fence he erected in 1879 was still there and in good condition.

Jarvis was a witness for appellants and testified in part as follows:

> "We ascertained where the north half of lot 2 was located by measuring from the south line of lot 1. I measured 12 rods to the north from the southwest corner. * * * The corner was indicated by a fence which went clear around lot 1. * * * Wahlquist at that time lived on lot 1. The corner of that old fence that Wahlquist showed me as the corner of lot 1 was in the same place as it is now. * * * We measured from the southwest corner of lot 1 as the fence there indicated. We allowed 5 rods to lot 1 and then measured off 7 rods more," for lot 2.

Jarvis went in possession of the north half of lot 2 as thus located soon after the execution of the deed from Margaret Thomas to him. He erected a brick dwelling house on the property, and constructed a picket fence on what he claimed to be the north boundary of the lot commencing at a point 198 feet (12 rods) north from the southwest corner of the block running east, and about two-thirds of the distance between North Main and Wall streets. Jarvis further testified that:

> "No one was living on the south half of lot 2 while I was there. It was not inclosed, and there were no improvements on it. There were no improvements of any kind on lot 2, except what I put there. * * * All that property east and north of me was unimproved. * * * We made some measurements as to the location of the fence this morning. * * * The 12-rod measurement took us 6 feet north of the fence now standing north of my property. It is my opinion that the fence as it now stands is not on a line with the fence as I built it. It is about 7 feet further to the south than where I built it."

Jarvis, on March 31, 1888, deeded the property to Morris R. Evans, and soon thereafter vacated the premises. About the time Evans purchased the Jarvis property one Hyrum Barton purchased and moved onto lot 1, where he resided until his death, which occurred in September, 1901, a period of about 13 years. Evans was a witness for appellants, and testified that immediately after he purchased the Jarvis property in 1888 he rented it to a man by the name of Solomon. He further testified:

> "If I remember correctly the Solomon rents were paid to me, but he was behind, and I just told him to get out. My impression is that he went out of the house. Later on Mr. Barton took the rents. It is possible that Mr. Barton may have collected some of the Solomon rents. I couldn't say. * * * I don't remember that I collected any after he moved out."

On July 12, 1898, the Salt Lake Valley Loan & Trust Company, a corporation, hereinafter called trust company, acquired the legal title to the north half of lot 2, and in June, 1909, the trust company, by warranty deed, conveyed the property to Houghton and Bothwell, appellants herein.

While the official map of plat E, bearing date of April 2, 1888, shows, as herein stated, block 19 to be 34 $^4/_{10}$ rods in length north and south, the evidence, nevertheless, shows, eliminating this map, that the distance between Third North and Fourth North streets is, because of the surplus ground in the block, approximately 37 $^5/_{10}$ rods. There are, however, plats, files, of the city engineer's office admitted in evidence, one of which bears date of June 29, 1885, that show the excess or surplus ground in the block. It also appears from the tracing on some of these maps that this excess or surplus ground was a part of Third North street as the same was originally platted and laid out.

On February 28, 1896, Hyrum Barton acquired by deed the legal title to the south half of lot 2 in block 19. The undisputed evidence shows that Hyrum Barton, from about the time he moved onto block 19 until his death in 1901, collected rents from the different tenants who lived in the Jarvis house during that time.

Matthew W. Wilson, one of the tenants referred to, was called as a witness, and testified in part as follows:

> "I knew Hyrum Barton in his lifetime. During the summer of 1897, from about * * * May until September I rented from him. * * * The house I lived in [referring to the Jarvis house] was a small two-room brick house. * * * When I rented that place I made arrangements with Hyrum Barton. * * * When I paid rent I paid it to Mr. Barton."

[1] Hyrum Barton not only collected rents from the tenants, but he took actual possession of the Jarvis property and made substantial and valuable improvements thereon, consisting in part of a large barn, a watering trough, chicken coops, etc., all of which were erected east and southeast of the house. He also erected a board fence east of the house

and extending north and south across the property between the house and the improvements mentioned. He, at his own expense, laid and maintained a pipe line connecting the house and yards with the city's water mains and supplied the house and premises with water. And the evidence shows that from the year 1901 to and including the year 1909, respondent and his predecessors in interest paid all water taxes assessed against the property. The evidence also shows that he constructed water ditches which were used in irrigating trees and shrubbery from year to year planted on the lot by him and members of his family. During several years of this time his plural wife lived in the house. The east end of the lot was used by Barton mainly as a yard for his chickens and domestic animals, and the barn and other improvements (outbuildings about the yard) were used for watering, feeding, and sheltering them. The barn later was "turned into * * * a carpet, mattress cleaning factory." and on October 25, 1910, was destroyed by fire. We think Hyrum Barton's entire course of conduct relating to the Jarvis property from the time he acquired the legal title to the south half of lot 2, as shown by the great weight of the evidence, was not only consistent with the theory that he owned it, but was inconsistent with the theory that his occupation of the premises was that of a trespasser, or, as counsel for appellants seem to contend, as agent of Evans. In fact, the evidence is undisputed that his claim of ownership and possession of the ground in block 19, from the north side of Third North street to the fence line immediately north of the Jarvis house, was so open and notorious that the entire premises were known, and generally spoken of by his neighbors in that vicinity, as the "Barton property."

The record shows that from the time the trust company acquired title (July 12, 1898) to the north half of lot 2 until it was deeded to appellants (June 1, 1908), a period of nearly 10 years, there were no houses or other improvements on block 19 north of the Jarvis property. This is important, as it tends to show by whom the taxes assessed against the Jarvis property during those years were paid. The assessment rolls of Salt Lake county for the year 1899, to and including the year 1911, show that the south half of lot 2 was assessed to Hyrum Barton. The land was assessed at $500 for each of these 13 years, and the improvements were assessed at from $135 to $150 for each of the years to and including the year 1909. No assessment was made on improvements for the year 1910. For the year 1911 the improvements, designated "found," were assessed at $100. The evidence shows that "found," as used in the assessment rolls, means "foundation." The evidence shows that in the year 1911 all that remained of the Jarvis house was the foundation and a part of the walls. During this period of time the north half of lot 2 was assessed to the trust company, and at no time during these 13 years was the trust company assessed for improvements on any part of lot 2. We, therefore, think it clearly appears that respondent and his predecessor, Hyrum Barton, not only possessed, occupied, and claimed to own the Jarvis property during the 13 years ending 1911, but paid all taxes, both general and special, assessed against the property during that time.

Assuming, for the sake of argument, but not conceding, that the boundary lines of lot 2 are where appellants claim them to be, few cases, if any, can be found where the facts show a more complete acquisition of title by adverse possession than that acquired and asserted by respondent in this case, as shown by the undisputed evidence.

[2] Moreover, the undisputed evidence shows that appellants have the amount of land, the title of which is not in dispute, that their own evidence, testimony, shows they purchased in block 19; and, should they prevail in this action, they would be adjudged to be the owners of land which they at no time either purchased or possessed. Counsel for appellants seem to deny this, if we correctly understand their position. We think the maps and plats of block 19, in evidence, considered in connection with the evidence of Houghton, one of the appellants, to which we have referred, clearly show this. Furthermore, the evidence, without conflict, shows that the respondent, in the year 1911, at his own expense, laid a cement walk commencing at the southwest corner of block 19 and extending north along the west side of, and contiguous to, his property, a distance of 192.12 feet, to the point or place which the trial court found and adjudged to be the northwest corner of the south half of lot 2. From that point he further extended the cement walk north 224.92 feet, or approximately 13½ rods, to the point or place which, according to the maps and plats in evidence, the correctness of which is not questioned, is the northwest corner of lot 3. John A. Houghton, one of the appellants, paid respondent for laying the 224.92 feet of walk.

As we have pointed out, the record shows that lot 3, as platted, is 165 feet (10 rods), and the north half of lot 2, which is south of and contiguous to lot 3, is 3½ rods in width in a northerly and southerly direction. This evidence alone accounts for all the land that appellants purchased and obtained a legal title to in block 19.

Counsel for appellants in their printed brief say that, because respondent and his predecessors in interest treated and acquiesced in the south line marked by Wahlquist's fence as the south boundary of lot 1, block 19, which was established by Kimball and Wahlquist, and which was used as a starting point by Thomas and Jarvis, he ought not now be permitted to say "that line is further north." The decisive question, however, here involved is the location of the boundary of lot 2 with reference to adjoining properties. As we have pointed out, the evidence shows that lot 2 on the north joins and is contiguous to lot 3; that not later than 1896 Hyrum Barton went into possession of all of the land in block 19 extending from Third North street north to a point on North Main street 192.12 feet from the southwest corner of the block. The only inference that can be fairly drawn from the evidence is that Hyrum Barton, when he acquired the legal title to the south half of lot 2, either continued to maintain the fence built by Jarvis north of the house, or, about that time, moved the fence and reconstructed it about 6 feet nearer the dwelling. In either event he evidently maintained the fence where he claimed the dividing line between the north half and the south half of lot 2 to be. On this point Jarvis testified in part as follows:

> "My best recollection is that my fence was 12 or 14 feet north of my house. * * * I am satisfied to-day that this [the fence] is not built on the same line, but that it is moved 6 feet further south. This fence is not on the same line as the fence what I built in 1887."

Other witnesses testified that the fence at the present time is on the line where the fence erected by Jarvis stood. This apparent conflict in the evidence is unimportant, because the court held that the dividing line of the north half and the south half of lot 2 is where the fence now stands. The evidence, what there is on the point, tends to show that most, if not all, of the surplus ground in block 19 was a part of Third North street as the street was originally surveyed and platted, but was never used by the public as a street highway. That is, this surplus ground was a part of the street on paper only. The more recent plats made by the city of the block show that the dimensions of lot 1 have been enlarged so as to include the excess ground.

[3] Counsel for appellants contend that the "city could not do any such act." If not, why not? As we have pointed out the evidence, without conflict, shows that respondent and his predecessor, Hyrum Barton, for more than 15 years (the great preponderance of the evidence shows 20 full years) claimed to be the owners, and were in the exclusive possession of the south end of block 19 (except the southeast corner of the block referred to in the pleadings as the property of Margaret Taylor) from Third North street northerly 192.12 feet to a point a few feet north of the foundation of the old Jarvis house on lot 2. Moreover, the evidence shows that respondent in recent years, erected an apartment house on the ground which the evidence, what there is on the point, tends to show was formerly a part of the street as the street was originally platted by the city. There is evidence tending to show that appellant Houghton, in the year 1909, was advised that the surplus ground was contiguous to and abutted on Third North street. On this point respondent testified as follows:

> "I had a conversation with Mr. Houghton regarding the improvements in 1909. * * * Mr. Houghton told me I was foolish to make improvements on these premises because I was in the street. He referred to what is designated as the Wahlquist property. I was making improvements there."

Under these circumstances we are not prepared to say that the city exceeded or abused its power to the prejudice of appellants by waiving whatever title or right it may have had to the surplus ground.

The complaint made here, stripped of all sophistry, verbiage, and redundancy, is the refusal of the trial court to find and adjudge that this ground, which was formerly a part of Third North street, is located in the middle of the block between lots 2 and 4, and thereby increase the dimensions of lot 3 to the extent of the area of the surplus ground, which the evidence tends to show is 12 rods south of the lot. It is too plain to admit of serious discussion that a judgment in favor of appellants would have that effect.

Counsel for appellants, in support of their contention that the court erred in holding that the dividing line between the north half and the south half of lot 2 is north of the place where the Jarvis house stood, cite and rely on the following decisions of this court: Leland v. Bourne, 41 Utah, 125, 125 Pac. 652; Moyer v. Langton, 37 Utah, 9, 106 Pac. 508; Young v. Hyland, 37 Utah, 229, 108 Pac. 1124; Binford v. Eccles, 41 Utah, 453, 126 Pac. 333. We think the doctrine announced in those cases, in so far as it is applicable to the facts of this case, supports the findings and judgment of the trial court. As we have pointed out, the evidence, without any substantial conflict, shows that respondent and his predecessor, Hyrum Barton, have been in open and undisturbed possession of the Jarvis property for approximately 25 years next preceding the commencement of this action, and during more than 15 years of that time, maintained a fence, or the remnants of a fence, commencing at a point 192.12 feet northerly from the southwest corner of the block to a point about 6 feet north of the Jarvis house, and extending east along the northern boundary line of the Jarvis property for about 80 feet.

The court's findings of fact and conclusions of law and decree were filed and entered December 1, 1915. Respondent filed his cost bill November 23, 1915, eight days before the finding and decree were entered. Appellants moved the court to strike the cost bill on the ground that it was prematurely filed and served. The court denied the motion. The order of the court denying the motion is assigned as error.

[4] Costs were not recoverable, in fact were unknown at common law. The right, therefore, to tax and recover costs in an action or proceeding is purely statutory. 11 Cyc. 24; 5 Ency. Pl. & Pr. 108; 7 R. C. L. 781; 2

Words and Phrases, 1633; Price et al. v. Garland, 5 N. M. 98, 20 Pac. 182; Smith v. Alford, 31 Utah, 346, 88 Pac. 16. Costs being unknown at common law, statutes authorizing them are strictly construed. Chapin v. Broder, 16 Cal. 403; Bell v. Superior Court, 150 Cal. 31, 87 Pac. 1031; Sellick v. De Carlow, 95 Cal. 644, 30 Pac. 795; State v. District Court, 33 Mont. 531, 85 Pac. 367; 7 R. C. L. 782; 5 Ency. Pl. & Pr. 111.

[5] Comp. Laws 1907, § 3350, provides:

> "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve a copy upon the adverse party, within five days after the verdict or notice of the decision of the court or referee, or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding."

The statutes of California (Fairall's Code of Civ. Proc. § 1033) and also the Montana statutes (section 7170, Code Civ. Proc. 1907), providing for the recovery of costs in civil actions, and the provisions of the Utah statute herein set forth, are identical. In Chapin v. Broder, supra, the Supreme Court of California says:

> "The recovery of costs is a matter regulated exclusively by statute, and the mode pointed out for that purpose must be strictly pursued."

In the case of Sellick v. De Carlow, above cited, the cost bill was filed four days before the decision, and the California court, in that case, held that the trial court erred in denying a motion to strike out the cost bill. The Supreme Court of Montana, in the case of State v. District Court, 33 Mont. 533, 85 Pac. 368, says:

> "Costs, as costs, are allowed only by statute, and can be collected only by the method pointed out by the statute [citing authorities]. When, therefore, the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached, and the court has no other power in the premises than to strike out and disallow them on motion of the adverse party."

This doctrine is approved by this court in the case of Smith v. Alford, supra. In that case the present Chief Justice, speaking for the court, says:

> "Costs are a creature of the statute merely, and the Legislature, who alone has the power to grant them, may likewise impose the conditions upon which they are to be allowed."

One of the conditions imposed by statute in this state in cases of this kind where the entry of the judgment is not stayed is that the cost bill "must be delivered to the clerk" and a copy served "upon the adverse party within five days after the * * * notice of the decision of the court." In the case at bar this was not done, but, on the contrary, the cost bill was filed and served, as stated, eight days before there was a decision or judgment in the case. This was not a compliance, or a substantial compliance, with the requirements of the statute. The trial court, therefore, erred in denying the motion to strike out the cost bill.

For the reasons stated, the judgment is affirmed on the merits. The cause, however, is remanded, with directions to the lower court to modify the judgment by disallowing the costs taxed by respondent. Each party to pay his own cost on this appeal.

CORFMAN, J., concurs.

FRICK, C. J. (concurring). Appellants' counsel vigorously assail the findings of fact, and insist that they are not supported by the evidence. They further contend that, in view that this is an equity case in which we have the power to make or direct findings, we, in view of all the evidence, should make or direct findings in favor of appellants. Speaking for myself, I must concede that the evidence in this case, on some of the questions involved, is not conclusive either way. The rule in this jurisdiction is, however, firmly established that every presumption is in favor of the findings and judgment, and in equity cases as in law cases that presumption prevails until it is overcome by something appearing to the contrary in the record of the proceedings brought to this court. In other words, the burden of showing that the findings and judgment are wrong, rests upon the appellant, and unless he makes it appear with reasonable clearness that the findings and judgment are wrong, or against law, he must fail. As pointed out by Mr. Justice McCarty in this case, what the result should be largely turns upon the question of to which of the parties should be awarded the surplus ground contained in block 19. While, as I said before, the evidence is not conclusive, yet I think the respondent's evidence is more in accord with the court's findings and judgment, and hence the conclusion reached by my Associates is right. I, therefore, concur.

(49 Utah, 528)

PROVO CITY v. PROVO MEAT & PACKING CO. (No. 3016.)

(Supreme Court of Utah. May 5, 1917.)

1. LICENSES 🔑1—"LICENSE TAX"—"OCCUPATION TAX."

A license tax is based on the police power of the state to regulate or prohibit a particular business, and not to raise revenue, while an occupation tax is primarily intended to raise revenue.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 1.

For other definitions, see Words and Phrases, First and Second Series, License Tax; Occupation Tax.]

2. LICENSES 🔑16(5)—"BUTCHER."

In Comp. Laws 1907, § 206x86 (Laws 1915, c. 100), empowering cities to license, tax, and regulate the business conducted by merchants, butchers, etc., the word "butcher" includes the occupation of a retail meat dealer.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 37.

For other definitions, see Words and Phrases, Butcher.]

3. LICENSES 🔑6(13) — REGULATION OF BUTCHERS.

Under Comp. Laws 1907, § 206x43 (Laws 1915, c. 100), empowering cities to provide for the place and manner of sale of meats, the city has power to impose a license tax upon retail meat dealers.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6.]

4. LICENSES 🔑6(2)—REGULATION OF BUTCHERS.

Where power is conferred to regulate a particular business or calling, the power to license is included within the power to regulate.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6.]

5. LICENSES 🔑6(13)—DOUBLE TAXATION.

Under Comp. Laws 1907, § 206, as to regulation and taxation of merchants, it is within the power of a city to impose a general merchant's license tax upon one who is engaged in a general merchandising business, including the sale of meats, and further to impose a license tax upon his business of selling meat.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6.]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

The Provo Meat & Packing Company was convicted of selling fresh meat without a license, and it appeals. Affirmed.

Jacob Evans, of Salt Lake City, for appellant. Jacob Coleman, of Provo, for respondent.

FRICK, C. J. The defendant, a corporation, was charged with carrying on "the business of selling fresh meat at retail and wholesale" in the city of Provo "without having first taken out and procured the municipal permit and license" required by the ordinance of said city. The defendant was convicted by the city justice of the peace. It appealed to the district court of Utah county where, upon the stipulation of facts hereinafter set forth, it was again convicted, and now presents the record on appeal to this court.

The stipulated facts, omitting the formal parts, in substance, are:

> That the city of Provo had theretofore duly passed two ordinances both of which were in force when the action was commenced, copies of which are attached to the stipulation of facts and will be hereinafter referred to; "that the defendant, on the 12th day of April, 1915, and for a long time prior thereto, was engaged in and carrying on business on Academy avenue, a public street of said Provo City; that in conducting said business, the said defendant carried for sale and sold a general stock of merchandising, including fresh meats at retail and wholesale, fish, green groceries, fruits, vegetables, canned goods, cheese, bread, butter, eggs, soda water, and other articles of food, and in connection therewith and as a part thereof said defendant carried for sale and sold hardware and other articles of general household usefulness; that said business was carried on as one general business, in one building, with only one front entrance, and under one general management: that the money derived from the sale of the various articles hereinbefore mentioned was deposited in one general account to the credit of the said defendant, and the said business, although different articles of merchandise were sold, was carried on and conducted as one general business, but said defendant does not slaughter within said city; that the said defendant before carrying on said business, to wit, on March 3, 1915, as aforesaid, procured from the said plaintiff a general merchant's license for the year 1915 under the provisions of that certain ordinance of said Provo City a copy of which is hereto attached and marked 'Exhibit A,' which said license was in full force and effect on the said 12th day of April, A. D. 1915; that said business was being carried on and conducted in the manner aforesaid by the said defendant on the said 12th day of April, 1915, without first procuring a license from said Provo City to sell fresh meat at retail and wholesale as provided in that certain ordinance of Provo City passed on the 25th day of March, 1915, a copy of which is hereto attached and marked 'Exhibit B'; that the said defendant, on said 12th day of April, 1915, and at all times, was ready, able, and willing and offered to pay the plaintiff for a city license either under the provisions of Exhibit A or B, as said Provo City may elect, but said city refused to allow said defendant to carry on his said business in the manner hereinbefore stated, unless the said defendant would take out and pay a city license under the provisions of both of said ordinances, which the defendant refused to do."

One of the ordinances provided for a tax on merchants who carried on business in Provo City. The stocks of merchandise were divided into 22 classes, ranging from $200, the lowest, to $500,000, and over, the highest. Those merchants who carried a stock of merchandise in excess of $500,000 constituted the first class, and were required to pay an annual tax of $400. Those who carried a stock in excess of $400,000 constituted the second class, and were required to pay an annual tax of $350, and so on down to the merchant who carried a stock of $200, who was required to pay an annual tax of $10. The ordinance was, in all respects, like the one passed on by this court in the case of Salt Lake City v. Christensen Co., 34 Utah, 38, 95 Pac. 523, 17 L. R. A. (N. S.) 898. The ordinance imposing the foregoing tax contained the following provision:

> "A merchant is one whose business is to buy and sell merchandise for gain or profit, but a merchant's license *shall not include a butcher's or meat market license, nor authorize the licensee to buy or sell meats, other than canned or cured.*" (Italics ours.)

The ordinance directly in question here, and under which appellant was convicted, so far as material, reads:

> "It shall be unlawful for any person, firm or corporation to engage in the business of slaughtering, slaughtering and selling, or selling fresh meat at wholesale or retail within the corporate limits of Provo City, Utah, without first making application for and procuring a permit and license so to do, as herein provided."

The ordinance provides for a license fee of from $15, the lowest, to $35, the highest.

The appellant was required to pay a license fee or tax of $35.

We have referred to the foregoing ordinances for the reason that appellant's counsel insists that the city of Provo can require his client to pay a tax under only one of said ordinances, and, in view that it had required it to pay under the merchants' ordinance, the city cannot require payment under the meat dealers' ordinance. We shall refer to this objection again hereinafter.

Our Constitution (article 13, § 12) provides:

> "Nothing in this Constitution shall be construed to prevent the Legislature from providing a stamp tax, or a tax based on income, occupation, licenses or franchises."

[1] As pointed out in the case of Salt Lake City v. Christensen Co., supra, the merchant's ordinance imposes a tax which is in the nature of an occupation tax rather than a license tax or license fee. The term "occupation tax" is, however, sometimes also applied to a license fee or license tax, and thus some confusion has at times arisen concerning the meaning of the two terms. Properly speaking, a license fee or a license tax comes within and is based upon the police power of the state to regulate or to prohibit a particular business. Such a fee or tax is primarily intended to regulate a particular calling or business, and not to raise revenue, while an occupation tax is primarily intended to raise revenue by that method of taxation. Our statute (Comp. Laws 1907, § 206x86), as amended by Laws Utah 1915, p. 168, confers power upon the cities of this state—"to raise revenue by levying and collecting a license fee or tax on any private corporation or business within the limits of the city and regulate the same by ordinance. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed." In subdivision 38, § 206, supra, after providing for the licensing of various occupations, callings, and businesses, it is also provided that cities shall have the power "to license, tax, and regulate the business conducted by merchants, retailers, shop and store keepers, butchers, druggists," etc., and subdivision 43 of the same section also confers power upon cities "to provide for the place and manner of sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and regulate the selling of the same."

[2] Appellant's counsel contends that neither one of the provisions to which reference has just been made confers power upon the city of Provo to impose the license fee or tax in question here. He contends that his client does not come within the term "butchers," and that such a power is not conferred in subdivision 44 aforesaid. While it is true that, in some cases, it has been held that meat dealers are not included within the term "butcher" or "butchers" in a license statute, yet in other cases it is held that the term "butcher shop," includes meat dealers. In Wiest v. Luyendyk, 73 Mich. 661, 41 N. W. 839, the Supreme Court of Michigan held that the terms "butcher shop" and "meat market" were commonly used as synonyms. In 6 Cyc. 261, it is said that the word "butcher" "may, and often does, include the person who cuts up and sells the meat." In 1 Stroud's Judicial Dictionary ([Eng.] 2d Ed.) 239, it is said:

> "The business of a 'butcher' is carried on within the meaning of a restrictive covenant if raw meat be sold on the premises though the animals be slaughtered elsewhere; and so the exposure of pork meat for sale is carrying on the business of 'pork butcher.'"

[3] In Green v. State, 56 Ark. 386, 19 S. W. 1055, the term "butcher shop" was held to include a place where meats were sold, although the animals from which the meat was obtained were slaughtered elsewhere. While it is quite true that the occupation of a butcher is mentioned in the statute we have quoted, yet we think that term also includes a dealer in meats. Such is, no doubt, the modern application of the term. But even though it be assumed that the appellant is not included within the term "butchers" in the statute we have quoted, yet its business is clearly included within subdivision 43, § 206, supra, which we have quoted in full.

[4] Counsel, however, insists that that subdivision only provides for the place and manner of sale of meats, etc. The contention is not tenable. The statute as clearly provides for the regulation as it does for the place and manner of sale of meats. Where power is conferred to regulate a particular business or calling the power to license is included within the power to regulate. In 3 McQuillin, Mun. Corps., § 989, the author says:

> "The prevailing rule is that *under power to regulate, the municipal corporation may license and charge a reasonable fee*, to cover the expense of regulation, especially concerning those occupations wherein regulation and supervision appear necessary or desirable for the public good. Thus, under power given the city to provide for the inspection and to regulate the sale of meats, power to tax for revenue the occupation of selling them is not given, but such fees and charges as are necessary to cover the cost of inspection and police supervision may be imposed."

Now, we have pointed out that, under our Constitution, both an occupation tax and a license fee or tax may be imposed. We have also shown that the Legislature of this state has clearly conferred both the power to impose an occupation tax for revenue purposes and to impose a license fee or tax for the purpose of regulation under the police power, and hence the objection of want of power must fail.

[5] No lawyer, we think, will question the necessity of regulating the sale of fresh meats. Nor will any lawyer in this day and age deny that there is a clear distinction between the right to raise revenue by taxing occupations and the right to impose a license fee or so-called license tax for the purpose of "regulating" a particular business

or calling. The courts, we think, all hold that where the purpose of the ordinance or statute is to regulate, under the police power, the amount of the license fee or tax must be reasonable, and may not exceed the reasonable cost of preparing and issuing the license and the reasonable expenses of inspection and supervision. In this case we are, however, relieved from the duty of passing upon the reasonableness of the fee or tax in question, since counsel, at the hearing, admitted that the amount imposed was not unreasonable. Counsel, however, further contends that, inasmuch as the appellant has paid the amount of the tax demanded from it under the merchant's ordinance, for that reason it cannot also be required to pay under the meat dealer's ordinance. In that connection it is argued that the city is merely attempting to split up appellant's business into distinct parts or elements and to tax each part separately. In support of the argument counsel cites and relies on what is said by the author in 3 McQuillin, Mun. Corps., § 1003, which reads as follows:

> "A municipal corporation cannot, by ordinance, under the delegated general power to tax privileges, segregate the several elements of right that accrue to the citizen under *one taxable privilege*, as recognized, defined and declared by law, and tax each of such *elements* as a *separate* and *distinct* privilege of its own creation, as, for example, by *dividing several privileges into many and requiring separate licenses* to sell special articles which necessarily belong to one legal privilege, and which the law permits to be sold under one license. To express the rule in other words, power to impose a license tax upon a business does not authorize a division of the business into its constituent elements, parts, or incidents, and levy a separate tax on each or any element, part, or incident thereof."

In the case at bar appellant, in its general stock of merchandise, has, however, also included several articles which are usually recognized as falling within the power to regulate as a distinct right and quite apart from the right of imposing an occupation tax. Suppose the appellant concluded to add to its general stock of merchandise large or considerable quantities of explosives, such as gun or giant powder, or dynamite, together with other explosives, and that all of those had been included in the value of its stock of merchandise under the merchant's ordinance, could it, nevertheless, successfully contend that Provo City could not require it to pay a fee for a license, or permit, to deal in and sell such explosives? True, such explosives are inherently dangerous, but that fact does not affect the power to regulate, but merely the degree or extent of regulation. While explosives affect the public safety, meats, and especially fresh meats, all know, may seriously affect the public health. In this day and age, and especially in cities and towns, it is quite as necessary to regulate the one as the other. It is apparent, therefore, that to require a merchant to pay a license for the privilege of dealing in fresh meats in no way affects the city's right to impose an occupation tax upon his stock of merchandise, including his meats. The license fee is imposed to defray the cost and expenses of issuing the license and of inspection and general supervision. That is not double taxation in any sense. Neither is it dividing or splitting the business into separate parts or distinct elements. Moreover, a mere cursory reading of the cases cited by Mr. McQuillin in support of the text we have quoted, namely, Re Sims, 40 Fla. 432, 25 South. 280, Canova v. Williams, 41 Fla. 509, 27 South. 30, and Southern Express Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619, will at once disclose that the license fee in question here is clearly distinguishable from the license taxes which were sought to be enforced in those cases. The question, therefore, is not one of power to impose and enforce the tax in question, but it is one of policy, with regard to which this court has no power to speak.

The objections urged by appellant's counsel are therefore without merit, and the judgment should be affirmed, with costs to respondent. Such is the order.

McCARTY and CORFMAN, JJ., concur.

(96 Wash. 618)

HUBBELL v. FORSYTH et al. (No. 13731.)

(Supreme Court of Washington. June 7, 1917.)

1. APPEAL AND ERROR 🔑173(5)—SUBMISSION OF ISSUE NOT PLEADED.

In an action for damages by the assignee of a lumber company against its remote grantors because of failure of the title on which the lumber company had based its right to a condemnation fund under the warranty deed from the grantors, where defendants pleaded delivery of the deed to the lumber company, and that, at the time of commencement of the condemnation proceedings, the lumber company was the owner of the land in fee simple by mesne conveyances, and further pleaded that the final award of the condemnation fund to third persons was not due to any infirmity in the title of the lumber company, defendants will not be heard in the Supreme Court on appeal to say that there was no delivery of the deed to the lumber company, and that its title is other than that alleged in their pleadings, since a party on appeal will not be allowed to submit an issue contrary to that pleaded by him below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1087, 1110, 1111, 1113, 1119.]

2. APPEAL AND ERROR 🔑173(5) — ISSUES IN LOWER COURT—WAIVER OF OBJECTION.

In such action, plaintiff having pleaded his assignment from the lumber company, it was incumbent upon defendants, if they desired to question the company's right to make the assignment for its failure to pay license fees to the state, to have raised the question by appropriate plea in the trial court, and, they not having done so, the objection is waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1087, 1110, 1111, 1113, 1119.]

3. JUDGMENT 🔑672—PARTIES CONCLUDED—CONDEMNATION PROCEEDINGS.

In condemnation proceedings, where a lumber company's remote grantors filed a petition and answer joining with the lumber company and praying that the condemnation fund be paid to it, and that claims of other parties be held to have been adjudicated in prior proceedings, and also filed a second pleading or petition in which they pleaded alone and prayed the same relief, and the prayer of such petitions, so far as decreeing the rights of the lumber company to the fund, was granted, and the decree was appealed from, and notice of appeal served on the attorneys who appeared of record for the company's grantors, the latter were parties in the trial court and on appeal to the proceeding in which rights to the condemnation fund were litigated, and judgment establishing the right of other parties as against the lumber company was conclusive against them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1186.]

Department 1. Appeal from Superior Court, Cowlitz County; Edward H. Wright, Judge.

Action by B. L. Hubbell against C. E. Forsyth and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. N. Pearcy and John T. McKee, both of Portland, Or., for appellants. B. L. Hubbell, of Kelso, for respondent.

MORRIS, J. This is the final chapter of the proceedings detailed in Northern Pacific Ry. Co. v. Smith, 68 Wash. 269, 122 Pac. 1057, and State ex rel. Smith v. Superior Court, 71 Wash. 354, 128 Pac. 648. It having been finally determined that the Smiths were entitled to the fund arising out of the condemnation proceedings by the railway company, the Gruber Lumber Company withdrew from the land and subsequently assigned to respondent its claim against Forsyth for damages because of the failure of the title upon which the lumber company had based its right to the condemnation fund under a warranty deed from Forsyth and wife to the lumber company.

Appellants first contend that the covenant of seisin embraced in the deed to the Gruber Lumber Company is a mistake and by cross-complaint sought to reform the deed in this respect. There is no evidence upon which this claim can be successfully based. The record is ample in sustaining the refusal of the lower court to so find and in denying reformation.

[1] It is next contended that there was no delivery of the deed due to the fact that Mrs. Forsyth died between the making and the delivery of the deed. At the time of the execution of the deed, the amount due upon the sale of the land had not been fully paid. It is evident that Mrs. Forsyth executed the deed and delivered it to her husband to be by him delivered to the grantee upon full payment of the land, and upon such payment being made the deed was delivered. This suggestion of any infirmity in the title of the lumber company is first raised by appellants in their brief on this appeal. In their answer below they pleaded delivery of the deed to the lumber company and that at the time of the commencement of the condemnation proceedings the lumber company was the owner of the land in fee simple by mesne conveyances. They further pleaded that the final award of the condemnation fund to the Smith heirs was not due to any infirmity in the title of the lumber company. With such a record appellants will not be heard here to say that there was no delivery of the deed to the lumber company and that the title of the lumber company is other than that alleged in their pleadings. A party upon appeal will not be allowed to submit an issue contrary to that pleaded by him below.

[2] Respondent's rights as assignee of the Gruber Lumber Company are attacked upon the ground that his assignor, the lumber company, had failed to pay its license fee to the state. The only reference in the record to any nonpayment of license fees due to the state is testimony from one witness that none had been paid since 1912. Respondent having pleaded his assignment from the lumber company, it was incumbent upon appellants, if they desired to question the right of the lumber company to make the assignment because of its failure to pay the license fees subsequent to 1912, to have raised the question by appropriate plea in the trial court.

Not having done so, the objection is deemed waived. Ransom v. Wickstrom & Co., 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588.

[3] It is next contended that appellants are not bound by the final judgment establishing the rights of the Smith heirs as against the lumber company. Two pleadings were filed in the condemnation proceedings on behalf of the Forsyths. In the first, called "petition and answer," they joined with the Gruber Lumber Company and prayed that the condemnation fund be paid to the lumber company and that claims of certain other respondents be held to have been adjudicated in prior proceedings. In the second pleading, called "petition," they pleaded alone and prayed the same relief. The prayer of those petitions, in so far as decreeing the rights of the Gruber Lumber Company to the fund, was granted by the lower court. The decree was appealed from to this court, and notice of appeal served upon attorneys who had appeared of record for the Forsyths. These facts, among others that might be mentioned, establish beyond question that the Forsyths were parties both below and on appeal to the proceedings in which rights to the condemnation fund were litigated. Being parties, final judgment establishing the rights of the Smith heirs as against the lumber company is conclusive against them.

Other contentions are discussed in the briefs, but we find them without merit.

The judgment is affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and CHADWICK, JJ., concur.

(96 Wash. 575)

GENERAL MARKET CO. v. POST-INTELLIGENCER CO., Inc. (No. 13805.)

(Supreme Court of Washington. June 4, 1917.)

1. LIBEL AND SLANDER 🔑7(15)—ACTIONABLE WORDS — IMPUTING VIOLATION OF FOOD LAW.

A publication that food owned by plaintiff market company had been condemned is not libelous per se as charging a violation of the pure food law, Rem. Code 1915, § 5453 et seq., prohibiting the sale or keeping for sale of unfit food, since the publication charges merely the ownership of unfit food.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 27.]

2. LIBEL AND SLANDER 🔑9(7)—ACTIONABLE WORDS—INJURING PLAINTIFF'S BUSINESS.

A publication, falsely stating that certain food condemned by state was owned by plaintiff market company, is not actionable per se as naturally tending to injure plaintiff's business; there being no charge that plaintiff was selling, intended to sell, or even had the goods in its possession.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 86–87.]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Libel action by the General Market Company against the Post-Intelligencer Company, Incorporated. From a judgment of dismissal, plaintiff appeals. Affirmed.

Wm. H. Bolen, of Seattle, for appellant. Hughes, McMicken, Dovell & Ramsey, of Seattle, for respondent.

FULLERTON, J. This is an action for libel. The amended complaint of the plaintiff, omitting the caption and conclusion, is as follows:

"I. That during all the times herein mentioned the plaintiff, General Market Company, was and now is a corporation, created, organized, and existing under and by virtue of the laws of the state of Washington, and having its principal place of business at Seattle, King county, Wash., and having paid its license fee for the current year to the state of Washington.

"II. That the plaintiff is the owner and operator of a large and profitable public market, known as the Westlake Public Market, or more generally known throughout the city of Seattle and the state of Washington as the 'Westlake Market,' located at Fifth avenue, Westlake avenue and Pine street, in the city of Seattle, King county, Wash., where food products and fruits of all kinds are kept, offered for sale, and sold to the general public of said city of Seattle and state of Washington; and was and now is dealing with the general public as its patrons throughout said city and state.

"III. That the defendant Post-Intelligencer Company, Inc., is a corporation of the state of Washington, owning and operating and publishing a daily, morning newspaper, known as the Post-Intelligencer, having a large general circulation throughout said city of Seattle and state of Washington.

"IV. That on the 4th day of March, 1916, the defendant published in said newspaper called the Post-Intelligencer the following words of and concerning the plaintiff in its trade and business: 'Tons of Food Found Unfit for Consumption. Property Owned by Storage Company and Westlake Market Condemned by State. Food products of several tons weight, including 3,300 pounds of cheese, 103 boxes of oranges, and 3½ barrels of salt herring, were seized and destroyed in the last week as unfit for human consumption by Will H. Adams of the State Department of Agriculture. The Diamond Ice & Cold Storage Company owned 2,700 pounds of the cheese, and the Westlake Market owned the remaining 600 pounds. The oranges were shipped to the Produce Distributors Company of Seattle, from California. Part of the shipment was sent to Everett and part to Victoria. The Everett shipment was traced and also condemned. The herring were seized in Everett.'

"V. That the defendant meant thereby the Westlake Public Market, and it was so understood by the readers of its morning newspaper, the Post-Intelligencer, to be the Westlake Public Market.

"VI. That the said publication was false and defamatory.

"VII. That the said false and defamatory words were published of and concerning this plaintiff, and was so understood and meant by this defendant, and was so understood by the readers of its morning newspaper, the Post-Intelligencer.

"VIII. That the plaintiff has been injured in its reputation and business and trade by reason of said false and defamatory publication to its damage in the sum of $50,000."

To the amended complaint the defendant interposed a general demurrer, which the trial court sustained. The plaintiff elected to abide by its complaint, whereupon the court entered a judgment of dismissal with costs. This appeal followed.

There are certain words which, when spoken or published of or concerning another, are actionable per se. This means that they are actionable without allegation or proof of an actual injury, because their natural, necessary, and proximate consequence is to cause injury to the person of whom they are spoken or published, thus giving rise to a conclusive presumption of law that an actual injury was caused thereby. What words are so actionable is not always easy of determination, and many confusing and conflicting decisions on the question can be found. It is the general concensus of opinion, however, that words are so actionable which charge the commission of a punishable crime, or which tend to injure a person in his occupation, trade, business, or profession. Since the appellant has not in his complaint alleged special damages, it must be held, if it is to be held that its complaint states a cause of action, that the words complained of therein are actionable per se.

[1] The appellant contends that the words are thus actionable under either or both of the general rules stated. It is said that the words published charge the commission of a crime because of the pure food and drug act (Rem. Code, § 5453 et seq.), which makes it a misdemeanor to sell, offer for sale, have in possession with intent to sell, or manufacture for sale, any article of food which is adulterated within the meaning of the act. But it is manifest, we think, that the article as published does not charge the appellant with doing any of these things. The charge is that a certain quantity of cheese, with other articles of food, was seized and destroyed as unfit for human consumption, by an official of the State Department of Agriculture, and that a part of the quantity of cheese was owned by the appellant. There is no charge that it sold the cheese, offered it for sale, held it in possession with intent to sell, or manufactured it for sale. It is not even charged that the appellant held it in possession. All that is charged is ownership. While the right of possession usually follows ownership, actual possession need not, and to charge the one is not to charge the other. But, even if possession were charged, it would not be to accuse it of crime. The appellant by its own affirmative allegations is a vendor of perishable food products. It would be strange indeed if, among its general stock of products, it did not at all times own and possess something that is unfit for human consumption; this because of the natural tendency of such products to decay, and the practicable inability to make selections when purchases of stock are made. But these are not acts the statute makes criminal. The statute punishes those who willfully purchase and vend the prohibited products, not those who own them from the necessities of the case but do not vend or offer to vend them.

[2] Whether the publication is actionable per se, because tending to injure the appellant in its business, is a more difficult question; but we think this was also correctly determined by the trial court. The article bears evidence on its face that it was a news item, reciting the activities of the State Department of Agriculture for the preceding week. Its general truthfulness is not negatived by the complaint; that is, it is not negatived that the department named did seize and destroy as unfit for human consumption the quantity of cheese, oranges, and salt herring mentioned therein. But the complaint is that the article falsely set forth as a fact that 600 pounds of the cheese so seized and destroyed were owned by the appellant. A hasty reading of the complaint might seem to indicate otherwise, but it will be observed that it is alleged that the false and defamatory words were published of and concerning the appellant, and the only thing published of and concerning the appellant is that it owned 600 pounds of the 3,300 pounds of the cheese seized and destroyed. The question then narrows itself to this: Is it libelous per se to publish that certain food products, which were seized and destroyed by a public health officer as unfit for human consumption, were owned in part by a certain person when such person did not in fact own any part of them?

It must be remembered when the question is considered that the publication contains no charge of the violation of a criminal statute, no charge that the vendor offered the goods for sale, held them for sale, intended at some future time to sell them, or had them in possession. For all that appears in the publication, the goods may have been purchased at some distant place under an order calling for wholesome and edible products, and seized by the health officer while in the course of shipment, or while they were in some warehouse or depositary before they were examined or delivered to the appellant. Indeed, this would seem a natural inference from the language of the article. The exact weight of the cheese seized is given, and the number of pounds owned by each of the parties named as owner is likewise given; the inference naturally following that the cheese was in one bulk and owned in the proportions stated by the persons named. Nor is there a charge that the appellant knew of the unwholesome condition of the cheese, and there is no presumption that a dealer in food products knows the condition of all the goods that it owns. He must know, or at least is presumed to know, the condition of such products as he sells or offers for sale to others; but it is common knowledge that a dealer in such products must buy from other dealers or from producers, often without inspection or the chance of inspection, and no one would suppose, we think, that, because such a dealer was found at some time to be the owner of an unwholesome food product, he was dealing in such products, or was in any way unworthy of trust or confidence. The natural, necessary, and proximate consequence of mistakenly and untruthfully publishing a charge of such a dealer that he was such owner cannot therefore be to injure him in his business, and it must follow that the publication of such a charge is not actionable per se. This is not to deny that injury may follow such a publication; it is but to deny that injury naturally or necessarily follows it. If injury does follow the publication, the injured party is not without remedy; he has but to allege and prove actual damage in order to recover.

The learned counsel for the appellant has industriously collected a large number of cases touching the law of libel. These we think it unprofitable to review. It would be to do no more than emphasize a condition already confessed, namely, that the courts are widely divergent on the question as to what matters published will constitute libel actionable per se.

The judgment should be affirmed, and it is so ordered.

ELLIS, C. J., and MOUNT and PARKER, JJ., concur. HOLCOMB, J., concurs in the result.

(96 Wash. 588)

BAUMGARTNER et al. v. CITY OF RENTON. (No. 13704.)

(Supreme Court of Washington. June 6, 1917.)

1. MUNICIPAL CORPORATIONS 🔑358(3)—PUBLIC IMPROVEMENTS—CONTRACTS—CONSTRUCTION.

Under a contract between a city and plaintiffs to pave and brick a certain avenue, the provision that city engineer shall in all cases determine the amount of work to be paid for and that his estimates shall be final and conclusive, subject to approval of council, when construed with the provision that no improvement shall be deemed complete until city engineer shall have filed a statement to that effect, but neither said statement nor acceptance of the work by the engineer shall prevent the city from thereafter making claim for uncompleted or defective work if the same is discovered within two years, did not make approval of work by city engineer binding and conclusive on both parties, and city, in a suit by plaintiffs within two years to recover a balance of agreed consideration, was entitled to judgment on its cross-complaint for money expended to remedy a defective construction which plaintiffs failed to relay according to contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890.]

2. MUNICIPAL CORPORATIONS 🔑358(3)—CONTRACT FOR PAVING—DECISION OF ENGINEER—CONCLUSIVENESS.

If a city in a contract for paving an avenue makes in explicit language the decision of the engineer as to compliance final, his decision is conclusive on the parties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890.]

3. MUNICIPAL CORPORATIONS 🔑365 — CONTRACTS FOR IMPROVEMENTS — DEFECTS — ESTOPPEL.

Defendant city was not estopped from questioning the sufficiency of the work because its inspector and engineer who were on the ground permitted the defective work to be performed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 898.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by A. J. Baumgartner and another, copartners doing business under the firm name and style of Baumgartner & Mongin, against the City of Renton, in which the City filed a cross-complaint. From a judgment for the City, plaintiffs appeal. Affirmed.

Tucker & Hyland, of Seattle, for appellants. Daniel Gaby, of Renton, and Bradford, Allison & Egan, of Seattle, for respondent.

FULLERTON, J. In the early part of the year 1913, the plaintiffs, A. J. Baumgartner and S. F. Mougin, as copartners, entered into a contract with the city of Renton to pave with brick a certain portion of First Avenue North in that city for the sum of $12,833.76. The paving was all laid by the contractors on December 20, 1913, and 70 per cent. of the contract price paid; the remainder being retained pending the settlement of certain lien claims for labor and material. The contractors afterwards satisfied these claims, and the balance due, with the exception of $500, was ordered paid by the city council. The retention of this last-mentioned sum was due to the fact that a portion of the paving was not laid in accordance with the specifications and would have to be relaid to comply therewith, the estimate of the city engineer being that the sum retained would be sufficient to cover the expense. This arrangement was satisfactory to the plaintiffs, and they agreed to do the relaying as part of their contract. The actual doing of the work was delayed until March 1, 1915, at which time, after an agreement with the city council, appellants started the work, tearing up certain portions of the paving; but after tearing it up they at once relaid it as it was, and refused to do anything more. The city thereupon relaid the pavement so as to remedy the defective construction, at an expense to the city of $1,569.83. The plaintiffs then brought this action against the city to recover the $500 balance on their contract price for the pavement. The city set up a cross-complaint, alleging damages in the sum of $1,569.83 as a result of the failure of plaintiffs to perform their contract according to its terms. The court found for the defendant in the full sum claimed on its cross-complaint, and gave judgment therefor, directing that the defendant credit on the judgment the $500 cash retained by the city out of the contract price, leaving a balance due defendant from plaintiffs in the sum of $1,069.83. The plaintiffs appeal.

The appellants first contend error in the following finding of fact made by the court:

> "That plaintiffs entered upon the performance of said contract and pretended to perform the same. That defendant paid to plaintiffs, as it was required by said contract to do, all the sums due and payable prior to the final and full payment, and thereafter paid to plaintiffs all but the sum of $500 on the whole contract price. That said sum of $500 was retained by defendant after investigation by plaintiffs and defendant of the facts as then understood to exist relative to the pavement, and was considered as being, and was then estimated to be, a sum sufficient to relay said defective portions of said work: but said work had been so carelessly and negligently performed by plaintiffs, without knowledge or consent of defendant, and without any warning thereof to defendant, that plaintiffs did not comply with the contract, in this, they did not use the size of roller required to prepare the ground for laying the pavement, the materials used were of inferior quality, the brick ill shaped, the sand was unwashed, the top layer of bricks was improperly rolled, the interstices between the bricks were largely filled with sand, instead of with proper grouting, producing a weak bond, the specifications were not complied with in the preparation of the grouting, either in the proportion of sand and cement used, in the methods of mixing, or in the methods of putting the grouting between the bricks, with the result that the spaces between the bricks of the wearing surface layer of the pavement were only partially filled with the grouting, and, in making the necessary repairs to the street and in relaying defective portions thereof, it became necessary to repair and relay the larger part of said pavement, all of which was done in a reasonable, prudent, and proper manner at a total cost of $1,069.83 over and above said $500, the whole cost to defendant being the sum of $1,569.83, all of which was paid on or before July 1, 1915, by defendant."

The evidence covers a number of pages of the statement of facts, and it would be unprofitable to review it here. Its examination, however, satisfies us that it fully supports the finding.

[1] The appellants next contend that the approval of the city engineer was binding and conclusive upon both parties, and neither the city nor the plaintiffs could go behind his decision. This contention is founded upon the following clause of the specifications made a part of the contract between the parties:

> "To prevent all disputes and litigation it is further agreed that the city engineer shall in all cases determine the amount of work to be paid for under the contract for this improvement, and his estimates and decisions shall be final and conclusive, subject to the approval of the city council."

[2] It is settled law in this jurisdiction that, where a contract for public work makes in explicit language the decision of the engineer final as to the performance of a contract, such decision is conclusive on the parties.

"But to make such a certificate conclusive, plain language in the contract is required. It is not to be implied." McQuillin, Mun. Corp. § 1938.

If there were no such provision in the contract, the contract itself would not preclude the city from recouping in damages for a breach of contract. Assuming that the provision set out above is sufficient standing alone to make the engineer's decision as to the completion of the work final, we find it modified by a further stipulation in the contract, namely:

> "No improvement shall be deemed completed until the city engineer shall have filed with the city clerk a statement declaring the same to have been completed. But neither said statement nor any acceptance of said work by the city engineer shall prevent the city from thereafter making claim for uncompleted or defective work if the same is discovered within two years from the completion and acceptance of the work."

This provision clearly modifies the one relied upon by the appellants, and makes the engineer's certificate conclusive only as to uncompleted and defective work discovered later than two years after the completion and acceptance of the work. As this defect was discovered within the two years, the city was entitled to make claim for it.

[3] The appellants further contend that the respondent is estopped from questioning the sufficiency of the work for the reason that its inspector and city engineer were on the ground, saw the manner in which the work was being performed, and permitted it to go on. But the contract itself furnishes an answer to this contention. By the contract the city reserved, not only the right to inspect the work while it was in progress, but the right to make claim for any defective work within two years after the contract work should be completed. The purpose of this was to protect itself against any incompetence or negligence on the part of its inspectors. The appellants engaged in the work knowing that their failure to properly perform it would not be excused because of the failure of the inspectors to see that it was performed according to the stipulations. There can therefore be no estoppel within the time limited from the fact that the work of inspection was indifferently performed.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(96 Wash. 566)

J. I. CASE THRESHING MACH. CO. v. SCOTT et al. (No. 13803.)

(Supreme Court of Washington. June 4, 1917.)

1. SALES ⟹441(3) — WARRANTY — BREACH — EVIDENCE.

A satisfaction slip, which the buyer of machinery signed after work thereon by the seller's expert, being without consideration, is not conclusive, but only evidence, on the question of the warranties being satisfied or breached.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1279, 1280.]

2. Sales 🔑288(4)—Contract—Notice of Defects.

That the written notice by buyer to the seller of defect in the machinery was not within the ten days provided by the contract does not prevent the buyer relying on breach of warranty and rescission, the seller at all stages having notice of the defects, and that being the only purpose of the provision.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 821.]

3. Sales 🔑287(1)—Rescission by Buyer—Return of Property—Contract.

Machinery having been received by the buyers on cars, provision of the contract for its return by the buyer, in case of defect not remedied breaching warranty, to place where it was received, is either so ambiguous or unreasonable as to be unenforceable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 811.]

4. Sales 🔑279—Contract—Divisibility.

Under contract of sale of steam plow and engine, providing that the order is divisible as to each machine and attachment, and that failure of a separate machine to fill the warranty shall not affect buyer's liability for any other, the plow fulfilling the warranty and being capable of use with any kind of traction engine, the buyer must pay therefor, notwithstanding breach of warranty as to the engine.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 783–792.]

Department 2. Appeal from Superior Court, Douglas County; R. S. Steiner, Judge.

Action by the J. I. Case Threshing Machine Company against W. H. Scott and others. Judgment for plaintiff, and defendants appeal. Modified.

Cade & Barrows, of Wenatchee, for appellants. Crollard & Crollard, of Wenatchee, for respondent.

HOLCOMB, J. Action by respondent J. I. Case Threshing Machine Company, hereinafter called the company, against appellants W. H., C. E., and L. H. Scott, to recover on three promissory notes and to foreclose a chattel mortgage on a certain steam plowing outfit.

Some time in March, 1913, one Wharf, an agent of the company, called at appellants' farm for the purpose of selling to them a plowing outfit. He examined the soil and recommended the machine finally sold as being adapted to plow that particular soil. These negotiations culminated in a written agreement of sale, dated April 8, 1913, the material portions of which are as follows:

"J. I. Case Threshing Machine Company, Racine, Wisconsin:

"You will please ship or deliver on or before the —— day of —— at once (or as soon thereafter as you can furnish for transportation or delivery), to Wenatchee or other convenient station in the state of Washington in care of Wells & Morris for the undersigned purchaser the following goods: One Case 80 horse power simple steam engine straw trac burning, * * * with the usual fixtures and extras furnished as part of its regular equipment. Also for the above machinery 1–10 bottom 14" Case hand lift eng. gang plow stubble btm. fuel bunkers & 12" extension rims on engine, 1 headlight, 1–16 bbl unmtd eng tender, tank pump & hose.

"In consideration whereof, purchaser will receive same on cars on arrival subject to the warranty below printed and pay freight and charges thereon and pay to your order $3,325.00 as follows: Cash $——, and execute notes on company's blanks with approved security, as below, with interest at 8 per cent. per annum from date until maturity and 10 per cent. per annum from maturity until paid; note for $1,108.00 due November 1st, 1913; note for $1,108.00 due November 1st, 1914; note for $1,109.00 due November 1st, 1915; * * * secured by proper storage, first mortgage on said machinery and earnings thereof, and also ——; and if purchaser fails to pay said money or execute and deliver said notes and mortgage (properly filed or recorded), it is agreed as a condition hereof that the title to said goods shall not pass and this order shall at the company's option stand as purchaser's written obligation having the same force and effect as notes and mortgage for all sums not paid in cash, and the whole amount of purchase money shall be due and payable, and the company shall stand discharged from all warranty. Said machinery is purchased upon and subject to the following mutual and interdependent conditions, and none other, namely:

"It is warranted to be made of good material, and durable with good care, and to be capable of doing more and better work than any other machine made of equal size and proportions, working under the same conditions on the same job, if properly operated by competent persons, with suitable power, and the printed rules and directions of the manufacturers intelligently followed. The condition of the foregoing warranty is that if, after a trial of ten days by the purchasers operating in the manner specified, said machinery shall fail to fulfill the warranty, written notice thereof shall at once be given to the J. I. Case T. M. Company at Racine, Wisconsin, and also to the dealer from whom received, stating in what parts and wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty (unless it be of such a nature that a remedy may be suggested by letter), the purchasers rendering necessary and friendly assistance and co-operation, without compensation for labor or material furnished, and the company reserving the right to replace any defective part or parts. If, after giving the notice and opportunity to remedy the difficulty complained of, as above provided, the company fails to send a representative to remedy said difficulty (or to suggest an efficient remedy by mail), or if, upon its attempt to remedy the same, the machinery cannot be made to fill the warranty, the part that fails is to be returned immediately by the purchaser, free of charge to the place where it was received, and the company notified thereof, whereupon the company shall have the option either to furnish another machine, or part, in place of the one so returned, which shall fill the warranty, or to return the notes, or money received for the machine or part so returned, and the contract shall be rescinded to that extent, and no further claim made on the company."

The outfit was delivered to appellants at Wenatchee, on cars, on the date of this instrument, and was removed to appellants' farm, some 12 miles distant. While the evidence is somewhat in conflict as to whether the machine fulfilled the warranty, it cannot be successfully disputed that great trouble was experienced in operating it; in fact, the engine would not generate sufficient steam to haul the plows until the arrival of one of the company's experts named Dunseth, who changed the grate and generated 175 pounds of steam, when a small amount of land was plowed. At that time only eight bottoms of the ten were used and a portion of the time only six, and the plowing that was done was not deep enough. As the wind blew away the straw used for fuel, the plowing was discontinued for the day, and that night at the solicitation of Dunseth the appellants signed a satisfaction slip stating that the machine was working to their satisfaction and filling the warranty. Controversies concerning the return of the machine were had between appellants and the company, and as appellants maintained that the machine failed to do the work that it was warranted to do, they refused to pay the notes and offered to return the outfit. The company thereupon commenced this action for the purpose above stated.

By way of affirmative defenses set up in their answer, appellants alleged that no liability could be fastened on them, since the machine did not meet the warranties made by the company, and because of this the consideration of the notes failed. In reply thereto the company alleged that appellants failed to live up to certain conditions of the contract, and are now estopped to complain of a breach of warranty. The lower court made findings of fact in conformity with the company's version of the evidence, and entered a judgment as prayed.

[1] The only conclusion that can be drawn from the record is that the plowing outfit never did fulfill the warranty or plow appellants' ground in a satisfactory manner. Nor is it seriously contended by the company that it did, but it asserted that appellants, because they signed the satisfaction slip above referred to, are not in a position to complain of a breach of warranty. Appellant W. H. Scott testified that he thought he was signing only a slip to certify that Dunseth's services on that day were satisfactory. In any event this satisfaction slip is not absolutely binding on appellants, as they received no consideration from the company for signing the same. It is nothing more than evidence, more susceptible of proof by reason of its being in writing, but evidence nevertheless to be considered in connection with all the other evidence in determining whether the warranties had been breached. The court found that the testimony indicates that subsequent to the execution of this slip the outfit did not do good plowing, but that the soil and season were not right. The court does not find that the condition of the soil and season was the cause of the poor plowing or prevented the engine from generating steam and developing power, nor could he so find from the testimony.

Appellants assert that this finding brings them within the rule announced in Scott v. Keeth, 152 Mich. 547, 116 N. W. 183, that an acceptance by a purchaser, after a test which leads him to believe the goods satisfactory, does not waive his right of action for a breach of warranty discovered later. While we do not think the instant case falls within the rule in that case, as the warranty there was for a fixed period of time, yet the fact in this case, that it clearly appears, as evidenced by the court's finding, that the outfit did not fulfill the warranty subsequent to the test made by Dunseth, tends to lessen the weight of the satisfaction slip as evidence and to support the testimony of appellant W. H. Scott, that he thought he was signing only a slip to show that Dunseth's services were satisfactory, to such an extent that we think the trial court erred in finding the machine worked to the satisfaction of appellants and was filling the warranty as stated in the satisfaction slip. We are also greatly influenced in reaching this conclusion by the almost undisputed evidence showing that the machine never did furnish power to plow properly or fulfill the warranty.

[2] It is argued that appellants have breached that part of the contract requiring immediate written notice to the company and its local agent of any defect after a ten days' trial. It is difficult to ascertain from the record when this ten-day period should start to run, as the machinery never worked satisfactorily and experts of the company came intermittently to fix it from the time it was first received by appellants to July 10, 1913. We can see no merit in this argument as written notice of the defects was given to the company and its local agents on June 24, 1913, and the company at all stages of the transaction had notice of the defects, as shown by the frequent visits of their experts to appellants' farm, and this was the only purpose of inserting a clause requiring such notice.

[3] Respondent next complains that that portion of the contract requiring the return of the defective machinery to the place where it was received has not been complied with by appellants. The contract provided: "In consideration whereof, purchaser will receive same on cars on arrival subject to the warranty below printed. * * *" In view of this provision and the fact that the machinery actually was received by appellants on case, it is apparent that the provision requiring the return of the machinery to the place where it was received means literally what it says or else it is so ambiguous as to be incapable of enforcement. If it does mean a physical return of the outfit to the cars at some unnamed place, it is unreasonable and unenforceable. Literal compliance would require the purchaser to commit a trespass. Case Threshing Machine Co. v. Huber, 160 Mich. 92, 125 N. W. 66, 32 L. R. A. (N. S.) 212; Osborn v. Rawson, 47 Mich. 206, 10 N. W. 201. Surely appellants should not be made to negotiate with the railroad company for the right to place the machinery on its property, and no other place of de-

livery is suggested by the company unless it might be to Wells & Morris, their local agents. But this suggestion cannot avail the company in view of Morris' testimony that he made it a point not to tell appellants where to deliver it.

[4] The court found that the engine is a separate machine from the plow, under the provision of the contract which reads as follows:

> "This order is divisible as to each machine and attachment ordered and the failure of any separate machine or attachment to fill the warranty shall not affect the liability of the purchaser for any other machine or attachment hereby ordered."

Since there is no evidence that the plows did not fulfill the warranty, the company urges that under no circumstances could appellants escape liability for the purchase price of the plow, which the court found to be $700. In spite of counsel's ingenious argument that the plows and engine were inseparable and so contemplated by the contracting parties since they were sold at one time and for one purpose, we are inclined to uphold the trial court's ruling in this respect. The true test seems to be that the different parts are separate and divisible if the part that does fulfill the warranty is useless without the part that fails to do so. In the instant case it is true the plows would be of no use to appellants without some means of pulling them, but obviously any kind of a traction engine capable of generating enough power could be used in pulling the plows, as they are not made to be used with a special kind of an engine and so be incapable of use with any other. In reaching this conclusion we are not unmindful of the case of Womach v. Case Threshing Machine Co., 62 Wash. 661, 114 Pac. 509. In that case the contract construed was practically the same as the one here involved. A threshing machine outfit was sold which included a separator and appurtenances, the separator alone failing to fulfill the warranty, and it was sought to hold the vendee liable for the appurtenances, consisting of a wind stacker, feeder, bagger and spout, and separator brake. It was there held that these appurtenances were but a part of the separator, and would be utterly useless without it as no doubt another separator of the same make and kind would be necessary to render the appurtenances of any use and value whatever. This case is therefore distinguishable on the facts.

Because the trial court found that appellants demanded the cancellation of the notes as a condition precedent to their surrender of the outfit to the company, it is now argued that appellants are precluded from any relief, since the contract expressly gave to the company the option of surrendering the notes or furnishing a new machine, and that by attaching this condition to their offer appellants have precluded the company from exercising this option. It is unnecessary to discuss the legal phase of this question, as we do not think the facts substantiate the court's finding. It appears that on June 24, 1913, appellants sent a written notice both to the company at its home office and to the local agent, stating wherein the machine was defective, and that it was being held subject to the company's order. No condition of any kind was attached to this notice and, in so far as can be ascertained from the record, no action was taken by the company to take possession of the outfit after receiving this notice and prior to the time it is claimed appellants demanded the cancellation of the notes before they surrendered the outfit.

The judgment against appellants is therefore modified by reducing it to the sum of $700, with interest as agreed at 8 per cent. per annum from April 8, 1913, and costs below.

ELLIS, C. J., and FULLERTON and PARKER, JJ., concur.

(96 Wash. 559)

WORKMAN v. ROYAL EXCHANGE ASSURANCE. (No. 13795.)

(Supreme Court of Washington. June 4, 1917.)

1. INSURANCE 🔑288(1) — MISREPRESENTATIONS.

Under Laws 1915, p. 703, § 1, providing that insured's misrepresentations shall not defeat a policy unless made with intent to deceive, insured's statement that his property had been insured in another company, but he did not know whether such policy was still in effect, does not invalidate a policy prohibiting other insurance, although such other policy was actually in force.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 660–669.]

2. INSURANCE 🔑372—MISREPRESENTATIONS—WAIVER.

Insurance Code (Laws 1911, p. 244) § 106, providing for use of the New York standard fire policy, except that insurer may indorse additional provisions upon the policy, does not prevent insurer from waiving a policy provision prohibiting insurance in other companies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 941.]

3. INSURANCE 🔑378(3) — KNOWLEDGE OF AGENTS.

Knowledge of a fire insurance agent, authorized to execute and deliver a policy, that the property had been previously insured in another company, will be imputed to the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 992.]

4. INSURANCE 🔑378(1)—WAIVER.

Where a fire insurance company was notified through its agent that property had been previously insured in another company, but thereafter issued a policy and accepted premiums, it waived a policy provision prohibiting other insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968, 975–997.]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by J. T. Workman against the Royal

Exchange Assurance. Judgment for plaintiff, and defendant appeals. Affirmed.

H. T. Granger, of Seattle, for appellant. Dysart & Ellsbury and C. D. Cunningham, all of Centralia, for respondent.

HOLCOMB, J. In this action respondent demanded and recovered judgment upon a fire insurance policy issued by appellant to the respondent on or about July 9, 1915, insuring the respondent, subject to the terms and conditions of the policy, against loss by fire on a certain 1½-story frame dwelling house situated in the town of Littell, Lewis county, Wash. The policy is for $700, and the complaint shows payment by the respondent of $8.40 as premium, alleges that the dwelling was destroyed by fire on August 21, 1915, and demands judgment for the amount of the policy.

Appellant answered, and, so far as needs be considered on this appeal, set out two affirmative defenses in substance as follows: (1) That the policy sued upon provides that it shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, and that at the time the policy of insurance sued upon was written the insured represented to the appellant that he had no other insurance upon the property, when in truth and in fact at that time he did have other insurance in the Fireman's Fund Insurance Company in the sum of $800, all of which was unknown to appellant, and had appellant known that there was such other insurance the policy sued upon would not have been issued; that appellant learned for the first time after the fire of the existence of the Fireman's Fund policy, and thereupon tendered to respondent the return of the $8.40 premium received by it, and in connection with the answer deposited in the registry of the court the sum of $8.40 in pursuance of the tender. (2) That the policy sued upon provided as follows: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy"—and that, at the time the policy of insurance in this case was issued, respondent had other insurance upon the property covered by the policy without the knowledge or consent of appellant.

To these affirmative defenses respondent replied, admitting the existence of the $800 policy in the Fireman's Fund Insurance Company, but denying that it was unknown to appellant, denying that the respondent misrepresented the facts, denying that the appellant would not have issued the policy sued upon if it had known there was other insurance, and denying that appellant first learned of the existence of the Firemen's Fund policy after the fire, and, referring to the second affirmative defense, respondent admitted that there was the other insurance, but denied that the other insurance was without the knowledge or consent of appellant.

The case being tried to the court without a jury, the trial court, after hearing the evidence, made and entered findings of fact and conclusions of law in favor of plaintiff, and, among other things, found in substance that Benedict & Roberts were the agents of the appellant company at Centralia, Lewis county, Wash., and that as such agents they solicited and importuned respondent to take out the policy of insurance which is the subject of this suit, and at the time of and previous to the issuance of the policy respondent stated to the agents of appellant that he did not know whether or not there was another policy of insurance upon the building or not, that an agent in Chehalis, Wash., had been carrying insurance upon the building, and he did not know whether that policy of insurance had expired or not, and did not know that there was another policy of insurance upon the building until after the building was destroyed by fire on the 21st day of August, 1915, and then it was learned by respondent for the first time that there was another policy of insurance upon the building. As a conclusion of law the court concluded that the answers and statements made by respondent as to other insurance upon the building were not made with the intention of defrauding, deceiving, or misleading the agents of the appellant company, and did not prevent the policy of insurance from attaching and becoming a complete policy of insurance.

[1] Two assignments of error are made by appellant, both based upon the affirmative defenses set up in its answer. The first of these is that the policy of insurance issued by appellant is the standard form of policy prescribed by the Legislature, and that this policy does not permit additional insurance, or concurrent insurance, without the written consent of the insurer. It is conceded that the written consent of the insurer to any additional insurance was not given in the instant case. The respondent testified, and the court found, that notice was given to the insurer of the concurrent insurance, as to which respondent did not know whether it had expired or not, and it was afterwards found to exist. The policy in fact was written by the Fireman's Fund Insurance Company on February 25, 1913, for the term of three years from that date, and therefore did not expire until February 25, 1916, and was in force at the time of the destruction of the premises by fire.

The case hinges largely upon an interpretation of section 1, c. 192, Session Laws 1915, amending section 34 of the Insurance Code, as follows:

> "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his

behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive. * * *"

In construing the effect of this statute in Woods v. Insurance Co. of Penn., 82 Wash. 563, 144 Pac. 650, we said:

> "This section refers to three conditions which may affect the validity of the policy or in a measure control the rights of the insured and the liability of the insurer under the policy: First. Representations made in negotiations before issuance of the policy with intent to deceive the insurer; second, breaches of warranty or conditions recited in the policy; and, third, the right of the insured to have the policy considered valid, to the extent of the amount of insurance the premium paid would purchase in the absence of a breached warranty recited in the policy."

In connection with this question the only representations made by Workman as to the existence of other insurance were that there had been a policy in another insurance company, represented by an agent named Coffman, in the neighboring town of Chehalis, and that respondent did not have the policy, but that Coffman had it, as he had left it with Coffman, and that he did not know whether the policy had expired or not. Notwithstanding these statements, appellant's agents, being desirous of writing the policy, proceeded without inquiry to write the policy, and retained it in their possession for a considerable time, until respondent had paid the premium. It is evident, therefore, if respondent's testimony is to be believed—and there is no preponderance against it—that he made no representations to appellant's agents which were deceptive or could deceive, and that any representations he made were therefore not made with intent to deceive.

[2] Appellant insists that the Insurance Code of this state, adopted in 1911 (Laws 1911, p. 244), by section 106 thereof, prescribes that no fire insurance company shall write any policy of insurance, except on what is known as the New York standard form; that the provision requiring other insurance, if permitted, to be indorsed or noted upon the policy, was one required by the law of Washington of which all interested parties were bound to take notice, and must be thereby controlled, and that therefore the policy was void, because in contravention of the law; that the defendant cannot read this clause out of the contract. Such a construction of that provision of the Insurance Code would place the entire burden upon policy holders of seeing that the necessary provisions were inserted in or indorsed upon the policies upon delivery to them, and, if there were any omissions made by the insurer or its agents, such omissions would avoid the policy, notwithstanding the innocence of the insured.

In the very recent case of Ramat v. California Ins. Co., 164 Pac. 219, where a policy was issued to the insured without any indorsement in writing permitting other insurance, and it developed at the trial that the insured had other insurance upon the property in two other insurance companies, the same contention being made as in this case that the nonindorsement of permission for concurrent insurance avoided the policy, Judge Fullerton observed:

> "It is argued from this that the statute gives to these provisions of the policy the force of positive law, making them controlling as written; and hence there can be no oral waiver, or waiver by acts, of such provisions, and that there can be no recovery where it is made to appear that there is other insurance on the policy not provided by agreement indorsed on the policy or added thereto. * * *"

He then quotes the section of the Insurance Code relating to oral or written misrepresentation or warranty made in the negotiation of the contract or policy of insurance by the assured or in his behalf, which was heretofore referred to, cited as 3 Rem. & Bal. Code, § 6059—34, and, discussing these several provisions of the statute together, says:

> "The second sentence of the section [above cited], it will be observed, provides that the breach of a warranty or condition in any contract of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss. Manifestly the provision of the policy, to the effect that the policy should be void if the insured then had or should thereafter procure any other contract of insurance, if not indorsed on the policy, was a condition in the contract of insurance. While it existed at the time of the loss, it is plain that it did not contribute thereto. It would seem to require no argument, therefore, to demonstrate that it was the legislative intent that the breach of such a condition should not avoid the policy. Nor is there anything in the other provisions of the section that would lead to a different result. If the respondent is to be believed, there was no intent or attempt to deceive. He informed the agent of the appellant of the additional insurance, and the policy of insurance was issued to him with full knowledge of such insurance."

It is further observed in that case that:

> "While the language of the section quoted may not meet the precise situation, it is especially provided that it shall be liberally construed, and the plain intent of the statute is that liability for losses shall not be avoided for a mere want of a literal compliance with the provisions of the policy, which do not contribute to the loss or operate to the injury of the insurer."

The only difference between this case and the one above cited is that in that case the insured testified positively that he informed the agent of the insurer, at the time that he applied for the insurance in question, that he had the other insurance, while in this case the testimony is not positive to that effect, but is only to the effect that the insured informed the agents of the insurer that there had been a policy issued upon the same property as to which he did not know whether it had expired or not. In any event, in this case such representations as were made were not false representations, did not deceive, and could not have contributed to the loss. Upon such information as the respondent gave to appellant's agents, it was the duty of the agents either to ascertain whether or not there was any other insurance in force upon the property, or to refuse to write the policy of insurance until they had ascertained whether such insurance was in force.

[3, 4] The agents who wrote the policy were the authorized agents to execute and deliver such policies, and the knowledge that they had from the insured was knowledge to be imputed to the insurer. Having such facts, it either waived the conditions of its policy, or it perpetrated a fraud upon the respondent, when it accepted the premium and continued the policy in force until after the loss occurred. It is advisable, and the better policy, of course, to hold that no fraudulent intent could be imputed to appellant in executing and delivering the policy in question, but that it must be presumed that it by mistake omitted to express the effect of other insurance existing on the premises, or waived that provision, and must be held to be estopped from setting it up. Gray v. Germania Fire Ins. Co., 155 N. Y. 180, 49 N. E. 675. We are convinced, therefore, that the policy of insurance issued and delivered to respondent under the circumstances shown in this case was a valid and enforceable policy of insurance, and that the judgment of the lower court is correct.

Affirmed.

ELLIS, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

(96 Wash. 544)

GRUBER v. CATER TRANSFER CO.

(No. 13756.)

(Supreme Court of Washington. June 4, 1917.)

1. CARRIERS ⇨246 — EVIDENCE — PRESUMPTION.

The presumption is that the driver of a truck used for the transportation of baggage did not have authority to invite or permit persons to ride upon the truck.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1275, 1284, 1296.]

2. CARRIERS ⇨244 — CARRIAGE OF GOODS — INJURY TO PERSONS INVITED BY SERVANT.

Where plaintiff contracted with defendant to carry goods for him in a truck which never carried passengers, and defendant sent his servant with such truck, and plaintiff by permission, but without defendant's authority, rode in the car with his goods and was injured by being thrown out of the truck, as defendant had not contracted to carry the plaintiff, it is not liable for his injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1115, 1116.]

3. CARRIERS ⇨318(5) — NEGLIGENCE — EVIDENCE—SUFFICIENCY.

In action for personal injuries received from falling out of defendant's baggage truck driven by its servant, evidence *held* not to show that the driver was guilty of gross negligence or of wantonly causing plaintiff's injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1309, 1310.]

4. CARRIERS ⇨246 — CARRIAGE OF GOODS — CUSTOM—PROOF.

Evidence that one of defendant's drivers of its horse drawn trucks had allowed another driver upon the seat with him, but had never allowed any one to ride upon the back part of his truck where goods were carried, as in the present case, was not evidence of a custom available to plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1275, 1284, 1296.]

Department 2. Appeal from Superior Court, Spokane County; Walter M. French, Judge.

Action by Martin Gruber against the Cater Transfer Company. Judgment for plaintiff, and defendant appeals. Reversed, and case dismissed.

Smith & Mack, of Spokane, for appellant.
Roche & Onstine, of Spokane, for respondent.

PARKER, J. The plaintiff, Gruber, seeks recovery of damages for personal injuries which he alleges he received from the negligence of the defendant transfer company in the operation of one of its transfer automobile trucks while he was riding thereon by consent of the driver thereof. Trial in the superior court sitting with a jury resulted in verdict and judgment in favor of the plaintiff, awarding him damages, from which the defendant has appealed to this court.

Appellant is a corporation engaged in the transfer business in the city of Spokane, using both automobile and horse-drawn trucks in its business. It apparently is not engaged at all in the carrying of passengers. In any event, the automobile truck here in question was in no sense a passenger carrying vehicle nor intended to be used as such, as its appearance plainly so indicated. About 9 o'clock in the morning on April 9, 1915, respondent called the office of appellant by telephone and arranged for it to send a moving truck to his residence to move some trunks and household goods to another part of the city some blocks distant. The contract thus made plainly did not contemplate the transportation of respondent himself. Appellant sent an automobile truck with two of its employés in charge to respondent's residence when it was loaded with the goods respondent desired transferred; the employés being informed of the place where the goods were to be taken. The employés were very familiar with the city, and needed no one to go along and show them the way. The goods being loaded and the truck ready to start upon its journey, respondent said to the driver, "Hadn't I better go up and show you where to put that stuff?" The driver replied, "Yes," "All right," or "Come on." Respondent himself gave these different versions of what the driver then said to him. The driver and the other employé of appellant occupied the seat on the front of the truck, leaving no room for another person to ride there. The sides of the body of the truck were some 18 inches high. The rear end gate was down. A small trunk was on the floor of the truck a foot or two from the rear end. Respondent sat down upon this trunk facing the rear. The truck then proceeded upon its way, and while passing over a crossing raised somewhat above the level of the roadway respondent was thrown or fell out, striking upon his head and shoulders, and causing the injuries for which he here seeks recovery. He claims that he was thrown out as the result of the reckless driving of the truck by appellant's employé. We think no statement of the facts can be made from the record before us more favorable to respondent's contentions than this summary. Indeed, it is respondent's own version, in substance, of the facts.

Appellant by timely and appropriate motions made upon the trial of the case challenged the sufficiency of the evidence to warrant any recovery against it, whatever the negligence of the driver may have been; the principal argument being that respondent was not upon the truck with the knowledge or consent of appellant, and that the driver had no real or apparent authority from appellant to consent to respondent being upon the truck as he was. The refusal of the trial court to so rule as a matter of law is the principal claimed error here relied upon.

It seems to us that the proper disposition of this case is controlled by our decision in Fischer v. Columbia & Puget Sound R. Co., 52 Wash. 462, 100 Pac. 1005. In that case the plaintiff contemplated becoming a passenger upon a freight train of the defendant company to which there was a caboose attached for the carrying of passengers. It was a long train, and plaintiff was near the front end, and it seemed doubtful whether he would be able to walk back to the caboose before the train started. The engineer, noticing this situation, told the plaintiff to get on the engine and ride. The plaintiff did so, and because of defective brakes the crew lost control of the train, resulting in plaintiff's injury, which would not have occurred had the plaintiff been riding in the caboose which was provided for passengers. It was held as a matter of law that the company was not liable because the plaintiff was not upon the engine by consent of the company or any of its agents who had authority to invite him to ride there, and no facts were shown pointing to any real or apparent authority on the part of the engineer to invite the plaintiff to ride there, so that the authority of the engineer in that respect could not become a question for the jury. Judge Gose, speaking for the court, quoted with approval the general rule as stated in Waterbury v. New York, etc., R. Co. (C. C.) 17 Fed. 671, as follows:

> "Undoubtedly the presumption of law is that persons riding upon a train of a railroad carrier, which are palpably not designed for the transportation of persons, are not lawfully there. And if they are permitted to be there by the consent of the carrier's employés, the presumption is against the authority of the employés to bind the carriers by such consent."

In the decision so quoted from, however, the question of implied authority of the engineer to invite the plaintiff to ride upon the engine was, because of the plaintiff's being a shipper of stock on the train and certain proof of custom introduced in evidence, held proper to be left for the jury to decide. After citing and reviewing a number of authorities, Judge Gose concluded the opinion of the court as follows:

> "We conclude, therefore, that the engineer, in inviting the appellant to get onto the engine, did not act within the real or apparent scope of his authority; that the appellant was required to take notice of this fact; that the appellant was not a passenger; that the company owed him no affirmative duty; and that he cannot recover."

[1] It seems to us that the presumption is equally strong in this case that appellant's driver did not have authority to invite or permit respondent to ride upon the truck, especially in the position which he did ride. Nothing could seem plainer than that the nature of the truck and the purpose for which it was being used would tell respondent that appellant never contemplated persons other than its employés riding thereon, and we think there is no evidence in the record which tends to affirmatively show to the contrary. Among the decisions cited and reviewed by Judge Gose in that opinion as lending support to the conclusion reached are Chicago, etc., R. Co. v. Michie, 83 Ill. 427; Atchison, etc., R. Co. v. Johnson, 3 Okl. 41, 41 Pac. 641; Flower v. Pennsylvania R. Co., 69 Pa. 210, 8 Am. Rep. 251; Snyder v. Hannibal, etc., R. Co., 60 Mo. 413; Duff v. Alleghany R. Co., 91 Pa. 458, 36 Am. Rep. 675; and Atchison, etc., R. Co. v. Lindley, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515.

[2] Our decision in Baird v. Northern Pacific Ry. Co., 78 Wash. 67, 138 Pac. 325, might seem to lend some support to respondent's contentions, but in that case an employé of the railway company in accordance with a custom which was known to the company and assented to by it was riding home upon the engine of a work train after working hours, when he was injured by the negligent operation of the engine. That decision goes no further than holding that, these facts appearing in the complaint, it stated a cause of action, and that proof of the alleged facts made the question of the authority of the operators of the engine in allowing him there one for the jury to decide. The following authorities lend support to our conclusion: Robinson v. McNeill, 18 Wash. 163, 51 Pac. 355; Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 91 S. W. 199, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881; Dougherty v.

Chicago, M. & St. P. Ry. Co., 137 Iowa, 257, 114 N. W. 902, 14 L. R. A. (N. S.) 590, 126 Am. St. Rep. 282; Clark v. Colorado & N. W. R. Co., 165 Fed. 408, 91 C. C. A. 358, 19 L. R. A. (N. S.) 988; Dover v. Mayes Mfg. Co., 157 N. C. 324, 72 S. E. 1067, 46 L. R. A. (N. S.) 199; Schulwitz v. Delta Lumber Co., 126 Mich. 559, 85 N. W. 1075; Mahler v. Stott, 129 Mich. 614, 89 N. W. 340; Scott v. Peabody Coal Co., 153 Ill. App. 103; Lygo v. Newbold, 9 Wels. & Hurl. (Exch. Rep.) 302. The last-cited case seems to be exactly parallel to the one before us. The decision is well epitomized in the syllabus thereof, which reads:

> "The plaintiff, a person of full age, contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with his cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the way, the cart broke down, and the plaintiff was thrown out and severely injured. Held that, as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained."

We see no escape from the conclusion that appellant cannot be held liable for the injuries received by respondent, and that it must be so decided as a matter of law.

[3] We do not understand counsel for respondent to seriously contend here that appellant's driver was guilty of gross negligence or of wantonly causing respondent's injury. Indeed, we see no room for such contention in the light of the evidence. Besides, the trial court in its instructions submitted the case to the jury upon the theory of appellant being in no event liable to respondent except upon its failure to exercise ordinary care for his safety, and we do not find in the record any exceptions to these instructions or request for instructions submitting to the jury the question of gross negligence or wanton action on the part of appellant's driver.

[4] We find in the record no evidence worthy of consideration pointing to any custom of allowing persons other than appellant's employés to ride upon its transfer trucks. The only evidence which could have any bearing whatever upon this question was the testimony of one of appellant's drivers of one of its horse-drawn trucks that he had allowed others to ride upon the seat with him. But even he testified that he never allowed any one to ride on the back part of his truck where goods were being carried. This, we think, is no evidence of custom available to respondent.

We conclude that the judgment must be reversed, and the case dismissed.

It is so ordered.

ELLIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

(96 Wash. 581)

STATE ex rel. BARNES et ux. v. SUPERIOR COURT FOR KITSAP COUNTY et al.

(No. 14014.)

(Supreme Court of Washington. June 4, 1917.)

1. Landlord and Tenant 🔑291(9½)—Unlawful Detainer—Bond—Application to Raise—Receiving Evidence.

Rem. Code 1915, § 821, providing that, on hearing of application to raise amount of bond in unlawful detainer action, evidence may be given, is merely permissive; and the court may be as well informed by admissions and statement of counsel as by reception of evidence.

2. Landlord and Tenant 🔑291(9½)—Unlawful Detainer — Striking Additional Bond.

Under Rem. Code 1915, § 821, providing that, if an additional bond ordered to be furnished by defendant in unlawful detainer action be found insufficient after hearing, the sheriff shall forthwith put plaintiff in possession, the bond, not complying with section 820, and being so found insufficient, may be stricken.

3. Landlord and Tenant 🔑291(9½)—Unlawful Detainer—Writ of Restitution.

Rem. Code 1915, § 819, declaring the writ of restitution, to be issued in unlawful detainer action at commencement thereof, returnable in 20 days, is merely a provision for the sheriff returning the writ with his doing thereon within such time, and does not limit its force and vitality to such time, but its life endures till final determination of the right of possession, so that, while it is suspended and held in abeyance by defendants giving a counter bond, it revives and can be enforced on defendant's failing on order to give an additional bond satisfying the statute.

4. Review 🔑3—Other Adequate Remedy—Dispossession Proceedings.

Writ of review will not lie for striking bond of defendants in unlawful detainer action and ordering restitution to plaintiff, there being plain, speedy, and adequate remedy by application under Rem. Code 1915, § 821, for an additional bond from plaintiff, and by appeal with bond staying, under sections 832 and 833, the writ.

[Ed. Note.—For other cases, see Review, Cent. Dig. § 3.]

Department 2. Original proceedings in review by the State, on the relation of John G. Barnes and another, against the Superior Court for Kitsap County; John S. Jurey, Judge, presiding. Writ denied.

John G. Barnes, of Seattle, for plaintiffs.
McClure & McClure, of Seattle, for respondents.

HOLCOMB, J. This original proceeding in review is prosecuted by relators, seeking to have certain orders of the superior court made in an unlawful detainer action against relators reviewed, revised, or annulled, and the proceedings thereunder stayed. In the original action, one Norris and wife, after service of a notice to vacate, proceeded in unlawful detainer to dispossess relators who held under an alleged written lease. They caused the complaint and special statutory summons in unlawful or forcible detainer to be served upon the defendants and applied for and had issued a writ of restitution at the time of the filing of the summons and complaint, on April 29, 1916, the bond therefor being fixed by the court at $500, which plaintiffs furnished, and the writ was served upon defendants. Within three days thereafter, as provided in section 820, Rem. Code, the defendants furnished a counter bond, which was filed with and approved by the clerk of the court on May 2, 1916. Thereafter, and within 20 days after its issuance as provided by the statute, the writ of restitution was returned by the sheriff into court, together with his acts thereunder. Thereafter a trial was had, in which the verdict of the jury was for the defendants; but the verdict was set aside and a new trial granted by the court. Thereafter plaintiffs in the action gave notice of a motion for an order for additional bond by defendants in the sum of $2,000. On February 9, 1917, the court made an order reciting that:

> The motion above referred to "coming on regularly for hearing upon the application of plaintiffs for an order requiring the defendants Barnes and wife to furnish additional bond in order to stay the writ of restitution issued in the cause, and the court, having heard the argument of counsel, makes the following order: Ordered, adjudged, and decreed that the defendants Barnes and wife furnish and file in said cause within 10 days from date hereof an additional bond in the sum of $1,000, with sufficient surety conditioned in the manner provided by law for the stay of the writ of restitution heretofore issued in said cause, and that, in the event of a failure of said defendants to furnish said bond as aforesaid, the sheriff of Kitsap county, Wash., proceed forthwith to execute said writ of restitution."

On February 19, 1917, relators filed a purported additional bond with but one surety and conditioned as follows:

> "Now, therefore, if the above-named principals shall pay to the above-named plaintiffs such sums as the plaintiffs may recover in this action for the use and occupation of the premises described in the complaint in this action subsequent to the date of the execution and filing of this bond, or any rent found due subsequent to the execution and filing of this bond, together with all damages the plaintiffs may sustain by reason of the said principals' occupying or keeping possession of said premises subsequent to the execution and filing of this bond, and also all the costs of this action incurred subsequent to the execution and filing of this bond, then this obligation to be void."

This bond was not approved by the clerk of the court, and on February 20, 1917, the plaintiffs in that action filed a motion to strike the bond from the files, on the ground that it had not been approved by the clerk of the court as provided by law and that it did not comply with the law nor with the order of the court entered on February 9, 1917; and that on the striking of the bond the sheriff of Kitsap county, Wash., be ordered by the court forthwith to execute the writ of restitution heretofore issued.

On February 24, 1917, the court made an order reciting, among other things, that, having heard the argument of counsel and being fully advised, the bond should be stricken from the records and files, and that the sheriff of Kitsap county forthwith put plaintiffs in the action in possession of the premises described therein; to all of which the relators objected and excepted.

It is contended that these orders were made by the court without any hearings as required by law, and that the order requiring additional bond was made without the introduction of any evidence, and that the life of the writ of restitution had expired, and the court had no power or jurisdiction to order its execution.

By the provisions of section 820, Rem. Code, a counter bond given by defendants to retain possession of premises in an unlawful entry and detainer action is required to be approved by the clerk of the court in such sum as may be fixed by the judge, with "two or more sureties" to be approved by the clerk of the court, and conditioned that they will pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of the premises or any rent found due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of the premises, and also all costs of the action. By section 821, Rem. Code, the plaintiff or defendant may at any time, upon two days' notice to the adverse party, apply to the court or judge thereof for an order raising or lowering the amount of any bond in the act provided for. The order complained of here was an order raising the amount of the counter bond to be given by the defendants, and that counter bond given by the defendants was, as we have seen, by section 820, supra, required to be signed by two or more sureties and approved by the clerk of the court and conditioned that they would pay to the plaintiff such sum as the plaintiff might recover for the use and occupation of the premises, and so on. The bond offered and filed by defendants was not executed by two sureties or more, was not approved by the clerk, and was not conditioned as required by the statute.

[1] Neither was it in all cases necessary for the court to receive evidence upon the application for an order raising the amount of the bond. The statute does, indeed, provide that upon the hearing of the application evidence "may be" given. But this is permissive and not mandatory. The court may be as well informed by the admissions and statements of counsel as by any evidence that might be offered; and, this case having been tried before the court, we may assume that the court was as well informed as to the necessities and requirements in regard to additional bond by evidence in the case as by any new evidence that might have been offered.

[2] It is contended by relators that the motion to strike the bond is a proceeding not contemplated by the statute, and that the only procedure available to the plaintiffs in

regard to the matter was that provided by section 821, supra, to the effect that:

> "The bondsmen may be required to be present at such hearing if so required in the notice thereof, and shall answer under oath all questions that may be asked touching their qualifications as bondsmen, and in the event the bondsmen shall fail or refuse to appear at such hearing and so answer such questions the bond shall be stricken."

But the statute further provides that:

> "In the event the court shall order a new or additional bond to be furnished by defendant and the same shall not be given within twenty-four hours, the court shall order the sheriff to forthwith execute the writ. In the event the defendant shall file a second or additional bond and it shall also be found insufficient after hearing, as above provided, the right to retain the premises by bond shall be lost and the sheriff shall forthwith put the plaintiff in possession of the premises."

The court gave the defendants 10 days instead of 24 hours in which to give the new or additional bond, and when they offered the new bond they did not procure the approval of the clerk of the court, and they limited its conditions in particular respects so that it could not comply with the terms of the counter bond required by section 820, supra.

[3] Nor is there any merit in the contention of relators that the writ of restitution issued at the time of the commencement of the action had lost its force and vitality because of the passage of more than 20 days after its issuance. The 20-day provision in the statute (section 819, Rem. Code) is merely a provision that the sheriff shall return the writ with his doings thereon within 20 days after its date. The life of the writ endured until the final determination of the right of possession of the premises. When the defendants in possession gave a counter bond and retained possession, they suspended and held in abeyance the writ of restitution, and when, under the statute, the defendants lost their right of possession by failure to comply with the statute, the writ of restitution instantly revived and could be enforced.

[4] We have thus far discussed the merits of the application because of the great earnestness and vehemence with which relators have insisted that the trial court exceeded its authority and jurisdiction in acting upon and striking the bond, and thus worked great injury to relators for which they have no plain, speedy, and adequate remedy. We feel, however, that there should be some discussion of the question of whether or not the writ of review is an appropriate remedy to be used in such a case as this in any event. That question is raised by respondent, but relators strenuously urge that in such a case as this there would be no plain, speedy, and adequate remedy at law to correct the erroneous acts and proceedings of the court below. It is contended that they would be deprived of possession of the premises in question during the pendency of the appeal and would thus be injured, and that there would be no plain, speedy, and adequate remedy therefor. One answer to this is that, in forcible or unlawful entry and detainer proceedings which are summary statutory proceedings, the law especially provides for the dispossession of occupants upon, a sufficient bond, and provides for the retention thereof by the occupants upon sufficient counter bond. It also provides that either party may at any time, upon two days' notice to the adverse party, apply for an order raising or lowering the amount of any bond in this act provided for. If the defendants are not protected by an adequate bond on the part of the plaintiffs, they have the remedy given by statute to apply for an additional bond and make a proper showing therefor.

Furthermore, the statute, as in other civil cases, provides for an appeal as a matter of course by any party feeling aggrieved by the judgment, and, if by the judgment below the defendant is dispossessed and a writ of restitution has been previously issued, it is provided that the writ shall be stayed by the execution and filing of a bond on appeal by the defendant. Rem. Code, §§ 832, 833. Mere dispossession, especially against the consent of the occupants, as here, does not imperil the legal rights of the occupants dispossessed when it comes to a final adjudication of the matter upon the merits.

We are therefore of the opinion that the writ should not lie, because there is a plain, speedy, and adequate remedy at law. Denied.

MOUNT and PARKER, JJ., concur. ELLIS, C. J., concurs in the result.

(96 Wash. 616)

GRANT REALTY CO. et al. v. HAM, YEARSLEY & RYRIE et al. (No. 13225.)

(Supreme Court of Washington. June 8, 1917.)

1. EMINENT DOMAIN ⇨243(2)—JUDGMENT—CONCLUSIVENESS—GOOD FAITH.

The contention, in a suit to quiet title to water as against a prior appropriator, that such appropriator's irrigation project was speculative and not in good faith, was foreclosed as against parties to a suit by such appropriator to condemn land for a dam and persons claiming under them by the order of the Supreme Court in such suit directing the entry of a judgment of condemnation, as the question of good faith was involved in that suit and should have been litigated therein.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 627, 700.]

2. WATERS AND WATER COURSES ⇨135—APPROPRIATION OF WATER—DILIGENCE IN CONSTRUCTING WORKS.

Rem. Code 1915, §§ 6316–6319, provides that as between appropriations of water the first in time is the first in right, requires the posting and filing of notice of appropriation, and provides that the appropriator must commence the construction of his works within three months if the use of the water is by storage and within six months if by diversion, and diligently and continuously prosecute such works to completion unless temporarily interrupted by the elements; that by a strict compliance with such rules the appropriator's rights relate back to the time the notice was posted; but that a failure to comply therewith deprives him of the right to the use of the water as against a subsequent appropriator faithfully complying therewith. Section 6329 gives the owner of nonriparian land the right to condemn land for ditches, canals, and works necessary to divert and convey the water to his lands. *Held*, that a proceeding by a nonriparian appropriator to condemn land for a dam for its irrigation project was a necessary part of the prosecution of the work, and, if prosecuted diligently and continuously, the time so consumed must be considered as employed in construction work so as to preserve the appropriator's rights, as any other rule would make it practically impossible for any one but a riparian owner to secure water by the doctrine of relation as against a subsequent appropriator, and such rule is not inconsistent with the rule that the right to condemn is dependent upon the right to water, nor does it penalize a subsequent appropriator owning the land sought to be condemned for resisting the condemnation.

3. WATERS AND WATER COURSES 🔑135—APPROPRIATION OF WATER—DILIGENCE IN CONSTRUCTING WORKS.

While Rem. Code 1915, § 6319, providing that an appropriator's rights to the use of water relate back to the time his notice of appropriation was posted, upon a strict compliance with the rules stated in the preceding sections, imposes its own rule of strict construction, such strict construction must be reasonable.

4. WATERS AND WATER COURSES 🔑128—APPROPRIATION OF WATER—CONSTRUING STATUTES TOGETHER.

Rem. Code 1915, §§ 6318, 6319, as to an appropriator's rights relating back to the notice of appropriation, must be construed with section 6329, authorizing condemnation of land for works, so that the one will not defeat the other; they being in pari materia.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 143.]

5. WATERS AND WATER COURSES 🔑135—APPROPRIATION OF WATER—DILIGENCE IN CONSTRUCTING WORKS.

Where it was necessary for an appropriator of water to condemn land for a dam for its irrigation project, and its ditches, flumes, and pipe lines would cost far more than the dam and outlet works, the failure to complete all of the project except the dam pending a condemnation suit was not a failure to diligently prosecute the work defeating the appropriator's rights, as the line would have lain idle and deteriorated until the dam site could be secured.

6. WATERS AND WATER COURSES 🔑135—APPROPRIATION OF WATER—DILIGENCE IN CONSTRUCTING WORKS.

Facts *held* to show that there was no culpable delay which would defeat the rights of an appropriator of water in prosecuting a suit to condemn land for a dam for its irrigation project.

7. WATERS AND WATER COURSES 🔑135—APPROPRIATION OF WATER—DILIGENCE IN CONSTRUCTING WORKS.

Where, in a suit by an appropriator of water to condemn land for a dam for its irrigation project, it delayed from March until the following January to enter findings and a judgment against it in order that its time for appeal might not start to run, but this delay was with the consent of the landowners' attorneys, the landowners and those claiming under them were estopped to claim that such delay defeated the appropriator's rights under its appropriation.

En Banc. Appeal from Superior Court, Grant County; Ralph B. Kauffman, Judge.

Action by the Grant Realty Company and others against Ham, Yearsley & Ryrie and others. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

Cannon & Ferris, of Spokane, and Williamson & Luhman, of North Yakima (Mack F. Gose, of Pomeroy, of counsel), for appellants. Merritt, Oswald & Merritt, of Spokane, for respondents.

ELLIS, C. J. In this action, plaintiffs, claiming as bona fide subsequent appropriators, seek to quiet title to the waters of Moses Lake, in Grant county, as against defendant's claim as a prior appropriator. For a description of Moses Lake, its environs, and outlet, we refer to the very full statement in the case of State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945.

Defendant owns a large tract of land lying southwesterly and 14 to 20 miles from the southerly end of the lake. This is semiarid, but capable of being rendered very productive by irrigation. In the latter part of 1908, Wilbur S. Yearsley, vice president and treasurer of the defendant Ham, Yearsley & Ryrie, a corporation, conceived the idea of using the waters of the lake for irrigating these lands. Investigation was started, and, it being determined that the water could be put on these lands by gravity, the first notice of the appropriation of the waters of the lake by defendant was posted on January 20, 1909, and recorded on January 28th of that year. As investigation proceeded, subsequent notices were posted and recorded on February 8, 1909, and February 23, 1909, July 6, 1910, and July 8, 1910, respectively. Investigation was continued till in August, 1910, defendant's officers were convinced that there was water available to irrigate about 30,000 acres of land. Touching the cost, defendant's engineer made different estimates, varying in amount according to the number of acres to be watered under the respective estimates. The plan was to store in the lake the annual runoff of water, place an intake pipe below the water level, and conduct the water by gravity through 13 or 14 miles of open ditch, pipe, and flume to defendant's lands. At the time of the trial in this case, the engineer had made an estimate for a final plan designed to irrigate 12,000 acres, the total cost of which would be $55 per acre, or $660,000. This plan called for the submersion of a 6-foot intake pipe at an elevation of 1,032 above sea level; the water surface of the lake to be raised by a dam to an eleration of 1,038. By this plan the acreage could be increased to 20,000 without any additional cost per acre. Plaintiffs' experts placed the cost per acre much higher. For the purpose of securing the site for the dam, a condemnation action was commenced and a notice of lis pendens was filed on October 7, 1910. The suit was against the Northern Pacific Railway Company, the record owners of the land sought to be acquired, and R. F. Pettigrew, who held a contract of purchase from the railroad company.

On October 8, 1910, F. H. Nagle, manager of the corporations, plaintiffs in the case now before us, posted notices of appropriation of the waters of Moses Lake with the professed intention of purchasing and irrigating lands around the lake and selling such lands with the water to settlers. For this purpose, plaintiff Grant Realty Company was organized in March, 1911. Nagle testified that the appropriation of water and the work done by him was for the benefit of that company.

The condemnation action was tried in February, 1911, but the findings of fact and judgment entered thereon denying defendant's right to condemn were not filed until January 10, 1912. Hon. R. H. Steiner, the judge before whom it was tried, testified that he had no independent recollection as to when he announced his decision; but refreshing his memory from a book kept by the clerk, which was not introduced in evidence, he concluded that the decision was announced on May 29, 1911. G. M. Ferris, one of the attorneys for the railway company in the condemnation action and one of the attorneys for plaintiffs in the present case, testified that the reason that judgment was not entered until January 10, 1912, was that counsel for Ham, Yearsley & Ryrie requested of counsel for the railway company and Pettigrew "that judgment be not entered in order that his time for appeal might not start to run." No evidence was offered to the contrary.

Soon after the entry of that judgment, an application was made to this court for a writ of certiorari to review it. The writ was granted, and on October 10, 1912, an opinion of this court was filed reversing the action of the lower court and granting the right to condemn. State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945. A petition for rehearing was filed, and the remittitur was not sent down until March 10, 1913. Meanwhile plaintiff in that suit, defendant here, continued its investigation as to the amount of water that would be available, and also constructed some of its ditch line. Yearsley, testifying from the books of defendant, stated that the amount expended in ditch construction was $6,123.33 since the condemnation action was commenced.

Turning now to the work done by plaintiffs, it was first actually started on March 26, 1911. Having become the owners of the land which defendant herein sought as a dam site, plaintiffs constructed a dam thereon to impound the waters for their own project. The intention was to irrigate as much land as the water available would supply. This, based upon knowledge acquired up to the time of the trial herein, was estimated at approximately 15,000 acres. The plan was for the Grant Realty Company, with a capital of $3,000,000, to purchase the lands, secure the water rights, and construct works. The land was to be divided into separate units each to be irrigated by a separate pumping plant. Later, the other plaintiff corporations, each with a capital of $1,000, were organized. To each of these subsidiary corporations was conveyed in return for its stock a tract of land forming a pumping or irrigation unit. These small corporations would sell the land to settlers and operate the plants. At the time of the trial there were eight of these pumping units constructed capable of serving a total of 3,282 acres. Approximately 700 acres were receiving water. In this work there had been expended $226,000, exclusive of the cost price of the land, but including salaries of a manager, bookkeeper, and stenographer amounting to $20,560, and traveling expenses amounting to $13,730.34.

Though the remittitur in the condemnation action was filed in the lower court on March 10, 1913, judgment of the trial court was not entered thereon until September 9, 1913. Defendant accounts for this delay by the statement that, Grant county being a small county, one jury a year usually does the work. This is not denied, and Judge Steiner's testimony tends to confirm it. In any event, shortly after the entry of the judgment on September 9th, the case was noticed for trial and a jury demanded. On October 2, 1913, plaintiffs herein first made their appearance in the condemnation action. On that date they moved to be substituted as parties defendant instead of the railway company and Pettigrew, upon a showing that they had acquired title to the property sought to be condemned. This motion was denied. On October 14th, they moved for leave to file an answer and again for substitution. These motions were also denied. On October 20th, they filed their answer and a motion to abate and vacate an order setting the condemnation action for trial. This answer was subsequently stricken and the motion denied. Thereafter, plaintiffs herein applied to this court for a writ to prohibit the trial court from proceeding with the trial of the condemnation suit without making the requested substitution, whereupon the hearing in the condemnation suit was continued to December 1, 1913. The peremptory writ of prohibition was denied by this court in an opinion filed on November 7, 1913. State ex rel. Grant Realty Co. v. Superior Court, 76

Wash. 376, 136 Pac. 144. On November 21, 1913, plaintiffs made a joint motion to set aside the order theretofore entered striking their answer, to vacate the order of condemnation, to vacate the order fixing the date of trial, and to abate the action. On the same day the complaint in the case at bar was filed directly attacking the right of defendant herein to the waters of the lake. The trial court being of the opinion, as he testified, that the right to the waters of the lake should first be determined, thereafter treated the order setting the condemnation trial for December 1, 1913, as vacated. On April 29, 1914, on motion of plaintiffs herein, an order was entered in the condemnation case granting a stay of the action until the trial of the case at bar, and plaintiffs herein were given leave to subsequently apply for a vacation of the order of condemnation entered pursuant to the remittitur of this court. Thereafter, the plaintiff in the condemnation suit, defendant here, applied to this court for a writ of mandamus to compel the trial court to proceed with the trial of the condemnation suit. On September 26, 1914, this court denied the peremptory writ, stating:

> "That the learned superior court did not abuse its discretion in so controlling the order of the disposition of the two causes as to first cause the question of the right of the respective parties to the waters of Moses Lake to be determined, in view of the possible influence that the disposition of that question may have upon relator's [defendant's] right to acquire and hold the land by right of eminent domain." State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 81 Wash. 690, 695, 696, 143 Pac. 310, 312.

The case now before us was brought to trial, and on July 26, 1915, a decree was entered adjudging to defendant the prior right to appropriate the waters of the lake, and dismissing plaintiffs' complaint with costs. Plaintiffs appeal.

Appellants contend: (1) That respondent has not prosecuted its project in good faith, but merely as a speculation; and (2) that respondent by lack of diligence has lost its right to claim a priority of water right by relation under the statute, Rem. Code, §§ 6318 and 6319, as against appellants who are subsequent appropriators of the waters of the lake.

[1] 1. We shall devote little space to the question of good faith. Every extensive irrigation project is, in a sense, essentially speculative. So far as the record shows, respondent's project is not more inherently speculative in its nature than that of appellants. Yearsley testified in substance that in the spring and summer of 1910 he entered into negotiations with Pettigrew and the Armours, of Chicago, with a view to uniting Pettigrew's and respondent's interests and a financing of the project by the Armours; that through the influence of Brumder Bros., of Milwaukee, the Armours were dissuaded from taking any interest in the matter; that he then attempted to interest the Brumders in respondent's project, but they gave him to understand that they had plenty of money and would proceed with their own project regardless of respondent's claims, whereupon respondent commenced the action to condemn for a dam and intake site. It is true that Yearsley testified that when he was negotiating with the Armours he supposed he was selling out, but from the entire evidence we are satisfied that he did not mean this literally, but in the arrangement as then contemplated he and his associates expected to retain an interest. At any rate, all this was before the appellant corporations had been launched by the Brumders, and this court subsequently (70 Wash. 442, 126 Pac. 945) ordered the entry of a judgment permitting a condemnation as against the railway company and Pettigrew, under whom appellants claim title to the land subject to the condemnation suit. Obviously, the question of respondent's good faith up to that time was foreclosed as to Pettigrew and the railway company in that proceeding, and also as to appellants who claim title to the land under those parties. It is true appellants claim title to the water of the lake by an independent appropriation, but that can make no difference. The question of respondent's good faith was as essentially involved in the condemnation suit as it is in this suit, and was or should have been litigated in that suit.

[2] 2. The statute of this state governing the appropriation of waters is founded upon the Arid Region Doctrine of appropriation as distinguished from the common-law rule of riparian rights. That doctrine is based upon the custom of miners in the early days in California, under which the first taker of water on public lands for a beneficial use was accorded the better right. Under that rule, the completed diversion, if diligently accomplished, related back to the initial work so as to cut out intervening claimants. Statutes such as ours are, in the main, but declaratory of this Arid Region Doctrine, with the added requirement of an initial statutory notice to the date of which the appropriator's rights shall relate on condition that he commence work within a given time and prosecute it diligently and continuously to completion and apply the water to a beneficial use. Our statute, reference being to Rem. Code, provides, in section 6316, that, "as between appropriations, the first in time is the first in right." In section 6317, it prescribes the character of the notice and provides for posting and filing the same. It then provides:

> "6318. If said use is by storage, the appropriator must, within three months after the notice is posted, commence the construction of the works by which it is intended to store the same. If said use is by diversion, the appropriator must, within six months after the notice is posted, commence the excavation or construction of the works by which it is intended to divert the same; it being herein expressly provided that such works must be diligently and continuously prosecuted to completion, unless temporarily interrupted by the elements.

> "6319. By a strict compliance to the above rules the appropriator's rights to the use of the water actually stored or diverted relates back to the time the notice was posted; but a failure to comply therewith deprives the appropriator of the right to the use of the water as against a subsequent appropriator who faithfully complies with the same."

It is manifest both from the custom which is its basis and from the terms of the statute that a claimant can invoke the rule of relation declared in section 6319 only by a compliance with the rule of diligence laid down in section 6318. What constitutes a sufficient compliance with that rule of diligence is the dominant question in this case. Appellants contend that the diligent and continuous performance of the actual physical work of construction and diversion to completion is a sine qua non, evitable only by the statutory excuse of temporary interruption by the elements. Respondent urges that delays in the actual work occasioned by litigation, especially if waged with the adverse claimant, must be excused. It seems to us that neither position is wholly correct. The first is too narrow, the second too broad.

It has usually been held that any matters not incidental to the enterprise itself, but rather personal to the appropriator, such as pecuniary inability, sickness, and the like, are not circumstances excusing great delay in the construction of the works necessary to actual diversion and use of the water. Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550; Rio Puerco Irr. Co. v. Jastro, 19 N. M. 149, 141 Pac. 874; 2 Kinney, Irr. & Water Rights (2d Ed.) § 739; 1 Wiel, Water Rights (3d Ed.) § 383.

From an assumed analogy, appellants argue that litigation is never an excuse. But to create the analogy it must be assumed that all litigation is purely personal to the litigant. The assumption is faulty. Condemnation for a site for an impounding dam or intake by an appropriator who does not own such a site is just as much matter incident to the enterprise to which the dam or intake is an essential as is the actual construction of the dam or intake. It would be simply idle to confer, as our statute does confer, upon the owner of nonriparian lands the right to condemn for such purpose if the time necessarily consumed in the condemnation must be entered in red on the ledger of diligence, and thus defeat his right of priority by relation, which the statute as a whole was intended to give. If time necessarily consumed in condemnation must be charged as time lost through lack of diligence under the statute, then every enterprise in which the condemnation of a site for diversion works is necessary is a defeated enterprise at its inception and the statutory right to condemn is not a right, but a snare. The right to condemn is dependent upon the initiation of the right to use the water by valid notice of appropriation, since it is an incident to the diversion of the water. Whatever the general rule, such is the law of this case as declared by this court on the original review. 70 Wash. 442, 126 Pac. 945. It is there said:

> "The relator's right to acquire this land by condemnation rests upon its right to the water which it proposes to use in its irrigation project. That is, if it has lawfully acquired by appropriation the right to so use the water, it then has the right to acquire the land by condemnation in aid of its irrigation project. Otherwise, it has no such right to so acquire the land, since its public use of the land rests upon its ability to use it as a part of its irrigation works, and of course, it can have no irrigation works if it has no water therefor."

It follows that the prosecution of the condemnation proceeding is a necessary part of the prosecution of the work to completion in order to enable respondent to invoke the doctrine of relation. It follows further that, if respondent has prosecuted the condemnation for its dam site "diligently and continuously," the time so consumed must be considered as employed in construction work. In the nature of the case, it is time just as necessary to the work of impounding and diversion as is the time necessary for the actual physical construction of the dam. The condemnation suit, therefore is not matter of excuse from performance of the work, but is itself matter of performance. Any other view would make it virtually impossible for any one but a proprietor of riparian lands to secure water for irrigation by the doctrine of relation as against a subsequent appropriator who actually takes the water pending suit to condemn a site for a dam or intake by the appropriator who first initiated his right by valid statutory notice. If the rule contended for by appellant is correct, then all that a riparian owner, whose property includes the only feasible site for diversion, would have to do, would be to ignore the nonriparian first appropriator's notice of appropriation and divert and use the water while the first appropriator was prosecuting his action to condemn the site for diversion. Such a construction would make the statute defeat itself. But appellants argue that respondent is trying to occupy two inconsistent positions: First, that the right to condemn exists because of the initiated water right; and, second, that the water right is perfected by the exercise of the right to condemn. We fail to see the inconsistency. Under the statute, the right to take the water as against a subsequent appropriator does depend in terms upon the initial notice of appropriation through the rule of relation. That is to say, the actual taking relates back to the original notice so as to defeat intervening appropriations of the same water. Such is the express declaration of the statute. Section 6319. If therefore the prime physical essential for the taking, namely, a site for diversion works, can only be acquired by condemnation, the final perfection of the water right so as to attach by relation as of the date of its initiation is essentially and necessarily dependent on the exercise of the right to condemn. This is not only a self-evident fact, but it is recognized by another section of the statute itself, section 6329, which gives to the owner of nonriparian land the right to condemn for right of way for any ditches, canals, and works necessary to divert and convey the water to his lands. It must not be forgotten that the very purpose of the statute is to abolish the doctrine of riparian rights by giving effect to the doctrine of relation through diligence in construction in favor of the owner of nonriparian land as well as the owner of riparian land. Equality of rights can only be attained by an equality of means. When this fact is clearly grasped, the two propositions, that the right to condemn exists because of the initiated water right and that the water right is perfected through the exercise of the right to condemn, are plainly not only perfectly consistent, but their existence in correlation is inevitable in every case where condemnation is necessary to the completion of the enterprise.

[3, 4] It may be conceded, as urged by appellants, that the statute of relation imposes upon the courts its own rule of strict construction. But even a strict construction must be a reasonable construction. It is elementary that statutes in pari materia must be construed together. So construing the statute of relation (sections 6318 and 6319), and the statute giving the right of condemnation (section 6329), no construction can be reasonable which would make the provisions of the one defeat those of the other. In every view of the matter, therefore, time reasonably consumed in the condemnation must be construed as time necessarily consumed in the performance of the work of construction, hence not delay to be excused by a showing of interruption by the elements or otherwise.

It is also urged that to excuse the delay caused by the condemnation suit, though that delay may have been largely occasioned by appellants' intrusion into the litigation, would be to penalize appellants for asserting their legal rights in a lawful way. It is true, as persuasively argued by appellants, that a landowner whose land is sought to be taken by condemnation has a perfect right, both legal and moral, to resist such condemnation in the courts, and that such resistance is not to be classed in the category of wrongful physical resistance or unlawful obstruction. But the only legitimate purpose of such resistance in the courts is to prevent the taking of his land—not merely to delay that taking. It follows therefore that, if he ultimately fail to defeat the right to condemn, he cannot claim any advantage from the delay occasioned by his attempt. He cannot defeat the condemnation on the ground of such delay and thus rob his adversary of an established right. So long as the condemnation suit is prosecuted with reasonable diligence, then, however long it may take to complete the condemnation, the rights of the parties to the water must be measured as of the date when the condemner posted and filed his notice of appropriation, else the doctrine of relation can never exist where condemnation is necessary.

While we have been cited to no decision and have found none on a statute and facts exactly parallel with those here presented, we have, by independent search, found two decisions which in principle seem to us to support the views here expressed. The present water code of Oregon provides for a change from the old form of procedure to a new and different method of initiating water rights, but it saves to persons or corporations whose appropriations had been initiated under the old law their rights as prior appropriators on condition that they, in compliance with the old law, "commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion." A corporation so claiming under the old law was charged with abandonment for lack of such diligent and continuous prosecution. The delay was caused by litigation and efforts to secure a right of way and reservoir site. The court said:

> "A delay caused by litigation and efforts by an irrigation company to obtain a right of way for irrigation ditches and reservoirs is not a ground for forfeiture of its rights. Pringle Falls Power Co. v. Patterson, 65 Or. 474, 128 Pac. 820, 132 Pac. 527. Such proceedings, instead of showing an abandonment, indicate that the company is fighting for the purpose of carrying forward the project." In re Willow Creek, 74 Or. 592, 644, 144 Pac. 505, 522.

Obviously, the court, without saying so in hæc verba, did in effect construe litigation necessarily incident to the prosecution of the enterprise, as a part of the construction work which the statute expressly said should be "prosecuted * * * diligently and continuously to completion." It treated the delay so occasioned as a thing sufficiently accounted for, rather than a thing to be excused.

The other case involved the question of diligence under a statute of California which provided that within 60 days after posting his notice the claimant of a water appropriation must commence construction of the diversion works and must prosecute the work diligently and uninterruptedly, and that by a compliance with those provisions the claimant's right to the use of the water relates to the time of posting the notice. The claimant in that case posted notices of appropriation of water flowing from certain abandoned artesian wells on public land, and commenced to construct ditches for diversion within 60 days, but was enjoined from entering on the lands for further work by a homesteader who had located on the land shortly after the posting of the notices of appropriation. The water claimant brought an action to establish her right to the water. She was defeated and appealed. The decision of the trial court was reversed. Touching this interruption in the work, the appellate court said:

> "Having capped the wells, and enjoined appellant from entering upon the land to complete the ditch, by means of which she sought to divert the water to the place of intended use, respondents are in no position to assert that appellant has failed to prosecute the work with diligence and become an actual appropriator." De Wolfskill v. Smith, 5 Cal. App. 175, 182, 89 Pac. 1001, 1003.

While that decision apparently rests on the ground of estoppel, it is clear authority for our view that, though a subsequent appropriator has a perfect right to defend his possession in the courts, the only legitimate purpose of his defense is to defeat the prior claimant's right, not merely to delay its consummation, and that any delay caused by such litigation cannot be asserted as lack of diligence or otherwise as against the prior appropriator so as to defeat his right to claim priority by relation.

[5] The further claim that respondent has lost its water right by the failure to complete all of its project except the dam pending the litigation is not tenable under the evidence. The dam and outlet works will cost about $65,000; the ditches, flumes, and pipe lines about $595,000. The interest on that sum since the commencement of the condemnation suit, October 7, 1910, at 4 per cent. to this time, would amount to nearly $150,000. This all to no purpose, since the line must have lain idle till the dam site could be secured, and the ditches, flumes, and wooden pipes without water would have probably so deteriorated as to require a practical reconstruction when the dam site shall be secured. The law of diligence is not a rule of unreason and waste.

[6, 7] The question of diligence, as it seems to us, is thus reduced to the inquiry whether or not the condemnation suit has been prosecuted with reasonable diligence under all the attendant circumstances. A detailed discussion of the record and evidence on this question would unduly extend this opinion, already too long. Most of the delays are accounted for by the three resorts to this court on different phases of the litigation, and by the fact that there is only one jury term a year in Grant county where the suit is pending. We are satisfied that there has been no culpable delay in the prosecution, unless it be respondent's failure to have judgment entered on the trial court's original decision of May 29, 1911 earlier than January 10, 1912. That delay, however, as proven by appellants themselves, was consented to at the time by their predecessors in interest. Had that consent been withheld, we must assume that the judgment would have been entered promptly on the court's decision. By their consent appellants' predecessors would certainly be estopped to claim any advantage from that delay. Because of their privity in title appellants should be held equally estopped. Indeed, the record furnishes reason to believe that even then appellants' promoters, the Brumders, were the real parties in interest.

Finally, appellants contend that in any event respondents' project is not feasible. That question, however, was essentially in issue when the order for condemnation was entered in the original suit. We then held that there was a sufficient showing of feasibility. True, we said that "the only unsolved problem seems to be as to the amount of water that can be so accumulated and stored." 70 Wash. 459, 126 Pac. 945. But we were nevertheless then satisfied that there was "little doubt of the practicability of relator's project." The evidence now before us upon this question is extremely conflicting. Assuming it still an open question, we are not convinced that the project is not feasible for the irrigation of about 12,000 acres.

The decree is affirmed.

HOLCOMB, MOUNT, MAIN, PARKER, FULLERTON, CHADWICK, and MORRIS, JJ., concur. WEBSTER, J., took no part.

(96 Wash. 592)

WORDEN et ux. v. WORDEN et al.
(No. 13825.)

(Supreme Court of Washington. June 6, 1917.)

1. Husband and Wife 🔑264—Ownership of Property—Evidence.

Evidence *held* to show that property which the husband agreed to devise to his nephew in return for care and support was the husband's separate property in which the wife had no interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916.]

2. Husband and Wife 🔑254 — "Separate Property"—Sale—Effect.

If the husband acquires lands with money belonging to him before his marriage, such land is his "separate property," and other land purchased with the proceeds thereof is also his "separate property."

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 897–899.

For other definitions, see Words and Phrases, First and Second Series, Separate Property.]

3. Husband and Wife 🔑36—Contracts—Validity.

Where the husband and wife on separation had each deeded certain property to the other, a subsequently executed instrument reciting such conveyances and confirming them, since it did not in fact affect community property, need not have seals attached to the makers' signatures, conceding that Rem. Code 1915, § 8751, abolishing private seals, did not apply to conveyances of community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 218.]

4. Husband and Wife 🔑278(2)—Contracts—Validity.

Such contract was not void as against public policy.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1046.]

5. Husband and Wife 🔑271—Contracts—Validity—Consideration.

A mutual contract of husband and wife, by which each released to the other certain community property to become the other's separate property, did not require the further payment of money as consideration.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 989–1002.]

6. Deeds 🔑41—Description—Sufficiency.

Conceding an agreement between husband and wife allotting respective shares in community property to have been a conveyance, its recital granting "all community right, title and interest in and to all real estate situated in the state of Washington, the record title of which may be in the name of the party of the first part," was fully adequate to identify the land, especially as between the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 84.]

7. Wills 🔑58(2) — Contract to Devise — Execution—Evidence—Sufficiency.

Evidence *held* sufficient to show oral contract by which testator agreed to devise certain land to plaintiff in return for care and support.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 165.]

8. Wills 🔑58(2) — Contract to Devise — Execution—Quantum of Proof.

To establish oral agreement to devise land in consideration of care and support, where the will as made contained the devise agreed upon, does not require the same degree of convincing evidence as cases wherein the confirmatory will was not made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 165.]

9. Frauds, Statute of 🔑129(6)—Specific Performance 🔑41—Agreement to Devise Land—Enforcement.

It is within equity jurisdiction of courts to compel specific performance of a promise to devise land in consideration of a parol agreement already proved and partly performed, since part performance would take the contract out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 314; Specific Performance, Cent. Dig. §§ 120–123.]

10. Frauds, Statute of 🔑133—Wills 🔑58(1)—Contract to Devise—Part Performance—What Constitutes—Admissibility in Evidence.

While execution of a will is not in itself sufficient as part performance to take an oral contract to devise lands out of the statute of frauds, the will is admissible in evidence in support of other evidence tending to establish the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 293–298; Wills, Cent. Dig. § 164.]

11. Wills 🔑67 — Contracts to Devise Lands—Theory of Enforcement.

Where testator agreed to devise land to plaintiff in consideration of care and support, and plaintiff went upon the land and worked thereon and made improvements and cared for the testator, but the will failed, the heirs who took the intestate property merely held as trustees for plaintiff.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 175–177.]

Department 2. Appeal from Superior Court, Whatcom County; Ed E. Hardin, Judge.

Suit by Robert Worden and wife against Earl Worden and others. Decree for defendants, and plaintiffs appeal. Reversed and remanded, with instructions.

R. J. Nightingale and H. S. Nightingale, both of Bellingham, for appellants. Hurlbut & Neal, of Bellingham, for respondents.

FULLERTON, J. On January 12, 1914, Ata Worden executed his last will and testament, devising to his nephew Robert Worden the south half, and to his nephew Elmer Worden the north half, of the northeast quarter of the southwest quarter of section 15, township 39 north, range 2 west, W. M. The will also provided that his horses should go to Robert Worden, and his notes and mortgages to the brother of the testator Dudley Worden, his cattle should be distributed equally between Dudley Worden, his nephews Robert and Elmer Worden, and the two wives of the nephews, and the residue of his estate of whatever nature should go to his nephews Robert and Elmer and to his brother Dudley equally. The will further provided:

> "In making this, my last will and testament, I am not unmindful of my wife Nellie Worden, but do not care to leave her anything, and mention her here simply to show that she was not forgotten by me in making this my last will."

Ata Worden died July 20, 1914, and his will was duly probated on August 7, 1914. His widow, Nellie Worden, learning that Earl Worden Chafee (formerly Earl Worden) and Lloyd C. Worden, two sons by a former marriage, were living, notified them of their father's death, and on September 14, 1914, a contest of the will was instituted by the widow and these two sons. Upon the hearing of this contest, the will was set aside, on the ground that it failed to name or provide for such sons, and the estate declared intestate. The court in probate refused to pass upon the claim of the widow to a community interest in the estate left by Ata Worden. Robert Worden and Jennie Worden, his wife, thereupon brought an action against the heirs, widow, and executor of Ata Worden to enforce performance of an alleged oral agreement to devise to Robert the south half of the 40 acres described in the will. Among other things, the complaint set up an instrument executed by Ata Worden and Nellie Worden on June 19, 1911, declaring that all real estate held by the parties was the separte property of the one in whose name it was standing, and that all property thereafter acquired should be the separate property of the one acquiring it. The answer set up as an affirmative defense that this instrument was obtained by deception and fraud and that there was no consideration to sustain it. This was denied in the reply, which also alleged that no instrument was ever recorded by defendant Nellie Worden claiming any community interest in the property of Ata Worden, that she had received and retained all of her share of the community property under a division agreement with her husband, and that she was estopped to claim a community interest in the property in controversy. On the trial, the court found that the defendant Nellie Worden had a community interest in the property, that Ata Worden made no contract to devise his property, and that plaintiffs had made improvements on the property to the value of $185, and had rendered personal services to the decedent to the value of $645, and that the rental value of their use and occupation of the land was $230, leaving a net amount due plaintiffs of $600. Decree was rendered denying specific performance of the oral agreement, quieting title in Nellie Worden to an undivided one-half, and in Earl Worden Chafee and Lloyd C. Worden, the sons of Ata Worden, to an undivided one-fourth each, awarding plaintiffs judgment for $600, and making the same a lien on the land. The plaintiffs appeal, assigning as error certain findings of fact and conclusions of law of the court, the refusal to make findings and conclusions requested by plaintiffs, and the making of its decree based thereon.

The appellants claim that the following finding made by the court is contrary to the evidence:

> "That the property hereinbefore described or mentioned and all the property in which the said Ata Worden was interested at the time of his death was acquired during the time of the marriage relation with the defendant Nellie Worden and by the joint efforts of the said husband and wife, and was the community property of the said Ata Worden and said defendant Nellie Worden."

The evidence shows that Ata Worden and Nellie Worden were formerly residents of the state of Michigan and intermarried there in the year 1884. At the time of marriage, Nellie Worden possessed no property, and Ata Worden was possessed of property which, prior to his removal to the state of Washington in 1889, he sold for $2,500. Of this money, the sum of $400 was applied in paying off a $300 mortgage on a 30-acre farm in Michigan belonging to the parents of his wife, Nellie, and $100 was given them in cash. The title to this land in the year 1907 seems to have been vested in the Wordens, but the evidence does not clearly disclose how it was acquired other than by this payment out of Ata Worden's separate funds. The balance of the proceeds of his sale of his own Michigan property to the extent of from $1,800 to $2,000 was laid out in the purchase and equipment of a 22-acre farm in Skagit county, Wash., on which the parties made their home. Domestic trouble arising between the parties, they agreed to separate and divide their holdings. Accordingly, on June 10, 1907, Nellie Worden quitclaimed to Ata Worden the 30-acre farm in Michigan, waiving all claim for dower and Ata Worden quitclaimed to Nellie Worden the home farm in Skagit county, reciting his intention to convey all community interest in that property. Nellie Worden remained in possession of the Skagit county property as her home, farming it with the help of a hired man and retaining all the revenues therefrom. Ata Worden left for Whatcom county, where he took up his residence, and husband and wife never thereafter lived together. Shortly after the division of property, Ata Worden exchanged the Michigan land for a farm near Lynden, in Whatcom county, which he subsequently sold, and the proceeds of the sale were invested in another farm in Ten Mile township. Since there was nothing of record in Whatcom county showing his right to transfer real estate as sole owner, it was always necessary to get his wife to sign his deeds, so he had her join him in the execution of a deed purporting to convey to one another all community interest that each might have in the real estate held by the other. This agreement is as follows:

> "This agreement made and entered into this 19th day of June, 1911, by and between Ata Worden, sometimes known as 'Atta Worden,' the party of the first part, and Nellie Worden, the wife of said Ata Worden, the party of the second part, witnesseth: That whereas, the above-named parties are husband and wife; and whereas, differences have developed making it impossible for said parties to longer live together, and said parties having agreed to live separately:
>
> "Now, therefore, in consideration of the mutual promises made herein, the one to the other, the said parties do agree that hereafter the said parties will live separate and apart from each other, and that any and all property which may be acquired by either of said parties shall be considered as the sole and separate property of the party acquiring the same, and relieved of any and all interest which the other party to this agreement might have by reason of the community existing between the parties hereto.
>
> "Said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all of his community right, title and interest in and to all real estate situated in the state of Washington and now standing in the name of the party of the second part, and the said party of the second part does hereby grant, bargain, sell and convey unto the said party of the first part all of her community right, title and interest in and to all real estate situated in the state of Washington the record title to which may be in the name of the said party of the first part.
>
> "It is mutually agreed by and between the said parties, and it is the intention of the parties hereto, that from this day henceforth the said parties shall each have the right to acquire and sell property and to transact business in all manner the same as if the parties hereto were unmarried persons.
>
> "In witness whereof, the said parties have hereunto set their hands and seals this 19th day of June, 1911. Ata Worden.
>
> "Nellie Worden.
>
> "Witness: H. C. Thompson."

This was filed for record August 1, 1911, and duly recorded in the records of Whatcom county. Having sold his farm in Ten Mile township, Ata Worden, on January 30, 1912, invested the proceeds in a farm near Ferndale, Whatcom county, described as the northeast quarter of the southwest quarter of section 15, township 39 north, range 2 east, W. M., comprising the land in controversy in this action. Here Ata Worden lived alone and cultivated the land until December, 1913, when, owing to his impaired physical condition, he was compelled to call his nephew Robert Worden to his assistance.

[1, 2] We think this evidence clearly establishes that the lands in controversy were the separate property of Ata Worden. So far as the evidence discloses, the Michigan land was his separate property at the inception of its ownership. But conceding that his wife had an interest therein, she conveyed it to him absolutely by her deed of June 10, 1907, an instrument which she nowhere questions. This was given by her in exchange for a deed making her the separate owner of a farm that had been bought with the money of Ata Worden in which she had no community interest. The Michigan land being the separate property of Ata Worden, the farm near Lynden acquired by him in exchange for his Michigan farm would also be separate property. The land in controversy through all mesne conveyances is shown to be the proceeds of property originally held in separate ownership, and under the rule in this state the original character of property held by a married person attaches to the proceeds of that property.

In U. S. Fidelity & G. Co. v. Lee, 58 Wash. 16, 107 Pac. 870, we state the rule as follows:

> "Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof. * * *"

See, also, In re Deschamps' Estate, 77 Wash. 514, 137 Pac. 1009; Guye v. Guye, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186.

But if there were any doubt as to the separate character of the property in this state acquired with the proceeds of the Michigan land conveyed to him by his wife in 1907, that doubt is completely dispelled by the execution of the instrument of June 19, 1911, in which Nellie Worden purported to convey to Ata Worden "all of her community right, title and interest in and to all real estate situated in the state of Washington, the record title of which may be in the name of" Ata Worden. Recognizing the effectiveness of this instrument as a declaration against any community interest, respondent Nellie Worden attacked it from every angle. She pleaded that it was procured by fraud and deception and without consideration. She testified there was no money consideration, but there was no evidence of fraud introduced. Before the trial court it was urged that the instrument was invalid under Rem. Code, § 8766, because the signatures of the parties were not sealed as required by that statute; that the contract was void as being against public policy, in that it was given in consideration of the dissolution of the marriage relation and that it attempted to convey a community interest by a general instead of by a specific description. The trial court held that the instrument was contrary to public policy, and hence void and without force or effect for any purpose.

[3] Under the facts in this case, the instrument dealt only with the separate property of the parties. The land in Nellie Worden's name was her separate property by reason of the deed of 1907 from her husband. The land in Ata Worden's name was his separate property because it was the proceeds of what was concededly separate property belonging to him. The object of executing the instrument was that it might be placed of record in Whatcom county, so that Ata Worden as a married man would not be under the necessity of procuring his wife's signature to every transfer of real estate made by him, and the evidence discloses he was an active trader. It is nothing more than confirmatory of the titles standing in their respective names as constituting separate property. It amounts to notice to the world of the separation of husband and wife, and of an agreement between them that all after-acquired property acquired by either shall be the sole and separate property of the party acquiring it. As the instrument does not in fact affect community property, there was no necessity that seals be attached to the signatures of the makers, even if we were to concede that Rem. Code, § 8751, abolishing private seals, was not operative as to conveyances of community property between husband and wife. See Powers v. Munson, 74 Wash. 234, 133 Pac. 453.

[4] Further, we think the trial court was in error in holding the agreement of June 19, 1911, void as against public policy. It merely recited the inability of husband and wife to live together, with their agreement to live separately, and was an adjustment of property rights in view of that situation of affairs.

> "* * * The great majority of the American decisions distinguish between agreements for future and agreements for immediate separation, holding that agreements for separation of husband and wife are valid if made in prospect of an immediate separation, but illegal if they provide for a possible separation in the future. * * *" 9 Cyc. 520.

[5] The agreement itself recites the consideration upon which it was based, and any claim of Nellie Worden that Ata Worden failed to pay her any money for entering into it is wholly without merit. The instrument is strong declaratory evidence against interest on the part of Nellie Worden.

[6] Objection is made that this agreement between the spouses is insufficient because it

attempts to convey by general, instead of specific, description of the land. If it were in fact a conveyance, it recites that Nellie Worden "does hereby grant, bargain, sell and convey unto said party of the first part [Ata Worden] all of her community right, title, and interest in and to all real estate situated in the state of Washington, the record title of which may be in the name of said party of the first part." Such description was fully adequate for the purpose of identifying the land intended, especially as between the parties. Butrick v. Tilton, 141 Mass. 93, 6 N. E. 563; Harvey v. Edens, 69 Tex. 420, 6 S. W. 306; Brown v. Warren, 16 Nev. 228; First Nat. Bank v. Hughes, 10 Mo. App. 7.

We do not think it necessary to invoke the principle of estoppel in this case, although there are circumstances sufficient to preclude the assertion by the widow of a community interest in the land. She not only executed the two deeds declaring to the world she had no interest in lands in Ata Worden's name, but she has failed to make and file for record a declaration of a community interest in any lands held by him. She has also taken and farmed for seven years the improved land given by him to her, and taken to herself all the revenue thereof. She had knowledge that Robert Worden and wife were living on and farming the land and taking care of her enfeebled husband with the understanding that Robert was to have the land on her husband's death, yet she failed to notify him that she claimed a community interest in the property, or to file for record a public declaration to that effect. We think it is clear from the evidence that the land devised by Ata Worden was his separate property in which his wife Nellie Worden is not entitled to assert any community interest.

[7] We think, also, the finding of fact that "Ata Worden during his lifetime did not make an agreement with plaintiffs to leave them or either of them any property by last will and testament," was contrary to the evidence. The agreement was an oral one, and Robert and Elmer Worden and their wives, as parties to the contract with the decedent, Ata Worden, were precluded from testifying to its terms, as was also the attorney who drew the will from testifying to the purpose of the testator in executing it. There is, however, abundant testimony of other witnesses as to declarations of the decedent that he intended to leave his land to his two nephews for taking care of him in his old age and during his helpless condition, and also of declarations that he had made the will for that purpose. Robert Worden took possession of and operated the south 20 acres as if it were his own, and made permanent improvements which the court found were of the value of $185, besides farming the land and sharing the proceeds with his uncle. The court also found that the care and assistance rendered the uncle by Robert Worden and his wife were of the value of $645. Dudley Worden, the brother of the testator and father of Robert Worden, was present at the time the agreement between uncle and nephew was entered into. He testifies:

> "Ata said: 'Robert made a proposition to support me for this 20 we are living on, and the stock and farming utensils. What do you think about it?' And I said, 'I think it is up to you parties. If you agree to it, I think it is all right.' And he said, 'Do you think he would?' And I said, 'I think he would.' And he said: 'You know Robert is under age. Do you think he would do it?' And I said, 'I think he would do it if he said he would, and, as far as I am concerned, I am willing to assist him what I can in that.' And he said, 'All right, let's talk it over together,' and he told me to call Robert in. Ata said to Robert, 'I was telling your father the proposition you made me about taking this 20 and supporting me.' And Robert said, 'Yes, I told him I would take and support him for this 20, and the stock, and things that went with it to work it with. I am ready to do it, and I am doing it.' And Ata said: 'Now, your father says that he thinks it is all right. Now, Robert, you go ahead and work this 20 just as if it was your own, and I will see you have it when I am done with it, so you will get it when I am done with it.' And Robert said: 'All right. Father hears this, so it is all right.' That is about all the conversation of that of any importance at that time."

The same witness testified of a later conversation with Ata Worden concerning the matter, as follows:

> "He wanted to know how was the best way to fix it up, and he wanted to know what I thought about it, and I said: 'I don't know. If Robert is to have this, you had better see a lawyer; of course, he needs some papers.' And he said: 'I guess I will make a will. I don't like to deed it while I am living. I would like to keep it in my own name while I am living.' * * * About the 11th of January, 1914, * * * he went over to Elmer's, and he was talking about making out papers, he was getting so bad. Ata stayed with Elmer, and next day Ata and Elmer come down here [Bellingham] and had the will made out, * * * and going home he said: 'I made out the papers to-day. I made out a will. Robert gets the south 20.' And he said: 'I can't talk very well. Elmer can tell you about it.'"

Edward W. Swanson, a merchant of Ferndale, testified of a conversation with Ata Worden, as follows:

> "I raised the question of Robert Worden, about his wanting to open an account and establish a line of credit because he was taking care of the old man, and I asked him about this, and Ata Worden told me that it would be all right, because he was going to take care of him and he would have the place. Just before that, I said, 'That is mighty nice, Robert staying there and taking care of you,' and he said, 'Yes, it is, and he will have the place.' That is about the extent of the conversation."

Joe Joyt testified:

> "Ata said he would give Robert 20 acres of land if he would take care of him, because he had to have somebody take care of him."

Harold Williams testified:

> "I knew Ata Worden. I was at his place working for Robert in 1913, about November. I stayed there two weeks, cutting poles and doing general farm work. Ata told me he intended to give Robert Worden that home place and also Elmer Worden the other 20 for taking care of

> him the balance of his days. * * * Robert farmed the place and built a fence and a woodshed and wagon shed. I helped him build the woodshed. Robert employed me and paid me."

William Carr testified:

> "I stopped at that farm in April, 1914, to trade or sell horses to Bob. I talked with Ata Worden. * * * He said: 'I am not able to do anything, Billie, any more. In fact, I can't cook my own meals. I have to have somebody here, you know, and I got the boys on here, and if they will go ahead and farm this thing, and do what is right, there is a good living in it for all of us, and when I get done with it it shall be the boys'.'"

Carl R. Lange testified:

> "One time I went to see him [Ata Worden] about some sacks, and Robert and I went in the house and talked with the old gentleman about the sacks. He said, 'Whatever Robert does is satisfactory to me.' * * * So whatever Robert did was a go; he was satisfied."

Thomas H. Edwards testified:

> "I was township assessor in 1914, and went there [Worden's farm] to assess in March or April. I went there to assess Ata Worden, and of course asked for general information, and he said the place belonged to Bob, and referred me to Bob for the information I desired. I examined the improvements. Robert built a woodshed and a couple of wells, and built a barn, and built an addition to the barn and a wagon shed. He made these before Ata Worden died."

Mrs. Mae Houser testified:

> "I knew Ata Worden and visited them the evening before Christmas [1913]. * * * He spoke of leaving his property to his two nephews Elmer and Robert. He said they would have a good home after he was gone, and I said, 'Do you intend leaving the property to the two boys Elmer and Robert?' and he said, 'Yes, providing they care for me as long as I live.' * * * I said that would be nice for the boys, and he said they were good boys and had been taking care of him, and if they took care of him as long as he lived the property would be theirs."

[8] There was no rebuttal testimony as to the agreement between uncle and nephew for the passing of the south 20 acres, nor of the testimony as to the making of the will in carrying out that agreement. The will itself is strong confirmatory proof that such an agreement was entered into. A case of this kind would not require the same degree of convincing evidence as those cases where no will had been made in conformity with an alleged oral contract. Here the will as actually made fully corroborates the other evidence. We think the trial court should have found that the oral contract to devise by will was entered into.

The case of McDowell v. Lucas, 97 Ill. 489, presents a case where an oral contract that a son should have certain lands on the death of the father was sustained upon evidence almost parallel to that in this case. The court said:

> "Here was a payment of the purchase money by four or five years' labor, which the son rendered to the father after he was of age, followed by an actual possession of the premises and the making of lasting and valuable improvements thereon, under and in pursuance of a verbal contract to convey the title. The concurrence of these things, when clearly established, has always been regarded as sufficient to authorize a court of equity to decree a conveyance. Bright v. Bright, 41 Ill. 97; Kurtz v. Hibner, 55 Ill. 514 [8 Am. Rep. 665]; Langston v. Bates, 84 Ill. 524 [25 Am. Rep. 466].
>
> "The fact that William Lucas paid his father one-third of the crops each year raised on the land, and the latter paid the taxes, does not militate against his right to a decree. Had the payment of rent been unexplained, a different question would have arisen; but it appears, from the testimony, to have been a part of the contract that one-third of the crops should go to the father during his life, and he was to pay the taxes, and at his death the absolute title should vest in the son. The payment of rent, therefore, in this case, does not establish the relation of landlord and tenant between the parties and, tend to prove that William Lucas was not occupying as a purchaser; but, on the other hand, the payment of rent was consistent with the contract under which William Lucas entered into possession of the land."

[9] It has long been recognized as within the equity jurisdiction of courts to compel specific performance of a promise to devise land given in consideration of a parol agreement which has been already proved and partly performed, since part performance would take the contract out of the statute of frauds. Waterman, Specific Performance of Contracts, § 41; Gupton v. Gupton, 47 Mo. 37; Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796.

[10] While it is the rule in this state that the execution of a will is not sufficient in itself as part performance taking an oral contract out of the statute of frauds (McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461), still we think the will is admissible in evidence in support of other evidence tending to establish the contract. Maddox v. Rowe, 23 Ga. 431, 68 Am. Dec. 535; Brinker v. Brinker, 7 Pa. 53; Moore v. Bryant, 10 Tex. Civ. App. 131, 31 S. W. 223.

In Maddox v. Rowe, supra, a will executed by a father in carrying out an agreement with his son was void for want of the required number of witnesses. The court in that case said:

> "The father made in writing what he thought was his will, and in that writing he said that he gave the two lots of land in controversy to the son. The contract, on his side, was that he should give these two lots to the son. Here, then, is a writing that may serve to help to prove the contract. The case is such, therefore, that it is not left wholly at the mercy of parol evidence. True, this writing was void, as a will, but that did not prevent it from being good, to help to prove the contract."

The case of Hiatt v. Williams, 72 Mo. 214, 37 Am. Rep. 438, is almost identical in its material facts with the case at issue here. The court there said:

> "The object of this suit was to procure a specific performance of an agreement, after the death of the person with whom the agreement is alleged to have been made, upon the ground that the plaintiff had fully performed on his part. The plaintiff was the youngest son of Th. Hiatt, who had four children. In 1858, having provided for his other children, as he supposed, to each of his two daughters having given a share, and his son who went to California, some money, he agreed with plaintiff, his youngest son, that if he would remain upon the homestead and

> support his father and stepmother during their lives, and work the farm (180 acres) under the direction of his father, he would convey in fee the homestead to the plaintiff, but not to take effect till he and his wife were dead. This arrangement was claimed and proved. In 1861 the father, with a view to carry out this purpose, which he was told could be best effected by a will, made a will devising this land to plaintiff. In the will, which was drawn up by defendant, Williams, who was a son-in-law of Hiatt, and a justice of the peace, no mention was made of his other children, and consequently, under our statute, it was a mere nullity. In 1866 this paper was delivered to plaintiff by his father, as answering the purposes of the two contracting parties. In 1870 the father died, and in 1873 the stepmother died, during which seventeen years the plaintiff lived on and worked the farm. These facts were stated in the petition and fully supported by the evidence. The circuit court, however, refused to enforce the contract. Upon what ground and for what reasons does not appear. No brief has been filed on the part of the defendant in error, and we have been unable to conjecture upon what ground the decree dismissing this bill was based. The case seems to be identical in principle with the case of Sutton v. Hayden, 62 Mo. 101, and Gupton v. Gupton, 47 Mo. 37, though much stronger in facts than either. The attempt to execute the contract by a will would surely not place the plaintiff in any worse condition than he was before. The will was merely introduced in evidence to support the contract, and it was certainly very strong evidence to show the intent of the father, who doubtless supposed that it would accomplish his purpose. A verbal agreement of this sort, in case of performance on one side, was enforced in the case of Gupton v. Gupton. That case is in effect identical with the present, though infinitely less persuasive in its facts, for here there was an actual service of 17 years. The judgment of the circuit court will be reversed, and that court directed to enter a decree in conformity with this opinion."

It is held in Gupton v. Gupton, 47 Mo. 37, that the surrender of the possession of a farm to a person who takes care of the owner under an agreement to devise it to him in consideration of such care, and the execution of a will to that effect, makes a valid contract. Likewise, it has been held that the taking possession and making improvements under an agreement for the devise of certain land in consideration of caring for the owner until his death is an enforceable contract. Watson v. Mahan, 20 Ind. 223; Mauck v. Melton, 64 Ind. 414; Bird v. Pope, 73 Mich. 483, 41 N. W. 514.

[11] In the case at bar, we have all the elements of part performance justifying the enforceability of an oral contract for the devise of lands. Robert Worden not only went into possession of the land, cleared and cultivated it, and made permanent improvements, but he boarded and cared for an aged man suffering with disease, all under a direct promise that he should have the land at the old man's death. The failure of the will executed in conformity with the contract throws the title to the land to his heirs, the respondents Earl Worden Chafee and Lloyd C. Worden; his wife, Nellie Worden, having no interest because of the prior property agreements between herself and the deceased. These heirs who receive the land because of the failure of the will merely hold as trustees of the trust impressed upon the realty by their ancestor. In a note to section 191 of Pomeroy on Specific Performance of Contracts, the author states:

> "The relief is granted, not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement."

If Ata Worden in his lifetime had conveyed the land to his nephew in discharge of the contract, his heirs would have been bound thereby. The facts in this case show full performance of the oral contract on the part of the appellants and attempted full performance on the part of the decedent by the execution of the will agreed upon, although such instrument proved to be void through failure to conform to statutory requirements. This impressed the land with a trust which his successors in interest are bound in equity to discharge. The law is well settled that the heirs can be compelled to specifically perform the contract of their ancestor to the extent of making a proper conveyance, and, in the event of their failure, that the court has power to appoint a commissioner to make the conveyance. In Dicken v. McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471, it is said:

> "The weight of authority is in favor of the position that a man may make a valid agreement to dispose of his property in a particular way by will, and that such contract may be enforced in equity after his decease against his heirs, devisees, or personal representatives. 22 Am. & Eng. Ency. of Law, p. 874, and cases cited in note 2; Schouler on Wills (2d Ed.) § 454; Waterman on Specific Per. of Contracts, § 51; Fry on Specific Per. (3d Ed.) § 223; Weingaertner v. Pabst, 115 Ill. 412 [5 N. E. 385]."

In Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741, it is said:

> "Strictly speaking, an agreement to dispose of property by will cannot be specifically enforced. * * * Yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser, with notice of the agreement, as the case may be. 3 Pars. Cont. (6th Ed.) § 406; Hale v. Hale, 90 Va. 728, 730, 19 S. E. 739."

We are satisfied that the findings of fact made by the court, as to the absence of an oral agreement to devise and as to the community interest in the land of respondent Nellie Worden, are contrary to the evidence.

The decree of the lower court will be reversed, and the cause remanded, with instructions to order the respondents Earl Worden Chafee and Lloyd C. Worden to convey to appellants Robert Worden and Jennie Worden the south 20 acres of the northeast quarter of the southwest quarter of section 15, township 39 north, range 2 east, W. M.;

and, in the event of their failure, that a commissioner to make the conveyance be appointed by the court. The executor of the estate of Ata Worden will also be instructed to distribute the personal property of the decedent to the appellants herein in accordance with the terms of the will.

ELLIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(96 Wash. 610)

WORDEN et ux. v. WORDEN et al.

(No. 13826.)

(Supreme Court of Washington. June 6, 1917.)

WILLS 🔑67—CONTRACTS TO DEVISE LANDS—THEORY OF ENFORCEMENT.

Where testator agreed to devise land to plaintiff in consideration of care and support, and plaintiff went upon the land and worked thereon and made improvements and cared for the testator, but the will was void, the contract was enforceable against the heirs who took the intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 175–177.]

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Suit by Elmer Worden and wife against Earl Worden and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with instructions.

R. J. Nightingale and H. S. Nightingale, both of Bellingham, for appellants. Hurlbut & Neal, of Bellingham, for respondents.

FULLERTON, J. This case involves the principles of law and much the same facts as those contained in Worden v. Worden, 165 Pac. 501; the oral contract with Elmer Worden for the devise of the north half of the northeast quarter of the southwest quarter of section 15, township 39 north, range 2 east, W. M., being founded on slightly differing evidence.

The evidence shows that appellant Elmer Worden was an older brother of Robert Worden, and a married man; that his uncle Ata Worden, prior to making the contract with Robert to come to the uncle's home and take care of him and the farm, had asked Elmer to make his home there, as the latter and his wife would be able to take proper care of the old man. In the fall of 1913, after the agreement with Robert Worden had been entered into, Ata Worden urged Elmer Worden to quit renting land and to come and build a home on the north half of the former's 40-acre tract, and promised him the land at death if Elmer would do so. Elmer refused to move onto the land and improve it unless his uncle would give him some kind of written evidence that it should be Elmer's at his uncle's death. It was finally agreed between them to go to the county seat for the purpose of executing papers that would make Elmer Worden safe; whereupon the latter agreed to build a house on the north half of the tract, go there to live, and deliver to the uncle two-thirds of the net revenues for his support. They went to Bellingham and consulted a lawyer on January 12, 1914, resulting in the drafting of Ata Worden's last will devising to Elmer Worden the north half of the testator's 40-acre farm and bequeathing to him certain personal property. Elmer Worden thereupon spent a couple of months at work to earn additional money to make improvements on the land. He moved onto the land in March of that year, erecting a couple of tents as a temporary residence for his family while constructing a dwelling house. He at once proceeded to build a frame house and a barn, put up 80 rods of line fencing, together with a garden and chicken fence, sunk a well, and cleared an acre and a half of land. Before these improvements were all completed and on July 20, 1914, his uncle died. The court found that the value of such improvements up to the time of his uncle's death was $550.

The evidence clearly establishes that appellants went into possession of the land and made valuable improvements thereon in consideration of the execution of the will assuring them of title on the death of the uncle. Under the authority of the case cited, this was an enforceable contract against the heirs. See, also, Irwin v. Dyke, 114 Ill. 302, 1 N. E. 913; Bohanan v. Bohanan, 96 Ill. 591; Bird v. Pope, 73 Mich. 483, 41 N. W. 514; Hughes v. Hughes, 72 Ga. 173.

For the reasons given in the case of Worden v. Worden, the decree in this case is reversed, and the cause remanded to the lower court, with instructions to order the respondents Earl Worden Chafee and Lloyd C. Worden to execute to appellants Elmer and Nettie Worden a conveyance of the north half of the northeast quarter of the southwest quarter of section 15, township 30 north, range 2 east, W. M.; and, in the event of their failure so to do that the court appoint a commissioner to make proper conveyance. The executor of the estate of Ata Worden, deceased, will also be instructed to distribute to the appellants the personal property attempted to be bequeathed to them under the terms of the void will of Ata Worden, deceased.

ELLIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(96 Wash. 541)

COOLIDGE & McCLAINE v. SALTMARSH et al. (No. 13742.)

(Supreme Court of Washington. June 4, 1917.)

BILLS AND NOTES 🔑161—NEGOTIABILITY—PAYMENT OF TAXES.

Under Rem. Code 1915, § 3392, providing negotiable instruments must contain unconditional promise to pay a sum certain, a note agreeing to pay any taxes assessed upon the note or its mortgage security is not negotiable, although no tax was actually imposed upon either note or mortgage.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 404.]

Department 2. Appeal from Superior Court, Douglas County; R. S. Steiner, Judge.

Mortgage foreclosure action by Coolidge & McClaine against Robert S. Saltmarsh, Margaret Saltmarsh, and William McCowat. From a foreclosure decree, defendant McCowat appeals. Affirmed.

John Pattison, of Spokane, and John W. Hanna, of Waterville, for appellant. Walter & Washington, of Coulee City, and Sam B. Hill, of Waterville, for respondent.

PER CURIAM. The plaintiff Coolidge & McClaine, a corporation, as holder of a promissory note and mortgage executed by Robert S. Saltmarsh and Margaret Saltmarsh, brought an action against them to foreclose the same, making a party defendant also William McCowat, who held a subsequent mortgage covering the same land. The court rendered decree foreclosing the Coolidge & McClaine mortgage. On issues raised between the Saltmarshes and McCowat on the latter's note and mortgage which he held by transfer from the original payee, the court held that the note was a nonnegotiable one and therefore subject, in the hands of McCowat as assignee, to all the defenses which the makers had against the original payee. The defendant McCowat appeals.

The attorneys for both appellant and respondents agree that the only issue in the case is the negotiability of the note, it having been established that it was procured by fraud on the part of D. Ryrie, the original payee, from whom it had been purchased by appellant.

The promissory note, given by Saltmarsh and wife to Ryrie and transferred by him to McCowat, is as follows:

"$2,400.00. Coulee City, Wash., Feb. 25, 1911.

"On the first day of January A. D. 1916, I promise to pay to the order of D. Ryrie, Spokane, Washington, the sum of twenty-four hundred and no-100 dollars, United States gold coin of the present standard of weight and fineness, payable at Spokane, Wash., with interest thereon, in like coin, after maturity, until paid, at the rate of eight per cent. per annum. And in case suit or action is instituted to collect this note or any part thereof, I promise to pay in addition to the costs and disbursements provided by statute such sum as the court may adjudge reasonable as attorney's fees in such suit or action, and to pay, in each year, on or before ten days before the same become delinquent, at said office, the taxes assessed in the state of Washington, upon the mortgage given to secure this note and the debt thereby secured, or upon this note or any part thereof. This note is given for the principal on an actual loan of twenty-four hundred and no-100 dollars, United States gold coin, and is secured by a mortgage on real estate of even date herewith.

"I contract and agree, that if the mortgaged property shall not, in the event of a foreclosure sale thereof, realize sufficient to pay in full the sum due under said mortgage, together with costs and expenses of foreclosure action, a deficiency judgment shall be rendered for any unpaid balance, which I promise to pay.

"No. of Note —— Robert S. Saltmarsh.
"Loan No. 728. Margaret Saltmarsh."

The Negotiable Instruments Act (Rem. Code, § 3392) declares that an instrument "must contain an unconditional promise or order to pay a sum certain in money" in order to be negotiable. The note in question, in addition to being for a sum named, also contains a promise to pay any taxes assessed upon the note or upon the mortgage securing it. We held, in Bright v. Offield, 81 Wash. 442, 143 Pac. 159, that such a provision in the note renders it nonnegotiable. In that case there was involved a provision in the note for payment of taxes, which constituted an implied rather than a direct promise by the maker to pay them. The court there said:

> "Since the amount of these taxes, rates, and assessments is uncertain, the amount of recovery would be uncertain. This provision, therefore, renders the note not merely an unconditional promise to pay a sum certain, but also, in necessary effect, a conditional promise to pay an uncertain sum."

The fact, as urged by appellant, that there was no law in force in this state for the taxation of notes and mortgages, would not detract from the effect of the rule. There always remains a possibility during the life of such contracts that they may be subjected to the liability of taxation, and a promise in the note to pay any taxes thereon would leave the amount to be paid indeterminate and open to conjecture upon the contingency of future legislation. See Carmody v. Crane, 110 Mich. 508, 68 N. W. 268; Walker v. Thompson, 108 Mich. 686, 66 N. W. 584; Smith v. Myers, 207 Ill. 126, 69 N. E. 858; Farquhar v. Fidelity Ins., etc., Co., Fed. Cas. No. 4,676.

The finding and conclusion of the court as to the nonnegotiable character of the note in controversy is in accord with the case cited, and, as the case is controlling, the judgment will stand affirmed.

(50 Utah, 1)

TYNG v. CONSTANT-LORAINE INV. CO.

(No. 3029.)

(Supreme Court of Utah. May 8, 1917.)

1. VENDOR AND PURCHASER 🔑334(1)—OPTION—MEETING OF MINDS—RECOVERY OF PAYMENT.

If minds of parties executing option agreement failed to meet upon question of amount of land to be conveyed plaintiff could recover from defendant amount paid thereunder.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959, 962, 964.]

2. APPEAL AND ERROR 🔑1006(4)—FORMER APPEAL — REVERSAL — NECESSITY OF SUBSTANTIAL ERROR.

After two appeals had previously been taken and four juries had passed on the facts and found in plaintiff's favor, judgment will not be interfered with unless defendant has been prejndiced in some substantial right during progress of trial or in submission of case to jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3953.]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by Charles Tyng against the Constant-Loraine Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Howat, Marshal, Macmillan & Nebeker, and Robert H. Butterfield, all of Salt Lake City, for appellant. Pierce, Critchlow & Barrette, of Salt Lake City, for respondent.

FRICK, C. J. The plaintiff brought this action to recover the sum of $1,000 from the defendant, which plaintiff alleged the defendant wrongfully retained from him. This case has been here on appeal twice before. Tyng v. Constant-Loraine Inv. Co., 37 Utah, 304, 108 Pac. 1109; Id., 154 Pac. 767. Plaintiff recovered in both trials, but the judgments in his favor were reversed on defendant's appeals. On the last trial the plaintiff again prevailed, and the defendant again appeals.

In view of the former opinions, to which we specially refer, and for the reason that both parties in their respective briefs state that "the evidence in this case is practically identical with that introduced on the previous trial of the case," we shall not state more of the record than is absolutely necessary to an understanding of the points decided.

The controversy between the parties arose out of what is termed an option agreement to purchase certain real property in Salt Lake City. The transaction in question, hower, arose between one R. A. Rowan, of Los Angeles, as the president of the defendant company, on the one hand, and the Equity Investment Company, a Utah corporation, upon the other. The plaintiff, however, succeeded to all of the rights of said company by assignment before the action was commenced. The transactions in question here were initiated by one Thomas E. Rowan, a real estate broker of Salt Lake City, by a telegram dated September 4, 1907, which was transmitted to said R. A. Rowan at Los Angeles. The telegram reads:

"Advise cash price west side State, taxes prorated, whether leased."

The telegram was addressed to R. A. Rowan for the reason that the title to the property inquired about was in him. On the following day R. A. Rowan wired as follows:

"Will accept fifty thousand. Property now mortgaged for twenty thousand at five per cent. Leases very short. See Kelsey & Gillespie for exact information."

To that telegram Thomas E. Rowan, on the same day, replied:

"Responsible party offers one thousand for thirty days' option. Recommend."

In response to the foregoing R. A. Rowan wired as follows:

"Will accept one thousand for thirty days' option for property west side State street. Price fifty thousand, subject to twenty thousand mortgage. Balance, thirty thousand, to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with National Bank of Republic, they to notify me by wire."

Upon receipt of the foregoing telegram the Equity Investment Company deposited with the bank aforesaid $1,000, and received from said bank the following writing:

"Salt Lake City, Septemebr 9, 1907. Received of the Equity Investment Company one thousand ($1,000.00) dollars as a deposit on account of the purchase price of the following described real property in the county of Salt Lake, state of Utah: [Describing the parcel of ground 55 feet by 165 feet]—which property the Equity Investment Company agrees to buy for the sum of fifty thousand ($50,000.00) dollars, payable as follows: Thirty thousand ($30,000) dollars on or before thirty days from the date of this receipt. The above mentioned deposit of one thousand ($1,000.00) dollars to be applied as a part of said payment, the balance of twenty thousand ($20,000.00) dollars to be covered by a mortgage for that amount now on the property, which mortgage the Equity Investment Company agrees to assume and pay; the property to be deeded by a warranty deed free of all incumbrances except aforesaid mortgage of twenty thousand ($20,000.00) dollars and the general taxes for the year 1907. The Equity Investment Company agrees to pay their proportion of the said taxes from the date possession is delivered to them. This deposit is made with the National Bank of the Republic, and accepted by them under authority of the following telegram from R. A. Rowan: 'Los Angeles, Calif., Sept. 6, 7, 1907. Thos. E. Rowan, Salt Lake City, Utah: Will accept one thousand for thirty days' option for property west side State street. Price fifty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with the National Bank of Republic, they to notify me by wire. R. A. Rowan.' If the Equity Investment Company does not complete the purchase of said property within the time and manner above specified, then this deposit shall be forfeited to the seller as liquidated damages. National Bank of the Republic, by Frank Knox, Pr."

The $1,000 was, in fact, plaintiff's money, and immediately after the deposit was made the Equity Investment Company assigned and delivered the foregoing writing to the plaintiff. It will be observed that in none of the statements does anything appear respecting the dimensions of the property, but in the writing that was given by the bank to the plaintiff the property is described as being 55 by 165 feet.

Pursuant to the foregoing deposit the defendant company, on the 20th day of September, 1907, by R. A. Rowan, as president, and P. D. Rowan, as secretary, executed and transmitted by mail to said bank at Salt Lake City a warranty deed by which it conveyed and warranted to the Equity Investment Company 53½ by 165 feet, and in said deed also quitclaimed all right, title, and interest in and to a strip 1½ by 165 feet adjoining the 53½ by 165 feet aforesaid. On the day before the option expired the plaintiff tendered to the bank the sum of $29,000, being the balance due on the option, and demanded a deed for the property described in the writing he had received from the bank, namely, 55 by 165 feet. The bank, however, tendered plaintiff the deed executed by the defendant as aforesaid, which the plaintiff refused to accept, and demanded a warranty deed for the full 55 by 165 feet, and refused to pay the $29,000 unless and until he should receive such a deed. A deed as requested by plaintiff was, however, refused by the defendant company, and hence this action to recover back the $1,000 deposited as before stated.

On the first appeal the judgment in favor of the plaintiff was reversed upon the ground that the district court had erred in submitting to the jury the question of whether the writing issued by the bank was authorized or ratified by the defendant company in the absence of any evidence to support such an issue. It was, however, also held on that appeal that, inasmuch as the plaintiff sought a recovery upon the writing issued by the bank, which was issued by it without authority and without evidence of ratification, he could not recover upon the contract evidenced by letters and telegrams. On the second appeal the judgment in favor of the plaintiff was reversed upon two grounds: (1) That the district court erred in refusing to submit to the jury the question of whether the minds of the parties had met upon the quantity of ground that was included in the telegrams; and (2) that the court had erred in requiring R. A. Rowan to answer certain questions on cross-examination. The latter objection is, however, entirely eliminated from this appeal. In the opinion on the second appeal the grounds are fully discussed, and, to avoid all controversy respecting what was decided, and the grounds upon which that decision is based, we append the following excerpts from the opinion:

> "A point is made that there is no evidence to show that R. A. Rowan, in sending the telegram, or in anything that he did, acted for the defendant, or that the $1,000 which was paid to the bank was deposited to the credit of the defendant, or for its benefit, or that it received the money, it, in such respect being contended that Rowan acted for himself, and that the money was deposited to his credit and for his benefit. While everything was done in the name of R. A. Rowan, except the making of the deed, which was in the defendant's name, still there is sufficient evidence to justify findings that Rowan acted for the defendant, and that it received the money deposited in the bank. At any rate, the defendant, by making and forwarding the deed to the bank, ratified the transaction to convey whatever west side State street property was owned by it, upon payments being made as specified in the telegrams. The serious question is: What contract in such respect was made? As has been seen, we, on the former trial, held that neither Rowan nor the defendant authorized the bank to make a contract to convey 55x165 feet by warranty, or to make any agreement with respect to the terms of the option, or that either ratified the writing which the bank gave in such particular. We also held that the telegrams which passed between Thomas E. Rowan and R. A. Rowan evidenced the terms of the option. Whether right or wrong, our holding as to that is the law in the case and was binding on a retrial on the same evidence. The evidence as to the bank's authority to give the writing, or as to the defendant's ratification thereof, is the same on this as on the other trial. And so was it regarded by the trial court, and for that reason were all questions as to such authority and ratification withheld from the jury. The writing which the bank gave can therefore not be looked to for the terms of the option. For that we must look elsewhere, primarily to the telegrams. In them we have the offer, acceptance, and terms of the option. Everything therein expressed is sufficiently definite and certain, except the description of the property. The description stated in the telegrams is, 'property west side State street.' That, of course, is ambiguous. It was competent to aid the ambiguity by extrinsic evidence, which the parties were permitted to do. The further question is: Was the ambiguity sufficiently aided to ascertain the intention of the parties as expressed by them in the contract? It is clearly enough shown just where the lot is, and that the defendant owned but one lot on the west side of State street. By extrinsic evidence it also is made to appear that the plat in the recorder's office showed the lot to be 55x165 feet. It, however, is just as clearly made to appear by the abstract books and records of deeds that the title which the defendant had by warranty deed was only to 53½ feet and 1½ feet by quitclaim. It also is made to appear that on the 1½ feet stood a wall of an old two-story house adversely possessed and held by another. To aid the ambiguity 'property west side State street,' we do not think the plat in the recorder's office was alone conclusive as to what was intended by the parties. That, of course, was some evidence of their intention, and some evidence as to what they meant by the language 'property west side State street.' But the abstract book and the records of deeds also were evidence for the same purpose. It is not shown that the plaintiff, before he paid the $1,000, saw the plat in the recorder's office, or the abstract books or records of deeds, or even examined the property to ascertain its frontage, or that he saw Kelsey and Gillespie for information, as was stated in one of the telegrams he could do for 'exact information.' He did see a 'regular real estate man's plat' which showed the property to be 55x165 feet, just as indicated by the plat in the recorder's office. But it is not made to appear that he even saw that before he paid the $1,000. So far as disclosed by the record, it is not made to appear just what information as to the exact number of feet in the lot the plaintiff had prior to, or at the time of, the payment of the $1,000, except as recited in the writing given by the bank that the lot was 55x165 feet, and that a warranty deed was to be given for that much ground. Nor is it made to appear from what source the bank got information as to the number of feet of ground to be conveyed or what induced it to give a receipt calling for 55 feet. Certain it is the telegram pointed to by it in its receipt, as authority to accept the money, gave it no such authority, and, indeed, gave it no authority, to make or specify any of the terms of the option to purchase. And we think the bank by the recital of the telegram in hæc verba, disclosed just what authority it had, that of a mere depository. After the payment of the $1,000, and when the abstract of title was examined by plaintiff's counsel, it was discovered that the defendant had title by warranty to only 53½ feet and a quitclaim to 1½ feet. Then it was that he and his counsel visited the premises and found the wall of the house on the 1½ feet. There, however, is evidence to justify a finding that the plaintiff believed and understood that the defend-

ant was to convey 55 feet by warranty deed. That is supported by the bank's receipt, which, while not competent, because unauthorized, to show the terms of the option, nevertheless, as it was seen and relied on by the plaintiff when the $1,000 was paid, was competent, with other matters, to show how he regarded the ambiguity and understood the contract as to the number of feet which, by its terms, was to be conveyed by warranty. But, since it is not made to appear that the defendant or Rowan, its president, had, prior to plaintiff's refusal of the defendant's tender, knowledge of the terms of the bank's receipt calling for a conveyance of 55 feet by warranty, the receipt was not evidence to show either the terms of the contract or in what sense the defendant understood them with respect to the ambiguity. We also think there is other evidence to justify a finding that the plaintiff, by the ambiguity, believed and understood that 55 feet of ground was to be conveyed by warranty. On the other hand, there is evidence to show that, had he, before he paid the $1,000, inspected the records to ascertain what 'property west side State street' the defendant had, the exact number of feet which it owned and was capable of conveying by warranty could have been ascertained, and thus he could have known just what the defendant meant by the phrase 'property west side State street.' Thus, when the extrinsic evidence is looked to, the meaning of the ambiguity 'property west side State street' is about as doubtful as it was before.

"Upon the record we deduce these propositions: Since the writing given by the bank was neither authorized nor ratified, there is no sufficient evidence to justify a finding that the defendant had agreed to convey 55 feet by warranty, or that it, by the ambiguous phrase, meant, or intended, to convey any other or different property than was owned and tendered by it. Hence the court erred in submitting the case to the jury on the theory that the defendant had agreed to convey 55 feet by warranty and in binding the jury as was done, that to render a verdict for the plaintiff the jury was required to find that the defendant had agreed to convey 55 feet by warranty. As to the plaintiff's understanding of the ambiguity, and in what sense he regarded the contract, there are two views. One is that he understood and regarded it in the sense that the defendant understood it and as tendering by its conveyance whatever property was owned by it on the west side of State street. If so, then the minds of the parties met; then did the defendant tender a deed in accordance with the agreement; and then was there no breach and no obligation to return the $1,000. The other view is that the plaintiff understood the ambiguity to mean a conveyance by warranty of 55 feet. If so, then the minds of the parties did not meet; then was there no contract; and then was the plaintiff entitled to a return of the $1,000 paid by him, not on the theory of any breach of contract, but of money had and received. And for that reason was the defendant not entitled to a direction of a verdict. On such view—the view that the minds of the parties had not met as to what was agreed to be sold and conveyed, and therefore, if the jury so found the facts, the plaintiff was entitled to a return of the $1,000—the plaintiff asked to go to the jury; and, as appears by his requests, that was the only view on which he asked a submission of the case. The court refused the requests or to submit the case on such theory, but, as has been seen, submitted it on the theory alone of whether the parties, independently of the recitals in the bank's receipt, and especially as evidenced by the telegrams, had entered into an agreement to convey 55 feet by warranty, or only 53½ feet by warranty and 1½ feet by quitclaim. Notwithstanding there are no cross-assignments, and no request or motion in the court below on behalf of the plaintiff to direct a verdict in his favor, he nevertheless, in defense of the verdict and judgment, urges an affirmance, on the theory embodied in his refused requests. Since this is a law case in which our power to review, except jurisdictional matters, is restricted to assignments of error, and where we may not, as in equity, look into the evidence to determine the correctness of the judgment, and as there was no motion nor request to direct a verdict in plaintiff's favor, nor even any assignment presenting the rulings refusing his request, our power to affirm the judgment on the theory of money had and received is doubtful, even though on a review of the evidence it should appear that such a direction, had it been asked, would have been justified. But looking into the record as we have, we, as already indicated, are of the opinion that the evidence is not so conclusive as to have entitled the plaintiff to such a direction had such a request been asked or motion made. So too, apparently, was the case regarded by the plaintiff himself, and hence asked for no such direction as matter of law, but for a submission as matter of fact. Thus is it apparent that to now affirm the judgment on the theory urged would be to infringe upon the right to trial by jury and to uphold the judgment upon a wholly different theory from that on which the case was submitted. The judgment therefore must be reversed, and the case again remanded for a new trial."

[1] Upon the last trial the district court submitted the issue to the jury as suggested in the foregoing opinion, and the jury found that issue in favor of the plaintiff. The jury having found that the minds of the parties did not meet upon the question of the number of feet that were included in the telegrams referred to, the defendant company, as suggested in the opinion on the second appeal, had no right to retain plaintiff's $1,000. Notwithstanding that issue has finally been settled by the jury in plaintiff's favor, the defendant, on its present appeal, nevertheless, again presents all the questions argued on the former appeals, with others added. Barring the assignments relating to the admission and exclusion of evidence, and a few other unimportant ones, all the questions now argued have been disposed of on the two former appeals, and no good purpose could be subserved in rearguing those questions here. If, as the jury found, the minds of the parties did not meet upon some essential elements, then it must follow that no contract was entered into by the parties, and hence the defendant retains the $1,000 of plaintiff's money without right or authority of law. That is practically all that is left of this case.

[2] The court fully and fairly submitted all questions of fact to the jury, and, in view that four juries (the first verdict was set aside by the trial court) have now passed on the facts, and all have found in favor of the plaintiff, the litigation should not be prolonged unless the defendant has been prejudiced in some substantial right during the progress of the trial or in the submission of the case to the jury. It is, however, due to defendant's counsel to say that many of their assignments, and a large part of their argument, are based upon the theory that there

was an enforceable contract or agreement entered into between the parties. In view that such theory is not the correct one, the exceptions to the instructions and the assignments relating to the refusal of the court to charge as requested are without merit.

Nor are the assignments relating to the admission and exclusion of evidence meritorious. Without going into further detail, it must suffice to say that a careful examinaof the record discloses nothing which would authorize us to interfere with the judgment in favor of the plaintiff a third time.

The judgment is therefore affirmed, with costs to the plaintiff.

McCARTY and CORFMAN, JJ., concur.

(50 Utah, 10)

WHEELWRIGHT v. ROMAN. (No. 2906.)

(Supreme Court of Utah. May 8, 1917.)

1. Trusts 🔑81(2)—Resulting Trusts—Payment of Consideration for Conveyance to Another.

Where a wife held title to property real and personal of which her husband was the sole owner, part of which had been inherited by the husband and conveyed to the wife, and part of which had been purchased with his money and title taken in her name, for business convenience and for lawful purposes, and the wife by unequivocal acts and conduct clearly indicated that she always recognized the rights of her husband and that the equitable title to the property was in him and made deeds to him of such property, the property was held by her in trust for the husband.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 116.]

2. Trusts 🔑70—Resulting Trusts—Husband's Property Held by Wife.

Where a wife held title to the sole property real and personal of her husband in trust for his benefit and made deeds and assignments of mortgages to the husband which were not registered and of which she retained possession, and all members of the family including a daughter, who delivered such deeds and assignments to the husband after the death of the wife, understood that the property was held for the sole benefit of the husband, whether or not the deeds were sufficiently delivered at time of execution, the property after her death belonged to the husband.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 95–97.]

3. Appeal and Error 🔑80(4)—Judgments Appealable.

A decree ordering a defendant to deliver to administratrix property real and personal conveyed to him by the intestate and account to her for the interest he may have collected on the notes, mortgages, etc., was a final and appealable judgment, since the provision for an accounting did not affect the finality of the judgment.

4. Judgment 🔑252(5)—Prayer for General Relief—Relief Awarded.

Where a husband was sued by the administratrix of his wife for property conveyed to him by instruments executed by intestate of which he received possession after her death, although the answer contained a prayer for general relief only, defendant was entitled to such specific relief as the pleadings and the evidence authorized.

5. Appeal and Error 🔑1176(1)—Review—Disposition of Cause.

Where it was more convenient to make and enter conclusions of law and judgment in the district court, the Supreme Court will do no more than indicate and direct what the findings, conclusions of law, and judgments shall be, and remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588, 4592.]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Mary M. Wheelwright, as administratrix of the estate of Gertrude Roman, deceased, against Daniel B. Roman. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Joseph Chez and David L. Stine, both of Ogden, for appellant. Halverson & Pratt, of Ogden, for respondent.

FRICK, C. J. The plaintiff, as the administratrix of the estate of Gertrude Roman, deceased, brought this action in equity against the defendant. The purpose of the action was to require the defendant to assign to the plaintiff, as administratrix of said estate, certain notes and mortgages which she alleged were the property of the deceased at the time of her death; to require him to account for the interest he collected on said notes and mortgages; to cancel the deeds to certain real estate, which were made by the deceased in her lifetime, in which the latter conveyed to the defendant the real estate therein described, and which plaintiff alleged, in her complaint, were not delivered to, but were wrongfully obtained by, the defendant; and that such real estate be declared the property of said estate. Plaintiff also prayed for general relief.

The defendant, in his answer to the complaint, set forth the facts concerning the ownership of said real estate and said notes and mortgages in detail. He, among other things, in substance alleged that the title to the real estate described in said deeds was placed in the name of the deceased for a special purpose, and that she held the same in trust for his use and benefit; that the notes and mortgages mentioned in the complaint were made in the name of the deceased for convenience merely, and all of said notes, and mortgages were duly assigned to the defendant by said deceased during her lifetime; that the deceased in her lifetime also made the deeds to the real estate referred to in the complaint and delivered the same to the defendant. He also specially alleged that he furnished the whole consideration or purchase price for the real estate described in said deeds and for the notes and mortgages described in the complaint, and that the deceased held all of said notes and mortgages, together with said real estate, in trust for the defendant and for his use and benefit. The defendant prayed judgment that the plaintiff take nothing by her complaint, and for general relief.

The pleadings are very long and go into great detail with respect to the transactions involved, but we think the foregoing, when supplemented by the statement of facts which follows, will sufficiently indicate the nature and purpose of the action and the defenses set up by the defendant, and also sufficiently indicate the issues involved.

There is little, if any, conflict in the evidence, and the questions to be determined are largely questions of law rather than fact.

The substance of the evidence is to the effect that Gertrude Roman, the deceased, was the wife of the defendant; that she died intestate in Weber county, Utah, on May 1, 1910; that the plaintiff was appointed administratrix of the decedent's estate on December 8, 1913; that this action was commenced September 1, 1914; that the deceased and the defendant lived together as husband and wife for many years and had reared a family of six children, five of whom were living at the time of trial in Ogden City, Utah; that in June, 1888, the father of the defendant before the former's death conveyed to the latter by warranty deed a portion of the real estate described in the complaint; that the defendant, thereafter, in 1889, sold a part of said real estate, and thereafter, with the proceeds thereof, purchased other parcels of the real estate described in the complaint; that in October, 1896, the defendant, without consideration, conveyed a part of the property which was conveyed to him by his father to the deceased; that in August, 1894, the defendant purchased, with his own money, other parcels of the real estate described in the complaint, all of which were also conveyed to the deceased without consideration as aforesaid; that thereafter, on the 13th day of May, 1899, the deceased made certain deeds in which she conveyed all of the foregoing real estate to the defendant, and said deeds were made to avoid the expenses of administration; that no manual delivery of said deeds was ever made to him, but the deceased continued in possession thereof during all of the time from May, 1899, to the time of her death in 1910; that after her death one of the daughters of the deceased and the defendant delivered said deeds to the defendant, and he then had them recorded in the records of Weber county; that during the period from about 1893 or 1894, up to the time of the death of the decedent, the defendant had loaned considerable money to citizens of Ogden; that he could not read or write, except to write his own name; that the deceased, upon the other hand, could read and write readily, and all of the notes and mortgages, amounting to $9,500, were taken in her name because she was more capable of transacting the business than was the defendant; that all of the notes and mortgages described in the complaint were made as aforesaid, and the deceased during her lifetime made assignments of all of them, but said notes and mortgages, together with the assignments thereof, were all in her possession at the time of her death; that the whole of the money represented by the notes and mortgages in question, as well as the consideration for all of the real estate described in the complaint, was the money of the defendant, and the deceased did not contribute anything except her services as aforesaid; that the deceased, on numerous occasions, and to divers persons, declared that the real estate and the notes and mortgages in question belonged to her husband, the defendant, and that she held the title thereof for business reasons, or for convenience merely.

The foregoing is a mere outline of the principal facts, and, to avoid repetition, we shall, in the course of the opinion, refer to some other matters more in detail.

A trial to the court resulted in findings of fact and conclusions of law in favor of the plaintiff. The court entered judgment declaring that the deceased was the owner of all of said real estate at the time of her death, that at said time she also was the owner of all of the notes and mortgages, and that the defendant surrender all of said notes and mortgages to the plaintiff, as the administratrix of said estate, and to account to her for any interest he had theretofore collected and for the rents and profits derived by him from said real estate since the death of the decedent. The defendant appeals from the judgment. In his assignments he assails the findings of fact as being contrary to the undisputed evidence and insists that the conclusions of law and judgment are contrary to law.

[1] Counsel for the defendant, in their brief, with much vigor, contend that, notwithstanding the fact that the deeds to the real estate in question and the assignments of the mortgages described in the complaint were in the possession of the deceased at the time of her death, yet they all were intended to be, and were as a matter of law, delivered to the defendant, and that he was lawfully possessed thereof, and that the equitable, as well as the legal, title to all of said real estate, as well as the said notes and mortgages, was in the defendant at the time of his wife's death, and the same always was, and now is, his property. Counsel cite many cases in which they contend it is held that, under facts substantially like those in this case, the delivery of the instruments there in question was sufficient in law. Among other cases that they cite and rely on are the following: Walker v. Green, 23 Colo. App. 154, 128 Pac. 855; Matson v. Johnson, 48 Wash. 256, 93 Pac. 324, 125 Am. St. Rep. 924; Gage v. Gage, 36 Mich. 229; Newton v. Bealer, 41 Iowa, 334; Somers v. Pumphrey, 24 Ind. 239-240; Dukes v. Spangler, 35 Ohio St. 119; Stone v. Duvall, 77 Ill. 475; Tabor v. Tabor, 136 Mich. 255, 99 N. W. 4; Dyer v. Skadan, 128 Mich. 348, 87 N. W. 277, 92 Am. St. Rep. 461. While in at least some of the

foregoing cases, under facts and circumstances in many respects similar or analogous to those in the case at bar, the appellate courts sustained the findings of the trial courts that the instruments there in question were intended to be and were delivered, yet it must be conceded that, while the facts and circumstances in the case at bar indicate a clear intention on the part of the deceased to vest the title and ownership of all the property in question in the defendant, the evidence is also clear that, so far as the deeds to the real estate are concerned, there never was an actual or manual delivery of them to the defendant until after the death of the deceased. In view that the undisputed facts and circumstances make the case at bar a border-line case upon the question of delivery, and for the reason, as will hereinafter appear, that those same facts and circumstances leave practically no room for doubt that the deceased held the title to all of the real estate as well as to all of the notes and mortgages in question in trust for the defendant, it becomes unnecessary for us to express, and hence we do not express, an opinion upon the question of whether the acts and conduct of the deceased constituted a delivery of the deeds and notes and the assignments thereof to the defendant.

We therefore proceed to a consideration of whether the deceased held the property in question in this case in trust for the use and benefit of her husband, the defendant. Upon that question, the evidence, as before stated, is practically undisputed that the defendant was the sole owner of all of the property in question, and that the title to the real estate was placed in the name of the deceased for convenience and for lawful purposes. What is true with respect to the real estate is likewise true with respect to the notes and mortgages. Again, the unequivocal acts and conduct of the deceased clearly indicate that she always recognized the rights of the defendant, and that the title to the property, that is, the beneficial or equitable title, was in him. The mere fact that she made the deeds by which she conveyed the real estate to her husband, and that she made all of the assignments of the notes and mortgages, although not delivered, nevertheless constitutes strong evidence that she constantly recognized the fact that the property was not her own. Plaintiff's counsel, however, point to the fact that there is ample evidence to show that the deeds and assignments were made for the purpose of avoiding the trouble and expense of administering upon the decedent's estate. A sufficient answer to that contention, however, is that, if that had been the purpose of the deceased, why was the whole of the real estate conveyed and all of the notes and mortgages assigned to the husband of the deceased, the defendant? Administration of the estate could just as well have been avoided by conveying the real estate and by assigning the notes and mortgages to her husband and their children in the proportions she desired to have them divided among them, as to convey all of the real estate and all of the notes and mortgages to her husband, the defendant. The fact, if it be a fact, however, that the deeds were made for the purpose of avoiding the expense incident to administering the estate, in no way either affects or weakens the controlling fact that the deceased held the title to all of the property in question in trust for the defendant.

[2] When the foregoing circumstances are considered in the light of the numerous declarations of the deceased during her lifetime, and up to within a short time of her death, then, as we before stated, there is little, if any, room to doubt that she held all of the property in question in trust for her husband. One witness, in referring to the declarations of the deceased concerning the real estate in question (quoting from the bill of exceptions), in part testified:

> "She [the deceased] said the property was all Mr. Roman's, he inherited it from his father, and she didn't have anything to say without Mr. Roman's consent, she was merely a business man, that is, understood the business better than he did, and consequently she attended to the business, and she had some of her property in her name on that account, because she was attending to his business and he didn't read or write very good, and she understood it, and it was much better in her name than it would be in his, that is, to transact business, but that was his property, because he wouldn't sell it, he said he was going to keep it for his sons."

In referring to the other parcel of real estate included in the deeds referred to in the complaint, the witness testified:

> "The property here in town, she [the deceased] told me it belonged to Mr. David Roman, that is, Mr. Roman's father, and just prior to his death he deeded it to him the [defendant]."

The witness further said:

> "She told me that the place in town belonged to her husband, that they would come and live in town if they would sell the farm—they called that their home, and they would sell the farm and live in town, but Mr. Roman objected on account of having three or four boys. He wanted to save it for the boys."

Another witness, who transacted business for the deceased, testified that, in referring to the money that was being loaned, and which is represented by the notes and mortgages in question, the deceased said:

> "The money we are placing out is my husband's money—my husband's money which I am placing out in my name."

The witness testified "that was the sum and substance of the conversation" he had with the deceased. The same witness testified that the assignments of the note and mortgages were all made in accordance with "her instructions."

Another witness testified that the deceased, in referring to the making of the loans, said: "She done the business; she said she done the business for Roman," the defendant.

Some time before her death, the deceased exhibited all of the notes and mortgages, together with the assignments thereof, and the deeds to the real estate in question, to one of her daughters, and the daughter testified that her mother then said:

> "Come here. I want to show you these papers. I want you to know how I fix these, and I am going to have all of them fixed. In case anything happens to me, you can always carry on the business with papa."

The same witness and one or two others also testified that the deceased told them that she wanted the daughter to transact the business for her father the same as the deceased had been transacting it in the past.

There were other witnesses who testified to other declarations of the deceased by which she clearly and unequivocally indicated that she at no time claimed ownership of the property in question, or any part of it, and that she always regarded it as her husband's property, and that all of it was placed in her name for convenience and for legitimate and lawful purposes, and that she held the title thereof for his use and benefit. Indeed, the whole trend of the evidence, that is, the great weight and effect thereof, is as above indicated. It should also be remembered that the deceased was suddenly stricken with paralysis, and, while she lingered for some days, yet she never regained consciousness after she was stricken, and died in an unconscious condition. She was thus prevented from giving any directions or making any disposition of the property in question other than she had made.

The testimony of the several witnesses respecting the declarations and statements made by the deceased is not disputed. Counsel for defendant insist that, under the undisputed facts and circumstances, it was the duty of the trial court to declare, as a matter of law, that the deceased held all of the property in question in trust for the defendant. Counsel cite and rely upon the following, among other, cases in support of their contention: Taylor v. Morris, 163 Cal. 717, 127 Pac. 66; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Cooney v. Glynn, 157 Cal. 587, 108 Pac. 506; Silvey v. Hodgdon, 52 Cal. 363; Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Culp v. Price, 107 Iowa, 133, 77 N. W. 848; Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482; Bailey v. Dobbins, 67 Neb. 548, 93 N. W. 687; Akin v. Akin, 268 Ill. 324, 109 N. E. 268; Endsley v. Taylor, 143 Ga. 607, 85 S. E. 852; Leroy v. Norton, 49 Colo. 490, 113 Pac. 529; Dieckman v. Merkh, 20 Cal. App. 605, 130 Pac. 27; Odell v. Moss, 137 Cal. 542, 70 Pac. 547. In some of the foregoing cases the question arose as between husband and wife; in others, between father and child; and, in others still, between brother and sister. The evidence respecting the trust in each one of the foregoing cases was much less convincing than is the evidence upon that question in the case at bar. In view of the importance of the question involved, we shall take the liberty of quoting from a few of the foregoing cases.

In Cooney v. Glynn, supra, in the course of the opinion the law is stated thus:

> "It has been established by a number of decisions in this state that where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other, upon a parol promise by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises. If made in good faith, and if it is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated."

In Bailey v. Dobbins, supra, the Supreme Court of Nebraska states the rule in the following words:

> "Generally speaking, where the purchase money of land is paid by one person, and the title is taken in the name of another, the party taking the title is presumed to hold it in trust for him who pays the purchase price. The reason given for this rule is that the party who pays the money is presumed to intend to become the owner of the property, and the beneficial title follows such intention. This presumption, however, does not arise where the legal title is taken in the name of some person for whom the purchaser is under a legal or moral obligation to provide. In such case, the presumption arises that the conveyance was intended as an advancement to the nominal purchaser. The foregoing will be recognized as elementary. Whether the conveyance be to a stranger, or to one for whom the purchaser is bound to provide, the presumption arising therefrom is not of law, but of fact, which may be rebutted by evidence tending to show that the intention of the purchaser was different from that to be inferred from the bare fact of such conveyance. This, also, is elementary. Hence, in either case, when it appears that the purchase money has been paid by one person, and the title taken in the name of another, the question is whether it was intended that the one to whom the conveyance was made should take the entire estate, or that the one paying the purchase price should hold the equitable title to the property. When the intention in that behalf is ascertained, the courts will give it effect, if possible."

In Dorman v. Dorman, supra, the law is stated in the headnotes in 58 N. E. 235, thus:

> "Where a husband purchases land, and takes the deed therefor in the name of his wife, the burden of proof to establish a resulting trust in his favor as against her heirs, and to rebut the presumption that such conveyance was intended as an advancement to the wife, is on the husband.
>
> "A husband purchased land, and paid the consideration therefor, but took the deed in the name of his wife. He made permanent improvements on the land, paid the taxes, and exercised complete control over it, and he and the wife occupied the premises for a time. The land constituted the principal part of his estate, and he had a family of small children. The wife had said that the land was deeded to her in trust for the husband. Held sufficient to show a resulting trust therein in favor of the husband."

It is also made clear in the foregoing cases that there is little, if any, room for the presumption insisted on by plaintiff's counsel that the property in question was transferred to the deceased as an advancement. Indeed, all the facts and circumstances in the case at bar rebut such a presumption.

We thus have a case where all the property in question was clearly shown to have been the sole property of the defendant; where the reason why it was held in the name of the deceased is clear and reasonable; where the deceased, during her lifetime and during a long period of years, many times declared the true origin of her title, and that the property was not hers, and that she held the title thereto merely as a matter of convenience for the use and benefit of the defendant, her husband; where the acts and conduct of the deceased in making the deeds to the real estate and the assignments of the notes and mortgages, when viewed in the light of her declarations, clearly indicate that she never did claim, or intended to claim, the property, or any of it, as her own, but always regarded it as the property of her husband, the defendant. The daughter who delivered the deeds and the assignments of the mortgages to her father after the mother's death also clearly understood that she was merely effectuating the well-grounded and long-continued purposes of her mother, the deceased. It would seem that all of the other members of the family must have joined in the conclusions of the daughter just referred to, in view that no application for administration was made until more than 3½ years after the mother's death and that this action was not commenced for nearly a year after plaintiff was appointed administratrix of the mother's estate. Nor, in view that the true condition of things was known by all concerned, was there any reason for the delay aforesaid. The defendant has now reached the age of upwards of 70 years. So far as the record discloses, he has no other property than the property in question. The evidence also shows that, although the defendant had no education, yet he is possessed of a natural instinct and ability to make money, and that it was largely, if not entirely, due to his efforts that the property in question was accumulated. Under the undisputed facts and circumstances, therefore, it would be a reproach both to the courts and to the law if, in his old age, he could be deprived of the use of his own property, and would be required to stand by and see his estate administered during his lifetime by another. Of what use are constitutional guaranties respecting the rights of property, if they may be disregarded by the courts?

In our opinion, the district court committed manifest error in holding that the property in question was the property of the deceased at any time, and especially at the time of her death, and in refusing to enforce the trust.

[3] Plaintiff's counsel further contend that, in view that the judgment requires an accounting to be made by the defendant, for that reason the judgment is not final, and hence not appealable. The contention is not tenable. What is required from the defendant is a part of the final judgment. The defendant appeals from that part, as well as from all other parts. The judgment is not interlocutory, but is final and conclusive respecting all matters covered thereby. The mere fact that the defendant is ordered to deliver the property to the plaintiff and to account to her for the interest that he may have collected on the notes and mortgages, etc., does not affect the finality of the judgment. If authority be required upon a proposition as elementary as the one now under consideration, the following cases will be found directly in point: Johnson v. Northern Trust Co., 184 Ill. App. 549; Allison v. Drake, 145 Ill. 500, 32 N. E. 537; McMurray v. Day, 70 Iowa, 671, 28 N. W. 476; Adams v. Sayre, 76 Ala. 509.

[4] Finally, the question arises whether the defendant can be given proper relief, in view that general relief is prayed for in the answer without praying for the specific relief, to which, in view of the foregoing opinion, he is entitled. That, in case general relief only is asked, any relief that is supported by the pleadings and the evidence may be granted, is well settled. In Rollins v. Forbes, 10 Cal. 299, the rule is stated thus:

> "If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief."

To the same effect are Ross v. Purse, 17 Colo. 24, 28 Pac. 473; Davis v. Davis, 9 Mont. 267, 23 Pac. 715; Kleinschmidt v. Steele, 15 Mont. 181, 38 Pac. 827; 1 Suth. Code Pl. & Pr. 111.

[5] In view that it is more convenient to make and enter conclusions of law and judgment in the district court, we shall do no more than indicate and direct what the findings, conclusions of law, and judgment shall be.

The findings of fact and conclusions of law, so far as inconsistent with this opinion, are set aside, and the judgment reversed. The cause is remanded to the district court, with directions to make findings of fact and conclusions of law in conformity with the views expressed in this opinion, and to enter judgment requiring the plaintiff, as administratrix of the estate of Gertrude Roman, deceased, to execute and deliver to the defendant a proper deed of conveyance to all of the real estate described in the complaint that is in controversy in this action, and, in case said administratrix refuses to make such a conveyance, to direct that the judgment or decree entered shall constitute such conveyance; that the court adjudicate and declare the title to said real estate to be in the defendant and that he is the owner thereof, and that the title thereto be quieted in him; that the defendant be declared to be the sole owner of all the notes and mortgages in controversy; and that the administratrix also be required to execute and to deliver to the defendant proper and sufficient assignments to all of the notes and mortgages aforesaid.

It is further ordered that, in case there are sufficient assets in said estate, the costs and expenses of this appeal be by the district court ordered to be paid out of said estate, and, if there are no assets in said estate, then it is ordered that neither party to this appeal recover costs.

McCARTY and CORFMAN, JJ., concur.

(25 Wyo. 109)

HATCH BROS. CO. v. BLACK et al.

(No. 884.)

(Supreme Court of Wyoming. June 11, 1917.)

1. DEDICATION 🔑37 — HIGHWAYS—ACCEPTANCE—GRANT.

Under Rev. St. U. S. § 2477 (U. S. Comp. St. 1916, § 4919), providing that the right of way for the construction of highways over public lands not reserved for public use is hereby granted, the grant may be accepted by the public without action by the public authorities, and continued use of the road by the public for such a time and under such circumstances as to clearly indicate an intention to accept the grant is sufficient.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74.]

2. DEDICATION 🔑32 — HIGHWAYS—ACCEPTANCE—GRANT.

Comp. Laws 1876, c. 102, § 1, as amended by Laws 1877, p. 135, was repealed by Laws 1886, c. 99; and Laws 1895, c. 69, § 1, stating the requisites of acquisition of public highways, recognize the right of the public without action of the authorities to accept a grant of a highway over public lands.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 64.]

3. HIGHWAYS 🔑6(1)—DEDICATION—ACCEPTANCE—GRANT.

Where public highway is granted it is not essential to establish the acceptance thereof that the public use it for the ordinary prescriptive period, and time is material only as an element to be considered with the character of the use and the convenience of the public.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 8.]

4. DEDICATION 🔑45—HIGHWAYS — ACCEPTANCE—GRANT—QUESTION FOR JURY.

Evidence *held* to make a question for the jury whether a highway across public lands granted by Rev. St. U. S. § 2477 (U. S. Comp. St. 1916, § 4919), was accepted by the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 88.]

5. PRINCIPAL AND AGENT 🔑22(1)—EVIDENCE—ADMISSIBILITY.

The declarations of the agent are inadmissible alone to show the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40.]

6. DAMAGES 🔑112—MEASURE OF DAMAGES—INJURY TO CROPS.

The measure of damages for injury to or destruction of crops is the value of the crops in the condition they were in at the time and place of the injury or destruction.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281–283.]

7. DAMAGES 🔑188(1) — EVIDENCE — SUFFICIENCY.

Evidence *held* insufficient on which to base a determination of the damages suffered by crops by driving sheep across them.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 511.]

8. DAMAGES 🔑217—MEASURE OF DAMAGES—NECESSITY OF INSTRUCTION.

An instruction as to the measure of damages in an action for damages for trespass is necessary to the correct assessment of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556–559.]

Error to District Court, Uinta County; John R. Arnold, Judge.

Action by the Hatch Bros. Company against Joseph Black and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Payson W. Spaulding, of Evanston, and Bagley & Ashton, of Salt Lake City, Utah, for plaintiff in error. B. M. Ausherman, of Evanston, for defendants in error.

BEARD, J. This action was brought by the plaintiff in error against the defendants in error to restrain defendants from obstructing an alleged highway, and for damages for preventing plaintiff from passing over said road with its sheep. Defendant denied that the road was a public highway, and filed a cross-petition claiming damages for trespass on their lands by plaintiff. The case was tried to a jury, resulting in a verdict and judgment in favor of defendants and against plaintiff for $916.04 and costs, from which judgment plaintiff brings error.

It appears that on April 27, 1912, defendant Joseph A. Black made a homestead entry on certain lands in section 24, township 13 north, range 121 west, in Uinta county, and that on July 30, 1912, defendant Joseph Black made a homestead entry on certain other lands in said section; that the road in question extended across a part of the said homestead entries of defendants, and extended a number of miles on either side of said lands; that in 1912 or 1913 defendants fenced their lands, and during the years 1912, 1913, 1914, and 1915, cultivated a part of said lands jointly and were equally interested in the crops raised thereon. They alleged in their cross-petition that during said years plaintiff had maliciously and repeatedly driven its sheep upon and across said land, injuring and destroying the crops of grain growing thereon to their damage in the sum of $2,000, and claiming exemplary damages in the sum of $20,000. Plaintiff replied, joining issue on the matters pleaded in the cross-petition. The plaintiff appears to have abandoned its claim for damages, and on the trial sought only to have defendants enjoined from obstructing the road and from preventing plaintiff free passage thereon across defendants' lands. The court denied an injunction, and gave judgment as above stated.

Many rulings of the district court are assigned as error, but they may be grouped and considered under a few heads:

1. Over the objection of plaintiff the court instructed the jury:

> "That under the laws of the state of Wyoming, the only publicly traveled roads in Wyoming, not officially established, declared to be public highways, are those designated as highways on government maps or plats in the record of a land office of the United States in said state of Wyoming."

And in the next paragraph of the instructions the jury was told that:

> "There being no evidence to the effect that said road was established in some manner recognized by the laws of the state, the alleged trail or highway over and upon the homesteads of the defendants is not a regularly constituted public road or public highway, and cannot by you be so considered."

The plaintiff in a number of instructions, couched in different language, requested the court to instruct the jury to the effect that by the act of Congress of July 26, 1866 (14 Stat. 253, c. 262 [U. S. Comp. St. 1916, § 4919]), the right of way for the construction of highways over public lands, not reserved for public use, was granted, and that such grant might be accepted by the public without action by the county authorities, by the public generally traveling the same as a public road, intending thereby to appropriate and use the same as a public highway; and if the jury found from the evidence that the road in question had been so used by the public for a great number of years prior to defendants' homestead entries, and while the same was public lands of the United States, not reserved for public use, such use by the public would constitute it a public highway, and the public would have the right to travel the same without interruption or molestation on the part of defendants. The court refused to so instruct, to which refusal plaintiff excepted.

[1] The statute relied upon by plaintiff is section 2477, U. S. Statutes, 6 Fed. St. Annotated, p. 498 (U. S. Comp. St. 1916, § 4919):

> "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Act July 26, 1866.

The grant is unconditional and contains no provision as to the manner of its acceptance. We think it is quite well settled that when land is granted for a right of way for a public highway, the grant may be accepted by the public without action by the public authorities. The continued use of the road by the public for such a length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant has generally been held sufficient. More especially so if it is made to appear that to interrupt the use would inconvenience the public. It must be borne in mind that it is not a question of the establishment of a highway by prescription which is here in question, but the acceptance of a grant; and therefore it does not depend so much on a definite length of time of use as upon the character of the use, taking into account the needs and convenience of the public, as manifesting an intention on its part to accept the grant. The Supreme Court of Colorado in Sprague v. Stead, 56 Colo. 538, 139 Pac. 544, after quoting the United States statute, said:

> "This was an express dedication for a right of way for a road over the land belonging to the government not reserved for public use. The acceptance of such grant while the land was a part of the public domain may be effected by public use. An appropriation in this manner is made with the consent of the owner previously given, and when confined to a reasonably certain and definite line creates an easement for the purposes of a highway, and subsequent entrymen and claimants take such land subject to that easement"—citing Montgomery v. Somers, 50 Or. 259, 90 Pac. 674; Murray v. City of Butte, 7 Mont. 61, 14 Pac. 656; McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393; Bequette v. Patterson, 104 Cal. 282, 37 Pac. 917; Wallowa County v. Wade, 43 Or. 253, 72 Pac. 793; Van Wanning v. Deeter, 78 Neb. 284, 110 N. W. 703.

See, also, Okanogan County v. Cheetham, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027; Hughes v. Veal et al., 84 Kan. 534, 114 Pac. 1081; Doyle v. Chattanooga, 128 Tenn. 433, 161 S. W. 997, Ann. Cas. 1915C, 283; Riley v. Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 642, 3 Ann. Cas. 788, and notes.

[2] By an act of the territorial Legislature approved December 9, 1869 (Comp. Laws 1876, c. 102, § 1), it was enacted that:

> "All roads within this territory shall be considered public highways, * * * which have been, or shall hereafter be, used and traveled by the public, so that the same would, according to the course of the common law, be deemed public highways."

Said chapter 102 was amended in 1877 (S. L. 1877, p. 135), giving the board of county commissioners power to adopt and appropriate to county and public use any road or route publicly traveled, and when so adopted and appropriated was declared to be a public or county road to all intents and purposes. By chapter 99, S. L. 1886, said chapter 102 as amended was repealed, and it enacted that:

> "No county road shall be hereafter established, * * * except by authority of the county commissioners of the proper county: Provided, however, that nothing herein contained shall be construed to affect the validity of any act done or right accrued under and by virtue of the law hereby repealed."

By section 1, chapter 69, S. L. 1895, all roads that were designated or marked as highways on government maps or plats in any land office of the United States, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the county commissioners, were declared to be public highways, thus recognizing as public highways roads which the government surveyors found to be traveled and used as such at the time of the survey, and without action by the county commissioners. The government survey of this land was shown to have been made prior to January 6, 1876. We discover nothing in these several statutes, as we understand them, prohibiting the public from accepting the grant of the right of way; but on the contrary, they appear to recognize that right.

[3] The decisions are not harmonious as to the time the public use must continue to constitute an acceptance of the grant by the public; some courts holding that it must be for the same length of time as would be necessary to acquire a right of way by prescription over privately owned lands, while others hold that the length of time of the user is not controlling and may be for a shorter period. The latter holding, we think, is supported by the better reasoning. Title or right by prescription implies adverse user, while we are here considering a case where the use is not adverse, but the appropriation and use of the land is with the consent and by an express grant of the owner. Time, therefore, becomes material only as an element to be taken into consideration together with the character of the use and the necessities or convenience of the public in determining the question of the acceptance of the grant. Counsel for defendants cites and places much reliance upon the case of Commissioners v. Patrick, 18 Wyo. 130, 104 Pac. 531, 107 Pac. 748. But the court was there considering the question of the establishment of a highway over private lands by prescription, and the question of the federal grant was not involved in the case. In this case there was evidence introduced to the effect and tending to prove that the road in question had been traveled and used by the public as a public highway as early as 1875 or 1876, and from that time continuously until it was closed by defendants in 1912 or 1913. That those using the road had done considerable work thereon by making dugways, constructing bridges, etc.; one witness testifying that he had spent about $500 on it about 1891.

[4] It was a question for the jury to determine, upon proper instructions, whether the grant of the right of way had been accepted by the public, prior to defendants' homestead entries, so as to establish the road as a public highway which the public had a right to use and to have remain open and unobstructed. Whether such an acceptance of the grant by the public would impose upon the county the burden of keeping the road in repair is not involved in the case, and has not been considered. We think the court erred in giving the instructions complained of, and in refusing to instruct, in substance, as requested by plaintiff.

[5] 2. Over the objection of plaintiff, the defendants were permitted to introduce evidence of statements made by persons in charge of certain of the sheep, claimed to have damaged the crops, as to whom the sheep belonged, and by whom such persons were employed, without other evidence of the agency of such persons than their declarations. That was error. Before statements or declarations of an alleged agent are competent and admissible in evidence against a principal, the agency must be established; and it is a familiar rule of evidence that agency cannot be established by the declarations of the alleged agent.

[6, 7] 3. It is contended that there was no competent evidence of the amount of damages, if any, suffered by defendants. The evidence consists of testimony that the crops for the years 1912, 1913, and 1915 were damaged. We fail to find any evidence of the value of the crops for 1912. For 1913 the defendant Joseph Black testified that he estimated the crop for that year at 700 bushels of grain, while on practically the same ground in 1914 they had 1,800 bushels; but there was no evidence of the value of the grain other than his statement that the damage to the crop was $500. For 1915 he testified that the damage to the grain was $700; that they had a good prospect for a crop. How a jury could arrive at the correct measure of damages from the evidence, we are unable to see. The measure of damages for injury to, or destruction of, crops is the value of the crops in the condition they were in at the time and place of the injury or destruction. Lester v. Highland Boy Gold Mining Co., 27 Utah, 470, 76 Pac. 341, 101 Am. St. Rep. 988, 1 Ann. Cas. 761; Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, and note. The amount of such damages is for the jury to determine from the facts proven, and not from the opinion of the parties or witnesses. "The reason for this rule is that it is the province of the jury to estimate the damages upon the facts as shown by the evidence, and the only end accomplished by the admission of such opinions and conclusions is the substitution of witnesses for jurors and of theories for facts." 4 Enc. of Evidence, 12 et seq., and cases there cited.

[8] As the judgment will have to be reversed and the case remanded for a new trial, it is proper to call attention to the fact that the jury was not instructed as to the measure of damages. Such instruction was necessary to a correct assessment of damages if any were awarded. Some other matters have been assigned as error, but we do not deem them important, and they will not likely arise upon another trial.

For the reasons stated, the judgment of the district court is reversed, and the case remanded for a new trial.

Reversed.

POTTER, C. J., concurs. SCOTT, J., did not participate in the decision.

(30 Idaho, 427)

WOLTER v. CHURCH et al.

(Supreme Court of Idaho. May 23, 1917.)

1. Appeal and Error 🔑627(1)—Transcript on Appeal—Jurisdiction.

A failure to file and serve transcript on appeal within the time specified by the rules of this court does not divest this court of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744–2749.]

2. Appeal and Error 🔑799 — Failure to File Transcript—Motion to Dismiss.

Where a motion to dismiss for failure to file transcript within the time specified by rule 26 of the rules of this court [153 Pac. xi] is made upon notice, and a showing is made in opposition to such motion, the showing should be sufficient to justify the court in reinstating the case if it had been previously dismissed without notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3158–3160.]

3. Appeal and Error 🔑627(2), 799—Failure to File Transcript—Dismissal—Diligence.

Where, upon appeal to this court, a transcript has not been filed within the time limited by the rules, such appeal will be dismissed upon motion, in the absence of a sufficient showing of diligence. Facts examined, and showing of diligence in the prosecution of the appeal *held* to be insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744–2747, 2749, 3126, 3158–3160.]

4. Appeal and Error 🔑624 — Transcript on Appeal—Extension of Time.

A stipulation for obtaining an extension of time within which to file transcript on appeal to this court should be obtained before the time limited by the rules of this court for filing such transcript has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737–2742.]

Appeal from District Court, Lincoln County; F. J. Cowen, Judge.

Action by Adelhaid Wolter against B. Church and another. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

Bissell & Helman, of Shoshone, for appellants. A. L. Fletcher, of Richfield, for respondent.

RICE, J. This cause comes on at this time upon a motion to dismiss the appeal. Several grounds for dismissal are urged, but it will only be necessary to consider the one relating to the failure of the appellants to file and serve transcript within the time limited by rule 26 of the rules of this court.

In this case the judgment was entered by the trial court on the 23d day of October, 1916. The appeal was perfected on the 8th day of January, 1917, and on the 21st day of March this motion to dismiss the appeal was filed. At the time of the motion the transcript had not been filed and served, and no extension of time for filing and serving the same had been applied for or granted.

[1] It has been decided in this state that failure to file and serve transcript on appeal within the time specified by the rules of this court does not divest this court of jurisdiction. Stout v. Cunningham, 29 Idaho, 809, 162 Pac. 928.

[2] By rule 29 [153 Pac. xi], such appeal may be dismissed without notice. A case so dismissed may be reinstated during the same term, upon good cause shown, on notice to the opposite party. In cases where the motion to dismiss for failure to file transcript within the time specified under rule 26 is made upon notice, and a showing is made in opposition to such motion, the showing should be sufficient to justify the court in reinstating the case if it had previously been dismissed without notice. In the absence of such a showing, the case will be dismissed.

[3] The principal showing of diligence in this case consists in setting forth the effort of appellants' attorney to procure the money from one of the appellants with which to pay the clerk and reporter for transcribing the record. The affidavit, however, sets forth that the clerk of the court and the official reporter did not require their fees in advance, but always informed the appellants' attorney that he might get the money from his clients before they would require payment. The affidavit does not state that these officers misled him with regard to the preparation, filing, and service of the transcript on appeal.

[4] This showing would have been proper in support of an application for an extension of time within which to file the transcript. It does not present a sufficient excuse for failure to obtain an extension of time within the limit allowed by rule 26. It is not shown that appellants' attorney ever sought to obtain an extension of time within which to file the transcript, nor is it shown that there was any excuse therefor, except that appellants' attorney "may have relied too implicitly upon his past ability to get extensions of time for filing of transcripts, through stipulations with opposing counsel at any time." Unless a valid excuse be shown, an appellant relying upon a stipulation that the time for filing the transcript may be extended must obtain such stipulation before the 60 days expire in order to show due diligence.

In this case, we think the showing of due diligence is not sufficient, and that the appeal must be dismissed. Costs awarded to respondent.

BUDGE, C. J., and MORGAN, J., concur.

(30 Idaho, 422)

HANSON v. MORRISON et al.

(Supreme Court of Idaho. May 21, 1917.)

1. Attachment 🔑69 — Justices of the Peace 🔑48—Jurisdiction of Justice of Peace and Probate Court.

Real estate may be attached under and by virtue of a writ of attachment issued out of a justice's or probate court.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 196; Justices of the Peace, Cent. Dig. §§ 177, 178.]

2. ATTACHMENT 🔑180—SALE—SUBSEQUENT ATTACHMENT—RIGHT OF PURCHASER.

Where real estate was levied upon and attached pursuant to a writ of attachment issued out of the probate court, and judgment was rendered in favor of the attaching creditor and an abstract thereof filed with the clerk of the district court, and thereafter the land was purchased at a sale in execution of such judgment, the interest of the purchaser is prior to a lien obtained by reason of an attachment levied upon the land, which was issued out of the district court after the issuance of the writ out of the probate court, but before the rendition of the judgment and the filing of the abstract thereof.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 453, 550–575.]

Appeal from District Court, Adams County; Ed. L. Bryan, Judge.

Action by Anna Hanson against Ira A. Brown, in which respondents, Frank H. Morrison and another intervened in order to determine priority of attachment liens. Judgment for interveners, and plaintiff appeals. Affirmed.

L. L. Burtenshaw, of Council, for appellant. Stinson & McCallum, of Council, for respondents.

MORGAN, J. It appears that on September, 4, 1913, the Council Lumber Company instituted an action against Ira A. Brown in the probate court of Adams county and, on the same day, caused to be issued therein a writ of attachment. Pursuant to the writ, and on the same day, the sheriff levied upon and attached the real estate in controversy, being the property of Brown. Thereafter judgment was rendered against him, and on March 21, 1914, an abstract thereof was filed with the clerk of the district court and execution issued. Pursuant to the execution, the sheriff levied upon the property, and on April 18, 1914, sold it to respondents. On February 23, 1914, appellant instituted an action against Brown, in the district court of the Seventh judicial district, in and for Adams county, and, on the same day, caused to be issued a writ of attachment pursuant to which the sheriff levied upon and attached the real estate in controversy. On May 4, 1914, respondents filed, with the court's permission, their complaint in intervention in that action, setting forth their claim of title to the land and asking that it be adjudged to be prior to the claim of appellant. Appellant demurred to the complaint in intervention, her demurrer was overruled, and, having failed to answer, her default was duly entered. Whereupon the court found the facts as above set forth, and on April 12, 1915, rendered judgment as prayed for by respondents. This appeal is from that judgment.

It will be seen that the writ of attachment upon which appellant bases her claim to the property was levied upon the land prior to the filing of the abstract of judgment of the probate court, but subsequent to the issuance of the writ of attachment by that court, and the levy upon the land made pursuant thereto.

[1] The question presented here is: Can real estate be attached pursuant to a writ of attachment issued out of the probate court? To properly determine this question, reference must be made to our Constitution and statutes conferring jurisdiction and authority upon such courts within this state. Section 21, art. 5, of the Constitution provides:

> "The probate courts * * * shall have * * * jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of five hundred dollars, exclusive of interest. * * *"

Section 4629, Rev. Codes, provides:

> "In all civil suits, and within its civil jurisdiction, all proceedings in the probate court, the process, provisional remedies and supplementary proceedings, and the rules of practice, pleading and procedure, shall be the same as is provided by law for justices' courts."

Therefore it is necessary to examine the provisions of our statutes concerning writs of attachment issued from justices' courts.

Sections 4686, 4687, and 4688, Rev. Codes, provide when and how writs of attachment may issue from such courts, and nowhere in these sections or, in fact, in the provisions of our entire Codes, is it even intimated that land may not be levied upon by authority of a writ of attachment issued out of a justice's court. In fact, the opposite conclusion is to be deduced from section 4688, which provides that the writ be directed to the sheriff or any constable of the county, requiring him to attach and safely keep all of the property of the defendant, not exempt from execution. Section 4689 is:

> "The sections of this Code providing for attachments out of the district court, except as in this chapter expressly provided, are applicable to attachments issued out of justices' courts, the necessary changes and substitutions being made therein."

Therefore no prohibition against writs of attachment issued from justices' courts being levied upon land having been made in the said chapter of the Code dealing with provisional remedies, they are authorized to issue such writs under and by virtue of which all property subject to levy pursuant to writs issued from the district court may be attached. There is no statute, or reason, inconsistent with the jurisdiction of justices' courts in this particular. It is true that section 4645 provides that parties to an action in a probate or justice's court cannot give evidence upon any question which involves the title to or possession of real property, nor can any issue presenting such question be tried by such court, and, where it appears that such question is involved, the probate court or justice of the peace must suspend all further proceedings in the action and certify the same to the district court; but it does not follow that, by issuing a writ of attachment, in execution of which the sheriff levies upon real estate, a probate court, or justice of the peace, will, necessarily, hear evidence upon a question, or try an issue, involving title to or possession of real property. The mere fact that such a writ issues and is levied upon real estate will not change the character of the evidence to be introduced at the trial. Bush v. Visant, 40 Ark. 125.

[2] It is true that, under the provisions of section 4736, a judgment rendered in a probate or justice's court creates no lien upon the lands of the defendant until an abstract of the same is filed and docketed in the office of the clerk of the district court; but in this action respondents do not claim a lien initiated by the judgment, but rather by the attachment. Where land is attached prior to judgment in the probate or justice's court, the lien thereby created is merged with the lien of a judgment in favor of the attaching creditor, an abstract of which is subsequently filed and docketed, and the lien resulting from such merger has priority as of the date of attachment in the same manner as in case of judgments and attachments procured in actions in the district court. Therefore, when respondents purchased this land at the sale in execution of the judgment rendered in the probate court, they purchased it clear of any claim of appellant arising subsequent to the date of the levy under authority of the writ of attachment from that court, for the levy of the writ of attachment issued out of the district court, upon which appellant bases her claim, was subsequent to the levy relied upon by respondents. First Nat. Bank v. Lieuallen, 4 Idaho, 431, 39 Pac. 1108.

Appellant cites the case of Wilson v. Madison, 58 Cal. 1, urging that it supports her contention that a writ of attachment from a justice's court cannot be levied upon land; but that case merely holds that, where a writ of attachment has been issued from a justice's court and a levy thereof is made upon land, and before an abstract of the judgment is filed, as provided by law, a homestead declaration upon the premises is filed by the judgment debtor, the land cannot be sold upon execution of the judgment. This is so because, under the laws of California, lands covered by homestead declarations are subject, not to prior attachments, but to prior judgments. This has been held in the case of McCracken v. Harris, 54 Cal. 81, where the attachment issued from the district court prior to the declaration of homestead. The court held, in that case, that, the declaration having been filed before judgment, it was not subject to the lien of attachment. It is evident, therefore, that the decision in the case of Wilson v. Madison, supra, was not based upon the theory that a writ of attachment issued out of a justice's court could not become a lien upon real estate.

The case of Dewey v. Schreiber Imp. Co., 12 Idaho, 280, 85 Pac. 921, is also cited by appellant in support of her contention that the probate court had no jurisdiction to issue a writ of attachment to be levied upon real estate. In that case it was held that by section 21, art. 5, of the Constitution, probate courts were not given power to try or determine cases in equity, and that a statute purporting to confer upon them the power to foreclose mechanics' liens, mortgages, and other liens on real property was unconstitutional and void. That decision has no bearing upon this case, because in issuing the writ of attachment the probate court was not proceeding in equity, but was merely making use of a provisional remedy given by the statutes in aid of an action at law.

The judgment appealed from is affirmed. Costs are awarded to respondents.

BUDGE, C. J., and RICE, J., concur.

(175 Cal. 130)

BORNSCHEIN et al. v. WHITAKER
(S. F. 8343.)

(Supreme Court of California. May 15, 1917.)

APPEAL AND ERROR ⟹345(1)—TIME FOR FILING DEMAND FOR RECORD—STATUTE.

Ten days' time allowed "after notice of decision" denying motion for new trial "or other termination" of such a motion for filing demand for record under Code Civ. Proc. § 953a, or for serving proposed bill of exceptions under section 650, commences to run immediately upon trial court's failure to pass on motion within three months allowed by section 660 after verdict or service on the moving party of notice of the court's decision; written notice of the decision not being essential, and the law itself giving actual notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George D. Bornschein and others against George W. Whitaker. Judgment for plaintiffs, and defendant appeals. On motion to dismiss appeal. Appeal dismissed.

Eugene F. Conlin, of San Francisco, for appellant. G. Gunzendorfer, of San Francisco, for respondents.

PER CURIAM. The ten days' time "after notice of decision" denying a motion for new trial or "other termination" of such a motion, within which a party may file demand for record under section 953a, Code of Civil Procedure, or may serve a proposed bill of exceptions under section 650, Code of Civil Procedure, commences to run *immediately upon the failure of the trial court* to pass on the motion within three months after the verdict of the jury or service on the moving party of notice of decision of the court. Section 660, Code Civ. Proc. *Written* notice of the decision denying the motion is not essential under these particular statutory provisions. *Actual* notice only is required, and in the event of such a termination of the new trial proceeding, as we have stated, the law itself gives the notice.

It follows that no valid proceeding for a record in lieu of a bill of exceptions, or for a bill of exceptions, was ever instituted, and consequently that the time for filing transcript on appeal in this court expired before the making of this motion.

This conclusion necessitates the dismissal of the appeal.

The appeal is dismissed.

(175 Cal. 192)

OTIS v. ZEISS. (S. F. 7253.)

(Supreme Court of California. May 23, 1917.)

1. JUDGMENT 🔑461(5)—EQUITABLE RELIEF—FRAUD—SUFFICIENCY OF EVIDENCE.

In suit to set aside a judgment quieting title to a parcel of land, evidence *held* insufficient to establish the fraud, alleged by plaintiff, that defendant falsely stated in his complaint and affidavit that he was the owner in fee of the property, and that the statement was at the time known by him to be false and untrue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 895.]

2. ATTORNEY AND CLIENT 🔑104—PRINCIPAL AND AGENT—KNOWLEDGE OF ATTORNEY AS KNOWLEDGE OF CLIENT.

Though knowledge of an attorney is knowledge of his client, the client will ordinarily be charged with constructive notice only where the knowledge of the attorney has been gained in the course of the particular transaction in which he has been employed by the particular client, a rule not without exceptions; but clear and satisfactory proof that knowledge of the former transaction was present in the mind and memory of the attorney at the time of the second transaction is necessary to bind the principal in the second transaction by constructive notice of the prior information of the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 92, 93.]

3. JUDGMENT 🔑461(1)—EQUITABLE RELIEF—FRAUD—BURDEN OF PROOF.

Fraud is not presumed, and must be proven, as in a suit to vacate a judgment for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 892.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by James Otis, surviving trustee under the will of A. C. Whitcomb, deceased, and the decree of distribution made in the estate, against Louis Zeiss. From a judgment against him on granting of defendant's motion for nonsuit, plaintiff appeals. Affirmed.

Olney, Pringle & Mannon and J. R. Pringle, all of San Francisco, for appellant. Tum Suden & tum Suden, of San Francisco, for respondent.

SLOSS, J. Plaintiff appeals from a judgment entered against him upon the granting of defendant's motion for a nonsuit.

The action was brought to set aside a judgment obtained by the defendant, Zeiss, quieting title to a parcel of land in the city of San Francisco, described as "city slip lot No. 19." The action in which Zeiss had obtained this judgment was one brought under the provisions of the McEnerney Act, so called (Stats. 1906, p. 78). The ground upon which the plaintiff in this action sought to set aside such judgment was that it had been obtained by fraud. City slip lot No. 19 is part of a tract of land which in March, 1851, belonged to the state of California. In that month the Legislature passed an act (Stats. 1851, p. 307) granting said tract to the city of San Francisco for 99 years. The complaint alleges that this leasehold interest, described as the "city title," became vested in the defendant, Zeiss, and that the reversion, described as the "state title," was conveyed, in November, 1855, to one Callaway, and has since, by mesne conveyances, become vested in the plaintiff as trustee. The action brought by Zeiss to quiet his title was commenced by him on August 22, 1906, on which day he filed his complaint, accompanied by the affidavit required by the statute. The fraud charged is that Zeiss falsely stated in said complaint and affidavit that he was the owner in fee of the property in question, and that such statement was at the time known by him to be false and untrue. The affidavit also contained the statement that Zeiss did not know of any person who claimed an interest in the property, and this statement is alleged to have been false, and made with intent to deceive the court and induce it to give him judgment as prayed by him. Judgment in the action brought under the McEnerney Act was given and entered on the 19th day of December, 1906, and plaintiff alleges that he had no knowledge of the pendency of said action or of the judgment therein until April 1, 1908.

The answer denies a number of the allegations of the complaint, and particularly those alleging fraud on the part of the defendant. The motion for nonsuit was based on the ground that the various allegations of fraud had not been proven.

[1] We may assume that the complaint charged the kind of fraud which would afford ground for setting aside a judgment valid on its face. So assuming, we are nevertheless bound to hold that the plaintiff failed to introduce any evidence tending to establish the fraud alleged. It was stipulated, for the purposes of the present appeal, that plaintiff had shown "the outstanding title, viz. the state title, in himself." The essence of the charge against Zeiss is that he knew that the state title was outstanding, and intentionally concealed this fact in order to mislead the court into making a decree declaring him to be the owner of the land.

Here the proof fails. The only witnesses called by plaintiff were the defendant himself, and his attorney, Mr. Otto tum Suden. Zeiss testified that he had purchased the lot in 1893 at a referee's sale in a partition suit. At the time of making the purchase he applied for and obtained a loan from the German Savings & Loan Society, and gave a mortgage on the property to secure the same. Zeiss knew nothing of any outstanding claim, and bought the land believing that the title was good. The title was searched by the bank which made the loan. "I supposed all the time," he testified, "I was getting a good title when I bought that property." After purchasing, he improved the property. He never heard of any claim against it until after he obtained his McEnerney decree. He had paid all the taxes since buying the lot.

There is nothing in all this to warrant even a suspicion that Mr. Zeiss himself had any intimation of an outstanding claim against the property. As he testified, he fully believed that he was acquiring a title in fee simple, and his conduct comported with that belief. It is sought, however, to charge him with constructive knowledge of the state of the title, because, as it is claimed, Mr. tum Suden, who acted as his attorney at the time when he made the purchase, was, or ought to have been, aware of the fact that his client was acquiring only the leasehold interest, or "city title." Here again the evidence fails. Zeiss, on his direct examination, testified that he had asked tum Suden to examine the title for him, and supposed he had done so; also that he had bought the property on tum Suden's advice. Tum Suden had been one of the attorneys in the partition suit in the course of which the sale to Zeiss had been ordered. But Zeiss further testified that he did not know whether or not tum Suden had examined the title, or had ever seen the abstract. Zeiss made the arrangement for the loan with the German Bank, and "depended on them to do the rest." Tum Suden himself testified that he had never seen the abstract, but that the title had been examined by Mr. Goodfellow on behalf of the German Bank. While he (tum Suden) knew the distinction between a city title and a state title, he supposed that Zeiss was acquiring the state title. It is argued that because Mr. tum Suden was an attorney in the partition suit, he must have known the true state of the title. But there is no evidence to warrant this conclusion. It is not alleged in the complaint, and there is no evidence, that any of the instruments affecting the state title, except the original conveyance to Callaway, were of record. The proceedings in the partition suit are not shown in the transcript. Nor are we advised by the bill of exceptions what were the contents of the abstract which was examined at the time of Zeiss' purchase. We cannot assume, in order to support a charge of fraud, that these undisclosed documents contained evidence of an outstanding title. The appellants argue that the deed to Zeiss, which was approved by tum Suden, shows on its face that only a qualified interest was being conveyed. But they have failed to incorporate this deed into their bill of exceptions, and the statement therefore has no support in the record.

The argument of the appellants seeks to impute to Zeiss constructive knowledge of information said to have been obtained by tum Suden while the latter was acting as attorney for other clients. Zeiss was not a party to the partition suit.

[2] While the knowledge of an attorney is the knowledge of his client (6 C. J. 638; Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073), the principal will ordinarily be charged with constructive notice only where the knowledge of the attorney has been gained in the course of the particular transaction in which he has been employed by that principal (6 C. J. 639). This rule is not without exceptions. Pom. Eq. Jur. § 672. But "it seems conceded on all hands that clear and satisfactory proof that the knowledge of the former transaction was present in the mind and memory of the agent at the time of the second transaction is necessary in order to bind the principal in such second transaction by constructive notice of the prior information of the agent." Wittenbrock v. Parker, 102 Cal. 93, 103, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. There is no such proof here, where the only affirmative evidence is that the agent did not know the alleged fact at all, and it is sought, on vague and incomplete premises, to infer that he might have had notice of the fact.

[3] It is elementary that fraud is not presumed, but must be proven. The appellant relies upon the rule laid down in Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007, that, where the question at issue is the state of the adverse party's mind, only slight evidence is required in the absence of a full disclosure by such party of the facts peculiarly within his own knowledge. Here, however, both Zeiss and his attorney did testify fully to all such facts. A finding of fraud in this case would have no support beyond that of shadowy and unsubstantial inferences which are in conflict with all the direct testimony.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 198)

In re DAVIS' ESTATE.

CARPENTER v. LEE.

(S. F. 7658.)

(Supreme Court of California. May 24, 1917. Rehearing Denied June 21, 1917.)

1. WILLS ⚷545(3)—ESTATES CREATED—REVERSION.

Under will devising estate to trustee to divide into five parts and pay one-fifth to each of several children, where one child died without heirs before testator's death, the disposition to him lapsed under Civ. Code, §§ 1310, 1343, and as to his portion there was intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1173.]

2. EXECUTORS AND ADMINISTRATORS 🔑17(2)—APPOINTMENT—RIGHT TO APPOINTMENT.

Under will devising property in certain shares to children, but providing that the share of one child should be paid to her in monthly installments, the remainder after death to go to her children, where a child of such devisee petitioned for administration and the devisee contested the petition, but did not apply for letters herself, the petitioner was entitled to appointment under Code Civ. Proc. §§ 1350a, 1377.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 44.]

3. EXECUTORS AND ADMINISTRATORS 🔑288—SPECIAL ADMINISTRATRIX—DISTRIBUTION OF ESTATE.

Where the executors named died, and a special administratrix was appointed to collect the assets of the estate, there could be no legal distribution until the appointment of a general administrator de bonis non, and an order for distribution was beyond the jurisdiction of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1136-1148.]

4. APPEAL AND ERROR 🔑634—SCOPE OF REVIEW—AUTHENTICATION OF RECORD.

An appeal from an order refusing to remove a trustee cannot be considered on the merits, if not supported by any authenticated record, but will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2829.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings in the matter of the estate of Eliza Davis, deceased, by Eliza E. Carpenter, for removal as administratrix of Sarah Lavinia Lee, and for her own appointment as such. From orders denying both prayers, the plaintiff appeals. Appeal from order refusing to remove trustee dismissed. Order denying application for letters reversed.

Wise & O'Connor, of San Francisco, for appellant. Louis Horwitz, of San Francisco, for respondent.

SHAW, J. Two appeals are here presented. The first is an appeal from an order denying the application of Eliza E. Carpenter for letters of administration upon the estate of Eliza Davis, deceased. The other is an appeal from an order denying the petition of Eliza E. Carpenter for the removal of the respondent, Sarah Lavinia Lee, from her office as trustee appointed by the court, under the will of Eliza Davis, deceased, and for the appointment of some other person in her stead.

Eliza Davis died testate on March 2, 1894, being then a resident of San Francisco. By her will the entire estate was devised to two trustees, namely, Joseph Donahue and Adam Grant, in trust, as follows: First, to convert the estate into money; second, to pay debts; third, to divide the residue of the estate into five equal parts and pay one-fifth to each of three of her children named, provided they should be discovered by the trustees within two years from the date of her death, to pay another fifth to her son Augustus Davis, and out of the remaining one-fifth to pay the respondent, Sarah Lavinia Lee, a daughter of the decedent, also known as Lavinia Lee, $40 per month during her natural life, and at her death the balance of said one-fifth to be paid to her children. It was further provided that if the trustees failed to discover the three first-mentioned children of the testatrix within two years from the death of the decedent, the shares given to them should be paid over to the other children, Augustus Davis and Sarah Lavinia Lee, but that the share of Sarah Lavinia Lee was "to be always subject to the above provision to pay it to her in monthly sums of forty dollars, during her life, and the remainder of her share, if any, to her said children, as aforesaid."

The will was duly probated and Adam Grant was appointed executor thereof. He died in 1898, and C. C. Webb was then appointed administrator with the will annexed. Webb died in 1903 and no successor or other general administrator of the estate has ever been appointed.

[1] The trustees were unable to discover either of the three children first mentioned. Augustus Davis died before the death of the testator leaving no children, or other living descendants, or wife, surviving. By the death of Augustus Davis without lineal descendants, the disposition to him lapsed. Civ. Code, §§ 1343, 1310. As to that portion there was intestacy. It is not necessary to the decision of this case to determine precisely the effect of these provisions. It is sufficient to note that the children of Sarah Lavinia Lee have a vested interest in the one-fifth part out of which, according to the first provision, she was to receive $40 per month during her life, and that they have a vested interest in one-half of the three-fifths conditionally given to the three undiscovered children, the effect being that her half of this three-fifths would be consolidated with the fifth directly given to her, and that out of the whole thereof she was entitled to receive only $40 per month during her life, and that the residue and remainder of that part of the estate would go to her children at her death.

The records in the estate were all destroyed by the conflagration of April 18, 1906. In 1910, by proceedings duly had, the record was restored. The two persons named as trustees in the will died. On November 1, 1910, on the petition of Sarah Lavinia Lee, the court appointed her to act as trustee under the will instead of the persons appointed by the will. The petition for the appointment of a trustee included an application for the appointment of a special administratrix of the estate, and thereupon the court also made an order appointing the said Sarah Lavinia Lee special administratrix of said estate, "with special and full power to collect and receive from the Pennsylvania Fire Insurance Company all money due on any policy of fire insurance, or due on any contract or for any reason, and to collect and preserve all the goods, chattels, debts, and effects of the decedent and to preserve from damage, waste and injury, the real estate." She gave bond as required by the order, and thereupon letters of special administration were issued to her, authorizing her to "collect and take charge of the estate of said deceased, and to exercise such other powers as may be necessary for the preservation of said estate." Thereafter she filed her final account as special administratrix, and the same was settled, showing a balance of money in her hands of $1,362.66. Afterwards, on April 4, 1913, said Sarah Lavinia Lee filed a petition for the final distribution of said estate. In pursuance thereof, the formal notice required by law having been given, the court, on April 23, 1913, made an order purporting to distribute the whole of said estate absolutely to the said Sarah Lavinia Lee.

[2] Eliza E. Carpenter is one of the children of said Sarah Lavinia Lee, and as such has a vested interest in the estate, under the terms of the will. She was therefore entitled to letters of administration thereon unless some other person having a better right applied for letters in opposition to her. On May 28, 1915, she filed a petition for the letters of administration here in question, and a petition for the removal of Sarah Lavinia Lee as trustee. Opposition to the petition for administration was made by Sarah Lavinia Lee, on the ground that there was no estate to be administered, and on the further ground that Eliza E. Carpenter was unfit to act in that capacity. Sarah Lavinia Lee, being the daughter of the decedent, was first entitled to letters, but as she did not apply therefor in opposition to the petition of Eliza E. Carpenter, the latter was entitled to administer. Code Civ. Proc. §§ 1350a, 1377. Upon the trial the allegation in the opposition, to the effect that Eliza E. Carpenter was an unfit person to act as administratrix, was withdrawn, and the petition for administration was denied, upon the theory that there was no estate to be administered. The contention of the appellant is that the court erred in its conclusion that the estate had been lawfully distributed. This is the principal question for consideration. The theory of the appellant is that there can be no distribution of an estate upon which there is no general administration, that the appointment of Sarah Lavinia Lee as special administratrix was merely for the special purpose mentioned in the order and in her letters as such, that it did not constitute her the general administratrix of the estate, and that after the death of Webb, and until general letters of administration de bonis non were granted, the court was without power or jurisdiction to make distribution thereof.

No rights of third parties are involved in the question as here presented and there is no claim that the petitioner has been guilty of laches sufficient to warrant a refusal of the appointment.

[3] We think this point is well taken. The powers of a special administratrix are drawn from the statute. "By our law he has the powers enumerated by statute, each and all of which pertain to the collection and preservation of the estate, and 'such others as are conferred upon him by his appointment.' Though the language above quoted is broad, its limitations are apparent. It is no general grant. It does not authorize the court to obliterate the distinctions between general and special administrators. The additional powers are only such as are incident to those designated, or in line with them." Estate of Welch, 106 Cal. 432, 39 Pac. 806. In accordance with these principles it was held in that case that the court had no authority, while there was a special administrator in charge of the estate and during the time when the general administration was suspended, to make a partial distribution. The court said:

> "If partial distribution can be decreed under section 1415, so also may general distribution, and all the distinctions between general and special administrators be thus swept aside. This was not the design of the lawmakers."

These principles are decisive of this case. If there can be no partial distribution during a time when there is no general administrator in office, much less can there be complete distribution. The decisions concerning errors made by the court in deciding a matter over which it has jurisdiction are not in point. The jurisdiction here involved is not that general probate jurisdiction which every superior court possesses under the Constitution, but a jurisdiction to pronounce a particular judgment in a particular estate. The superior court has general jurisdiction of matters of probate. The superior court of the city and county of San Francisco had and still has, in a certain sense, jurisdiction over the estate of Eliza Davis, deceased. But after the death of Webb, the administrator with the will annexed, it did not have further jurisdiction to proceed to close and distribute the estate until it had first appointed a successor to Webb in the general administration. The decree of distribution made under these circumstances was therefore of no effect. The court still retained jurisdiction of the estate, and it had the power, and it was also its duty, to appoint some one to take charge of the property and make the distribution in the regular manner provided by law. Estate of Pina, 112 Cal. 14, 44 Pac. 332.

[4] We find that the appeal from the order

refusing to remove Sarah Lavinia Lee as trustee is not supported by any authenticated record. Consequently we cannot consider it on the merits. Her claim, which she asserted in opposition to the application for letters of administration, that she is the absolute owner is, of course, inconsistent with her duty as trustee, but it is not determined in her favor by the refusal of the court to remove her. The proper course, with reference to the appeal from that refusal, is to dismiss it. We are not to be understood as holding that such an order is appealable. It is not included in the list of orders and judgments made appealable by sections 963 and 1701 of the Code of Civil Procedure.

The appeal from the order refusing to remove Sarah Lavinia Lee as trustee is dismissed.

The order denying the application for letters of administration is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(175 Cal. 187)

In re AYERS' ESTATE. (S. F. 7307.)

(Supreme Court of California. May 23, 1917.)

1. EXECUTORS AND ADMINISTRATORS 🔑314 (12) — APPEAL — REVIEW — WHO MAY COMPLAIN.

An executor cannot question on appeal the estate's division among heirs and beneficiaries.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1293–1295.]

2. APPEAL AND ERROR 🔑161—REVIEW—WHO ENTITLED TO.

Where testator's son under a distribution agreement received money and land to which the will did not entitle him, and mortgaged the land, he cannot question the validity of the agreement upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 979–983.]

3. APPEAL AND ERROR 🔑161—REVIEW—WHO ENTITLED TO.

Ordinarily a party cannot accept the benefits of a judgment and also appeal from it, although appellant may accept what he is concededly entitled to, and appeal to establish his claim to something additional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 979–983.]

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

In the matter of the Estate of David Ayers, deceased. From a decree of distribution, Charles Ayers, individually and as executor, appeals. Both appeals dismissed.

W. F. Cowan, of Santa Rosa, for appellant. J. R. Leppo and D. R. Gale, both of Santa Rosa, for respondent.

SLOSS, J. David Ayers died on the 30th day of June, 1912, survived by a daughter, Anna Mary Ross, and three sons, Charles Ayers, G. Lemuel Ayers and Clarence L. Ayers. On July 30, 1912, a paper was admitted to probate as the last will of said decedent. Charles Ayers and G. Lemuel Ayers were named in the will as executors and letters testamentary were issued to them. By the will the testator gave certain cash legacies to five grandchildren, and to Anna Mary Ross and Clarence L. Ayers. He also devised certain real property to two of his sons. In addition, he devised to Charles Ayers and G. Lemuel Ayers his "ranch on the Santa Rosa and Sebastopol road, Charles taking the east half thereof and G. Lemuel taking the west half thereof," the testator's intention, as expressed in the will, being to divide the ranch equally as to acreage, without regard to improvements. All the live stock, vehicles, and harness on the ranch, as well as any money or other personal property remaining after satisfying other legacies, was bequeathed in equal shares to the said four children of the testator. On July 29, 1912, Anna Mary Ross, Charles Ayers, G. Lemuel Ayers, and Clarence L. Ayers entered into an agreement for the division of the estate. By this instrument it was provided that 20 acres of the ranch above mentioned should be set off to Anna Mary Ross, and that the residue of money and personal property, over and above the legacies, should be divided equally among the three sons, no part thereof to go to Anna Mary Ross. The agreement described the 20 acres which were to go to Anna Mary Ross, and two parcels of about 40 acres each (comprising the rest of the ranch), which were to go to Charles and G. Lemuel, respectively. The 20-acre piece was at the easterly end of the ranch. In October, 1913, G. Lemuel Ayers, one of the executors, filed his petition for distribution, setting up the making of this agreement, and asking that the estate be distributed in accordance with its provisions, in so far as they conflicted with the terms of the will. Charles Ayers filed a petition, asking that the estate be distributed in accordance with the will. Anna Mary Ross filed an answer to the latter petition, setting up the making of the agreement. Charles Ayers then filed an answer to the petition of G. Lemuel Ayers, and to the answer of Anna Mary Ross. In this pleading he made allegations designed to show that his consent to the agreement entered into by the four children of David Ayers had been obtained by means of menace exercised by Anna Mary Ross, and that he had rescinded the agreement. The court below sustained the demurrers of Anna Mary Ross and G. Lemuel Ayers to this answer, and made its decree distributing the estate in accordance with the terms of the agreement. From this decree Charles Ayers, individually and as executor, appeals.

[1-3] The respondents move to dismiss the appeals. It is well settled that an executor has no standing to question, by means of an appeal, the division of the estate among the beneficiaries or heirs. Bates v. Ryberg,

40 Cal. 463; In re Wright, 49 Cal. 550; Roach v. Coffey, 73 Cal. 281, 14 Pac. 840; In re Williams, 122 Cal. 76, 54 Pac. 386.

The motion to dismiss the individual appeal is based upon the ground that, since the making of the decree, the appellant has been in the possession and enjoyment of all of the real and personal property distributed to him, and that, having thus accepted the fruits of the decree, he is not in a position to maintain an appeal from it.

By affidavits the moving parties show that immediately after the making of the decree of distribution, all of the distributees received and took possession, respectively, of all of the property distributed and awarded to them. Included in this was the sum of $630.83 in cash, of which Charles Ayers received one-third, i. e., $210.27, no part of said residue having been paid to Anna Mary Ross. The ranch described in the will contained a little over 100 acres, of which 20 acres were distributed to Anna Mary Ross, and two parcels, each containing 40.18 acres, to Charles Ayers and G. Lemuel Ayers, respectively. Charles Ayers, it is stated in these affidavits, has, ever since the making of the decree, been in possession of the 40.18 acres so distributed to him. Since the entry of such decree, the wife of said Charles Ayers has recorded a declaration of homestead covering said 40.18 acres. Furthermore, said Charles Ayers and his wife have executed two mortgages upon said tract to secure the payment of two notes for $1,200 and for $3,000, respectively. Both of said mortgages have been recorded, and the latter still remains unsatisfied of record.

The counter affidavit of the appellant does not deny the material facts thus stated. He deposes "that he has not, by conveyance, acquiescence, estoppel, or otherwise, conveyed any interest that he may have in said estate to any other person." He does not deny, however, that he has been in possession of the 40.18-acre tract, and he admits, in express terms, the execution of the two mortgages. With respect to the personal property, he denies that it was accepted or received by him, "with the idea of defeating the rights of any other person in case said decree of distribution shall be set aside or reversed." This evasive statement is, in effect, an admission of the receipt of the money. The force of the admission is not qualified by the affiant's disclaimer of an intent to defeat the rights of others.

"The right to accept the fruits of a judgment and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other." In re Shaver, 131 Cal. 219, 63 Pac. 340; In re Baby, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239; San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047; Turner v. Markham, 152 Cal. 246, 92 Pac. 485; Bunting v. Haskell, 152 Cal. 426, 93 Pac. 110; Walnut Irrig. Dist. v. Burke, 158 Cal. 165, 110 Pac. 517.

Where, however, the appellant is concededly entitled to that which he has accepted, but is claiming something more, he is not precluded from maintaining an appeal for the purpose of establishing his greater claim. San Bernardino County v. Riverside County, supra; Walnut Irrig. Dist. v. Burke, supra. The appellant seeks to bring the case within this limitation of the rule. But the facts do not fit the claim. Under the will the appellant was entitled to the east half of the ranch, and G. Lemuel to the west half. Under the agreement, carried into the decree, Mrs. Ross obtains 20 acres of the east half, leaving the remaining 80 acres to be equally divided between the appellant and his brother, G. Lemuel Ayers. The appellant's 40 acres, therefore, include 10 acres which, under the will, would have gone to his said brother. Not only has he gone into possession of land to which, under the will, he would not have been entitled, but he has incumbered it by a mortgage. Similar considerations apply to the personal property. Under the will, the residue of cash would have gone to the four children in equal shares. Under the decree Mrs. Ross received none of it, and the appellant took one-third, instead of the one-quarter which would otherwise have come to him.

Both appeals are dismissed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 191)

AYERS v. ROSS et al. (S. F. 7305.)

(Supreme Court of California. May 23, 1917.)

Appeal and Error ⟹150(1) — Review — Moot Question.

Plaintiff's appeal, in action to set aside a distribution agreement, will be dismissed where a decree of distribution, enforcing such agreement, has previously become final, and appellant has accepted benefits of that adjudication.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934, 946.]

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Charles Ayers against Anna Mary Ross and others. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

W. F. Cowan, of Santa Rosa, for appellant. J. R. Leppo and D. R. Gale, both of Santa Rosa, for respondents.

SLOSS, J. The essential facts of this appeal are stated in the opinion in Estate of Ayers (S. F. No. 7307) 165 Pac. 528, just decided. Here the plaintiff brought a civil action to set aside the agreement between the four children of David Ayers for the division of the estate. The grounds of attack

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

are the same as those set up by him in the probate proceeding. A demurrer to the complaint was sustained without leave to amend. The record contains a document entitled "Judgment by the Court," and from this judgment the plaintiff appeals. It may well be questioned whether the entry in question constitutes a judgment, or is merely an order sustaining the demurrer, and therefore not the subject of an appeal. But passing this point, it appears that, since the taking of the appeal, the controversy has been decided against the appellant's claims by the granting of a decree of distribution in accordance with the terms of the agreement. It further appears that the appellant has accepted the benefits of this distribution. Upon these grounds respondents move to dismiss the appeal.

The decree of distribution having become final by our order dismissing the appeal therefrom, the matters there determined against this appellant are no longer open to question. He is not therefore in a position to question the correctness of the adjudication in favor of the validity of the agreement. In re Blythe, 108 Cal. 124, 126, 41 Pac. 33. Having accepted the benefits of that adjudication, he cannot appeal from the present judgment, which, like the decree of distribution itself, rests upon a basis which is inconsistent with the maintenance of the position asserted by the complaint.

The appeal is dismissed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 171)

MOORE et al. v. STRAYER et al. (L. A. 5009.)

(Supreme Court of California. May 18, 1917.)

APPEAL AND ERROR ⚿345(1)—TIME FOR APPEAL—STATUTE.

Under Code Civ. Proc. § 941b, requiring notice of appeal to be filed within 60 days after entry of judgment, provided that, if proceedings on motion for new trial are pending, the time for appeal shall not expire until 30 days after entry in the trial court of order determining motion "or other termination," the quoted phrase refers to section 660, making court's failure to decide motion within three months "after the verdict of the jury or service on the moving party of notice of a decision of the court" equivalent to a denial of the motion; hence it was immaterial that the notice of intention to appeal was filed before notice of decision of the court, since the statute relates to the power of the court, and not merely to the rights of the appealing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Rebecca J. Moore and another against Henry Strayer and others. Judgment for defendants, and plaintiffs appeal. On motion to dismiss appeal. Motion denied.

M. B. Butler, of Pasadena, for appellants.
Tanner, Taft & Odell, of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. The judgment from which plaintiffs and cross-defendants appeal was entered on May 1, 1916. Appellants, without waiting for service of notice of the decision of the court (which notice, as shown by the record, was in fact duly served on June 23d), served and filed their notice of intention to move for a new trial on May 15th, which motion, pursuant to notice given of the time of hearing thereof, was made July 3d. The court, however, made no ruling thereon until September 18th, on which date it made a formal order denying the motion. Respondent's contention is that the motion was denied by operation of law three months after the filing of the notice of intention, which expired on August 15th, and hence the notice of appeal filed October 17th was too late.

We do not so construe the statute. Section 941b of the Code of Civil Procedure provides that notice of appeal shall be filed within 60 days after entry of judgment, provided, however:

> "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

The words "other termination" include by way of reference the denial of the motion by operation of law as provided in section 660 of the Code of Civil Procedure, where it is said:

> "The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court."

Under this provision the three months' time, within which the court was empowered to act upon the motion, did not commence to run until "service on the moving party of notice of the decision of the court." This notice, as we have seen, was not served until June 23d, which date marks the time from which to measure the three months' period within which the court was vested with jurisdiction to pass upon the motion. If the rights of the party appealing were alone to be considered, the giving of the notice of intention might, as to him, be construed as a waiver of service of notice of decision, but the provision relates to the power of the court, jurisdiction of which to pass upon the motion is divested only by the service of notice of decision followed by the lapse of a period of three months, during which it is empowered to act on the motion for a new trial. It thus appears that the time within which the court was, under the provision of section 660, supra, required to act upon the motion, did not expire until September 23d. The act of the court in making the order denying the motion was had on September 18th, which was five days before the expiration of the three months from service of the notice of decision.

It follows that the notice of appeal served on October 17, 1916, was within the time specified therefor.

The motion to dismiss is denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; HENSHAW, J.

(175 Cal. 196)

In re WISE'S ESTATE. (L. A. 4505.)

(Supreme Court of California. May 24, 1917.)

1. Executors and Administrators 🔑24 — Right to Appointment—Public Administrator.

Under Code Civ. Proc. § 1365, stating the order of precedence of applicants for letters of administration, the public administrator takes precedence of "any person legally competent" who is not entitled to letters by virtue of relationship, and the grantee of a person entitled as heir or next of kin has no right in preference to the public administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132-140.]

2. Executors and Administrators 🔑17(2, 7)—Right to Appointment — Public Administrator.

Where the heirs are nonresidents, they are not entitled to administer under Code Civ. Proc. § 1369, and hence cannot nominate the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 44, 57-59.]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Proceedings in the matter of the estate of Mary O. Wise, deceased. From an order denying the petition for letters of administration, A. C. Mouser appeals. Affirmed.

A. C. Mouser, of San Diego, in pro. per. Hamilton & Lindley, of San Diego, for respondent.

SHAW, J. The appellant, A. C. Mouser, appeals from an order of the superior court denying the petition of two nonresidents, heirs of the decedent, for letters of administration upon the estate of Mary O. Wise, deceased, to Mouser, and granting letters thereon to Edwin Reed, who was the public administrator of the county of San Diego. Mary O. Wise died intestate seised of real property situated in said county. The only fact by virtue of which the appellant claims the right to letters is that, since the death of the decedent, he has received a conveyance from one of her heirs purporting to convey to him all of the right, title, and interest of said heir in a part of the said real property of which Mary O. Wise died seised. The said heir was not and is not a resident of the state of California.

[1, 2] The right to letters of administration upon the estate of one who dies intestate is controlled by section 1365 of the Code of Civil Procedure. Under that section, persons are entitled to letters in the following order:

> "1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. 2. The children. 3. The father and mother. 4. The brothers. 5. The sisters. 6. The grandchildren. 7. The next of kin entitled to share in the distribution of the estate. 8. The public administrator. 9. The creditors. 10. Any person legally competent."

The opening clause declares that relatives are entitled to administration only when they are entitled to succeed to the personal estate. It will be seen that the public administrator takes precedence of "any person legally competent" who is not entitled to letters by virtue of relationship. There is no provision that the grantee of one of the persons entitled as heir or next of kin shall have the right in preference to the public administrator. As the heirs were nonresidents, they were not entitled to administer. Code Civ. Proc. § 1369. Hence they could not nominate. Estate of Beech, 63 Cal. 458. It follows that the appellant had no right to letters, and that the court below properly refused to grant the petition as against the public administrator, who also applied for such letters. There are cases holding that where a person dies testate and the executor named in the will fails to apply for letters, the court, under section 1323 of the Code of Civil Procedure, may appoint "any other person interested in the will" who petitions therefor, and that this gives authority to appoint the grantee or assignee of a person who takes under the will. In re Bergin, 100 Cal. 376, 34 Pac. 867; Estate of Engle, 124 Cal. 292, 56 Pac. 1022. These cases have no application to the rights of persons to administer upon the estate of an intestate.

It is unnecessary to consider the respondent's objection to the transcript.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(175 Cal. 166)

PAYNE v. CUNNINGHAM. (L. A. 4011.)

(Supreme Court of California. May 18, 1917.)

Contracts 🔑229(2)—Building Contract—Superintendence.

A building superintendent's contract that the superintendent should be paid 10 per cent. upon the cost provided the buildings were completed for an amount not exceeding a certain sum, and providing that "should he fail to keep within the above-mentioned maximum cost then no charge should be made for such superintendence for such excess," did not, in case the cost exceeded the maximum sum, release the owner from obligation to pay the percentage charged on such maximum sum, but relieved him from paying the percentage only as to the excess above such sum.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by John A. Payne against Rose M. Cunningham, administratrix. From a judgment, defendant appeals. Reversed and remanded, with directions.

Tanner, Odell, Odell & Taft, of Los Angeles, for appellant. Pendell & Gleason and Schweitzer & Hutton, all of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff brought this action alleging a breach of contract on the part of C. B. Cunningham (now deceased, and for whom his administratrix has, pending suit, been substituted), in that he had failed to complete the alteration and construction of certain buildings within the time and for the amount agreed upon to plaintiff's damage in the sum of $4,000.

With his answer denying the material allegations of the complaint, defendant Cunningham filed a cross-complaint, wherein he alleged that by an agreement in writing plaintiff employed him to superintend the construction and alteration of certain buildings and for his services agreed to pay him upon completion thereof 10 per cent. of the total cost, which cost was $9,848.31, and for which percentage therein, amounting to $984.83, notice of claim of lien was duly filed. For a second cause of action, cross-complainant alleged that under the authority of plaintiff and for his use and benefit he paid out and expended for labor and material used in the construction of said buildings $421.47, no part of which has been paid and for which and the sum of $984.83 he prayed judgment against plaintiff, and asked that the latter sum be declared a lien upon the property, foreclosure of which was sought. The answer to the cross-complaint admitted the making of the contract whereby defendant was to receive 10 per cent. of the total cost of the building, but alleged that by the terms of the contract defendant and cross-complainant agreed that the maximum cost of the building should not exceed $7,400, and that defendant was to have no compensation for his services if the cost of construction and alteration exceeded said sum. As to the second cause of action, the answer does not deny that cross-complainant, under the authority of plaintiff, paid out for labor and material used in the erection and construction of said buildings the sum $421.47, but merely denies that such sum is due cross-complainant from plaintiff for labor and material used.

The court found that the parties entered into a written contract, the substance of which is as follows: Cunningham was to "obtain bids and subcontracts, for and in the name of the party of the first part (Payne), covering the furnishing of such materials and labor as may be required in the construction and alteration of said buildings, and any and all bids and subcontracts must be approved and signed by the party of the first part." Cunningham agreed "to furnish a bond of two thousand ($2,000) dollars to insure the correctness of materials and the faithful performance of workmanship, also the completion of the construction and alteration of said buildings within the maximum cost of seven thousand four hundred ($7.400.00) dollars, including his compensation for managing the construction and alteration of said buildings, * * * and have the construction and alteration of said buildings completed within (90) days from the date of signing this agreement." Payne agreed "to promptly pay all bills for material and labor when same are accompanied by an order stating the amount of the said bill and signed by the party of the second part (Cunningham)." Payne also agreed to "pay the party of the second part as compensation for his services the sum of ten (10%) per cent. of the total cost of the buildings upon completion, provided the party of the second part completes said buildings within the maximum cost above mentioned. Should he fail to keep within the above-mentioned maximum cost then no charge shall be made for such superintendence for such excess." The court, reciting that oral and documentary evidence was introduced, further found that Cunningham did not agree to complete the construction and alteration of the buildings mentioned in the contract within a maximum cost of $7,400 or any other sum; that he did not give the bond mentioned in the contract; that plaintiff allowed him to proceed with the prosecution of the work without giving a bond; that, while it was true that Cunningham agreed to complete the construction and alteration of the buildings within 90 days from the date of the contract, such agreement was conditioned upon Payne, the owner, complying with certain provisions thereof, among which was one that cross-complainant should be allowed to obtain the bids and subcontracts covering the furnishing of materials and labor, instead of which, however, Payne himself assumed the procuring of such contracts and, in one instance, without cross-complainant's knowledge or consent, let a contract for plumbing which was not completed within the time allowed by the terms of the contract for the entire completion of the construction and alteration of the buildings, and that Payne was not damaged by any delay on the part of Cunningham to complete the building within the time mentioned in the contract; that it is true that the total cost of said construction and alteration was the sum of $9,848.31, and also true that Payne "signed all subcontracts that were in writing and had knowledge of all subcontracts let without writing, and had opportunity to know the amounts thereof, and made no objection thereto until the said buildings were completed, and that during the construction of said buildings he himself was present, observing the said construction and taking part in the ordering of materials and letting of subcontracts"; that Cunningham "entered upon the duties prescribed in said contract and continued to perform said duties until said buildings were entirely completed according to the plans and specifications as modified by plaintiff," for which he has received no compensation; and that Cunningham "paid out for labor and material used in said building over and above the moneys received by him from plaintiff the sum of four hundred and twenty-one and $^{47}/_{100}$ ($421.47) dollars." Claim of lien for the $984.83 was duly filed.

Upon these findings the court rendered judgment denying plaintiff's right to recover anything upon his complaint, and, as to defendant, likewise denied recovery upon the cross-complaint of her intestate other than an award of $10 costs. From judgment so denying her the relief prayed for, cross-complainant prosecutes this appeal upon the judgment roll alone, claiming that upon the findings she is entitled to judgment.

The court in express terms found that Cunningham did not agree that he would complete the construction and alteration of the building for a sum not exceeding $7,400, and, conceding the contract ambiguous in this respect, we must assume the interpretation thereof thus given on the oral evidence introduced to be correct. The provision in the contract to the effect that plaintiff would pay Cunningham 10 per cent. upon the cost provided the structures were completed for an amount not exceeding $7,400, read in connection with the sentence following it that "should he fail to keep within the above-mentioned maximum cost then no charge shall be made for such superintendence for such excess," should not be construed as releasing plaintiff from the obligation to pay the percentage charge on the $7,400 which he agreed to pay, but that as to such excess only no charge should be exacted by Cunningham. To say that, if the building cost $5 more than the $7,400, so specified, Cunningham should receive nothing for his services, would lead to an absurdity. Moreover, it appears that the plans and specifications were modified and changed by plaintiff, and that Cunningham, with the full knowledge of plaintiff who made the contracts for labor and materials, performed the service of superintending the work without objection from plaintiff until the building and alterations were entirely completed according to these modified plans and specifications.

As to the $421.47 alleged by Cunningham to have been paid out by him under the authority of plaintiff for labor and material used in the construction of the buildings and for which a personal judgment is asked, not only is there no sufficient denial of such fact, but the court found the allegations to be substantially true.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of cross-complainant upon the first cause of action for $740 with the usual decree for the foreclosure of claim of lien therefor filed, together with judgment in favor of cross-complainant and against plaintiff for the sum of $421.47 upon the second cause of action.

We concur: SHAW, J.; SLOSS, J.

(175 Cal. 203)

TAYLOR v. AVILA. (Sac. 2276.)

(Supreme Court of California. May 24, 1917.)

1. APPEAL AND ERROR 🔑934(2) — PRESUMPTIONS FAVORING TRIAL COURT.

The Supreme Court must assume, in favor of the judgment below for plaintiff, that the trial court indulged a presumption which was warranted by the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777.]

2. WATERS AND WATER COURSES 🔑151—CONVEYANCE OF FEE — EXTINGUISHMENT OF EASEMENT—STATUTE.

In view of Civ. Code, § 1105, providing that a fee-simple title is presumed to be intended to pass by the grant of real property, unless it appears from the grant that a lesser estate was intended, where the owner of land and plaintiff, who had acquired a prescriptive right to maintain and use a ditch for irrigation across such land, conveyed to defendant, by a grant, bargain, and sale deed, for the actual consideration of $1,750, the land together with all water rights, ditch rights, etc., used to irrigate the lands described, the conveyance extinguished all easements which plaintiff possessed over the land, and the last clause of the description did not reserve to grantor the easement she had over the land to use a ditch to irrigate her adjoining land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 155.]

3. DEEDS 🔑22—GRANT, BARGAIN, AND SALE DEED—ESTOPPEL OF GRANTOR.

A grant, bargain, and sale deed operates to pass title in fee unless it contains in itself some limitation, exception, or reservation, and estops the grantor from thereafter claiming any right or estate in the land conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 40–42.]

4. DEEDS 🔑117—PROPERTY CONVEYED—APPURTENANCES—STATUTE.

Though by Civ. Code, § 1104, the appurtenances to land conveyed by grant, bargain, and sale deed passed by operation of law without express mention, a deed of a tract which was part of a larger tract, "together with any and all water rights * * * made use of for the purpose of irrigating or draining said land," cannot be construed as a reservation of the water rights, as the use of the unnecessary words does not justify giving them an effect opposite to their express import.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 336–341.]

Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Isabella Taylor against Manuel

J. Avila. From the judgment and an order denying new trial, defendant appeals. Judgment and order reversed.

H. Scott Jacobs, of Hanford, for appellant. Miller & Miller, of Hanford, and Frank B. Graves, of Lemoore, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying a new trial.

The plaintiff sued to establish and quiet title to her alleged right to maintain and use a water ditch extending from a branch of the main canal of the Lemoore Canal & Irrigation Company southerly through the land of the defendant to and over the land of plaintiff. The court found that the plaintiff was the owner of the alleged easement through the lands of the defendant and gave judgment accordingly.

The facts involved can best be shown by a chronological statement. In the year 1903, plaintiff owned 80 acres of land, being the west half of the northwest quarter of section 15, and the defendant, or his predecessors, owned the land immediately adjoining the same on the north situated in section 10. About that time, the ditch in question was constructed. It ran along the eastern edge of defendant's land to and into the plaintiff's tract, and was used to conduct water from said canal to and over the plaintiff's 80-acre tract for its irrigation, being also used by the defendant on his land for a like purpose. In that year plaintiff conveyed to one Gularte the northern 25 acres of her 80-acre tract, without reservation. Notwithstanding this conveyance, she thereafter continued to use the ditch as before, for the irrigation of the remaining 55 acres. The court found that this use was under claim of right, adverse to Gularte, and that thereby in the year 1913 she had acquired a prescriptive right to maintain and use said ditch for that purpose. On July 11, 1913, she and Gularte conveyed the said northern 25 acres of land to the defendant. The deed of conveyance described the property conveyed as follows:

> "All that certain lot, piece or parcel of land situate, lying and being in the county of Kings, state of California, and bounded and particularly described as follows, to wit: The north 25 acres of the northwest quarter of the northwest quarter of section 15, township 19 south, range 20 east, M. D. B. & M., *together with any and all water rights, ditch rights, or interests in ditches, canals, water or water rights, made use of for the purpose of irrigating or draining said lands or any of said lands above described.*"

The deed was in the form of a grant, bargain, and sale deed, and purported to be made for the consideration of $10. The actual consideration as it appears from the evidence, was $1,750, which sum was paid by the defendant to Gularte and the plaintiff jointly.

The defendant claims that the finding that the plaintiff had acquired the right to use the ditch, as against Gularte, by the adverse use mentioned, is without support in the evidence. He also claims that, even if it be conceded that a prescriptive title was acquired by the plaintiff, the deed of conveyance executed by the plaintiff and Gularte operated to convey to the defendant the absolute fee in the 25 acres and extinguished any easement therein which plaintiff may have possessed at the time.

[1] There is evidence sufficient to support the finding that the plaintiff, prior to the execution of said deed, had, by prescription, acquired title to the use and maintenance of the ditch over the said 25 acres which was then owned by Gularte. There was evidence to the effect that the plaintiff had continuously used the ditch to carry water from the canal to her land, for its irrigation, for more than five years prior to the execution of the aforesaid deed. The defendant contends that there was no evidence that this use was made under a claim of right, and hence that the use was not of the adverse character necessary to the acquisition of a title by prescription. The court may reasonably have inferred from the evidence that the use was made without consulting Gularte, openly and in the same manner as if the plaintiff had the absolute right to such use. From all these facts, the court might have presumed that the use was under claim of right and adverse. Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361; s. c., 146 Cal. 642, 80 Pac. 1078; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. 1027. We must assume, in favor of the judgment, that the court did indulge in this presumption. It constituted evidence in the case and was sufficient, in connection with the other evidence, to support the finding of title by prescription.

[2] We see no escape from the conclusion that the conveyance of 1913, by plaintiff and Gularte to the defendant, operated to extinguish all easements which the plaintiff then possessed over the said 25 acres of land.

> "A fee-simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended." Civ. Code, § 1105.

[3] The rule that a grant, bargain, and sale deed operates to pass the title in fee, unless it contains in itself some limitation, exception, or reservation, and that it estops the grantor thereafter from claiming any right or estate in the land so conveyed, is too well settled to require citation of authority. We find in the above deed no limitation or qualification whatever upon the fee simple estate granted. The plaintiff, having made such conveyance, is estopped from asserting that it did not convey the entire estate in the land described.

[4] The contention of the plaintiff that the last clause of the description, the italicized portion, qualifies the fee-simple estate granted, and, in effect, reserves to the grantor the

easement she theretofore had over the 25 acres, for the use and maintenance of the ditch wherewith to carry water across the same for the irrigation of the remaining 55 acres, cannot be sustained. The language is without ambiguity, and its entire purport is to transfer to the grantee all water rights, ditch rights, or interests in ditches, canals, water, or water rights, used to irrigate or drain the said 25 acres. It has no application or effect to reserve any then existing water rights, ditch rights, or other easements over the 25-acre tract for the benefit of the 55 acres. It may be conceded that the italicized clause in the conveyance was unnecessary, since the appurtenances to the land conveyed would pass by operation of law without express mention. Civ. Code, § 1104; Cave v. Crafts, 53 Cal. 140. But the language purports to grant easements to the grantee, not to reserve easements possessed by the grantor. However unnecessary it may have been, it could not by construction be given the opposite effect to that which the language plainly expresses. We are therefore forced to the conclusion that by this deed the plaintiff conveyed away all her interest in the easement over the 25 acres of land which she now seeks to have established, and it operated to defeat her rights, so far as the 25-acre tract is concerned.

The circumstances attending the execution of this deed suggest a probability that the parties intended to include in the deed a reservation in favor of the grantor of the existing easement she then possessed over the 25 acres of land as alleged in the complaint, and that by mutual mistake it was omitted therefrom. But the complaint contains no allegation of such mistake, and it does not seek any reformation of the deed. If any such mistake was made, the plaintiff can only avail herself of the benefits thereof by an appropriate amendment of the complaint when the case again reaches the trial court.

As the record stands, we have no choice but to reverse the judgment and order, and it is so ordered.

We concur: SLOSS, J.; LAWLOR, J.

(175 Cal. 161)

TRACY v. SMITH et al. (L. A. 3983.)

(Supreme Court of California. May 18, 1917.)

1. VENDOR AND PURCHASER 🔑44—VALIDITY OF CONTRACTS — FALSITY OF REPRESENTATIONS—EVIDENCE.

In an action to rescind a contract to purchase land, and to recover back the purchase price, evidence *held* sufficient to warrant findings that the vendor's representations as to the condition of a water plant through which the land was irrigated, and that the locality in question was free from frost, and a damaging frost had never been known, were false.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69–76.]

2. VENDOR AND PURCHASER 🔑36(2)—VALIDITY OF CONTRACTS — REPRESENTATIONS — FACTS OR OPINIONS.

Representations by vendors of land planted to citrus trees that a damaging frost had never occurred in the locality, and that the water plant through which the land was irrigated was in a splendid condition, were not mere statements of opinion, but were representations of material existing facts, as to which, since the representations were positive and unqualified, the truth should be established in the form made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 53.]

3. VENDOR AND PURCHASER 🔑36(2)—VALIDITY OF CONTRACTS — REPRESENTATIONS — FACTS OR OPINIONS.

While a further representation that the land was absolutely free from frost might, if considered alone, be deemed merely an expression of opinion, the false statement in connection therewith that a damaging frost had never been known in that neighborhood gave the statement that the property was absolutely frostless the character of a statement of fact rather than a mere opinion.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 53.]

4. VENDOR AND PURCHASER 🔑37(4)—VALIDITY OF CONTRACT—FALSE REPRESENTATIONS —FAILURE TO INVESTIGATE.

The purchaser was not precluded from rescinding and recovering back the purchase price, because of failure to make inquiry, and investigation, the result of which would have disclosed the true condition of the water system, and the fact that severe frosts had occurred, where she was an inexperienced woman, without knowledge of the subject with which she was dealing, and there were no circumstances attending the transaction calculated to arouse her suspicion.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 57.]

5. APPEAL AND ERROR 🔑173(10)—DEFENSES —LACHES—FAILURE TO URGE BELOW.

In a purchaser's action to rescind a contract and recover back the purchase price, laches could not be urged on appeal as a defense, where it was not raised in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1104–1107.]

6. VENDOR AND PURCHASER 🔑123—ACTIONS FOR RESCISSION — LACHES — NECESSITY OF PLEADING.

Under Code Civ. Proc. § 434, providing that, if certain objections to the complaint be not taken by demurrer or answer, the defendant must be deemed to have waived the same, an objection to rescission by a purchaser on the ground of laches was waived when not pleaded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 221–227.]

7. VENDOR AND PURCHASER 🔑119—RESCISSION BY PURCHASER—LACHES.

Where a purchaser induced to buy land planted to citrus trees, in July, 1912, by misrepresentations that a water plant, through which it was irrigated, was in good condition, and that damaging frosts had never occurred, did not discover until March, 1913, that her trees were killed by frost, and then learned that heavy frosts had occurred in previous years, and shortly thereafter consulted an attorney under whose advice she immediately took steps to secure redress, and did not learn until after suit was brought of the falsity of the representations as to the water system, there was no bar by laches.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 212–214.]

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by A. I. Tracy against Wm. M. Smith and another, individually and as a copartnership doing business as Smith & Mizener. From a judgment for plaintiff, defendants appeal. Affirmed.

Humphrey Marshall, Jr., and Frederick A. Preston, both of Los Angeles, for appellants. W. C. Shelton, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to rescind a contract whereby plaintiff agreed to buy from defendants for a stipulated sum a five-acre tract of land, planted to one-year old citrus trees, and to recover the sum of $1,500 paid defendants on the purchase price thereof, upon the ground that plaintiff was induced to make the contract and payment of purchase money thereon through and by means of false and fraudulent representations made by defendants as vendors of the same. From a judgment in favor of plaintiff defendants appeal.

It appears without controversy that plaintiff, a widow, having inherited a small sum of money from the estate of a deceased brother, conceived the idea of investing it in an orange grove. She was introduced to defendant D. A. Mizener, who, with Wm. M. Smith, constituted the copartnership of Smith & Mizener, which owned a subdivision of land in Los Angeles county called Orchard Dale. To secure a supply of water for the irrigation of the subdivision they organized a water company, which at the time of the transaction with plaintiff had installed a water system consisting of wells and some twelve miles of pipe lines for the development and distribution of water, shares in which company were allotted to and sold with each tract of land. Plaintiff was shown a lot designated on the map of said subdivision as lot 50 of block 3, containing approximately five acres, which in May, 1912, had been planted to orange trees, and for the purchase of which, together with 10½ shares of stock in said Orchard Dale Water Company evidencing her right to the use of water thereon, she, on July 8, 1912, entered into the contract which it is sought to rescind.

It is conceded that prior to the time that plaintiff entered into the contract the defendant D. A. Mizener represented to her that the Orchard Dale Water Company had then developed an unlimited supply of water amply sufficient for any use which the tract and the lots therein would ever require, and that the plant and water system through and by means of which the water was distributed was perfectly built and equipped and in such splendid condition that, barring minor repairs thereto, the cost of water to the stockholders in said company for the first five years would be the cost of production only, that the land was located in a district that was absolutely frostless, and that damage by frost had never been known in the neighborhood, all of which representations so made to plaintiff by Mizener the court found to be untrue and known by him to be untrue when made. The court further found that plaintiff was a woman of little experience in business and knew nothing of the subjects of representation, other than the statements so made to her by defendant Mizener, upon which she relied believing them to be true, and, because thereof, she was induced to and did enter into the contract.

Notwithstanding the repeated declarations of this court that, where there is a substantial conflict of evidence touching an alleged fact, a finding thereon by the trial court will not be disturbed, appellants attack the findings for want of sufficient evidence to support them.

[1] To quote at length the testimony would be an idle task. Suffice it to say that an examination of the record, while showing a conflict in the testimony offered, exhibits ample evidence tending to prove each and every fact found of which complaint is made. That the locality was not free from frost, but subject to killing frost, appears from the fact, conclusively shown, that all the trees, several hundred in number, planted in the succeeding spring upon said lot, though protected by paper wrappings, were during the winter of 1912-13 killed, and that, contrary to defendant's statement that "a damaging frost had never been known in that neighborhood," evidence was received which strongly tended to prove that during the winter immediately preceding the making of the contract severe frosts occurred in that locality doing great damage to the orchards and destroying many of the newly planted orange trees, all of which facts were well known to Mizener.

The finding that the representations in regard to the supply of water and the condition of the distributing system were untrue is supported by evidence given by Mizener himself, who was a member of the board of directors of the water company. His testimony was to the effect that at the time he made the statements to plaintiff he knew that a large part of the distributing system had deteriorated to an extent that rendered it unfit for use, that it was necessary to immediately replace some 6,000 feet of the main pipe line, and that the condition and quality of the water in one of the wells was such that the use thereof would have to be abandoned, in connection with which was the testimony of the president of the water company to the effect that for a long time prior to September, 1913, the condition of the pipe lines was such that from 15 to 20 per cent. of all the water pumped was lost by leakage, and that in September, 1913, the board of directors determined it to be necessary to make repairs, install new pipe, and develop an additional supply of water at a cost to the stockholders of $25,000. Indeed, it is impossible to perceive how the court could have reached any conclusion other than that the representations made by Mizener to plaintiff with reference to the water and distribution system were untrue.

[2] Appellants contend that, conceding a sufficiency of evidence to support the findings, the representations so found to have been made were matters of opinion only, and hence, even if they were false and untrue, such fact constituted no ground for an action of rescission on the part of plaintiff. The condition of the water system, and whether or not a damaging frost had ever occurred in the locality were material existing facts as to which, since the representations were positive and unqualified, the truth thereof should be established in the form made. In Sheer v. Hoyt, 13 Cal. App. 662, 110 Pac. 477, it is said:

> "Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract, and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations."

See, also, Bickel v. Munger, 20 Cal. App. 633, 129 Pac. 958.

[3] It is true that as a rule expressions of opinion, whether real or pretended as to what may or may not occur in the future, or as to matters equally within the power of both parties to ascertain, are not deemed representations upon which, though admittedly false, an action can be founded. Winkler v. Jerrue, 20 Cal. App. 555, 129 Pac. 804. Hence, considered alone, the statement that the land was "absolutely free from frost" might be deemed merely a prediction or an expression of Mizener that in his opinion the locality would never be subject to frost. It was, however, a positive representation by one assuming to have knowledge of the subject, based upon a statement known by him to be false in fact that "a damaging frost had never been known in that neighborhood," which, if true, when made in connection with the statement that the property was absolutely frostless, warranted the making of the latter and gave it the character of a like statement of fact rather than a mere opinion. Muller v. Palmer, 144 Cal. 305, 77 Pac. 954.

[4] It is next insisted that plaintiff is not entitled to recover because she had opportunity for making inquiry and investigations, the result of which, if made, would have disclosed the true condition of the water system, and the fact that during the previous winter severe frosts had occurred in the neighborhood as a result of which much damage was done to the orchards, and many of the young trees killed. There were no circumstances attending the transaction calculated to arouse the suspicion of an inexperienced woman without knowledge of the subject with which she was dealing, or cause her to question assurances from Mizener that what he told her in response to her inquiries would be the truth. There is no rule of law which, under the circumstances here shown, required plaintiff in dealing with defendant to have acted upon the assumption that he was dishonest, and the law will not deny her redress because she failed to act upon such assumption.

> "The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity." Strand v. Griffith, 97 Fed. 854, 38 C. C. A. 444; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 Pac. 117.

[5-7] The question of plaintiff's laches as a defense was not raised in the trial court, and hence should not, for the first time, be urged here. Indeed, objection to the recission on that ground, since not pleaded, is deemed waived. Code Civ. Proc. § 434. Moreover, if considered on the merits, the contention is ill founded, since it is shown that she did not discover that her trees were killed by the frost until March, 1913, and then learned of heavy frosts occurring in prior years. Shortly thereafter she consulted an attorney as to her rights, under whose advice she immediately took steps to secure redress for the deceit practiced upon her. Indeed it was not until after the filing of the first complaint in the action that she learned of the fraudulent representations as to the condition of the water system.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

(175 Cal. 173)

In re WILLITS' ESTATE. (L. A. 4726.)

(Supreme Court of California. May 21, 1917.)

1. WILLS 🔑55(1)—CONTEST—SUFFICIENCY OF EVIDENCE.

Evidence regarding an 88 year old testator's Spiritualistic activities, his belief in mediums, etc., *held* to sustain a verdict that his will leaving his property, except for minor legacies, to a Spiritualist companion, who had obtained some $85,000 from him during his lifetime, was void because of her undue influence and his mental incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-140, 148-150, 161.]

2. WILLS 🔑329(3)—CONTEST—INSTRUCTIONS.

In a will contest, instructions that contestants must prove their case by preponderance of the evidence and that the burden of proving testator's mental incapacity was upon contestants *held* to sufficiently charge regarding the burden of proof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 776.]

3. WILLS 🔑330(3)—CONTEST—INSTRUCTIONS.

In a will contest, an instruction that an 88 year old testator was mentally incapacitated if he did not appreciate the nature of his property and his children's claims to his bounty *held* warranted by evidence regarding his belief in Spiritualistic mediums and gifts of $85,000 to a woman Spiritualist companion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 781.]

Department 2. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

In the matter of the estate of Milton L. Willits, deceased. From a decree denying the will probate and from an order denying a new trial, Emma Helmer appeals. Affirmed.

Earl Rogers, W. H. Dehm, and Milton M. Cohen, all of Los Angeles, for appellant. Kemp, Mitchell & Silberberg, and Enyeart & Holton, all of Los Angeles, for respondents.

HENSHAW, J. Milton L. Willits died testate on January 6, 1915. At the time of his death he was 88 years and 2 months of age. The will was executed about 11 weeks before his death, and thus about 3 weeks before his eighty-eighth birthday. He left surviving him five adult children. By his will each of these children was bequeathed a legacy. To one was given $1,500, to another $1,000, to two others $500 each, and to the fifth the cancellation of a debt owed to the father. He gave also to two grandchildren $500 each. He then bequeathed to Bertha Helmer $1,000, and all the rest and residue of his estate of every kind and character to her sister, Emma Helmer. By this will the specific legacies amounted to $5,500. The total value of his estate at the time of his death is shown to be $2,500. This will was offered for probate. Two of the sons contested, and as grounds of contest pleaded: First, that the testator was not of sound and disposing mind at the time of the execution of the will; and, second, that the will was the product of undue influence exercised upon the testator by Emma Helmer.

In this contest the jury found for the contestants upon both of the grounds advanced. From the decree denying the will probate and from the order refusing to grant her motion for a new trial Emma Helmer appeals, and on appeal and as the principal ground for the reversal of the decree and order insists that the evidence is insufficient to sustain the verdict of the jury.

In view of the fact that the value of the testator's estate disposable under his will is but $2,500, and that the specific legacies amount in value to $5,500, it is at once apparent that Emma Helmer, the residuary legatee and devisee, will take nothing under the will. Her appeal, however, will be understood when it is explained that in the three years immediately preceding his death, during which time the deceased was in intimate association with Emma Helmer, he gave to her and she received from him real and personal property of a value in excess of $85,000, which property was all of the property which the old man owned, so that at the time of his death nothing remained but a small amount of personal property, live stock, and farming implements upon a valuable farm in Illinois, which farm he had previously deeded to her. Of everything but this personal property he had stripped himself or been stripped. Moreover, of his five adult children some were married and with children of their own. None of them was in affluent circumstances, several of them quite poor. Some of them had lived upon and faithfully worked the father's farm in Illinois. The meager legacies, the face value of which they could not receive, were all that was left to them, while this stranger in blood, who had known him casually for but one or two years and intimately for the three years preceding his death, took or was given all that the old man had. Actions are pending against Emma Helmer, instituted by the heirs at law of the deceased, for an accounting of his moneys, which in large sums came into her possession during his lifetime, and which she contends were gifts from him, and to set aside conveyances of real property which he made to her. Manifestly, if the heirs at law should be successful in these actions, the property thus recovered would become the residuum of his estate and fall under the residual clause of his will, by which Emma Helmer would take it all. Hence, while taking nothing under the will as it now stands, her contingent interest is very large, and hence, therefore, her appeal from the decree denying it probate.

As the principal proposition advanced upon appeal is the insufficiency of the evidence, a résumé of that evidence becomes necessary. Milton L. Willits, born in 1826, early in his lifetime married, became a farmer in Illinois, and by thrift and industry acquired large and valuable holdings of farm land. His wife bore him ten children, five of whom survived her and are still living. She died in 1869, and he became interested in Spiritualism. This study or pursuit obsessed him. He endeavored to make a medium of his second wife, and the family friction which resulted led to proceedings instituted in the courts of Illinois to have him declared incompetent. In this his second wife and some of his children joined. A verdict of the jury favored him. His children grew up without any serious estrangement apparently resulting from this. His second wife was divorced and died, and his interest in Spiritualism waxed. In his own home he had "circles" about three times a week, attended other "circles" away from home, and had a "cabinet" for Spiritualistic purposes built in his house. He firmly believed not only that he held through mediums direct communication with spirits in the other world, but that these spirits could take to themselves matter and so "materialize"; that through their direct aid and instrumentality one received messages, directions as to the conduct and the management of one's worldly affairs, artistic development in "picture making," in medicine and healing. He had for "guides" a band of spirits who were active in various branches for which they were best fitted. The personnel of this band changed from time to time. Some were the spirits of people that he had known on this earth; others he had never known. Thus Dr. Dent, a former friend, was the head of the band that exercised healing powers. Maude Adams, the actress, was to him "Little Maudie" and was one of his spiritual guides. He knew that she had been a famous actress, but he knew also that she had "passed over" because she told him so. When it was established to him that "Little Maudie" was alive and still devoting her histrionic genius to the delight of audiences here on earth, he satisfactorily explained that sometimes evil spirits did this sort of false impersonation. The same is true of a "medium," Mrs. Karcher, into whose hands he fell. Mrs. Karcher was just on the point of perfecting herself by self-abnegation and study so that she could transmute dross into gold and silver ores of great value. More than this, she could, when she had attained full power, "materialize" these valuable metals out of airy nothingness. Mrs. Karcher secured a written contract under which the deceased bound himself to maintain her during her period of study until she perfected herself, when out of the profits which would immediately follow she was to repay him. He became alarmed about Mrs. Karcher, declaring not unwisely, as his experience proved, "that he was afraid of women; they always had gotten my money." So he gave her $100 and fled. He was perturbed for fear Mrs. Karcher would seek him out and endeavor to enforce his contract, but was much relieved when her spirit appeared and told him she was dead. Being afterwards advised that Mrs. Karcher was still upon this earth, he declared that there must be some mistake about it, as her spirit had certainly appeared to him.

Paying more attention to chronology, after the divorce from his second wife, Mr. Willits became interested in a medium who was a great "magnetic healer," and installed her with her husband and son on his farm, where they remained for over a year. In 1882 or 1883 there was laid out at Mt. Pleasant Park, at Clinton, Iowa, a Spiritualistic camp ground where were held annual meetings. Mr. Willits assisted in its organization, advanced money, joined as maker of a note to secure a loan for it, was a director, and attended every meeting from its organization until his death, except in the years 1912 and 1913. In this park he built two cottages which he rented during the meetings, himself living in one of them. About 1897 he came to this state under the directions of the spirits and became involved with the Karcher woman, as above related. Leaving California, he went to Chicago, and from 1902 to 1907 spent the major portion of his time with a Mrs. Green, who there resided. Mrs. Green was a medium, and séances were held at her house. With Mr. Willits' assistance she was developing a higher order of Spiritualism known as the "Magi." The members of this society of Magi called to their aid in their troubles over mundane affairs the spirits of the ancient Atlantians, who had their earthly residence upon the now submerged continent of Atlantis. Mr. Willits' especial "guide" or "control" during this period was an Atlantian spirit called "Billy." These researches into higher spiritual truths and demonstrations were rudely interrupted by the police of Chicago, who broke into one of Mrs. Green's meetings and after a fight arrested her.

After this experience, with faith unshaken, he continued to attend the meetings at the Spiritualistic camp. He was confirmed in his devotion by a communication which he received from Mr. Burdick, whom he had known on earth, and who had "passed over," Mr. Burdick telling him that the $5,000 which he had loaned to the Mt. Pleasant Park was the best investment he (Mr. Burdick) had ever made, the reason being, as Mr. Burdick's spirit explained, that when he "passed over," because of this loan, the spirits "in the other world had met him and taken good care of him and fixed him up right." Mr. Willits' own exposition upon this subject was that the more you did for Spiritualism in this world the better off you were with the spirits in the next world, and he instanced the case of a friend of his, William Drury by name. William Drury in his lifetime had done nothing for Spiritualism, and when he "passed over" he was left in "outer darkness"; the spirits did not receive him very well, and he did not get along with them, but, being informed of this, he, Mr. Willits, got in communication with them and fixed it up so that now "Mr. Drury was doing fairly well."

Thus Mr. Willits' life flowed on, very much under the guidance of the communications which he received from the spirit world through the mediums whose society he frequented. In 1908 he first met Emma Helmer at the Spiritualistic camp, and again in 1910. Their acquaintance up to this time was casual. Emma Helmer's occupation was that of a stenographer. She had spent several years in that capacity in a lawyer's office in Denver, Colo., and she had been a public stenographer. She was interested in Spiritualism. She addressed the camp meetings upon the wonders of Spiritualism. She was active in endeavoring to sell "scholarships" which entitled the holder to take a course of study in spiritualism and for the sale of which she received a commission. Knowing Mr. Willits but casually, in 1910, after the camp meeting, she sent him a Christmas card. Later he wrote to her, asking her if she would take care of the renting of his cottages in 1911, and she agreed to do so. At the camp meeting of 1911, which both attended, they came into close personal relationship. To a witness who was present at that camp meeting, a Miss Burton, Mr. Willits expressed the desire to find Mr. Green (the husband of Mrs. Green, the medium above mentioned) and to induce him to go with him to California. Emma Helmer, being told of this by Miss Burton, asked Miss Burton to "tell Mr. Willits that 'I will take him to California. That is just where I want to go, but I can't go unless I find some one to pay my traveling expenses.'" The result was that when Mr. Willits left the camp ground Emma Helmer went with him. They traveled about together, going to New Boston, in Illinois, where was Mr. Willits' farm; thence to Colorado, Emma Helmer's home; thence back to New Boston; then to San Diego, Cal.; and finally to Los Angeles, where a home was bought and paid for with Mr. Willits' money. They moved from this first home to another in Los Angeles, and there he lived with the Helmer family until his death. He thus lived with the Helmers for the last 3 years of his life, from the time when he was 85 years of age until he was 88 years of age. During their travels, of course, Mr. Willits paid all expenses. Within two months after they were settled in Los Angeles Miss Helmer received from him $1,000. Within three months she had received over $4,000. In a period of 7 months she was the recipient of $12,670. In the year 1913 she obtained over $4,000. In 1914 she obtained over $3,000. This was all the money which he had accumulated in the past years, and in addition to this she received the major portion of the money which he received from the sale of a part of his farm land—all of it indeed save that which went for the payment of his obligations. Before this friendship sprang up his monthly expenditures had not exceeded $100. Afterward he not only withdrew and turned over to Emma Helmer all the moneys which he had accumulated and all that came in as proceeds from his farm, but he was constantly importuning his banker in Illinois to send on every deposit made to his credit as promptly as possible. Every one of these deposits was turned over to Miss Helmer. In these years he was physically feeble, his personal expenditures negligible, for he seldom or never left the Helmer home excepting in the company of Emma Helmer. He wrote a number of letters quite by himself. Later his correspondence was taken over by Emma Helmer, and his letters were typewritten by this competent stenographer.

In 1914 Emma Helmer and her mother accompanied or took the old man to the Iowa Spiritualistic camp meeting. She carried the purse and attended to all the details of travel. Their relationship was such that at the camp meeting Mr. Bloomer, a friend of Mr. Willits, complimented him on his "fine-looking wife." Miss Helmer replied: "We are not married. I am keeping house for him. God sent me to take care of him." They made this Eastern trip in the late summer or early autumn of 1914, but in the middle of April preceding Mr. Willits executed to Emma Helmer his deed of all of his Illinois lands. The deed was prepared by Miss Helmer herself. The form appropriate for such a conveyance under the laws of the state of Illinois, and the description of the property, being obtained from Mr. Willits' papers and the deed itself typewritten by Miss Helmer. After the deed was so drawn by Miss Helmer in her home she escorted the old man to a notary public, where he executed it and gave it to her. She did not have it recorded until after his death, and indeed maintained the utmost secrecy about it, even under circumstances, as will hereinafter appear, where a disclosure was manifestly called for. While at the camp meeting in Clinton, Iowa, in like manner the deceased conveyed to her the two cottages which he owned. This conveyance she had placed of record, and it is not without significance that the deed to the Iowa property, which in all probability would not come under the notice of the deceased's relatives, was recorded, while the utmost reserve was maintained in the matter of the deed to the farm in Illinois where Mr. Willits' children resided. Leaving the camp meeting, the three, Mrs. Helmer, Miss Helmer, and Mr. Willits, went to New Boston, near to which town his farm was situated. They saw none of Mr. Willits' children, and it is doubtful whether those children were advised of their father's presence. This last visit to New Boston was made after Mr. Willits had conveyed to Miss Helmer all of his real property. Notwithstanding this, he gave a written option while at New Boston agreeing to sell his ranch for $150 an acre, except 80 acres of rough land which was to be sold at $100 an acre, and agreeing further to pay $1 per acre commission upon such sale. Miss Helmer explains this act of Mr. Willits as being his endeavor "to get a price on the land," but it is not a strained inference to conclude that he thought that he was giving an option for the sale of real property which was his own.

While they were thus visiting at New Boston, and on the eve of their departure for California, they were served with summons in conservator or guardianship proceedings instituted by one or more of the children. Mr. Willits became much excited, but Miss Helmer quieted him, telling him to keep cool, that "she would see him through; that she had not been in a law office four years for nothing." Mr. Willits was on the verge of a collapse. Mr. Campbell, a disinterested witness, testified that Miss Helmer declared that these proceedings "were a disgrace that the children had brought upon Grandpa that she was not going to stand for, but she would spend her own money if necessary in order to defend his good name." Mr. Campbell explained that senility was not a reflection upon his good name, but was a mere matter of physical and mental decadence, and that the action was quite natural, because he knew that in his "normal mind he [Mr. Willits] would desire his property to go to his children." He also told Miss Helmer, who solicited him to bear testimony to Mr. Willits' competency, that he could not take the witness stand and say that he considered Mr. Willits capable of handling his own affairs, and referred to the control exercised in those affairs by the spirits. Miss Helmer "said that was a matter of religious belief and ought not to enter into business affairs. But I pointed out to her in what manner that might easily influence the disposition of a man's property." All this resulted in Miss Helmer seeking the services of Mr. Hanna, an attorney at law in the nearby town of Monmouth. In the conversations and consultations over the matter of the conservator proceedings, at all of which Miss Helmer was present, she made no disclosure to Mr. Hanna of the fact that Mr. Willits had given to her substantially all that he possessed. The conversations assumed that Mr. Willits was still a prosperous, prudent farmer, whose children were endeavoring to take his "property" away from him. Miss Helmer is particular to say that they were endeavoring to take his "property," and not his "farm"; Mr. Willits' property at that time, under Miss Helmer's contention, being wholly and exclusively the small amount of personalty left on her farm. Notwithstanding the fact that one of the specific charges in the conservator proceedings was that he was squandering and dissipating his estate, she made no disclosure to Mr. Hanna of what in fact Mr. Willits had done for and given to her.

It was there and at that time and under these conditions that the will here questioned was drawn and executed in the office of Mr. Hanna. The circumstances leading up to the making of the will are narrated by Mr. Hanna and Miss Helmer. They are somewhat vague, but it does appear that Mr. Hanna, the attorney for Mr. Willits only in the conservator proceedings, asked Miss Helmer if Mr. Willits had made his will, and when it was found that he had not, he was advised to do so. The conversations were for the most part in the presence of Mr. Hanna, Miss Helmer, and her mother, though Mr. Hanna conversed with Mr. Willits alone. As a result of his conversation with Mr. Willits, and without suggestion from any one else, the will was drawn in accordance with Mr. Willits' expressed wishes. Mr. Hanna dictated the terms of the will, Mr. Willits came back in the afternoon of the same day the will had been prepared, it was read to him, and its legal effect explained. No one was present when it was read and explained to him, and Miss Helmer was not present when it was executed. Immediately thereafter Mr. Hanna secured the presence of Mr. McCray and Mr. Martin, two business men of the town and wholly disinterested, and they witnessed the execution of the will. Such is Mr. Hanna's version, given by deposition.

Notwithstanding this testimony, the two disinterested witnesses to the execution of the will declared that there was a lady in the room at the time Mr. Willits executed the will in their presence, that it was not a stenographer in Mr. Hanna's office, as Mr. Hanna endeavored to make it appear, but it was a young woman in street clothes, whose name they believed was Helmer, and, as their recollection served, she had her hat on. Of significance in this connection is the varied evidence given by Miss Helmer herself. Upon the witness stand Miss Helmer testifies positively that she was not present at the time the will was made; that she went to Mr. Hanna's office in the afternoon to take Mr. Willits away with her; that she did not hear the reading of a will to Mr. Willits and did not see the witnesses who signed the will as witnesses; she did not hear the will read nor any of its provisions and did not know of the execution of the will until afterward, when Mr. Willits told her he had a will drawn and gave it into her charge. Miss Helmer first gave her deposition concerning these matters. This deposition was transcribed and submitted to her for correction. She retained it in her possession for some weeks. During this time the deposition of Mr. Hanna was taken in Illinois, and Mr. Hanna, it will be remembered, testified that Miss Helmer was not present at the reading of the will to Mr. Willits or at its execution. The following excerpts from Miss Helmer's testimony are illuminating. The answers which are canceled are those answers which appeared in the original transcription of her deposition. The amended answers were given under the indicated circumstances, the emendations being underscored. Asked how she obtained possession of the will, her answer is:

"Mr. ~~Hanna~~ Willits gave it to me to take, and I returned it to Mr. Hanna afterward."

Asked when she first saw the will in Mr. Willit's possession she answered:

"Back there ~~is~~ after we left Mr. Hanna's office."

Her deposition then proceeds as follows:

"Q. Do you remember the fact that Mr. Martin and Mr. McCray were called in from another office to witness the will?

"A. ~~I think they were."~~ I don't know anything about it.

"Q. During the time you were there was this will signed?

"A. ~~Probably.~~ I don't know.

"Q. Don't you know that was the fact?

"A. ~~I guess that was so.~~ I don't know that it was.

"Q. Did you hear the will read at that time?

"A. No, sir.

"Q. Did you hear any of the provisions of it?
Just a little.
"A. Yes, sir.
"Q. You heard all of that read to Mr. Willits by Mr. Hanna?
No
"A. ~~Yes,~~ sir.
"Q. You were near enough so that you could hear the reading of that will?
of a little of it.
"A. Yes, sir; I heard the reading of ~~that will.~~
"Q. And then Mr. Willits signed it?
I don't know when he signed it.
"A. ~~Yes sir; I think he signed it then.~~
"Q. And then he called out the two witnesses and signed it before them?
I do not know when the witnesses were called in.
"A. No sir; ~~they called them in before.~~
"Q. And he signed it in the presence of the witnesses?
He evidently did.
"A. ~~Yes sir; in the presence of the witnesses.~~
"Q. After this was all read over, what did Mr. Willits say?
I don't know what he said; I was not there.
"A. ~~He didn't say anything.~~
"Q. He didn't say, 'That is all right'?
How can I tell when I was not there?
"A. ~~He didn't say anything I suppose that is so he said, 'That is all right.'~~
"Q. Did he say anything?
Mr. Hanna could tell you.
"A. ~~I think that is what he said.~~
"Q. Isn't it a matter of fact that he did not know what was being talked about?
I don't believe Mr. Willits ever signed anything he didn't understand.
"A. ~~Of course he knew what it was. He made it himself. He ought to know it was all right.~~
"Q. Didn't he say to Mr. Hanna, 'That is all right; that is the way I want it'?
I do not know what he said.
"A. ~~I think he did say it.~~
"Q. As a matter of fact, Mr. Willits was so deaf that he couldn't hear?
He could hear when spoken to distinctly.
"A. ~~Yes sir.~~
"Q. He read it so loud that you and everybody else could hear?
"A. Yes, sir.
"Q. Were the witnesses present when the will was being read over to Mr. Willits?
I suppose so.
"A. ~~Yes sir.~~
"Q. And they discussed the contents of the will with Mr. Willits?
Maybe they did.
"A. ~~They talked to him and had a conversation with him.~~
"Q. What did he say?
know what they said.
"A. I don't ~~remember.~~
"Q. Didn't he tell you that people could come back?
under certain conditions.
"A. He believed that they could communicate.^
"Q. And appear to them?
"A. Yes, sir.
}he might have thought this possible."

The argument of appellant is that Mr. Willits, notwithstanding his age, was a shrewd, prudent business man of cultivated mind; that he was a student of Spiritualism, no more; and that his Spiritualistic theories were not permitted by him to influence him in the conduct of his daily life and business affairs. The evidence upon these matters, besides that of disinterested witnesses, is abundant from the writings of the deceased himself. Touching his cultivation and Spiritualistic beliefs the following are extracts from a letter written by him in 1912 to a comparative stranger, who he apparently thinks is related to him. He writes to him something of his genealogy, explaining that:

> "On my mother's side of the family they wer what wer called Pensylvaney Duch both family were Quakers so we belong to that sock my father & mother died with what was called milk sickness one dieng one day and the other the next."

He then proceeds:

> "I spent the most of the last ten years in the city of Chicago Ill in the family by the name of Green the wife of Mr. Green is what is known as a materializing medium. This somewhat strange process consists in reclothing the spiritual body in a real material body as it seams in the mortal body this is accomplsid by by the help of the of a band of kemests on the spirit side of life who are able to draw the neccessary elements from the meduom & the sitters in the circle to reclothe the spiritual form my own experience has proved to me beond a posable doubt that this is a truth. How do I know this to bee true because I had had actual communication with many people that I was well acquainted with they lived in the life form also those that I never knew on earth spirit communion I think is the grandest thing that came to earth without it we could get no evidence of a futur life all Bibles all evidence of a future life would bee imposable By what natrar is this wonderful blessing secured by the messmerick or psychic law of controle which enables one person to controle the physical body of another person I have been given the proscess by which this is obtained is to depolarize the brain cells that is to throw the celles into a negative condition this anables the spirite or operator to express itselfe the same that it does or can through its own organism you know it is n uncoman thing for people to be paralozed and loose controle of part of their physical bodies and sometimes the hole physical structure."

In 1907 the husband of one of his daughters had died. His name was Hollis. He writes to his daughter that he has heard from Hollis in the spirit world, and tells her:

> "Bro H H Roberts & his Sone Earnest wer hear the Son to get help Hollis brought for the same purpose here they meet their Friends this gives the Spirite a better opportunity to gain strength and light I was toled that Hollis & Earnest were about in the same Condition."

Hollis and his wife owed Mr. Willits money in his lifetime. When Hollis died he left his wife in poverty. The father enforced from his widowed daughter the collection of this debt upon the ground that Hollis in the spirit world had directed him so to do, and he writes to her:

> "Well that was Fortunate inDeed for if I had not been here and so situated that I could arrange matters with Hollis agreeable to his wishes to have the Debt payed off theire could have been nothing done to settle the Debts satisfactorily so I feel sure evry thing has turned out for the best."

It will be remembered that he sold 80 acres of his land for $14,000. That was in 1912, and while he was living with Miss Helmer. By far the greater portion of this money went to Miss Helmer. A disinterested witness testified that Mr. Willits told him that:

> "He had got orders to sell that land. He said he had been told to sell it and his business here was to sell it. He said he had a communication from the spirit world."

Touching his mental condition during the last portion of his life, his mind was feeble, his memory bad, and he either did not understand or took no interest in anything saving Spiritualism.

> "He told me many times that that was one of the greatest things that he could do. Every dollar that he spent in developing mediums and assisting the spirits to manifest would be a great source of pleasure to him in the future life."

[1, 2] It would be a serious reflection upon the intelligence of the profession if space should be given to a discussion of the sufficiency or insufficiency of this evidence to support the verdict. It speaks so positively and convincingly as to require no comment, and we pass on, therefore, to the asserted errors in the matter of the instructions which the court gave and refused to give to the jury. The first complaint is that the court refused to instruct the jury that the burden of proof was on contestant to establish the allegations of incompetency and undue influence. Yet throughout its instructions the court with much repetition did so instruct the jury. Thus it told the jury:

> "One has the right to make an unjust will, an unreasonable will, or even a cruel will. He may make an unjust, an unnatural, or capricious will. Unless you believe the contestants have proven their case by a preponderance of the evidence, you must find for the proponent."

Again, after telling the jury that the presumption of law was that the testator was of sound and disposing mind on the date on which the will was made, the court added:

> "Likewise in this connection the burden of proving the contrary by a preponderance of the evidence rests upon the contestants."

[3] The court instructed the jury as follows:

> "You are instructed that, if M. L. Willits was of unsound mind either as to the nature and extent of his property or as to his relation to his children and the nature of their claims to his bounty, he cannot be regarded as of sound mind and memory, though he may have been of sound mind as to all other persons and matters."

The objection to this instruction does not appear to be that it contains any erroneous declaration of law, but only that there was no evidence in the case to which it was applicable, appellant declaring that:

> "There is an abundance of evidence in the case presented by the contestants themselves showing that the decedent at all times was perfectly competent to understand the treatment accorded him by his children in contrast with that of strangers who took care of him, and that he had full understanding of the status of his property."

The foregoing summarization of the evidence, imperfect as it is, is a complete answer to this objection.

Having thus considered all of the propositions advanced by appellant, it follows that the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: MELVIN, J.; LORIGAN, J.

(33 Cal. App. 452)

BAILEY v. BAKER, Sheriff. (Civ. 2055.)

(District Court of Appeal, Second District, California. April 17, 1917.)

PROCESS ⚷52—EXECUTION—EXPIRATION OF SHERIFF'S TERM.

Under Pol. Code, § 4171, process remaining with a sheriff, partly unexecuted, at expiration of his term, is to be executed by his successor; so that mandate requiring him, after such time, to complete the execution commenced by him, is wrong.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 59–63.]

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Mandamus by Matthew Bailey against T. A. Baker, Sheriff of Kern County. From an adverse judgment, defendant appeals. Reversed.

J. W. Wiley, of Bakersfield, for appellant. E. L. Foster, Geo. E. Whitaker, and Chas. A. Barnhart, all of Bakersfield, for respondent.

CONREY, P. J. The defendant appeals from a judgment directing the issuance of a peremptory writ of mandate requiring him, as sheriff of the county of Kern, to take possession of and deliver to the plaintiff certain described personal property. A former judgment, rendered in October, 1913, after an order sustaining a demurrer to the petition, was reversed by this court. For a statement of the facts alleged in the petition we refer to that decision. Bailey v. Baker, 28 Cal. App. 537, 153 Pac. 242. The case was tried by the superior court in January, 1916, and the present appeal purports to be from a judgment rendered on February 9, 1916.

The court found the facts in accordance with the allegations of the petition; also that the personal property described in the petition was not claimed by any person other than the Security Trust Company; also that, after having taken possession of the property as required in the claim and delivery proceedings in the action of Bailey v. Security Trust Company, the defendant sheriff redelivered the same to that corporation, although there had not been given to the plaintiff, Bailey, any notice of time and place when the sureties would justify, and the sureties did not justify upon the redelivery undertaking which had been given by the Security Trust Company to the sheriff. The court further found that the term of defendant Baker as sheriff expired in January, 1915, and that from and after that date one D. B. Newell was and is the duly elected, qualified, and acting sheriff of Kern county.

Appellant claims that the judgment should

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

be reversed, for the reason that a writ of mandate may not issue against an ex-sheriff to compel him to perform duties under process placed in his hands while he was sheriff. We have decided this question in another proceeding incidental to the present case. Ex parte Baker, 162 Pac. 922. That was a habeas corpus proceeding, arising out of an order committing Baker to the custody of the sheriff for contempt by reason of his refusal and neglect to comply with the directions of the writ of mandate issued in this case. This court held that the duties of sheriff under the facts of this case were controlled by section 4171 of the Political Code, wherein it is provided that:

> "* * * When any process remains with the sheriff unexecuted, in whole or in part, * * * at the expiration of his term of office, said process shall be executed by his successor or successors in office. * * *"

Having stated the rule that the powers of the office shall not continue to be exercised by one whose term has expired, we said:

> "Unexecuted process in his hands does not lose its force, but the power of the law with respect to such process thereafter moves through the arm of the new officer, to whom whatever belongs to the office should be delivered."

We are satisfied with the conclusions reached in Ex parte Baker, supra, from which the further conclusion follows that the appeal should be sustained.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

(33 Cal. App. 418)

CASTRO POINT RY. & TERMINAL CO. v. ANGLO-PACIFIC DEVELOPMENT CO.

(Civ. 2017.)

(District Court of Appeal. First District, California. April 16, 1917. Rehearing Denied by Supreme Court June 14, 1917.)

EMINENT DOMAIN ⟹198(1)—LAND FOR RAILROAD—PUBLIC NECESSITY.

In the absence of express provision in Civ. Code, § 465, and Code Civ. Proc. §§ 1238, 1241, 1244, relating to acquisition by eminent domain of lands for use of a railroad corporation, and defining the procedure therefor, which would require it to show affirmatively that there is an existing public necessity for the construction of the road for which the land is sought, that is not a question to be litigated, except to the extent that a person whose lands are sought to be taken may put in issue the good faith of the corporation in seeking to acquire the land for a private interest or end rather than for the public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 528.]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Condemnation proceedings by the Castro Point Railway & Terminal Company against the Anglo-Pacific Development Company. From an adverse judgment, defendant appeals. Affirmed.

Reed, Black, Nusbaumer & Bingaman, of Oakland, for appellant. McCutchen, Olney & Willard, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action for the condemnation of certain lands of the defendant in the city of Richmond for the use of the plaintiff as a railroad corporation. The cause was tried before the court without a jury. The evidence was not voluminous, and there is little, if any, dispute as to the facts of the case. The main and practically the only question involved is as to the sufficiency of the plaintiff's proof to warrant the trial court in denying the defendant's motion for a nonsuit and to justify its judgment of condemnation. Upon the trial of the cause, the plaintiff introduced in evidence a certified copy of its articles of incorporation, showing that it was a regularly organized railroad corporation, having for its object the construction of a railroad for the doing of a general freight and passenger business; and also presented in evidence the resolutions and maps of the corporation showing the proposed route of its railroad and the site and location of its terminals, and also showing the location of the lands of the defendant and others proposed to be taken. From these maps it appeared that the proposed railroad would be about two miles long, having its northern terminal in the hamlet of Winehaven, where it would connect with a railroad already there known as the Belt Line, and running around the easterly and northerly shores of the Richmond peninsula, and that the plaintiff's proposed line would thence extend southerly along the shore line of the peninsula to deep water. There was then presented the testimony of the chief engineer of the plaintiff, who testified that he had made surveys of the route and terminals of said railroad, and that the lands of the defendant sought to be condemned formed a part of said route and of one of said terminals, and were necessary for such uses, and that the work of constructing said railroad was in progress. With these proofs the plaintiff rested its case, whereupon the defendant moved for a nonsuit upon the ground that the plaintiff had offered no proof showing any public necessity for the existence of such a railroad or for the taking of the lands in question. The court denied this motion, whereupon the defendant offered evidence tending to show that there were other lands which it was claimed were equally available for the uses to which the plaintiff proposed to put the land sought to be condemned, and also tending to show that there was no present public necessity for the building of said railroad growing out of an existing freight or passenger traffic needing to be served by it. The defendant also tendered some evidence showing that the incorporators of the railroad in question were also the principal owners of a rock quarry at or near its proposed northern terminal, and which would be chiefly benefited by the construction of the railroad. The court, however, rendered judgment in plaintiff's favor, whereupon the defendant prosecutes this appeal.

The sole question presented to the court upon this appeal is as to whether the plaintiff, in addition to the proofs above set forth, was required to show affirmatively that there existed a public necessity for the railroad for the uses of which the lands of the defendant were sought to be taken. The contention of the appellant is that, when this issue is raised by the pleadings, the burden is cast upon the plaintiff to make such affirmative showing as to the existence of a present public necessity for the railroad in question. On the other hand, the respondent maintains that when the plaintiff has shown, as it did in this case, that it was a railroad corporation duly organized for the purpose of constructing and operating a railroad and conveying freight and passengers for hire, and that the land sought to be condemned was necessary for the uses for which it is sought, it has sufficiently established its right to the exercise of eminent domain in the taking of said lands for such uses under section 465 of the Civil Code and section 1238 of the Code of Civil Procedure.

We feel constrained to give our concurrence to the above contention on the part of the respondent herein from a consideration of the terms of the sections of the Codes above cited, and from what appears to us to be the settled view of the courts of this state respecting the proofs required in cases of this character. Section 465 of the Civil Code in its enumeration of the powers of railroad corporations provides:

> "Every railroad corporation has power: * * * (7) To purchase lands * * * to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, pt. 3, Code of Civil Procedure, for the condemnation of lands."

Section 1238 of the Code of Civil Procedure, under the title of "Eminent Domain," provides as follows:

> "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * (11) Railroads. * * *"

Section 1241 of the Code of Civil Procedure, under the same title, contains the following provision:

> "Before property can be taken, it must appear: (1) That the use to which it is to be applied is a use authorized by law; (2) that the taking is necessary for such use; provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by a vote of two-thirds of all of its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county or incorporated city or town, of any proposed public utility, * * * and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor."

Section 1244 of the Code of Civil Procedure under the same title prescribes what the complaint in a condemnation suit must contain, as follows:

> "The complaint must contain: (1) The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff. (2) The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants. (3) A statement of the right of the plaintiff. (4) If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding. (5) A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property. * * *"

A comparison of these several sections of the Code setting forth the right and the procedure in cases of eminent domain discloses that their only statement as to the cases wherein any proof or showing of a public necessity for the taking of property under the right of eminent domain designates cases where municipal corporations are seeking through their legislative bodies to acquire property for public uses; and that in such cases the resolution or ordinance of such legislative body shall be conclusive evidence of the public necessity of such proposed utility or improvement. In all other cases where private property is so sought to be taken by those entitled to exercise this right under section 1238, Code of Civil Procedure, all that is required to be shown is that the use for which the property is to be taken is a public use, and that the property is necessary for such use. By the express terms of section 1238 it is provided that railroads are public uses in behalf of which the right of eminent domain may be exercised; while section 465 of the Civil Code expressly grants to railroad corporations the right to acquire lands by condemnation to be used in the construction and maintenance of their roads. It would thus appear that there is no express requirement in the sections of our Code which relate to the acquisition of lands for the use of railroad corporations through the exercise of eminent domain, and which define the procedure therefor, which would require these quasi public corporations seeking to exercise that right to show affirmatively that there is an existing public necessity for the construction of the particular railroad for the uses of which such lands are sought to be taken.

In the early case of Contra Costa R. Co. v. Moss, 23 Cal. 324, it was held that, when the Legislature determines that railroad corporations were so far public in their nature as to be entitled to exercise the right of eminent domain, the necessity for the particular railroad seeking to exercise that right was hereby established, and that the question as to whether there was a public need for such railroad was no longer a judicial question except in cases where the rights of private ownership were being invaded under pretense of an appropriation for a public use.

In the case of City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, which was an action for the condemnation of lands for sewer purposes, it was held that when the Legislature had defined sewerage to be one of the public uses for which private property may be taken, and when a city or town decides for itself, as it may do, that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer; "when it shows that the use to which the property is to be applied is a public use (and that is shown by the statute in this case), the inquiry on that head is closed. Code Civ. Proc. § 1241."

In the case of San Francisco & San Joaquin Valley R. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473, the case of City of Pasadena v. Stimson, supra, was cited as authority for the proposition that, as to the necessity for the right of way, the existence of the public use and the location through the defendant's land established the necessity.

While the decisions of the courts of other jurisdictions are not uniform upon the subject, the effect of the foregoing cases would seem to be to settle the law in this state in favor of the view that, when the Legislature has declared that railroad corporations shall have the right to condemn lands of private persons for their uses, the question as to whether there is a present public need for the construction and operation of the particular railroad seeking to exercise that right is no longer a judicial question to be litigated in the condemnation proceeding, except to the extent that a private person whose lands are sought to be taken may put in issue the good faith of the railroad corporation in seeking to acquire his land for uses which are not public but really to subserve some private interest or end; and such we understand to be the full extent and effect of the cases of County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621, and of Madera Railway v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27. In so far as this latter issue is presented in the case at bar, it need only be said that, without reviewing it, the evidence sufficiently justifies the findings of the lower court to the effect that the plaintiff is acting in good faith in seeking to construct, maintain, and operate its railroad, and that the same will be of benefit and use to the public; and that, while it is true that the incorporators of the plaintiff are also directors and stockholders of certain corporations engaged in the operation of quarries which will be benefited by the building of such railroad, it was nevertheless not incorporated for the mere purpose of being of private benefit to those interested in said corporations, but was incorporated for the purpose of building and operating a railroad between certain termini, and that said railroad will be so situated when constructed as to be of benefit and use to the public. These findings of the trial court will not, under the settled rule, be disturbed upon appeal.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(33 Cal. App. 424)

PEOPLE v. MASCHINI. (Cr. 380.)

(District Court of Appeal, Third District, California. April 16, 1917.)

1. Criminal Law 🔑1132—Appeal—Failure to File Brief or Appear—Procedure.

The Attorney General properly submitted the cause for determination upon the record, where accused filed no brief on appeal, and, although notified that cause had been placed on calendar, made no appearance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2980–2983.]

2. Criminal Law 🔑1159(3)—Appeal—Questions for Jury.

Where the only effect of accused's testimony as corroborated was to produce a conflict in the evidence, the case was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

3. Criminal Law 🔑1159(4)—Appeal—Credibility of Witnesses.

Whether certain testimony offered by defense to impeach a state witness accomplished its purpose was for jury to decide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077.]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Thomas Maschini was convicted of selling alcoholic liquors in "no-license territory," and he appeals from the judgment and order denying him a new trial. Affirmed.

G. M. Pittman, of Eureka, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was by information charged with, and by a jury convicted of, the crime of selling alcoholic liquors in supervisorial district No. 2, in Humboldt county, which is alleged to have been at the time of the commission of the act so charged "no-license territory"; it having been assigned to that category by the electors of said supervisorial district at an election held therein under the provisions of the so-called "Wyllie Local Option Law" (St. 1911, p. 599) on the 23d day of April, 1912.

The appeals are from the judgment and the order denying him a new trial.

[1] Although the record on appeal was filed on the 17th day of November, 1916, in the Supreme Court, to which the appeal had erroneously been taken, and the cause transferred to this court and the record filed here on the 21st day of November, 1916, the defendant failed to present and file a brief within the time required by the rule of this court, and none has since been filed or permission to file one asked for. The cause was placed upon the calendar of the regular April term of this court, beginning on the 9th day of April, 1917, and when so placed upon said calendar the attorney of record of the defendant was regularly notified of that fact. When the cause was called for hearing and argument, the defendant was not represented by counsel, nor did he appear in person to support his appeal, and no oral argument in his behalf was made. The Attorney General, in view of the situation thus presented, properly submitted the cause for determination upon the record. People v. Coates, 163 Pac. 502; People v. Magri, 163 Pac. 503.

We have carefully examined the testimony, the rulings of the court upon the evidence, and the instructions. We have not discovered any prejudicial rulings admitting or rejecting testimony, and the charge to the jury contains a fair and correct statement of the principles of law pertinent to the issues.

It is not deemed necessary to reproduce herein, even synoptically, the testimony from which the jury reached their conclusion that the accused was guilty as charged in the information. It is sufficient to say that we have, as stated, carefully read it, and thereby have been convinced that it fully supports the conclusion that, on the 20th day of August, 1916, supervisorial district No. 2 of Humboldt county was dry or no-license territory; that the unincorporated town of Shively is situated within said "dry" unit; that the defendant kept a hotel in said town; and that on the day named he sold to one O. E. Gardner, an attaché of the office of district attorney of Humboldt county, in the presence and sight of one H. F. Kilker, another attaché of said office, a bottle of whisky, and received in payment therefor from said Gardner the sum of 50 cents.

[2, 3] The defendant positively denied selling any intoxicating liquor to Gardner, on the day named or at any other time, further testifying that what he did sell to him was soda water, and there was apparently some corroboration of that testimony. But manifestly the most that this court can say of that testimony is that its effect was only to produce a conflict in the evidence, which it was solely within the competency of the jury to resolve. And it was entirely with the jury to decide whether certain testimony offered by the defense in impeachment of the character of the witness Gardner for truth, veracity, and integrity was or was not sufficiently persuasive to accomplish its purpose.

The record presents to us no other alternative but to affirm the judgment and order, and it is so ordered.

(33 Cal. App. 397)

ROEBLING CONST. CO. v. DOE ESTATE CO. (Civ. 1625.)

(District Court of Appeal, Third District, California. April 12, 1917. Rehearing Denied by Supreme Court June 11, 1917.)

CONTRACTS ⚷289—SUFFICIENCY OF PERFORMANCE—BUILDING CONTRACT.

A building contract specifying material and method of work for constructing cement floors to be approved by owner's architect is complied with, and contractor entitled to compensation, where specifications are followed and monthly certificate of architect approving work is obtained, although the flooring subsequently proved unsatisfactory, and the architect refused a final certificate on account of such defects.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1310.]

Appeal from Superior Court, City and County of San Francisco; L. F. Price, Judge.

Action by the Roebling Construction Company against the Doe Estate Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Campbell, Weaver, Shelton & Levy, of San Francisco, for appellant. F. M. Parcells, of San Francisco, for respondent.

CHIPMAN, P. J. The action was brought to recover a balance of $12,039.75 alleged to be due upon the contract price for concrete work performed on the Wiley B. Allen building in San Francisco. The complaint sets forth in hæc verba the contract upon which the action is based. Among its provisions are the following:

"First. The contractor agrees, within the space of fifty (50) working days from and after the date of recording of this contract, to have the foundations in shape to receive the cast-iron bases and sidewalk beams (balance of work in 35 working days); to furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner all the trench, excavating reinforced concrete foundations, reinforced basement walls, basement floor, all floor and roof slabs, penthouses, all girder and column concrete, fireproofing, all concrete sidewalks, retaining walls, etc., and other works shown and described in and by, and in conformity with the plans, drawings and specifications for the same made by Havens & Toepke, the authorized architect employed by the owner, and which are signed by the parties hereto, one set of which is on file in the office of the city and county recorder, and the other in the office of the architect subject to inspection by parties interested.

"Second. Said architect shall provide and furnish to the contractor all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith under the direction and supervision and subject to the approval of said architect, or a superintendent selected and agreed upon by the parties hereto, within a fair and equitable construction of the true intent and meaning of said plans and specifications. * * *

"Fifth. The owner agrees, in consideration of the performance of this agreement by the contractor, to pay, or cause to be paid, to the contractor, his legal representatives or assigns, the sum of thirty-nine thousand five hundred seventy-six dollars in United States gold coin, at times and in the manner following, to wit, seventy-five per cent. of the amount of labor performed and materials erected at building and as estimated according to the whole contract price and payable on the first day of each month, commencing on the first day of August, 1908. and the balance to wit, the sum of nine thousand eight hundred and ninety-four dollars, thirty-five days after completion and acceptance by the architects of this contract.

"Provided, that when each payment or installment shall become due, and at the final completion of the work certificates in writing shall be obtained from the said architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates under his hand to the contractor or, in lieu of such certificates, shall deliver to the contractor in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand by him for the certificate, shall, at the expiration of said three days become due and payable and the owner shall be liable and bound to pay the same on demand.

"In case the architect delivers the writing aforesaid in lieu of the certificate then a compliance by the contractor with the requirements of said writing shall entitle the contractor to the certificate. * * *

"Thirteenth. The payment of the progress payments by the owner shall not be construed as an absolute acceptance of the work up to the time of such payments; but the entire work is to be subject to inspection and approval of the architect or superintendent at the time when it shall be claimed by the contractor that the contract and works are completed; but the architect or superintendent shall exercise all reasonable diligence in the discovery and report to the contractor as the work progresses of materials and labors which are not satisfactory to the architect or superintendent so as to avoid unnecessary trouble and cost to the contractor in making good defective parts. * * *

"All floor slabs in the third, fourth, fifth, and sixth floors except in corridors and lavatories to be cemented over with a coat at least ¾" thick made of equal parts of fine, sharp, clean, screened gravel to equal parts of either Golden Gate or Standard cement as selected. Said cementing to be perfectly smooth and and well troweled and to be perfectly level. * * *

"Before the concrete topping is placed on concrete floor slabs throughout third, fourth, fifth, and sixth floors see that all concrete work is well cleaned off (broom cleaned) then well wet and dusted with cement, all to be done before the top coat of cement is applied."

Paragraph 4 of the complaint was amended during the trial to read as follows:

"That each and every of the covenants and conditions in said agreement contained upon the part of said plaintiff to be by it kept and performed have been fully complied with, kept, and performed by it. And plaintiff further says: That it did all the work in said contract mentioned, and duly performed on its part, in every respect, said work according to specifications and terms of the contract. That said work was fully performed, finished, and completed by plaintiff on or about the 1st day of July, 1909. * * * That thereafter, to wit, on the 25th day of September, 1909, plaintiff demanded of defendant's architects certificates in writing for the payments, in said contract mentioned and provided to be made unto plaintiff, then remaining unpaid, but plaintiff says said architects refused to deliver to plaintiff such certificates in writing for said payments, and ever since have refused and still refuse, to deliver the same unto plaintiff. That of the sum of $39,576, the amount by said defendant agreed to be paid to plaintiff for said work, as in said contract provided, no part thereof has been paid saving and excepting the sum of $27,536.25, so that plaintiff says, and charges the fact to be, that a balance of $12,039.75 is due, owing and unpaid therein."

The answer set up the defense of nonperformance. A cross-complaint was also filed by defendant alleging damages: (1) Cost of linoleum laid down to minimize the damages; (2) loss of rentals; (3) estimated cost of completing the work required by the contract, amounting in all to $19,753.20. As the decision of the court was against the defendant upon the issue of performance, it necessarily disposed of the claim for damages. Says the brief of defendant:

"If the decision thereon be upheld, the litigation will be concluded in all respects; if the court shall hold that the plaintiff did not perform, the matter will be at large and a new trial of all issues will be in order."

The controversy involves only the work done in the construction of the top cement finish upon the third, fourth, fifth, and sixth floors of the building. The court made the following findings:

"III. As to the allegations contained in amended paragraph IV of said complaint, and the denials of said allegations contained in paragraph V of the defendant's answer herein, the court finds that plaintiff fully performed all of the covenants and conditions of said contract, and the modification thereof set forth in paragraph III as amended, upon its part to be kept and performed, and did all the work in said contract mentioned, and did fully perform on its part, in every respect, said work according to the specifications and terms of the contract; and did fully perform, finish, and complete said work in compliance with all of the conditions, and in accordance with the plans and specifications, of said contract on the 1st day of July, 1909.

"As to said allegations and denials, the court further finds that the construction and installation of the top cement finish upon the third, fourth, fifth, and sixth floors of the building in which the work was contracted to be done and performed was completed by plaintiff on or about the 29th day of March, 1909, in accordance with the specifications and conditions of said contract, in a good and workmanlike manner, and when completed, as aforesaid, said top cement finish was well troweled, perfectly smooth, and perfectly level; that on said date said top cement finish was in a wet and soft condition, well troweled, perfectly smooth, and perfectly level, and thereupon plaintiff covered said top cement finish of said floors with sand, in order to facilitate the drying and hardening of said top cement finish upon said floors; that on the 5th day of May, 1909, said sand was removed, whereupon it was discovered that in the interim said top cement finish had become dry and had become hardened, and was on said date found to be cracking, checking, and loosening from the slab or rough concrete upon which said top cement finish had been applied; that thereafter said top cement finish of said floors continued to crack and check and become loosened from said slab or rough concrete, and said cracking, checking, and loosening increased steadily until approximately 50 per cent. of said top cement finish of said floors had been cracked, checked, or loosened from said slab or rough concrete; that said condition of said floors continued up to the date of the trial of this action.

"That said contract expressly provides that the architect for the owners of said building shall provide and furnish to the contractor all details and working drawings necessary to properly delineate said plans and specifications, and that the work shall be done and the materials furnished in accordance therewith, under the direction and supervision, and subject to the approval of, said architect, or a superintendent selected and agreed upon by the parties thereto; and the court here finds that the materials used by plaintiff in the construction of the top cement finish of the third, fourth, fifth, and sixth floors of said building were inspected and approved by the architect for said building, or his authorized representatives; and that said materials were mixed in the proportions specified by the contract; and that the work of laying or installing the same upon said floors was all done and performed by plaintiff under the inspection, direction, and supervision of said architect, or his authorized representative, and approved by him, from the commencement of the laying of said top cement finish until its completion, on or about the said 29th day of March, 1909; that the cracked, checked, and loosened condition of said top cement finish was not discovered by, or known to, either plaintiff or defendant until the sand was removed therefrom, on or about the 5th day of May, 1909; that said condition of said top cement finish was and constituted the first intimation received by defendant as to the ultimate condition of said floors."

Upon the matters set up in defendant's cross-complaint and the answer thereto, the court made the following findings:

"As to the allegations set forth in paragraph XII of plaintiff's answer to the first count of the cross-complaint herein, the court finds that on or about the 29th day of March, 1909, the plaintiff and cross-defendant herein had fully performed and completed that portion of the work stipulated to be done by it under its said contract with said cross-complainant, comprising the cement topping of the third, fourth, fifth, and sixth floors of said building, leaving the same perfectly smooth, well troweled, and perfectly level, and that, in performing said work, cross-defendant fully complied with the requirements of said contract, which specified that the floor slabs on said floors should be cemented over with a coat at least three-fourths of an inch thick, made of equal parts of fine, sharp, clean, screened gravel to equal parts of either Golden Gate or Standard cement, as selected; that thereafter, to wit, on or about the 5th day of May, 1909, said cement topping or surface on said floors was discovered by said cross-complainant and said cross-defendant to have cracked and checked in several places on each of said floors, whereupon and thereafter, and at various times during the months of May, June, July, and August, 1909, cross-defendant removed the cracked portions of said cement topping and replaced the same with the materials and in the proportions and in the manner as required by the specifications aforesaid each and every time leaving the cement topping so removed perfectly smooth, well troweled and perfectly level; that the checked and cracked condition of said floors was in no wise caused by any act or thing done, or any act or thing undone, by cross-defendant, or to any fault, lack of good workmanship or failure or refusal to comply with the specifications of said contract upon its part to be performed; that the cracking and checking of said cement topping upon said floors was caused by the improper mixture of gravel and cement, said gravel and cement having been mixed and laid down by plaintiff in the proportion of equal parts, being the proportion specified and required by the contract."

Plaintiff had judgment as prayed for, from which defendant appeals as also from the order denying its motion for a new trial.

Appellant's contentions are:

"I. The findings and the evidence both establish that the plaintiff did not perform the work required by the contract in that the top cement finish on four floors of the building was cracked and loose from the rough concrete.

"II. The complaint and the evidence both establish that the plaintiff did not obtain the acceptance nor the certificates of the architect which under the contract were the prerequisites of payment of the money sued for, but, on the contrary, that the architect refused to accept the work. There is no averment, finding, or suggestion of proof that the architect's decision was impelled by fraud or resulted from mistake."

It is obvious from the findings that the trial court decided that plaintiff had fully performed its contract, in respect of these floors, by constructing them, as it had agreed to do, in accordance with the plans and specifications prepared by defendant's architects and written into the contract. Defendant's position is that if a possible way was open to plaintiff by which it could have produced a good floor it was its duty to do so, failing which the consequences must fall upon plaintiff; that, in short, it guaranteed a good floor unless it was impossible to build it by following the specifications.

Plaintiff's contract was to do certain concrete work in connection with the construction of a class A steel and concrete building being erected by defendant. The portion of the work which plaintiff was to do was specifically pointed out; the materials it was to use and the proportions of the ingredients of the concrete were specifically mentioned and the manner in which plaintiff was to apply the mixture carefully provided for. The evidence was that plaintiff performed the work in strict compliance with the requisites of the specifications, and, with the exception of the floors mentioned, the result was entirely satisfactory.

It appears that in constructing these floors plaintiff laid the concrete foundation, or built what are termed the "floor slabs," but did not put on the finishing coat until a month or six weeks later; plaintiff being engaged upon other parts of the work meanwhile. Before the finishing coating was laid on the slabs, the latter were cleaned and prepared as directed by the specifications, the top coating was made "perfectly smooth and well troweled and perfectly level," as called for in the specifications. The surface was then covered with sand, an approved method of protecting the cement in the process of hardening or curing, and adhering to the slabs. Later, as found by the court, on the removal of this sand, cracks in the cement and failure to unite with the slabs in places were disclosed. All this work at its various stages was done under the personal inspection of the architect or his representative, and, as the court found, with his approval. The court found that plaintiff "laid the cement topping upon the third, fourth, fifth, and sixth floors of said building in a good and workmanlike manner, and did fully perform and complete the work thereof in compliance with the conditions and in accordance with the plans and specifications of the contract." Plaintiff's attention having been called to the defective condition of the floors, it promptly expressed its willingness to remedy it, and it made an attempt to do so by relaying the defective places in the top coating, in doing which it followed the requirements of the specifications for this work in every particular; but the mixture failed to unite with the slabs, the result being that about 50 per cent. of the floors was in this defective condition when plaintiff completed his contract and had called for a certificate of final completion, which was refused. There was evidence tending to show that a better result might have been obtained had plaintiff put on the top finish contemporaneously with laying the slabs; that to have "scored" the top cement finish on the concrete slabs, or to have marked the floors off into "expansive joints," would also have been in accordance with good workmanship; that the cement finish might have been flooded with water and allowed thus to dry or cure and less shrinkage might have followed. These suggestions of experts were obtained upon defendant's theory that, had there been any possible way to do the work which would have avoided what happened, it was plaintiff's duty under the contract to adopt such way regardless of the obligations imposed by the terms of the contract and regardless of the duty put upon the architect in the matter of personally directing, instructing, inspecting, and supervising the work. Scoring was not mentioned in the specifications. The architect testified:

> "Q. As a matter of fact, you personally directed them to omit the scoring? A. They asked me how I would like to have the floors scored. I said, 'No,' make the floors smooth and level."

Nothing was said in the specifications about getting the top finish on simultaneously with the fabrication of the slabs. The specifications read:

> "* * * Before the concrete topping is placed on concrete floor slabs throughout third, fourth, fifth, and sixth floors, see that all concrete work is well cleaned off (broom cleaned) then well wet and dusted with cement; all to be done before the top coat of cement is applied."

These directions were faithfully followed. They show clearly, however, that the laying on of the top finish contemporaneously with the construction of the slabs as the work progressed was not contemplated. The witnesses generally agreed that to have laid the top coating contemporaneously with the other work on the floors would have been the best practice, though some of them thought it impracticable and much more expensive than the course taken. Architect Toepke testified:

> "Q. Then, in your opinion, it would make no difference whether the cement coating was laid simultaneously with the concrete slab, or some time afterwards? A. Well, I do not see that there would be but very little difference."

And this may account for the absence of any such requirement in the specifications or any directions other than therein expressed. The contract expressly provided that all work shall be done "in accordance with the plans and specifications prepared by Havens & Toepke, architects, and under their direction, supervision and control," and "material delivered or work erected not in accordance with the plans and these specifications must be removed at the contractor's expense and replaced with other material or work satisfactory to the architects"; but it was also provided that the architects "shall exercise all reasonable diligence in the discovery and report to the contractor, as the work progresses, of materials and labors which are not satisfactory to the architect or superintendent, so as to avoid unnecessary trouble and cost to the contractor in making good defective parts." The delay in putting on the top finish was known to the architects, and, if it was likely to affect the work injuriously, the architects in fairness should have called attention to it. They made no objection, but supervised the putting on of the top finish and approved the work. Furthermore, the work on the four floors was finished on February 26, 1909, "with the exception of an opening of a brickmason's hoist," estimated to cost $120, and, on March 1, 1909, a statement of the condition of the work at that time was presented to defendant, a bill made out, and demand made for payment, and the record shows that payment was made on the architects' certificate that this particular work of laying the top cement finish was completed with the exception of a small amount of trowel finish about the elevator opening, amounting to $120. And the court found that all the floor work, including the top finish, was completed on or about March 29, 1909, "under the direction, inspection, and supervision of said architect, or his authorized representative, and approved by him, from the commencement of the laying of said top cement finish until its completion." Except as to this small bit of work, noted in the statement, the architects' certificate was in effect a certificate of the completion of the work on these four floors on March 1st. It is urged by defendant against this conclusion that the architects could not at that time (March 1, 1909) have known what subsequently developed and hence could not have intended to certify to the completion of the work. But they knew as much as plaintiff knew, and they knew that plaintiff was doing the work and in fact did the work precisely as it had agreed to do it, and, unless it can be held that plaintiff guaranteed the work to result in a perfect floor, it seems to us that defendant ought not to be permitted now to go behind the certificate of its agents chosen by it to pass upon this very matter. We cannot say that the contract imported such guaranty. It seems to us that, when the plaintiff agreed "to furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner * * * all floor and roof slabs * * * and other works shown and described," etc., its engagement was to do this, as the contract specifically provides, "in conformity with the plans, drawings and specifications for the same made by Havens & Toepke, the authorized architects employed by the owner, * * *" and "under the direction and supervision and subject to the approval of said architects." This interpretation, we think, is, as the contract provides, "within a fair and equitable construction of the true intent and meaning of said plans and specifications." Where, in the erection of a building, the owner agrees to pay a certain sum for doing a certain part of the work and specifically provides the kind of materials to be used and the manner in which they are to be used and stands by and directs and afterwards approves the work, the risk of its serving the purpose intended by the owner is clearly upon him.

Appellant cites English and American cases in which the contractor was held to have guaranteed good results in the absence of an express warranty to that effect, although counsel say:

> "In some cases a contrary conclusion has been reached where the plans and specifications are furnished by the owner and the builder merely agrees to perform the labor and furnish the materials specified."

We do not feel called upon to give particular attention to the cases cited in which we think the rule enunciated will be found to rest largely either upon the terms of the contract, or upon the character of the work to be done. The rule applicable here, we think, will be found in Bancroft v. S. F. Tool Co., 120 Cal. 228, 52 Pac. 496, and Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983. And the distinction made in these cases is pointed out in Bryson v. McCone, 121 Cal. 153, 53 Pac. 637, where it was held that defendant undertook, not only to make the plant according to specifications, but also guaranteed that it would do certain work. In Mannix v. Tryon it was said:

> "He (the plaintiff) did not agree generally to plaster the dwelling, which would leave to him the selection of the materials and the method of doing the work. His agreement was to do it in a way that the owner and the original contractor had designed; according to the specifications which they had agreed on. He had no discretion in the matter. When he followed strictly those specifications, used exactly the materials they called for in the composition of the mortar and hard finish, and applied them in a workmanlike manner, he did all his contract called for. He did not contract for results, but only to do the work in a specified way."

Jones & Laughlin Steel Co. v. Abner Doble Co., 162 Cal. 497, 123 Pac. 290, is a case where it was contended that the contractor warranted that the floors of the warehouse, being constructed in part with materials furnished by plaintiff, would bear certain weights. Speaking of the defendant, the court said:

> "The inference is that it could and would judge for itself as to the sizes of beams required. It had a competent and experienced architect in its employ. There is nothing necessarily showing that the defendant was not, or did not consider itself, competent to determine the matter, or that it relied on plaintiff's advice or suggestions regarding it; or that plaintiff offered or undertook to give such advice."

We have not referred to the evidence and the findings as to the cause of the cracking and checking of the top dressing. The court found, and there was evidence to support the finding, that:

> It "was caused by the improper mixture of gravel and cement, said gravel and cement having been mixed and laid down by plaintiff in the proportion of equal parts, being the proportion specified and required by the contract."

We cannot see that it was essential to the finding of the court that plaintiff had fully performed its contract, to make a finding as to the improper proportions of sand and cement in the mixture required by the specifications, as the cause of the defects in the floors. If, as we hold, plaintiff contracted only to furnish the materials and do the work in compliance with the plans and specifications and in good and workmanlike manner, the cause of the defects would be immaterial. Whatever the materiality of the finding may be, if any, its tendency is to fix the responsibility upon defendant by whose direction this improper mixture was used.

It appeared that the last progress payment was made by defendant in pursuance of the last certificate issued by the architect, April 7, 1909. The bill, dated April 1, 1909, states on the debit side the total due under the contract at that date, less 25 per cent. Then follow payments as credits and dates of payment, including the March payment, leaving a balance, $836.25, for which a certificate was given. The final bill rendered is dated June 23, 1909, in like form, for the whole contract price less the credits from the beginning to the April 1st bill, inclusive, and less the 25 per cent. reserved under the contract. During the ensuing months, plaintiff endeavored to remedy the defects in the floors, keeping itself strictly within the specifications, but met with the same difficulty encountered in first laying them. On September 24, 1909, plaintiff made written demand on the architects for certificate of acceptance and final payment, and on September 27, 1909, the architects replied, stating:

> "That a certificate of acceptance will not be issued for the reason that the cement topping of the third, fourth, fifth, and sixth floors is not in compliance with the specifications, it being loose in several places and badly cracked and will not be acceptable to owner in its present condition."

It appeared that, beginning on September 1, 1908, and continuing monthly on the first of each succeeding month to April 1, 1909, inclusive, architects' certificates were issued and payments promptly paid thereon, and up to this time no question arose as to materials or workmanship. The top dressing of these floors was substantially completed in February, with the exception of the little work already pointed out costing $120, and this remaining work was done in March and carried into the bill of April 1st, which was paid on the architects' certificates.

Plaintiff relies and, it seems to us, with justifiable confidence, upon the case of City Improvement Co. v. City of Marysville, 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317. It is true that in that case there was a final certificate of completion, and this is urged as one of the grounds for distinguishing the two cases. It seems to us that, so far as the work in question is concerned, the March certificate, while perhaps not an acceptance, was a certificate of the completion of the work in accordance with the plans and specifications, and the court found that this work had been fully performed and completed on March 29th.

The rule is well established, as stated in Coplew v. Durand, 153 Cal. 278, 279, 95 Pac. 38 (16 L. R. A. [N. S.] 791):

> "Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract." City Street Improvement Co. v. Marysville, supra; Cal. Sugar Agency v. Penoyer, 167 Cal. 274, 279, 139 Pac. 671.

The court said, in Coplew v. Durand, supra:

> "The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with."

It must not be overlooked that the only part of the work now or at any time in controversy was the top dressing of the floors. We have seen that the March certificate of completion covered this work, and it was paid for on that certificate, so that it cannot be said the plaintiff was wholly without the architects' certificate. The refusal to issue the final certificate in September was based upon the claim "that the cement topping of the third, fourth, fifth, and sixth floors is not in compliance with the specifications." The evidence was, and the court found, that the work was done in conformity with the specifications in every particular, and at the time of its completion no question arose as to any feature of the work. On the contrary, it was declared by the architect Toepke to be satisfactory. The reason given for the refusal was not founded on the facts, nor upon what we regard as the fair construction of the contract, and can only be based upon the theory that plaintiff guaranteed a good floor, which was a matter not within the province of the architect to foreclose and make the ground of his refusal; neither is it a theory justly deducible from the provisions of the contract.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(33 Cal. App. 411)

KARAHADIAN v. LOCKETT. (Civ. 2021.)

(District Court of Appeal, First District, California. April 14, 1917. Rehearing Denied by Supreme Court June 11, 1917.)

1. Vendor and Purchaser 🔑137—Contract—Construction.

A contract for purchase of land conditioned upon the purchaser's attorney approving the title does not authorize such attorney to arbitrarily or capriciously reject the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 260.]

2. Vendor and Purchaser 🔑16(1)—Acceptance of Contract—What Constitutes.

Part payment of the purchase price constitutes an acceptance of terms contained in a contract for sale of land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 17.]

3. Brokers 🔑52 — Compensation — Sufficiency of Service.

A vendor's broker is entitled to commissions where prospective purchaser executed a valid contract of purchase, although such agreement contemplated that it would be followed by another contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by K. Karahadian against Philip Lockett. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Everts & Ewing, of Fresno, for appellant. John Shishmanian, Barbour & Cashin, and D. A. Cashin, all of Fresno, for respondent.

LENNON, P. J. The plaintiff in this action was employed and authorized by the defendant "to sell" certain real property belonging to the defendant, and "to receive any deposit" which might be paid on account of the purchase price. Thereafter the plaintiff, as the agent of the defendant, entered into a written contract with parties known as "Kludgian brothers" to purchase the defendant's property for the sum of $14,000, but upon terms slightly different from those originally proposed and authorized by the defendant. The defendant, however, in writing ratified the contract thus made by the plaintiff, and accepted from him the sum of $200, which, simultaneously with the execution of the contract, had been paid to plaintiff by the intending purchaser on account of the purchase price. In addition to containing all of the essentials of a valid and enforceable contract of purchase and sale, the contract in question provided that "upon a favorable report of the attorneys" for the purchaser concerning the title to the property the parties thereto would enter into an agreement for the purchase of the property "upon the terms and conditions therein mentioned." Subsequently the attorney for the purchasers rejected the title to the property for alleged defects, which it is admitted did not exist, or if existing could have been readily cured. Ultimately the purchaser refused upon demand to perform his contract, and declined the defendant's tender of a deed to the property. The defendant had agreed to pay the plaintiff 5 per cent. of the purchase price in the event of a sale. Upon substantially these facts the case was tried in the court below and judgment rendered for plaintiff in the sum of $700 upon a finding to the effect that the plaintiff had procured a purchaser for defendant's property who had entered into a valid and enforceable contract binding him to purchase. The evidence we think supports this finding.

[1-3] The clause in the contract concerning the necessity for a favorable report upon the title to the property from the attorneys of the purchaser cannot be construed, as counsel for the defendant contends, to mean that the obligation of the purchaser was dependent upon a mere arbitrary, capricious, and whimsical rejection of the title to the property by his attorney. Obviously the clause in question did not have the effect of making the contract here involved merely an agreement for an option to purchase rather than a completed contract of purchase and sale. The payment of the deposit of $200 on account of the purchase price was an acceptance of the terms and conditions of the contract (Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249, 681; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123); and while it savored to some extent of a preliminary contract which contemplated that it would be followed by another contract of purchase and sale, nevertheless inasmuch as it was mutually obligatory and contained in and of itself all of the essentials of a valid and enforceable contract, obviously the defendant, had he so desired, could have compelled the intending purchaser to perform, and therefore neither the latter's refusal to accept the deed tendered to him, nor his failure to enter into the second contract, could operate to defeat the plaintiff's right to recover his commission from the defendant.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(33 Cal. App. 414)

FAIRMONT CREAMERY CO. v. LOS ANGELES ICE & COLD STORAGE CO.

(Civ. 2217.)

(District Court of Appeal, Second District, California. April 14, 1917.)

1. Factors 🔑52—Pledge of Goods.

Though, before a car of eggs is consigned to a factor, he had obtained customers therefor, he receives the property for the purpose of making a transfer, within Civ. Code, § 2991, providing that one who allows another to assume the apparent ownership of property for purpose of making any transfer of it cannot set up his own title, to defeat a pledge of the property, made by the other, to one who received the property in good faith in the ordinary course of business and for value.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 83, 84.]

2. Factors 🔑52—Pledge of Goods—Good Faith of Pledgee.

For defendant who took a pledge of a car of goods from a factor to whom plaintiff had consigned them to be a pledgee in good faith, and so under Civ. Code, § 2991, entitled to hold them against plaintiff, he need not have examined the bill of lading, which in fact gave the factor apparent ownership, but he could at his risk assume that it did.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 83, 84.]

3. Pledges 🔑9—By Apparent Owner—For Value.

So far as a pledge by apparent owner of property is for past indebtedness, it is not for value, necessary under Civ. Code, § 2991, to be good against the real owner.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 20.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Fairmont Creamery Company against the Los Angeles Ice & Cold Storage Company. Judgment for plaintiff, and defendant appeals. Reversed.

Sidney J. Parsons and Horace Wilson, both of Los Angeles, for appellant. Henry K. Norton and Wilbur Bassett, both of Los Angeles, for respondent.

CONREY, P. J. Action for conversion. Judgment was rendered in favor of the plaintiff, and the defendant has appealed from the judgment.

As shown by the evidence, it appears that on the 17th day of June, 1913, one Fred F. Lambourn was engaged in business at Los Angeles as a broker selling merchandise on behalf of consignors, and also as a dealer in merchandise on his own account. He had been in business for several years, and so continued until the 4th day of August, 1913, when he was adjudged bankrupt. The plaintiff was engaged in the produce business at Omaha, Neb., and had been doing business with Lambourn as broker since April, 1911. On June 5, 1913, Lambourn telegraphed to plaintiff that he had sold a car of eggs. The telegram was as follows:

"Sold car candled current receipts fifty three and over small dealers eighteen cents track. Wire car number and when can ship."

On June 7, 1913, the plaintiff shipped the carload of eggs thus ordered and made the consignment directly to and in the name of Lambourn. The car arrived at Los Angeles on June 17th. When the merchandise was shipped from Omaha, a bill of lading therefor, showing the shipment from plaintiff to Lambourn, was received by plaintiff from the railroad company and was mailed by the plaintiff to Lambourn. According to the testimony of plaintiff's sales manager, this was done that Lambourn "might obtain possession of the eggs for the purpose of making delivery to the various parties to whom he had made sale as our broker." At the same time, the plaintiff forwarded, through the Omaha National Bank to that bank's correspondent in Los Angeles, a draft on Lambourn directing him to pay to the order of the Omaha National Bank the sum of $2,160 "and charge to account of this company." The draft was not paid.

On June 17, 1913, Lambourn informed the superintendent of the defendant that he had a car of eggs and wanted a loan on it. The eggs were taken into possession of defendant and placed in its warehouse, and defendant issued to Lambourn a warehouse receipt therefor. Thereupon, and on the same day, the defendant loaned to Lambourn the sum of $2,300, taking his note for that sum, together with an agreement pledging and depositing with the defendant said carload of eggs as collateral security for the payment of that or any other liability or liabilities of Lambourn to the defendant, "due or to become due or that may be hereafter contracted." At all times mentioned in this opinion Lambourn was indebted to the defendant in an aggregate amount much exceeding the value of the property claimed by the plaintiff in this action. The evidence does not show when this indebtedness, other than the $2,300 loan, was incurred, except that defendant had been making loans to Lambourn for about two years, and on August 4, 1913, he owed it $90,000. In making that loan of June 17th the defendant made no special inquiry as to ownership of the merchandise and did not see or ask to see the bill of lading. It simply accepted Lambourn's statement that he had the car there and the fact that it was there.

The defendant did not, at the time of making the loan and receiving the pledge, have any knowledge concerning the ownership of the property other than that it was in possession and control of Lambourn, as above stated. On September 10, 1913, the defendant sold said lot of eggs and received therefor the sum of $2,880. On September 24, 1913, the plaintiff made written demand upon the defendant, stating therein that the plaintiff "is the sole owner" of said property stored with defendant in the name of Fred F. Lambourn, and demanded immediate delivery thereof and offered "to pay all reasonable charges upon said eggs upon delivery of same."

The first and principal question presented here arises under appellant's claim that the evidence is insufficient to support the finding that the plaintiff was the owner and entitled to the possession of the goods at and after the time of the transactions which took place between the defendant and Lambourn on the 17th day of June. Appellant relies upon certain sections of the Civil Code.

"A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership." Civ. Code, § 2369.

It appears that Lambourn was a "factor" within the definition stated in Civil Code, § 2026, which says:

"A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

"One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value." Civ. Code, § 2991.

[1] Replying to the contention of appellant under these provisions of the statute, and especially under section 2991, Civil Code, counsel for respondent first argue that upon the facts shown Lambourn did not have apparent ownership of the property; that he did not receive the goods "for the purpose of making any transfer," since the goods when shipped had already been sold and were consigned to Lambourn purely as a bailee to make delivery. We do not agree that his authority was thus limited. It may be that the property had been sold in the sense that there were purchasers to whom the goods were intended to be distributed by Lambourn, but there remained to be done by him the acts which would transfer the eggs to those purchasers. In the meantime they could not be identified as belonging to any purchaser, and the property remained in possession of Lambourn for the purpose of making those transfers.

[2, 3] Counsel for respondent further suggest the fact that the defendant did not inquire of Lambourn as to the form of the bill of lading and never saw that document until the day of the trial. Therefore they say that as to them Lambourn had mere possession,

and that appellant cannot in any sense be said to be a pledgee who received the property in good faith in the ordinary course of business. We think that it was not necessary for appellant to examine the bill of lading. By acting upon the assumption that Lambourn had such bill of lading and without examining the same for itself, appellant took the risk that he might not have any such document in his possession. But, since he did have it, the case is the same as if appellant had examined it and relied upon the evidence obtained by its own inspection.

Respondent's counsel refer us to Akron Cereal Co. v. First National Bank, 3 Cal. App. 198, 84 Pac. 778, where the provisions of section 2991 were considered. That case, like the case at bar, was an action for conversion of goods which had been forwarded to a point where they were to be sold or distributed. But the facts were essentially different from the present case, since, among other things, it appeared that the merchandise had been shipped by the plaintiff to its own order, and the terms of the bill of lading had not been such as to vest apparent ownership in the agent. The court there said that, in order that by reason of the pledge made to the defendant the plaintiff should be deprived of his right to the property, it was incumbent upon the defendant to show that the pledgor had been allowed by the plaintiff to assume the apparent ownership thereof for the purpose of making a transfer of it. "The pledgee must show the existence of these conditions as well as good faith on his part before he can claim a title superior to that of the original owner." Referring to the person in possession who made the pledge of the property, it was said:

> "His apparent ownership of the property is limited by its source, and the rights of the defendant to the property as against the plaintiff are limited in the same manner."

Admitting the full force of these principles, nevertheless we think that the defendant has shown that Lambourn's apparent ownership of the merchandise at the time when he attempted to pledge it to the defendant was caused by the conduct of the plaintiff in consigning it to Lambourn for the purpose of transferring it to purchasers, and defendant is entitled to the protection given by section 2991 of the Civil Code.

The court determined that the value of the goods was $3,120. The pledge was good as against the plaintiff's claim, for the amount of the debt created by the $2,300 loan, and for any additional advances made thereafter by the defendant to Lambourn. It was not, as against the plaintiff, valid as security for indebtedness existing prior to June 17, 1913, since as to such indebtedness it was not a pledge made "for value."

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

(33 Cal. App. 426)

PEOPLE v. SCHMIDT. (Cr. 475.)

(District Court of Appeal, Second District, California. April 16, 1917. Rehearing Denied May 14, 1917. Denied by Supreme Court June 14, 1917.)

1. HOMICIDE 🔑234(1) — PARTICIPATION OF DEFENDANT—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder by dynamiting, evidence *held* sufficient to show defendant's active participation in the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 482.]

2. CONSTITUTIONAL LAW 🔑197 — EX POST FACTO LAW—TIME.

The time important to be taken into consideration in determining whether a law is ex post facto or not is the time and the state of the law when the alleged offense was committed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550.]

3. CONSTITUTIONAL LAW 🔑197 — EX POST FACTO LAW.

Where, after a murder and before indictment was filed against defendant, Pen. Code, § 995, was amended to take away defendant's right, on motion to set aside indictment, to urge any objection to grand jurors which would be good on challenge to the trial jury, either as to the panel or an individual juror, and such law became operative after the indictment was filed, and before defendant was arrested, and before he made his motion to quash the indictment, such law was not objectionable as ex post facto, as it related to procedure, and did not deprive defendant of a substantial right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550.]

4. INDICTMENT AND INFORMATION 🔑137(1, 4) —MOTION TO QUASH—STATUTE.

Defendant, on motion to quash the indictment, can urge only such grounds as are permitted him by Pen. Code, § 995; moreover, no inquiry can be made as to the sufficiency of the evidence or the mode of examining witnesses before the grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480, 483.]

5. DISTRICT AND PROSECUTING ATTORNEYS 🔑3(1)—APPOINTMENT OF DEPUTY—STATUTES.

Despite Pol. Code, § 4230, fixing the compensation of county officers, not limiting them in the employment of deputies, a county officer, such as the district attorney, is entitled to appoint as many deputies as he chooses, providing that, if he appoints any in excess of those for which compensation is provided to be paid from the public treasury, he must, under section 4024, pay such deputies at his own expense, if they are to receive compensation.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10–12, 15.]

6. CRIMINAL LAW 🔑1158(3) — REVERSAL — RULINGS ON CHALLENGES TO VENIREMEN.

On challenges to veniremen for bias, to justify reversal the evidence given by the venireman upon his examination must be practically without conflict as to the fatal points, and be so opposed to the decision of the trial court that the question becomes one of law.

7. JURY 🔑103(14)—BIAS—STATUTE.

In a prosecution for murder by dynamiting a newspaper building, where it appeared that veniremen had heard of the explosion shortly after it occurred, had read newspaper accounts and discussed the explosion with persons not connected with the case, etc., and that they had an opinion, which would require evidence to dislodge, that the building had been blown up by dynamite unlawfully exploded with criminal intent, it appearing from their answers that the foundation for any opinion entertained by them was public rumor, statements in public journals, and common notoriety, each declaring his ability to lay the opinion aside and consider the case against defendant fairly and impartially, denial of challenges to the veniremen for actual bias was properly made, in view of Pen. Code, § 1076, declaring that where the opinion of a venireman is founded on public rumor, statements in public journals, etc., he shall not be disqualified, providing it appear that he can act impartially, etc.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 474, 478.]

8. Conspiracy 🔑47 — Evidence — Acts of Conspirators—Proof of Conspiracy.

In proving a conspiracy, it is not necessary that proof be made that the parties met and actually agreed to undertake performance of the unlawful act, but a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of its existence, by leaving the weight and sufficiency of the evidence to the triers of the questions of fact.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107.]

9. Criminal Law 🔑423(3) — Evidence — Conspiracy.

In a prosecution for murder by dynamiting a building, where the evidence established a nation-wide conspiracy on the part of a labor union to terrorize open-shop employers by means of dynamite and nitroglycerin outrages, it was proper to show all the acts, declarations, and correspondence had between persons concerned referring to the means and methods employed and to be employed in furthering the common design, though defendant for the first time took an active part in the conspiracy a considerable time after explosions in the eastern part of the country had been produced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 991, 992.]

10. Criminal Law 🔑423(9) — Evidence — Conspiracy.

In such prosecution, declarations of any of the conspirators, made after any particular explosion had been caused, were not inadmissible as having been made subsequent to the completion or accomplishment of the object of the conspiracy, which was still alive and in effect with its ultimate objects unattained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1000, 1001.]

11. Criminal Law 🔑404(4)—Evidence—Demonstrative Evidence.

In such prosecution, evidence consisting of a suit case, containing an alarm clock, a coil of black fuse, some blasting caps, and copies of newspapers containing accounts of the destruction of the newspaper building, such suit case having been found in the checking room at a ferry station in a different city some months after the explosion, was competent; the clock and other contents being of a kind similar to those used by defendant's coconspirators in the manufacture of their infernal machines.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891, 893, 1457.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

M. A. Schmidt was convicted of murder, and, from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Nathan C. Coghlan and Edwin V. McKenzie, both of San Francisco, Job Harriman and J. H. Ryckman, both of Los Angeles, and William F. Herron, of San Francisco, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Thomas Lee Woolwine, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

JAMES, J. Appeal from a judgment directing the imprisonment of the defendant in the state penitentiary for the period of his natural life, and also from an order denying his motion for a new trial.

The defendant was accused by an indictment of a grand jury of the county of Los Angeles, in which several other defendants were named, of having on the 1st day of October, 1910, feloniously and with malice aforethought murdered one Charles Hagerty. The indictment was filed on the 5th day of May, 1911. Defendant not being apprehended until the year 1915, he was then placed upon trial, which, after a lengthy hearing, resulted in a verdict of guilty being returned against him. It will be necessary to make a somewhat extended statement of the evidence heard at the trial, in order to give proper illustration to the argument of appellant and to the propositions which he advances and which he claims entitle him to have the judgment reversed. In this statement we shall refer most particularly to the testimony introduced on behalf of the prosecution. The attempt will be only to first furnish in narrative a history of the alleged crime, as the evidence for the people tended to prove it, and we will later consider the competency of the testimony as it is met by objections urged on behalf of the appellant.

In the year 1905, there existed in the United States an organization designated as the International Association of Bridge and Structural Ironworkers. It was an organization, as its name implies, made up of various suborganizations or labor unions scattered throughout the country. The objects, as declared by its constitution, were:

> "To cultivate feelings of friendship among the craft, to assist each other to secure employment, to reduce the hours of labor, to secure adequate pay for work, * * * and to elevate the moral, intellectual and social condition of all members, and to improve the trade."

The offices of the association were in Indiana, and a system was provided by which funds should be collected and disbursed. J. J. McNamara was the secretary and treasurer of the association during the time herein mentioned, and the association in 1905 declared a general strike against the American Bridge Company, which was a large contracting concern engaged in the erection of structures of iron and steel. One of the objects desired by the association was to compel all employers who were using nonunion labor to unionize their plants and employ only members of the recognized union. The American Bridge Company was one of the chief employers of nonunion labor, but was not the only concern carrying on business on the open-shop plan in the structural iron and steel line. J. J. McNamara, apparently without any authority given him by the constitution or members of the organization, unless that authority is deemed to be an implied one, encouraged persons to destroy various work being constructed under the open-shop plan. In 1908 and 1909, bridges, viaducts, and other structural work being done by nonunion employers, to the number of perhaps 20, were destroyed by dynamite or nitroglycerin. Most of these explosions were produced with the knowledge and active encouragement of J. J. McNamara, and funds of the association were used to pay the persons who destroyed the work. The evidence was sufficient to show that the purpose of J. J. McNamara and fellow officers of the association was to compel the employers of nonunion labor to accept the dictates of the association, and in order to do this the means apparently most ready and acceptable to their hands was the use of dynamite and other high explosives for the purpose of ruining work under construction and destroying the results of the labor of the nonunion employés. It was customary for the heads of local unions scattered about the country, when they desired assistance in protecting their cause in the particular locality, to request of the International Association funds and assistance. In 1910, the attention of J. J. McNamara and his fellow officers was directed to the state of California, and particularly to the city of Los Angeles, which was known to be to a considerable extent an "open-shop" city. One Clancy, a leader of an ironworkers' union in San Francisco, wrote to J. J. McNamara several times, asking that a certain man be sent to the west (this man being one Hockin, who had produced several explosions theretofore in the east). J. J. McNamara did not send Hockin, but did send his brother, J. B. McNamara. J. B. McNamara reached Seattle and was there visited by Clancy, and he then proceeded to San Francisco. The McNamaras had themselves concocted an infernal machine which had been used to produce the explosions on the nonunion work. This machine consisted of a "tatoo" clock attached to a board, to which board was also attached a dry battery. By a system of wiring, the clocks on the alarm dials could be set at any chosen hour, and, when that hour arrived and the bell-hammer commenced to vibrate, electrical connection would be made from the battery to a fulminating cap attached to dynamite or whatever explosive was used, and thus the results planned for would be accomplished. J. B. McNamara, in the office of the association in Indianapolis just before he left there for the coast, said, in the presence of his brother and one McManigal, that he was going out and give them "a damned good cleaning up." At the time J. B. McNamara arrived in San Francisco, a great effort was being made to unionize the city of Los Angeles in the ironworking trades, and a great deal of money was spent in that endeavor. The Los Angeles Times and the Merchants' & Manufacturers' Association of Los Angeles had both advocated the open-shop plan of labor employment and had been most active in work in opposition to the efforts of the unions to stamp out the open-shop policy. One Zehandelaar was the secretary of the Merchants' & Manufacturers' Association, and Harrison Gray Otis was president and manager of the Los Angeles Times. The defendant was a union worker who resided in San Francisco at and before the occurrence of the explosion which caused the death of Hagerty. He had been active in the work of attempting to unionize the city of Los Angeles and had visited that city immediately before meeting McNamara, in the interests of the unionist work. Immediately upon the arrival of J. B. McNamara in the city of San Francisco, he was visited by defendant frequently. On the 17th day of September, 1910, defendant wrote out (the evidence proved his handwriting) an advertisement which was published in two San Francisco newspapers, in the following form:

> "Wanted—By party of men, 16–24 foot launch for ten days; cruise around Bay and tributaries. Best of references."

Soon thereafter a launch was rented from a boat-furnishing concern. This launch was a power launch and was called the "Pastime." About the same time, a man appeared at the office of a company manufacturing high explosives, which office was located in the city of San Francisco. This man desired to purchase a very high explosive, asking for "90 per cent. nitroglycerin." Upon inquiry being made as to what work was to be done with it, the manufacturing company's representative was informed that it was desired to be used in blowing out stumps. The applicant was expostulated with by the manufacturer's agent and told that such a high percentage of explosive was not needed, but that a 40 per cent. grade would be sufficient. However, the high per cent. quality was insisted upon, with the result that an order was given by the agent to his company to have manufactured 500 pounds of 80 per cent. dynamite. The manufacturing plant of the powder company was located across the bay from San Francisco, and from that plant was later taken the explosive by defendant and two other persons. After securing the launch for a rental period, the men went to Oakland and procured some enameled letters which they placed over the name painted on the launch and changed it from "Pastime" to "Peerless." Schmidt was one of these men who appeared at the different places. One of the defendant's eyes was defective, and quite noticeably so to the ordinary observer. He was identified by storekeepers at Oakland, by a boathouseman at Sausalito, where the name of the launch was changed, and by the delivery agents of the powder manufacturing company at the latter's plant. He was identified by persons who were acquainted with his physical characteristics and who saw him at the numerous times when he visited McNamara during the latter's stay in San Francisco. It will be unnecessary to mention particularly the evidence which described the defendant as being a participant in the work of securing the dynamite. It is enough to say that there was ample evidence to authorize the jury to conclude that he was one of the persons so concerned. The dynamite having been secured, it was taken to the city of San Francisco and a large part of it stored in an empty house which was rented for the purpose. On the morning of October 1, 1910, an explosion occurred in the building in which the Los Angeles Times was published, and which was owned by the Times Publishing Corporation. The explosion occurred at 1 o'clock in the morning at a time when numerous of the employés were still at work, the journal published being a morning newspaper. The explosion occurred in a little alleyway which, on the ground floor, separated two portions of the building and which was closed overhead. The explosion was of such violence as to rend iron or steel beams and to force débris through the roof of the building and to a considerable height above. Fire immediately succeeded the explosion, and the building was almost entirely destroyed, 21 persons being killed, among them Charles Hagerty. One witness testified to having seen a man whom he believed to be J. B. McNamara in the lower building of the Times the night before the explosion occurred. On the morning of the 1st of October, a suit case was found near the residence of the president of the Times Company by police officers. One of the officers started to cut open the suit case, when a whirring noise was heard, and the men immediately got out of the way. When they reached a distance of 100 feet or more, there was an explosion which blew a large hole in the ground, tore the leaves from trees, and broke a number of windows in the neighborhood. At about the same time, a package was found close to the residence of Zehandelaar, the secretary of the Merchants' & Manufacturers' Association. This package was found to contain a number of sticks of dynamite and an infernal machine manufactured in exactly the way that the McNamaras had before fashioned those instruments of destruction. The dynamite found in this parcel was stamped with the name of the company which furnished the explosive to the defendant and McNamara in San Francisco, and upon being analyzed by a chemist, was found to be of the same composition as the lot procured from the company by Schmidt and McNamara. One witness testified that in the summer of 1910 he had a conversation in San Francisco with the defendant, and asked him at that time where he had been. The witness then said:

> "He said he had been down to Los Angeles, and so we got to talking further. He says, 'They are having an awful time down there,' he says. He says: 'They are beating up men down there. They won't give a union man any chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon.'"

After the indictment of defendant, search being made for him, he was not to be found. It was shown in testimony that he had gone to New York and lived at the house of Emma Goldman a portion of the time under an alias. One witness testified that defendant told him that he had intended to go to London, England, but that he could not get away from New York on account of the war. Further, that he (Schmidt) said that if he had had the Los Angeles job alone he could have got out all right with it. The person McManigal, who has been before referred to herein, testified on behalf of the prosecution and gave evidence relating to the general destructive operations inaugurated and carried out under the direction of J. J. McNamara. The records and files found in the office of the association at Indianapolis, embracing correspondence had by McNamara with various persons concerned in producing explosions, were introduced in evidence.

[1] Taking the testimony all in all, and leaving out of consideration now the matter of its competency at this point, it must appear that the evidence was ample to show the active participation of the defendant in the crime which had been committed. To what has been stated, it may be added that there was evidence sufficient in quantity and competent to show that the explosion in the Times building was the result of exterior agency, or an explosive brought onto the premises and used in an unlawful way. The foregoing is a somewhat meager abstract of the evidence and presents its salient features only. The testimony given at the trial covers about 8,000 pages, and more than 600 exhibits were introduced before the jury.

The points relied upon by appellant as furnishing ground for his claim that the judgment and order in this case should be reversed will be considered in the order in which they are proposed by his brief.

The defendant upon being brought into court presented a motion in which numerous alleged grounds were set forth as reasons why the indictment should be quashed. One of the principal grounds asserted was that four of the grand jurors were disqualified by reason of bias and prejudice. Defendant, in his affidavit which was presented with the motion, set out many alleged facts which would tend to show that the grand jurors challenged had been, prior to their being sworn on the jury, active in securing information relative to the matter of the explosion which produced the death of Hagerty and the fellow employés. Under section 995 of the Penal Code, as that law existed at the time of the commission of the alleged homicide, and at the time the indictment was filed, a defendant accused by indictment was permitted, on his motion to set aside the indictment, to urge any ground good on challenge to a trial jury, either as to the panel or an individual juror. In 1911, before the indictment was filed, the Legislature by act amended section 995, Penal Code, and by that amendment took away the right to urge on such a motion the last-mentioned causes. This act became effective in the latter part of May of the same year, the indictment having been filed in that month of May, but prior to the taking effect of the law. An affidavit was made by the grand jurors challenged, setting forth in a general way that they had acted without prejudice in the consideration of the defendant's case and had been uninfluenced by reports or information received by them from outside of the grand jury room. As the defendant set forth specific facts tending strongly to show that the jurors challenged could scarcely avoid feeling a bias in his case, it is extremely questionable that this affidavit made on behalf of the jurors could have been considered as a complete answer to the motion, as to the particular ground mentioned. However, the defendant did ask leave to examine the jurors in open court, which leave was denied him, and this brings us directly to the important question to be considered, to wit, as to whether the law, in existence at the time the motion to quash the indictment was made, was applicable to the proceedings on that motion, or whether the law in force at the time of the commission of the alleged homicide and the filing of the indictment is the one under which the defendant's motion should have been determined. If the law applicable was the law in effect at the time of the commission of the homicide and the filing of the indictment, then the court committed error in denying the defendant's motion.

It is the contention of the appellant that the change in the law by which the ground of the bias and prejudice of the grand jurors as foundation for a motion to set aside the indictment was taken away, if made to apply to the motion when presented by him, would be ex post facto, and hence unconstitutional. The definition of an "ex post facto law" is given very full exposition by the Supreme Court of the United States in the leading case, which is entitled Kring v. State of Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. In determining whether a law is ex post facto or not, the decisions sometimes declare that, where such law merely works a change in procedure or remedy, it is not amenable to objection as being unconstitutional on the ground stated. Such a definition is perhaps too narrow, as the court in the Kring Case takes occasion to declare. In the case cited, referring to Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648, the court approvingly adopts language in definition of the term ex post facto when it declares:

> "It defines four distinct classes of laws embraced by the clause: '(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates the crime or makes it greater than it was when committed. (3) Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.' "

The statement of the writer of the opinion in Calder v. Bull is further quoted, where he says:

> "But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the law; but only these that create or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction."

The gist of the decision is that any substantial right which the law gave a defendant at the time to which his guilt relates cannot afterwards be taken away from him, even though such law does affect "procedure or remedy." The right referred to, however, must be, and such is the tenor of the decisions, a right material to the establishment of the defense of the defendant. Objections to the form of pleadings, not going to the extent of reaching a defect in the statement of facts showing the offense, generally and naturally must be held to fall within that class of law changes which do relate to procedure merely and to procedure not such as a defendant accused of crime may be said to have a vested right in. A law curtailing the number of peremptory challenges which a defendant may interpose to the trial jury is held not to be ex post facto. Harris v. United States, 4 Okl. Cr. 317, 111 Pac. 982, 31 L. R. A. (N. S.) 820, Ann. Cas. 1912B, 810. Laws which, in a statute passed after the commission of a crime and before the trial, make witnesses competent to testify who at the time of the commission of the offense were by law incompetent, are held not to deprive a defendant of a substantial right. Mrous v. State, 31 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834; Hopt v. Utah, 110 U. S. 618, 4 Sup. Ct. 202, 28 L. Ed. 262. See, also, note to People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572.

Our own Supreme Court, in the case of People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257, has held that where a homicide was committed before the adoption of the Constitution of 1879 and at a time when the law required that the defendant be prosecuted by indictment of a grand jury, and by the Constitution before trial it was provided that the prosecution might be either by indictment by grand jury or information of the district attorney, a prosecution by information was not invalid and the law then in force was not open to the objection that it was ex post facto. In that case, the court adopted the language of Judge Cooley, as contained in his work on Constitutional Limitations (page 331), and which finds place repeatedly in decisions dealing with the subject under consideration, and quotes:

"But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings, if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, though it cannot lawfully, we think, in so doing, dispense with any of these substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated simply to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right."

The court further says, referring to the text of Judge Cooley's work:

"The following examples are given by him in a note to page 332: 'The defendant in any case must be proceeded against and prosecuted under the law in force when the proceeding is had. A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of remedies which do not prejudice him; nor one which reduces the number of the prisoner's peremptory challenges; nor one which, though passed after the commission of the offense, authorizes a change of venue to another county; nor one which modifies, simplifies, and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offense.' * * * It is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard of the right of the Legislature to make such changes questioned, neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed, at the time the act was committed. * * * 'The Legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another.' Mr. Bishop, in his work on Statutory Crimes, lays down the same doctrine. He says: 'There is no such thing as a vested right in any particular remedy.'"

See, also, People v. Mortimer, 46 Cal. 114.

[2] The time important to be taken into consideration in determining whether a law is ex post facto or not is the time (and the state of the law) at which the alleged offense was committed.

"If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an ex post facto law. If passed after the commission of the offense, it is as to that ex post facto, though whether of the class forbidden by the Constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its ex post facto character." Kring v. Missouri, supra.

[3] It happened in this case that the law making the change in the statute was passed after the commission of the alleged offense and before the indictment was filed, but that it did not become operative until after the indictment was filed. It was in effect before the defendant was arrested and before he made his motion to quash the indictment. As this law in its changed form referred to the procedure under which the defendant might attack the indictment, it on its face was effective at the time the motion to quash was made and was the procedure to be looked to in governing the motion of the defendant. That it did not deprive him of a right substantial in his defense, we are also assured. A defendant under our law may be prosecuted by indictment or by information after commitment by a magistrate. There is no legal impediment at all, if the lawmakers so decide, in permitting a commitment to be made by a biased or prejudiced magistrate, or an indictment to be returned by a grand jury holding preconceived views as to the guilt of a defendant. The indictment surely must be made to state a public offense, for the defendant cannot be legally put upon trial upon one which is insufficient in that respect. The matter of the production of an indictment by grand jury or commitment by a magistrate neither presupposes the guilt of a defendant nor in any wise tends to create any presumption in that direction. It furnishes a procedure by which the defendant is brought into court, and, if this procedure on its face is formally regular, any special objections which are to be established by facts dehors the record must be viewed as not of the substance of things or material in influencing the conviction of a person accused of crime. "An indictment is but an accusatory paper." People v. Hatch, 13 Cal. App. 528, 109 Pac. 1097. Our Code by specific provision declares that, unless objections available to a defendant on a motion to quash an indictment or information are taken seasonably, they are waived; in other words, the indictment or information, because of any defects which might be pointed out upon the motion to quash, is not a void indictment, and the question of legal jurisdiction is not concerned therein. Pen. Code, § 950; Ex parte McConnell, 83 Cal. 558, 23 Pac. 1119; People v. Bawden, 90 Cal. 195, 27 Pac. 204; Ex parte Moan, 65 Cal. 216, 3 Pac. 644. We cite these cases and the Code law in illustration of the view we take that the amended section of the Penal Code in force at the time the defendant made his motion to quash the indictment, not only related to a matter of procedure, but to such matter of procedure as neither went to the question of

the guilt or innocence of the defendant or tended to deprive him of any substantial right theretofore secured to him in aid of a full defense.

[4, 5] In the motion to quash the indictment, it was also asserted by the defendant that persons other than those authorized by the law were permitted to be present during the proceedings taken before the grand jury, and that evidence of illegal, hearsay, and secondary character was permitted to be introduced and was considered. It is well settled, not only that a defendant on a motion to quash an indictment can only urge such grounds as are by section 995, Penal Code, permitted him, but that no inquiry can be made as to the sufficiency of the evidence or of the mode of examining the witnesses heard before the grand jury. In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. To the same effect is People v. Hatch, 13 Cal. App. 521, 109 Pac. 1097. In support of the ground that an unauthorized person was permitted to be present during the proceedings had before the grand jury, the defendant referred to Earl Rogers, Esq., who appeared in the capacity of a deputy district attorney of Los Angeles county. It was shown that said Rogers had been duly appointed as a deputy by the district attorney, but it is urged that, as all of the deputies permitted to be pointed under section 4230, Political Code, had theretofore been appointed, the appointment of Mr. Rogers was in excess of that number and he acquired no official capacity as a prosecutor in order to entitle him to be present himself before the grand jury. Section 4230 of the Political Code refers particularly to the salaries of officers and does designate the various deputies who shall be allowed, with pay, to each of the county officers in counties of the class to which Los Angeles belongs. That section is particularly designed to fix the compensation of county officers, and not to limit them in the employment of deputies. A county officer is entitled to appoint as many deputies as he chooses, with the proviso that if he appoints any in excess of those for which compensation is provided to be paid from the public treasury, he must pay such deputies at his own expense, if they are to receive compensation. Section 4024, Pol. Code.

The next complaint made by appellant is that the trial judge committed prejudicial error in disallowing certain challenges taken by the defendant as to 17 of the veniremen who were examined as to their qualifications to sit as jurors and try the defendant for the crime charged. The challenges interposed were all upon the ground of the actual bias of the veniremen. As was most natural to occur, after the destruction of the Times building, reports as to the cause thereof were widespread and became the subject of discussion between individuals, as well as furnishing material for various reports in the newspapers. Prior to the impanelment of the jury which sat at the trial of this defendant, the two McNamaras, jointly charged in the same indictment with defendant, had pleaded guilty and been sentenced, and this information had been heralded forth through like channels. Many of the veniremen called had read newspaper reports and heard street discussion regarding the explosion and its cause. The state of mind of each of the 17 veniremen, as developed by the lengthy examination of counsel, was in the main similar as to the matters constituting the alleged bias. A general statement of the answers brought forth, with little variation, was about as follows: The venireman had heard of the explosion in the Times building shortly after it occurred; he had read accounts thereof in the newspapers and had discussed with persons not concerned in the case the subject of the explosion; that these accounts assigned the cause of the wrecking of the Times building as being the explosion of dynamite unlawfully used; that, upon the McNamaras pleading guilty to the charge, venireman had read an account of the proceedings, and from all of these things had formed an opinion that the Times building had been blown up by dynamite unlawfully exploded with criminal intent; that the opinion was more or less fixed; and that evidence would be required to dislodge it. None of the veniremen, in any opinion or belief which they entertained, connected the defendant with the commission of the crime, save one, who stated in a general way that he held an opinion affecting the guilt of the defendant. Some of the veniremen had passed the scene of the explosion and had observed the wreckage, with twisted iron beams, and in some cases had observed that windows in an adjoining building had been shattered. In the course of their questioning, counsel for the defendant intimated that it was a part of their defense that the Times building was destroyed by a gas explosion accidentally, and not by dynamite with criminal intent. The argument in support of the challenge was that, as these veniremen had formed an opinion as to the facts establishing the corpus delicti, they were utterly disqualified, notwithstanding that they in no wise in their opinion otherwise connected the defendant with the commission of the crime. It satisfactorily appeared from the answers given by the veniremen that the foundation for any opinion entertained by them was that denominated in section 1076, Penal Code, as "public rumor, statements in public journals, and common notoriety"; and each of the persons examined declared that he had the ability to lay that opinion aside and to consider the case against the defendant fairly and impartially. This statement was brought forth by the examination of the district attorney in order to justify a denial of the challenges in accordance with the provisions of section 1076, Penal Code, which declare that where the opinion is of the class mentioned the person should not be disqualified as a juror, "provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." As has been already suggested, it appeared that the explosion which destroyed the building of the newspaper was of such character as to occasion general discussion among the citizens of the community and much comment in the public journals. It would seem difficult indeed to have found any citizen of observing mind and fair intelligence who had not by some manner or means learned of the disaster and of the probable or possible cause thereof.

[6] It has been repeatedly declared by our Supreme Court that on challenges such as those here considered, in order to justify a reversal, the evidence given by the venireman upon his examination must be practically without conflict as to the vital points thereof, and be "so opposed to the decision of the trial court that the question becomes one of law." People v. Owens, 123 Cal. 482, 56 Pac. 251. And particularly pertinent to the situation which was presented in this case are the observations of Mr. Justice Henshaw in the case of People v. Scott, 123 Cal. 434, 56 Pac. 102, where he says:

> "A reading of the testimony taken upon voir dire discloses, as is usual, conflicting and contradictory statements by the jurors. They had formed opinions touching the guilt or innocence of the defendant. They would carry those opinions with them into the jury box. It would take evidence to remove them, nevertheless they could and would give to the defendant a fair and impartial trial. They could and would be governed by the law as delivered by the court, and by the evidence as received in court. It is the state of facts, commonly presented where upon the question of bias the evidence would have justified a finding either way. Under such circumstances, we are powerless to disturb the ruling of the trial court. Citing People v. Fredericks, 106 Cal. 554 [39 Pac. 944]. We recognize that with the increased facilities for the dissemination of news it is far more difficult than formerly it was to obtain a jury of men ignorant of the circumstances of the charge which they are called upon to try. * * * But, unless the testimony adduced upon voir dire is so clear upon the question of actual bias that this court can say as matter of law that the juror is disqualified for that reason, we cannot disturb the ruling of the trial court."

To like effect are many of the decisions, and we cite People v. Flannelly, 128 Cal. 84, 60 Pac. 670; People v. Ochoa, 142 Cal. 268, 75 Pac. 847; People v. Miller, 125 Cal. 44, 57 Pac. 770; People v. Brown, 148 Cal. 743, 84 Pac. 204.

[7] In so far as the examination of the jurors disclosed that their observation of the conditions at the wrecked building after the explosion contributed to the forming of the opinion they had, it appears that such observation only tended to convince them of the fact that there had been an explosion. and not as to the means employed. It seems to have been conceded, even in the questions of counsel propounded to the veniremen, that an explosion had in fact occurred. The denial of the challenges for actual bias cannot be said to have been improperly made.

We now come to a consideration of the kind and competency of the evidence which made up the proof offered by the prosecution. As a part of its case, the state, as we have before indicated, introduced testimony showing a series of unlawful acts which had been committed some time prior to the first appearance of the appellant Schmidt in his connection with the antiopen-shop campaign. This testimony included evidence of the fact that bridges had been blown up, material destroyed, and life threatened throughout a number of the eastern states as a result of the determination of the executive board of the International Association of Bridge and Structural Ironworkers to unionize work; that money had been paid to various persons for the purpose of compensating them in the unlawful and reprehensible enterprise. Conversations occurring between the persons so engaged, some of them referring to explosions which had already occurred, some of them referring to future plans in the same direction, were narrated. In fact, it is apparent that any and every act of the individuals concerned referring to the unlawful enterprise, wherever evidence thereof could be procured, was presented to the jury. The record of correspondence kept in the office of J. J. McNamara, the secretary-treasurer of the international association, was obtained and was also produced in evidence. This was correspondence passing between the office of McNamara and various persons concerned in the unlawful depredations undertaken by the executive board of the association, and it came and went to different cities scattered over the United States. The work of destruction of structures erected by open-shop contractors in the east was well under way before Clancy's appeal for help in California was received and heeded. As a result of that appeal, J. B. McNamara came west on his mission of destruction. Plainly, from the sketch we have made of the evidence, it was made to appear by overwhelming proof that a conspiracy was organized and the work thereof prosecuted to the end that at every place in the United States where the open-shop was in force it was planned to use the weapon of nitroglycerin or dynamite to intimidate those opposed to the demand of the executive board of the International Association. The evidence showed that this conspiracy, so gigantic in its scope, was a continuing one; that is, the only limit to its life seemed to be the exhaustion of the means available to the executive board, or the submission of the employers of non-union labor. And we think that counsel for appellant fails to apprehend the effect of the evidence to establish the conclusions just suggested, when he refers to the destructive work done in the East as work done in the "Eastern conspiracy." The distinction so sought to be impressed, and which we cannot allow, is made for the purpose of giving weight to the argument found in the brief of appellant that the appellant Schmidt, not being a party to the lawless acts committed in the East, was prejudiced because of evidence being introduced with reference to such acts. Conceding the correctness of his premise, we might well adopt the appellant's conclusion. But the basis for the argument is lacking in the proof.

[8] It is a fundamental rule long settled by decisions that in proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, and that a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. People v. Donnolly, 143 Cal. 394, 77 Pac. 177; People v. Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193; People v. Eldridge, 147 Cal. 782, 82 Pac. 442. It is not denied that, after a conspiracy has been established and it has been established that a person is connected therewith as a conspirator, the latter may be prosecuted as for complicity in any unlawful act thereafter committed by any of the conspirators which is within the scope ot the general design or plan. People v. Olsen, 80 Cal. 122, 22 Pac. 125. "Where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. * * * Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part" of the common design for which they combined. People v. Kauffman, 152 Cal. 331, 92 Pac. 861; People v. Creeks, 170 Cal. 369, 149 Pac. 821; The Anarchists' Case, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. In People v. Collins, 64 Cal. 293, 30 Pac. 847, our Supreme Court says:

> "The law holds each party to it (the conspiracy) responsible for the acts of each coconspirator done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination."

And again:

> "Evidence of the statements of a coconspirator, made during the life of the conspiracy, are admissible against the other conspirator." People v. Oldham, 111 Cal. 648, 44 Pac. 312.

An examination of the decision in the case of Ryan v. United States, decided by the Circuit Court of Appeals and reported in 216 Fed. at page 13, 132 C. C. A. 257, shows that a number of persons, 30 in all, they being connected with the same association hereinbefore referred to, were indicted for a conspiracy to commit the crime of transporting dynamite and nitroglycerin in interstate commerce in passenger trains; the facts of the case referring to the same occurrences and the same conspiracy as the prosecution here made proof of. It seems that practically the same testimony as to the various explosions produced, the means employed, the correspondence had, together with conversations between the participants in those crimes, were all offered and received in evidence. The court there declared that such evidence was competent, in that a continuing conspiracy was charged. If the evidence was admissible there to show a continuing conspiracy as charged, it may with as much propriety here be said that the evidence did establish that the conspiracy was of that nature.

[9] Being of that nature, it was proper to show, as the court there held, all of the acts, declarations, and correspondence had by the persons concerned which referred to the means and methods employed and to be employed in the furtherance of the common design. It matters not, if the evidence is sufficient to show such later connection, that Schmidt, the appellant here, for the first time took an active part in furnishing aid to the conspirators to effect their objects a considerable time after the Eastern explosions had been produced. The proof of all of the matters first adverted to was essential to show the existence of the conspiracy and to define its nature and scope. The necessity of showing appellant's connection with the conspiracy was a distinct and separate matter for proof. This requisite of the law we think was sufficiently covered in the instructions of the court, and the jury was fairly advised of the subjects to which the different varieties of evidence were properly applicable.

[10] For the reasons we have stated, validity cannot be granted to any one of the exceptions taken because of the introduction of declarations of any of the conspirators made after any particular of the explosions had been caused, as being declarations inadmissible because made subsequent to the completion or accomplishment of the object of the conspiracy. The conspiracy was still alive and in effect, and the ultimate results had not been attained, when J. B. McNamara came to the state of California for the purpose of assisting in the work. We have before sketched briefly the salient features of the testimony showing that Schmidt, upon McNamara's arrival in San Francisco, took an active part in securing dynamite for Mc-

Namara's use. All of the appellant's acts in that connection were performed as secretly as possible, under assumed names, and with every indication of appellant's complete and active co-operation and sympathy with the work of destruction theretofore done, then being planned, and which was thereafter executed. Schmidt, the appellant, immediately before the Times explosion, had been in the city of Los Angeles aiding in the attempt to close the open shops. That he knew for what purpose the dynamite was to be used is indicated when he said to a witness who testified in the case, in the summer of 1910, that:

> "They (in Los Angeles) won't give a union man no chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon."

And immediately after the Times explosion Schmidt was not to be found and was not found until a long time thereafter, when he was discovered living at the house of Emma Goldman in New York, a portion of the time, under an assumed name. The length of this opinion would be extended to a greater limit than is warranted, were we to attempt to discuss in detail the testimony as it is shown in the 8,000 pages of the reporter's transcript. While there may be portions of the testimony received which in a detached way could properly have been excluded, the weight of the evidence was so overwhelming in its proof of the conspiracy and its objects as to enforce the conclusion that the defendant in the right secured to him under the Constitution did not suffer substantial prejudice.

[11] Rather unusual stress is laid in support of the claim for error in allowing one particular bit of evidence to come in. Several months after the explosion which occurred at the Times building, a suit case was found in the checking room at a ferry station in San Francisco. The suit case was identified by a Mrs. Ingersoll as being one which she had seen in the possession of J. B. McNamara before the 1st of October. The suit case carried a check label, and upon being opened was found to contain an alarm clock, a coil of black fuse, some blasting caps, a brass plate, some brass bars with screws, and copies of San Francisco newspapers dated October 1st. The newspapers contained accounts of the destruction of the Times building. These articles were all exhibited to the jury. We think the evidence was competent. The clock and brass pieces were of a similar kind to those used by the McNamaras in the manufacture of their infernal machines. As proof of the fact that an explosion had been produced as "bargained for," J. J. McNamara, the secretary-treasurer of the association, had always required his men to produce newspaper accounts showing that they had performed their work successfully. In a circumstantial way, these articles were all evidence tending to show the execution of the work of the conspirators and to show J. B. McNamara's connection therewith, and incidentally the connection of Schmidt with the same enterprise. The introduction of similar evidence was approved in The Anarchists' Case, supra.

The gravity of the offense and the serious consequences which it has entailed to this appellant is justification to counsel for having presented the very extensive argument which is found in the three volumes of appellant's briefs. Careful consideration has been given to each of the contentions therein set forth, the chief of which are made the subject of the foregoing discussion. Other matters urged as constituting error, such as alleged misconduct of the trial judge and the argument affecting the action of the court in giving or refusing to give certain of the instructions, we find without merit. We are satisfied that the defendant received a fair trial and that his conviction should be sustained.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(33 Cal. App. 448)

PEOPLE v. MARINO. (Cr. 666.)

(District Court of Appeal, First District, California. April 17, 1917. Rehearing Denied by Supreme Court June 14, 1917.)

1. Criminal Law 🔑371(9) — Statutory Rape—Evidence of Other Acts.

In a prosecution of a father for rape upon his 17 year old daughter, evidence of prior acts of intercourse was admissible in support of the charge upon which defendant was being tried upon the theory that it tended to show the lewd and lascivious tendencies and disposition of the prosecutrix and defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831.]

2. Criminal Law 🔑370—Statutory Rape —Pregnancy.

In a prosecution of a father for rape upon his 17 year old daughter, evidence that prosecutrix when 14 years old became pregnant from an act of sexual intercourse with her father, and when she informed him of the interruption of her menstrual periods that he stated that he knew what was the matter with her—that she was in the family way—and that he took her to a doctor, who performed an abortion, was relevant for the purpose of showing that the defendant's conduct when informed of interruption of daughter's menstrual periods was tantamount to an admission that he knew she was pregnant, and that he was the cause thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825–829.]

3. Criminal Law 🔑829(3) — "Rape" — Refusal of Instruction—Harmless Error—"Sexual Intercourse."

While refusal of a requested instruction to the effect that there could be no conviction unless the evidence showed to a moral certainty that defendant had penetrated sexual organs of prosecutrix was improper, it caused no detriment to defendant where the court in the charge given, in substantial accord with Pen. Code, § 261, defined the crime of rape to be "an act of sexual intercourse accomplished with a female not the wife of the defendant when the female is under the age of 18"; the phrase "sexual intercourse" as commonly understood implying actual penetration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.

For other definitions, see Words and Phrases, First and Second Series, Sexual Intercourse; Rape.]

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Vitale Marino was convicted of rape, and he appeals. Judgment and order appealed from affirmed.

W. H. Tully, of San Jose, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Arthur M. Free, Dist. Atty., and Archer Bowden, Deputy Dist. Atty., both of San Jose, for the People.

LENNON, P. J. Upon this appeal from a judgment of final conviction after a verdict finding the defendant guilty of the crime of rape upon his 17 year old daughter, the sufficiency of the evidence to support the verdict is not challenged. A reversal of the judgment is urged because of the ruling of the trial court, which, over the objection of the defendant, permitted the prosecutrix to testify in substance that when she was about 14 years of age she became pregnant as the result of an act of sexual intercourse with her father. Upon that occasion she told her father, the defendant, that "she did not get her monthlies." The defendant replied, "I know what's the matter with you—you are in the family way." The defendant then left the house, and two or three hours later returned, whereupon he said to the prosecutrix, "Dress up and I will take you to a place where you will get over what you have." Defendant took the prosecutrix to the home of a Mr. Gibson, and while there told her in Italian to "tell Dr. Gibson" that she was "in a family way." She so told Gibson, who replied that he could help her, but that he "could not do it for nothing." Whereupon the defendant promised to pay Gibson the sum of $50. At this point in the testimony of the prosecutrix the trial court sustained an objection to a question which sought to elicit what Gibson did to her, but permitted her to say that she remained alone with Gibson for three or four hours, after which she was taken "to some place to get well," where she remained "very ill" for about a week. The defendant called there to see her in the evening of the day that she left Gibson's house, and said to her, "How are you? Are you better?"

[1, 2] We see no error in the ruling complained of which permitted the above narrated facts to go in evidence. The act of sexual intercourse referred to therein was one of a series of such acts which the prosecutrix testified had been committed with her by the defendant from the time that she was 14 years of age. Under the settled rule in this state the evidence of those prior acts was admissible in support of the charge upon which the defendant was being tried upon the theory that it tended to show the lewd and lascivious tendencies and disposition of the prosecutrix and defendant. People v. Castro, 133 Cal. 11, 65 Pac. 13. It is conceded that if the pregnancy of the prosecutrix and the abortion to which she testified had resulted from the act of intercourse which constituted the basis of the charge for which the defendant was convicted, proof thereof would be proper and pertinent for the purpose of establishing the corpus delicti. People v. Tarbox, 115 Cal. 57, 46 Pac. 896. While in the case of People v. Soto, 11 Cal. App. 431, 105 Pac. 420, the court said: "So far as we are aware" it has never been held that proof of the pregnancy of the prosecutrix under the age of consent is admissible except for the purpose of establishing the corpus delicti of the charge, on the other hand we know of no authority—and none has been cited to us—which holds that such proof of pregnancy, and evidence of an abortion performed upon the prosecutrix, as the result of one of a series of prior acts of sexual intercourse, are not admissible as tending to show the commission of that act. However that may be, the record shows that the proof pertaining to the pregnancy of the prosecutrix following the particular prior act in question, and the abortion performed upon her, was proffered and received primarily for the purpose of showing that the defendant's conduct when informed by his daughter of the interruption of her menstrual periods was tantamount to an admission that he knew she was pregnant, and that he was the cause thereof. Such we think was the fair inference to be drawn from such testimony, and consequently for that purpose, if for no other, it was admissible. The fact that it also tended to show the commission of two separate, independent, and outlawed crimes did not render it incompetent as evidence for the purpose for which it was offered. Being one of a series of prior acts of sexual intercourse, the remoteness of the particular act under discussion and of the incidental pregnancy and abortion from the time of the commission of the particular act forming the basis of the charge on trial may have lessened the weight of such evidence, but did not destroy its relevancy.

[3] The trial court refused a requested instruction to the effect that proof of penetration, however slight, was essential to the crime of rape, and that therefore the defendant should not be convicted unless it could be said, after a consideration of all of the evidence, to a moral certainty, etc., that the defendant had penetrated the sexual organs of the prosecutrix. While this instruction correctly stated the law, and should not perhaps have been refused, nevertheless the failure to give it caused no detriment to the defendant, for the reason that the trial court in its charge, in substantial accord with the

language of the statute (Pen. Code, § 261), defined the crime of rape to be "an act of sexual intercourse, accomplished with a female not the wife of the [defendant] * * * where the female is under the age of eighteen." The phrase "sexual intercourse," as employed in this definition of rape, is commonly understood, we think, to imply an actual penetration. This being so, it is evident that the charge of the court considered as a whole in effect required the jury to find the fact of penetration before they could find the defendant guilty.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(84 Or. 450)

STATE ex rel. WITHYCOMBE, Governor, v. STANNARD, County Clerk, et al.

(Supreme Court of Oregon. June 6, 1917.)

1. MANDAMUS ⚿=147 — CAPACITY OF GOVERNOR TO SUE—CONSTITUTION.

Under Const. art. 5, § 10, declaring that the Governor shall take care that the laws shall be faithfully executed, the Governor of the state has the right to bring mandamus to compel the county clerk of a county, the sheriff, the county judge, and others to perform the duties imposed upon them by law in regard to the calling and holding of elections, and, in particular, in respect to a special election.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 288.]

2. MANDAMUS ⚿=143(1) — PREMATURITY OF PROCEEDING—COMPELLING ACTION BY ELECTION OFFICIALS.

The Governor could bring mandamus to compel the county clerk of a county, the sheriff, and other officers to perform the duties imposed upon them by law in regard to the calling and holding of election before the time had arrived on which the posting of notices and other prerequisites to the election are required to be done, the officials having absolutely refused to take steps toward holding the election, and declared their intention not to do so, since, though ordinarily mandamus will not lie to compel the performance of an act until the time for doing the act has arrived, where a refusal to perform has occurred, and where it seems probable that the act will not be performed within the time required, mandamus will lie, and a proceeding brought upon the strength of the refusal is not premature.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 282-284.]

Burnett, J., dissenting.

In Banc. Mandamus by the State of Oregon, on the relation of James Withycombe, Governor, against J. R. Stannard, County Clerk of Curry County, and others. Demurrer to the writ overruled.

Geo. M. Brown, Atty. Gen., and I. H. Van Winkle, Asst. Atty. Gen., for petitioner. S. M. Endicott and W. C. Winslow, both of Salem, for defendants.

McBRIDE, C. J. This is a proceeding in mandamus to compel the defendants to perform the duties imposed upon them by law in regard to the calling and holding of elections, and in particular in respect to the special election to be held throughout the state of Oregon on June 4, 1917. It is alleged that the defendants, who are the county commissioners, county judge, clerk, and the sheriff of Curry county, refuse to take steps required by law or to give the notices necessary in respect to such special election, and declare that they will not take the steps required by law to hold such election. To this writ a demurrer is filed stating two grounds: (1) That the relator has not the legal capacity to sue; and (2) that the writ does not state facts sufficient to constitute a cause of action.

As to the first ground, it may be said, in brief, that by section 10 of article 5 of the Constitution it is declared that the Governor shall take care that the laws shall be faithfully executed.

[1] Where a public official charged with a duty to the whole state, as in this case, refuses to execute the law and to perform his duty in that regard, we think the Governor is acting only in obedience to this requirement of the Constitution in appealing to the court to compel that official to perform such legal duty.

[2] It is also alleged that this proceeding is premature, and that mandamus will not lie until the time has arrived upon which the posting of notices and other prerequisites to an election are required to be done. Upon this theory the relator would be compelled to wait until the last minute of the last hour within which the act might be done, and after that time had expired, before he could bring a proceeding to compel the act to be performed. A proceeding to compel performance of an act after the time for such performance has expired would be futile, and would result in a condition wherein there would be no adequate remedy against a grave public wrong. The law does not contemplate any such absurdity; and accordingly it has been held that while ordinarily mandamus will not lie to compel the performance of an act until the time for doing the act has arrived, yet where a refusal to perform the act has occurred, and where it seems probable that the act will not be performed within the time required, mandamus will lie, and a proceeding brought upon the strength of such refusal is not premature. State ex rel. v. Railroad Company, 85 Kan. 649, 118 Pac. 872; Attorney General v. Boston, 123 Mass. 460; People ex rel. v. Smith, 152 App. Div. 514, 137 N. Y. Supp. 387. The latter case was one of mandamus to compel the board of elections to file certain certificates of nomination, wherein the court says:

"The duty devolved upon the board of elections is to file certificates of nomination which are in conformity to the provisions of the last valid statute relating thereto, if any such exists. No

> express demand to file any particular certificate has been made upon defendants. There has been no express refusal to do so. Granting that defendants' duty is a public one, and that omission to perform such duty is equivalent to a refusal to perform, * * * it may be urged that as yet the defendants have not omitted to perform, for the time fixed within which performance may be had has not yet expired. * * * But although evidence is lacking of an express refusal to perform a particular act, we think that it may justly be inferred that defendants will refuse to file any certificate except one which shall comply with the requirements of the statute above referred to. * * * Where delay in reaching such determination will result in depriving one of an efficient remedy if the determination is erroneous, either the presumption above referred to should prevail, or the person charged with the performance of the duty should seasonably announce his determination respecting his future action in terms admitting of no mistake or misunderstanding."

The case above cited is not so strong as the case at bar, because here the defendants absolutely refused to take steps toward holding the election, and declared their intention not to do so. The statutes under which those decisions were rendered are similar to our own, and the opinions seem to be based upon sound common sense.

The following cases are cited as holding a contrary view, and while some of them, upon a cursory examination, would appear to be in point, yet, when thoroughly analyzed, none of them are applied to circumstances exactly identical to those in the case at bar.

The first case is Commissioners of Lake County v. State, 24 Fla. 263, 4 South. 795. In this case there was no allegation in the complaint that the commissioners had refused to call the election. It was only alleged that they did not intend to and would not perform that duty. The court held that this was not a sufficient allegation to call into effect the power of mandamus. The other Florida cases are to the same effect.

Lee v. Taylor, 107 Ga. 362, 33 S. E. 408, merely holds that mandamus will not lie to compel a tax collector to pay over tax moneys to an outgoing treasurer so that such treasurer can get a commission. It seems to have no relation whatever to the case at bar.

In Gormley v. Day, 114 Ill. 185, 28 N. E. 693, there does not appear to have been any refusal on the part of the clerk to post the copies of an ordinance. The court also held on the merits, that the petitioner was not entitled to the relief sought. The case is not in point.

The case of People v. Quinn, 143 Ill. App. 123, was a mandamus proceeding by the city treasurer to compel the city comptroller to pay over to the relator moneys received by such comptroller from day to day as they were collected. It was held that mandamus does not lie to direct the performance of an act until a default, that the defendant was entitled to a reasonable time within which to pay over the money he held, and that if he held it beyond such time mandamus would lie. In that case it is apparent that no serious mischief would have resulted had the issuance of a writ been delayed until after refusal to comply, while in the case at bar it is plain that delay in the issuance of the writ until the time prescribed by law for the county court of Curry county to perform its duty would render any proceeding entirely futile, and might result in defeating the will of the people of the whole state as to important measures to be submitted at the ensuing special election.

The case of State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964, grew out of a political controversy as to whether the La Follette or anti La Follette delegates should be placed on the ballot as the genuine Republican delegates. The court held that, as the time for placing the names of the candidates upon the official ballot had not arrived, the proceeding was premature. Nevertheless they went into the question upon its merits in an opinion which, owing to its learned length, it is impossible to epitomize here. In said case, as in a case in Wisconsin, hereafter to be noted, we find the court practically conceding that there may be "special circumstances" in which courts will depart from the general rule that mandamus will not lie to compel the performance of an act until the duty to perform it is due.

Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49, was mandamus to compel the court to allow an appeal. Held, that the petition must show that the petitioner has a clear right to an appeal, which has been refused him, and that it was not shown in that particular case. The case is not in point.

State ex rel. v. Hunter, 111 Wis. 582, 87 N. W. 485, was a mandamus proceeding to compel a city treasurer to set aside certain moneys as school funds, wherein it was held that the funds had not yet come into his hands and might never come there, and that the application was premature. In the course of the opinion it is said that mandamus will not lie to compel the performance of an act not yet due by a public officer because of a mere threat by him that he will not perform it.

The court admits that this is contrary to the ruling in Attorney General v. Boston, 123 Mass. 460, and adds very significantly:

> "Extreme cases may, perhaps, arise demanding the use of mandamus to control the performance of prospective duties; but this is certainly not such a case."

It appears to us that the case at bar is just such an "extreme case." Here there rests upon the county court of Curry county an important duty, which by their general demurrer they admit they have been requested to perform, and refuse to perform and will not perform; and this, too, in a case where such refusal might defeat the will of the whole people of the state in respect to important measures which will come up for their vote at the ensuing election. They say, in effect, that they intend to paralyze the arm of the state and defeat the will of the voters. If this is not an extreme case, it would be difficult to find such.

The case of Northwestern Warehouse Company v. O. R. & N. Co., 32 Wash. 218, 73 Pac. 388, was mandamus to compel defendants to build a side track for plaintiff's warehouse. This is a somewhat complicated case, in which it is announced that mandamus will not lie in anticipation of a supposed omission of duty, but it must appear that there has been an actual default in the performance of a clear legal duty actually due. The court held that the law did not require the defendants to construct the track, and the case went off on entirely different grounds from anything involved in the case at bar.

Sights v. Yarnalls, 12 Grat. (Va.) 292, was mandamus to compel the issuance of a saloon license, in which it was held that mandamus would not lie to compel the council to grant a license until the time had arrived at which the application for such license could come up for consideration. This was evidently a case where a delay would not defeat plaintiff's right.

Spiritual, etc., Association v. Selectmen, etc., 58 Vt. 192, 2 Atl. 747, is a case fully covered by the syllabus, which is as follows:

> "A petition for a writ of mandamus will not be granted to compel public officers to do an act already beyond their control, nor against their successors in office, not yet elected, to compel them to perform an act in the future."

It is evident this case is not in point by a thousand miles.

Thaxton v. Terrell, 99 Tex. 562, 91 S. W. 559. This was mandamus to compel the land commissioner to receive an application for state land. It appears that defendant accepted the application after the writ issued subject to certain conditions as to the minerals on the same. It was held that this acceptance avoided the necessity of issuing the writ; that plaintiff had a remedy in equity to compel the issuance of patents without the restrictions imposed by the land commissioner. For that reason the case is not in point.

State ex rel. v. Bates, 38 S. C. 326, 17 S. E. 28, was mandamus to compel the state treasurer to transfer certain stocks formerly owned by a deceased person to the relator, who was his legatee, and the court in that case decided that such transfer should not be made until the expiration of one year prescribed by law for creditors to present their claims, and that for this reason the application was premature. It is plain that the transfer might never be made if the claims should consume the stock. The case is not in point.

City of Zanesville v. Richards, 5 Ohio St. 589, was mandamus to require the auditor to enter upon the tax list for the years 1855 and 1856 certain taxes levied for city purposes for these years. The return showed that the time had passed within which the auditor could place levies upon the tax list for 1855, said list having passed out of his hands, and that the list for 1856 had not yet come into his possession. The case does not disclose that he refused to place the taxes for 1856 on the list when they should come into his possession. The case is easily distinguishable from the one at bar for the reasons already given.

State ex rel. v. School District, 8 Neb. 98, is a similar case, in which there is no allegation of a demand or refusal to comply.

In State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368, demand and refusal had not occurred. The court lay special stress upon this fact.

Board of Commissioners, etc., v. County Commissioners, etc., 20 Md. 449, was mandamus to compel the county commissioners to levy a tax, and it was therein held that there was no presumption that because the commissioners had refused to levy the same kind of a tax in 1861 they would refuse to levy it in 1862, and that the court would not act on such presumption.

Sterling v. McMaster, 82 Md. 164, 33 Atl. 461. This was mandamus to compel McMaster, treasurer and collector, to place in the hands of the sheriff bills for the collection of unpaid taxes. The case is somewhat similar in some respects to the case at bar, but it has this distinguishing feature: In that case there was ample time left after the period fixed by law for the treasurer to turn over the bills in which mandamus might be brought and the alleged duty enforced. A failure to issue the writ therefor would not work any serious injury, and under these circumstances the court held that the writ was premature. These are practically all the cases cited outside of our own state, and in many of them it is laid down as a general rule that mandamus will not issue to compel the performance of a duty before the time for such performance has arrived. This rule, in some form or other, has been "parrotted" down from court to court and from judge to judge, without any particular reason being given for it, or any attempt to distinguish between those cases where a denial of the writ will work no serious or irreparable injury and those "extreme cases," to use the words of the Michigan Supreme Court, where such denial would work great injustice or public injury, or prevent the exercise of the constitutional right of all citizens of the state to a voice in the elections. The rule, as a general one, is good, but, as heretofore shown, there are well-defined exceptions to it, and this is one of them. The courts will not chop technicalities when their aid is asked to compel the performance by a public officer of a duty which he owes to the citizenry of the whole state, but, where no other remedy presents itself, will exercise their constitutional authority to compel by mandamus the performance of such duty.

The demurrer is overruled.

McCAMANT, J., took no part in the consideration of this case.

BURNETT, J. (dissenting). On petition of the relator an alternative writ of mandamus issued out of this court reciting the official character of the Governor of the state and of the Attorney General, and the fact that the defendants are officers of Curry county. It is also set forth that by chapter 422 of the Laws of 1917, now in effect, a special election is required to be held throughout the state June 4, 1917, at which sundry legislative enactments and proposed amendments to the Constitution shall be submitted to the people for their approval or rejection. The essential charging part of the writ reads thus:

> "That notwithstanding the provisions of said chapter 422, Laws of 1917, and the requirements of the other laws of the state of Oregon, the defendants herein, and each of them, have refused, and do now refuse, to perform the duties imposed upon them by law with respect to giving notice of and holding elections with reference to the election provided for in said chapter 422, within Curry county, or to do or perform any other duty or thing with respect to preparing for, giving notice of, or holding any election within said Curry county, Oregon, on the fourth day of June, 1917, or to canvass or abstract and record the returns of said or any election to be held on said date, or to transmit the certificate thereof to the Secretary of State, or to do any other act or thing in connection therewith, and threaten and declare that they will not do so, and, unless commanded so to do by order of this honorable court, will not perform such duties aforesaid. * * *"

A demurrer to the writ having been overruled pro forma, the defendants have answered to the effect that Curry county has no funds available for the expense of the election, it not having been included in the annual budget; further, that the county is already indebted in at least the sum of $5,000, and that the additional expenditure involved will be in excess of the constitutional limit; and, lastly, that, in order to meet the cost of the election, the county court will be compelled to levy taxes in excess of the 6 per cent. limit prescribed by the constitutional amendment adopted at the November election held in 1916.

The initial act required in the matters involved is for the county clerk to issue notice of election not less than 10 days prior to the day appointed for holding the same. This action is not indispensably necessary of performance in any event until at least May 24, 1917, a date yet in the future. The quoted excerpt from the writ, upon which the relator bases his claim, contains only conclusions of law. It is in effect nothing more than the expression of his prediction that the defendants will not meet his views of the law in their action in the premises. Mr. Chief Justice Moore, writing in State ex rel. v. Williams, 45 Or. 314, 330, 77 Pac. 965, 970 [67 L. R. A. 167], said:

> "The writs having stated that the municipal judge neglected to issue bench warrants 'as required by law,' the phrase quoted is only a legal conclusion, and not the averment of a material fact, stated as the foundation of an enforceable right."

This doctrine is well supported by many authorities, both before and since then, holding that such statements do not present any issue for consideration.

Moreover, paraphrasing the statement of the writ, the defendants have a right to "refuse, and do now refuse, to perform the duties imposed upon them by law," for the very good reason that the time for their performance has not yet arrived.

> "A relator is not entitled to the writ unless he can show a legal duty then due at the hands of the respondent; and, until the time arrives when the duty should be performed, no threats or predetermination not to perform it can take the place of such default. The law does not contemplate such a degree of diligence as the performance of a duty not yet due. The general rule is that the writ will not be granted in anticipation of a supposed omission of duty, however strong the presumption may be that the person sought to be coerced by the writ will refuse performance at the proper time. An important reason for refusing the writ in such cases is that, until the duty is due, no practical question can be presented to the court, but simply a supposed case." 2 Spelling, Extraordinary Relief, § 1385.

Again, we find in section 12 of High on Extraordinary Legal Remedies (3d Ed.), the following:

> "Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act; and, since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed; nor does the law contemplate such a degree of diligence as the performance of a duty not yet due."

This court itself has spoken on the same subject in State ex rel. v. Bryan, 26 Or. 502, 507, 38 Pac. 618, 619, where Mr. Justice Wolverton writing, uses this language:

> "It is a just presumption that all public officers will faithfully discharge the functions of their respective offices, and observe all the duties enjoined upon them by law, and it would be a work of supererogation for the courts, by mandamus or other process, to command them to perform their duties in futuro, as they are by law directed. Courts will not assume or exercise supervisory control over public officers and functionaries, whether state, county, or municipal, nor will they attempt to control their acts, or command them to act, except in cases where there has been a plain violation of official and public duty which the law specially enjoins upon them, and it is made to appear that some private individual or the public has a legal right or title to the due performance of such duty, and that there exists no other plain, speedy, or adequate remedy in the ordinary course of law."

The following precedents are to the same effect: U. S. v. Bowen, 6 D. C. 196; Lake Co. v. State, 24 Fla. 263, 4 South. 795; Ex parte Ivey, 26 Fla. 537, 8 South. 427; Lee v. Taylor, 107 Ga. 362, 33 S. E. 408; Gormley v. Day, 114 Ill. 185, 28 N. E. 693; Chicago, etc., R. R. Co. v. Olmstead, 46 Iowa, 316; State v. Carney, 3 Kan. 88; Sterling v. McMaster, 82 Md. 164, 33 Atl. 461; Alleghaney Co. v. Com'rs, 20 Md. 449; State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368; State v. York Co. Sch. Dist., 8 Neb. 92; Hardin v. Guthrie, 26 Nev. 246, 66 Pac. 744; State v. Noyes, 25 Nev. 31, 56 Pac. 946; Zanesville v. Richards, 5 Ohio St. 589; State v. Bates, 38 S. C. 326, 17 S. E. 28; Thaxton v. Ferrell, 99 Tex. 562, 91 S. W. 559; Spiritual Atheneum Soc. v. Randolph, 58 Vt. 192, 2 Atl. 747; Sights v. Yarnalls, 12 Grat. (Va.) 292; N. W. Warehouse Co. v. O. R. & N. Co., 32 Wash. 218, 73 Pac. 388; State v. Hunter, 111 Wis. 582, 87 N. W. 485; Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49; State v. Houser, 122 Wis. 534, 100 N. W. 964; People v. Quinn, 143 Ill. App. 123; R. R. Co. v. Thompson, 55 Tex. Civ. App. 12, 118 S. W. 618; State v. Adcock, 225 Mo. 335, 124 S. W. 1100; Pierce v. Executive Council, 165 Iowa, 465, 146 N. W. 85; Scott v. Singleton, 171 Ky. 117, 188 S. W. 302.

A leading case, sometimes cited in opposition to this doctrine, is that of Attorney General v. Boston, 123 Mass. 460, where the city council, authorized by statute to maintain a ferry at rates to be prescribed, ordered that it be free of ferriage after a certain future day, and the court, on application made before that time arrived, compelled the continued collection of toll by a writ of mandamus. Rightly considered, this case is not variant in principle from those already cited; for the duty to collect toll was imperative at and before the issuance of the writ, and it was what the court sought to enforce by its precept. Besides, the statute of the state of Massachusetts governing the matter gives jurisdiction to its courts far more extensive than ours on the subject of mandamus. The law of that state, as quoted in the opinion, is this:

> "The court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, where no other remedy is expressly provided, and may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes, to courts of inferior jurisdiction, corporations, and individuals, necessary to the furtherance of justice and the regular execution of the laws." Gen. St. c. 112, § 3.

The procedure there contemplates that mandamus may be used as a preventive remedy. This case has been cited many times as authority for allowing mandamus at the suit of some private person or of the Attorney General to enforce a general public duty, but rarely, if ever, in support of the proposition that the writ will lie to enforce a duty not due when it was issued. In State ex rel. v. C., B. & Q. R. R. Co., 85 Kan. 649, 118 Pac. 872, this procedure was employed to compel two railroads to install connections as required by an order of the railroad commission directing the work to be done within 90 days. The precept was issued three days after the order was made. The defendants defended on the merits, pointing out, among other things, that it would be an unreasonable burden, entailing more expense than the revenue derived therefrom would liquidate. By some means or other the decision was delayed until after the expiration of the 90 days. Under those circumstances the court made the rule absolute, but the same judge who penned the majority opinion dissented from the doctrine thereof on this point, saying:

> "The duty and the time were coextensive. It was held in State ex rel. Price v. Carney, 3 Kan. 88, that no previous threat or predetermination not to perform a legal duty can amount to a fault or omission, even though the showing be sufficient to convince the court that the respondents will omit to perform their duty. This was followed in State ex rel. Reynolds v. Barker, 4 Kan. 435, in Dobbs v. Stauffer, 24 Kan. 127, and quoted with approval in Rosenthal v. State Board of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157, and is in accord with the mandatory requirement of the statute. A present omission to do a future duty is a legal impossibility. The first time when it could be definitely known that the order had been disobeyed was nearly 90 days in the future, and I think an action before that time must have been premature."

In Tax Commission v. Campbell, 36 Nev. 319, 135 Pac. 609, the court gave a moot opinion on the duty of county officers to furnish tax rolls by a certain future time, but dismissed the proceeding, with leave to apply again if the plaintiff should be so advised. It was said explicitly, though, that the writ would not be granted in anticipation of a refusal to perform the duty when the time for it should come.

State v. Metcalf, 18 S. D. 393, 100 N. W. 923, 67 L. R. A. 331, was a case where the defendant officer was required by alternative mandamus to place the names of certain candidates on the official ballot. Without citing authority in support of its opinion, the court said:

> "Having made his demand, concerning which no doubt exists in this case, if the auditor did not express a willingness to comply therewith, it was proper to institute this proceeding, when, if defendant intended to comply with the demand, he might have disclosed such intention and have avoided any judgment for disbursements. But, having answered and contested the relator's right, he cannot be heard to say that he would or might have complied with the relator's demand."

A similar case (People v. Smith, 152 App. Div. 514, 137 N. Y. Supp. 387), cited in support of the instant writ, was modified on appeal in 206 N. Y. 231, 241, 99 N. E. 568, the court saying that it should not be considered as a precedent, and that it should be limited to the very case itself. Later, in People v.

Britt, 206 N. Y. 246, 249, 99 N. E. 573, 574, the case was further limited, and, speaking of the situation, the court says: "The remedy for this incongruous result is with the Legislature." These few cases are opposed to the great weight of authority, and are sporadic instances of where courts have used their power in meddling with mere political questions.

It is required by our statute that the writ shall "state concisely the facts, according to the petition, showing the obligation of the defendant to perform the act, and his omission to perform it." L. O. L. § 616. There can be no present omission to perform an act in the future. The writ is not to be confounded with injunction. Neither can it be made to perform the office of a bill of quia timet. We are not required to balance the relator's fears for the future against the presumption that the defendant officers will regularly perform their duties at the proper time. Mandamus ought to be used sparingly, and only in clear cases, and this court ought not hastily to use its original jurisdiction to clarify a mere political emergency. No refusal to perform any official act, presently required or past due, is imputed to any of the defendants; and if we regard the authority of State ex rel. Booth v. Bryan, 26 Or. 502, 38 Pac. 618, already decided by this court, as well as the great weight of reason and precedent, the writ should be dismissed.

(84 Or. 450)

STATE ex rel. WITHYCOMBE, Governor, v. STANNARD, County Clerk, et al.

(Supreme Court of Oregon. June 6, 1917.)

1. COUNTIES 🔑150(2) — LIMITATION OF EXPENDITURES — REMOVAL OF RESTRICTIONS — SPECIAL ELECTIONS.

Under Laws 1917, p. 894, directing that a special election be held in June, in all voting precincts of the state, for the purpose of voting on proposed laws and constitutional amendments, authorities of Curry county were not justified in refusing to take steps towards holding the election on the ground the county budget made no provision for the election, for the reason that the next regular election will occur in 1918, although Laws 1913, p. 458, provides that no greater expenditure of public moneys shall be made for any specific purpose than the amount estimated in the budget plus 10 per cent., the act of 1917 removing the restrictions by an implied command that the several counties pay the expense of such election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 216.]

2. CONSTITUTIONAL LAW 🔑70(3) — PUBLIC POLICY—ADOPTION BY VOTERS.

Questions of public policy and questions of what it is best to insert in the Constitution must be regarded as having been conclusively settled when the legal voters adopted the amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131.]

3. CONSTITUTIONAL LAW 🔑70(1) — JUDICIAL FUNCTIONS—CONSTRUCTION.

The oath of the judiciary is to construe the Constitution as it is and not as it might have been.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 137.]

4. COUNTIES 🔑150(2) — EXCEEDING DEBT LIMIT — "INVOLUNTARY INDEBTEDNESS" — ELECTIONS.

Under Const. art. 11, § 11 (see Laws 1917, p. 12), providing that the prohibition against the creation of debts by counties prescribed by section 10 of this Constitution shall apply and extend to debts hereafter created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state, etc., any debt contracted by Curry county in holding the special election provided for by Laws 1917, p. 894, would be an "involuntary indebtedness," incurred in the performance of a duty and obligation imposed by a law of the state, and therefore prohibited, if exceeding the $5,000 limit fixed by said section 10.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 216.]

5. COUNTIES 🔑150(3) — DEBT LIMIT — PRESUMPTIONS.

After a levy is made, the payment of taxes is regarded as a certainty, and, for the purpose of determining whether an expenditure will exceed the debt limits of a county, it will be assumed that the tax has been collected.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 217.]

6. COUNTIES 🔑150(2)—ELECTIONS—EXPENDITURE OF FUNDS—PREFERENCES.

Although, if its plans were carried out, it would be impossible for county to hold the special election provided for by Laws 1917, p. 894, without exceeding the constitutional debt limit, it must set aside a sufficient sum to pay for the election, and out of the balance pay for its plans, such obligation having preference.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 216.]

In Banc. Original proceeding for a writ of mandamus by the state, on relation of James Withycombe, Governor, against J. R. Stannard, County Clerk of Curry County, and others. Writ issued.

The Twenty-Ninth Legislative Assembly passed two proposed laws, and at the same time, under the authority of article 4, § 1, of the state Constitution, referred them to the people for approval or rejection. The Legislature also proposed five amendments to the state Constitution, and, pursuant to article 17, § 1, of the organic act, these proposed amendments were ordered submitted to the people for their approval or disapproval. Chapter 422, Laws 1917, directs that a special election be held on June 4, 1917, in all the voting precincts of the state, and that the two proposed laws and the five proposed amendments shall be submitted to the legal voters for their approval or rejection at such special election.

The constituted authorities of Curry county announced that they would not obey the mandate of the Legislature, and that they would not take any steps towards holding an election in Curry county. Upon the petition of James Withycombe, as Governor of Oregon, an alternative writ of mandamus was issued out of this court commanding the clerk, sheriff, county judge, and commissioners of Curry county to perform all the duties imposed upon them by the laws regulating elections, or to show cause for any failure on their part. The defendants demurred to the alternative writ, but the demurrer was overruled for reasons expressed in an opinion by Mr. Chief Justice McBride. 165 Pac. 566. The county officials then answered by admitting that they—

"have refused, and do now refuse, to do the things or perform the acts specified and set forth in the general election laws of Oregon to be done and performed by the respective county officers with respect to giving notice of and holding elections with reference to the election provided in said chapter 422, within Curry county, or to do or perform any other act or thing with respect to preparing for, giving notice of, or holding any election within said Curry county, Oregon, on the 4th day of June, 1917."

The answer contains three further and separate defenses; and, for the purpose of supporting these separate defenses, the defendants relate the facts concerning the budget and the tax levy for 1917, the present indebtedness, and the probable expense of holding an election. The petitioner demurred to the answer. After hearing the arguments of counsel, we rendered an oral decision sustaining the demurrer, and directing the issuance of a peremptory writ of mandamus ordering the defendants to hold the election, and this written opinion is prepared for the purpose of complying with a requirement of the Constitution. The parties have supplemented the writ and answer by a written stipulation giving detailed information concerning the items in the budget, the levy for 1917, and the character of the outstanding indebtedness. The answer expressly admits all the facts averred in the writ: the demurrer to the answer admits the facts alleged in that pleading; by the written stipulation, the parties added to the facts related in the writ and answer; and therefore the controversy was presented upon an undisputed statement of facts.

In November, 1916, an itemized estimate of the expenses proposed to be incurred during the year 1917 was made, in full compliance with chapter 234, Laws 1913, commonly known as the "Budget Law." The budget contains estimates for the salaries to be paid to the several county officers. The estimated cost of the county court is $1,300; of the circuit court, $1,500; of the justice court, $700; of books, stationery, postage, telephone, express, and freight for all offices, $1,500; of water, fuel, lights, repairs, and furniture for all offices and of new vaults for treasurer's office, $800; of board of prisoners, $400; of medical attendance, clothing, and board for the poor, $700; of auditing county books, $175; of bounties on wild animals, $1,000; of widows' pensions, $400; of advertising and printing, $700; of interest on warrant indebtedness, $4,000; and of insane, $100. The budget also includes estimates for bridges, roads, and schools. However, no provision was made for election expenses, for the reason that the next regular election does not occur until 1918. According to the written stipulation, a tax levy was made on December 29, 1916, as follows: "For state tax, 2.3 mills; county tax, general, 4.1 mills; school purpose, 1.6 mills; road and bridges, 7 mills." The county owes $5,000 for debts contracted pursuant to state laws and incurred prior to November 7, 1916, when section 11 was added to article 11 of the Constitution. The tax levy for 1917 was made in accordance with the budget for that year, and, exclusive of state taxes, the levy will produce $61,120. It will cost $1,200 to hold an election in Curry county. If during 1917 the county expends the full amounts estimated for the several items mentioned in the budget, and if the county also incurs a debt of $1,200 for holding an election, the total indebtedness will exceed $5,000; but this conclusion rests on the assumption that the county has no income except from the tax levy made in December, 1916.

Geo. M. Brown, Atty. Gen., and I. H. Van Winkle, Asst. Atty. Gen., for petitioner. S. M. Endicott and W. C. Winslow, both of Salem, for defendants.

HARRIS, J. (after stating the facts as above). The officials of Curry county offer three excuses for their refusal to prepare for holding the special election. The first excuse arises out of the fact that the budget for 1917 makes no provision for an election; the second proceeds upon the theory that the expense of the election will increase the indebtedness of the county beyond the maximum limit fixed by article 11, § 11, of the Constitution; and the third is predicated upon the contention that the tax levy for 1918 will necessarily be raised over and above the increase permitted by article 11, § 11, of the organic act. In brief, the defendants argue that there is no election fund available to pay the cost of the election; that the expense of the election will increase the indebtedness beyond the limit fixed by the Constitution; and that to raise the money to pay the expense of the election will require a levy for 1918 in excess of the limit allowed by the Constitution. Since the defenses interposed by the defendants grow out of the budget law and sections 10 and 11 of article 11 of the Constitution, it will be appropriate first to call attention to the statute and the Constitution.

The budget law requires the county court to make an estimate of the amount of money proposed to be raised by taxation for the ensuing year. The statute directs that the estimate shall be fully itemized, showing under separate heads the amount required for each department of county government, county office, each county improvement, building, roads, bridges, and "shall contain a full and complete disclosure of the contemplated expenditures from the money or moneys proposed to be raised by taxation, showing the amount of each public expense." The estimates and the tax proposed to be levied must be published, together with a notice of the time and place at which the taxpayers can discuss the budget and proposed tax with the county court. After the hearing is had, the county court is directed to declare the amount of taxes to be raised, and to make a levy sufficient to raise the necessary taxes,

> "and no greater tax than that so entered upon the record shall be levied by the authority proposing such tax for the purpose indicated or collected, and thereafter no greater expenditure of public moneys shall be made for any specific purpose than the amount so estimated and 10 per cent. thereof." Chapter 234, Laws 1913.

Article 11, § 10, of the Constitution, originally read thus:

> "No county shall create any debts or liabilities which shall singly, or in the aggregate, exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion; but the debts of any county at the time this Constitution takes effect shall be disregarded in estimating the sum to which such county is limited."

At the regular general election held on November 8, 1910, this section of the Constitution was amended to read as follows:

> "No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, or to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question." Laws 1911, p. 11.

At the next regular general biennial election held on November 5, 1912, the section was again amended, and it now appears thus:

> "No county shall create any debts or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion or to build and maintain permanent roads within the county; and debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate with previous debts and liabilities incurred for that purpose exceed two per cent. of the assessed valuation of all the property in the county." Laws 1913, p. 9.

A new section, designated as section 11 of article 11, was added to the Constitution at the election held on November 7, 1916, and it is here set out in full:

> "Unless specifically authorized by a majority of the legal voters voting upon the question neither the state nor any county, municipality, district or body to which the power to levy a tax shall have been delegated shall in any year so exercise that power as to raise a greater amount of revenue for purposes other than the payment of bonded indebtedness or interest thereon than the total amount levied by it in the year immediately preceding for purposes other than the payment of bonded indebtedness or interest thereon plus six per centum thereof; provided, whenever any new county, municipality or other taxing district shall be created and shall include in whole or in part property theretofore included in another county, like municipality or other taxing district, no greater amount of taxes shall be levied in the first year by either the old or the new county, municipality or other taxing district upon any property included therein than the amount levied thereon in the preceding year by the county, municipality or district in which it was then included plus six per centum thereof; provided, further, that the amount of any increase in levy specifically authorized by the legal voters of the state, or of a county, municipality, or other district, shall be excluded in determining the amount of taxes which may be levied in any subsequent year.
>
> "The prohibition against the creation of debts by counties prescribed in section 10 of article 11 of this Constitution shall apply and extend to debts hereafter created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state, and any indebtedness created by any county in violation of such prohibition and any warrants for or other evidences of any such indebtedness and any part of any levy of taxes made by the state or any county, municipality, or other taxing district or body which shall exceed the limitations fixed hereby shall be void." Laws 1917, p. 12.

[1] Recurring to the answer, the first defense is rested upon the provisions of the budget law. The argument is that chapter 234, Laws 1913, commands that no greater expenditure of public moneys shall be made for any specific purpose than the amount estimated in the budget plus 10 per cent.; that the budget made no provision for elections for the reason that the next regular election will occur in 1918; and that therefore to spend public moneys in 1917 for a special election would be to violate chapter 234, Laws 1913. The budget law was enacted by the Legislature, and the same body passed chapter 422, Laws 1917, providing for the special election. The authority that restricted the disbursements to specified purposes can, subject to certain exceptions not controlling here, afterwards remove those restrictions. The act of 1917, directing that a special election be held, also carries with it an implied command that the several counties of the state pay the expenses of such election; and therefore the restrictions imposed by the earlier statute of 1913 are removed to whatever extent it may be necessary to release the county from that statute in order to permit compliance with the later statute of 1917.

The second and third defenses may be considered together, since they depend upon tax and indebtedness limitations prescribed by the Constitution. Section 11 of article 11 is divided into two paragraphs. The first paragraph imposes a limitation upon the power to tax, while the second prescribes a limitation upon indebtedness. Notwithstanding the language employed in section 11, it was earnestly argued that this section will not include indebtedness incurred in holding the special election, for the reason that such indebtedness would be involuntarily incurred in the performance of an obligation thrust upon it by the Legislature. All doubts concerning the intent and meaning of section 11 will be removed if we first call attention to the construction that for more than a quarter of a century was placed upon section 10, and if we then carry that construction with us and apply it as directed by section 11. In Grant County v. Lake County, 17 Or. 453, 464, 21 Pac. 447, this court held that section 10 only applied to debts and liabilities which a county voluntarily created, and that it did not include involuntary indebtedness thrust upon it by operation of law. The first judicial construction placed upon section 10 has been adhered to in every subsequent adjudication, whether the section was presented in its original or in its amended form; and no difference of opinion can possibly exist concerning the accepted meaning of this provision of the Constitution. Wormington v. Pierce, 22 Or. 606, 614, 30 Pac. 450; Burnett v. Markley, 23 Or. 436, 440, 31 Pac. 1050; Dorothy v. Pierce, 27 Or. 373, 375, 41 Pac. 668; Security Co. v. Baker County, 33 Or. 338, 343, 54 Pac. 174; Eaton v. Mimnaugh, 43 Or. 465, 471, 73 Pac. 754; Brockway v. Roseburg, 46 Or. 77, 82, 79 Pac. 335; Brix v. Clatsop County, 46 Or. 223, 80 Pac. 650; Cunningham v. Umatilla County, 57 Or. 517, 519, 112 Pac. 437, 37 L. R. A. (N. S.) 1051; Andrews v. Neil, 61 Or. 471, 120 Pac. 383, 123 Pac. 32; Bowers v. Neil, 64 Or. 104, 128 Pac. 433; Wingate v. Clatsop County, 71 Or. 94, 142 Pac. 561; Stoppenback v. Multnomah County, 71 Or. 493, 142 Pac. 832. The obvious purpose of section 11 is to broaden the prohibition of section 10, and to include in the prohibition a kind of indebtedness not previously included. Manifestly, section 11 is designed to include a class of indebtedness which the courts had previously said that section 10 did not include. The extent of the enlargement of the prohibition is made plain and certain by expressly extending section 10 to debts "created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state." This language needs no extraneous words to aid in its construction, for it is unambiguous and self-construing. To hold that section 11 does not apply to any involuntary indebtedness would be to deny the indisputable meaning of the clearest language. Standing alone, section 10 applies to voluntary indebtedness; but, when aided by section 11, it also applies to involuntary indebtedness, or debts created in the performance of duties and obligations imposed by the Constitution or laws of the state. Aside from the exceptions expressly specified by the Constitution, a county is absolutely prohibited from incurring an indebtedness in excess of $5,000.

While it is not necessary to seek information outside the plain language found in sections 10 and 11, yet it may be of more than passing interest to call attention to the discussions appearing in the public prints, prior to November 7, 1916, concerning the origin and purpose of the amendment to the Constitution. An organization known as the State Taxpayers' League caused the amendment to be framed and circulated the petitions for its submission to the voters. The pamphlets printed by the state and sent to all the voters expressly stated that the amendment had been "initiated by State Taxpayers' League"; and, furthermore, a printed argument made by the State Taxpayers' League in behalf of the amendment appeared in the voters' pamphlet. A monthly newspaper called "The Tax Liberator" was the avowed official publication of the Oregon Taxpayers' League. Copies of the paper are on file with the Oregon State Library. The publishers of this paper proclaimed that one of the purposes of the amendment was to place a limit on the power of disbursing officers to incur indebtedness. An extract from an editorial appearing in "The Oregon Voter," a weekly publication, and republished on page 2 of the July, 1916, issue of the Tax Liberator, reads thus:

> "Emergencies there will be, requiring immediate, heavy expenditure. This applies to public as well as private business. The private business man knows that his income is limited; yet he must be ready to meet emergencies, and must take care of himself when they arise. The public bodies must learn the same lesson; they must learn that they must arrange public finances within the limit of income in such a way that emergencies can be met when they arise. This will require saving and trimming in advance the same as a farmer or other man in private business must do. Facing a limit beyond which expense must not go will result ultimately in more careful financing and ample provision for emergencies. Absence of any limit simply results in adding the emergency expense to present running expenses, regardless of the size of the increased burden upon taxpayers."

Moreover, in answer to the argument that the proposed amendment would not be workable, the sponsors for the amendment claimed that in framing it they had "exactly followed the principles of the Colorado law, which has proven to be most workable and entirely satisfactory to all concerned." Page 7, October, 1916, issue of The Tax Liberator. In this connection it is interesting to note that the Constitution of Colorado (Const. art. 11, § 6) provides that "the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to" the qualified electors. One Rollins held warrants issued by Lake county, one of the counties of Colorado, for the ordinary expenses, such as fees for witnesses and jurors, election costs, and charges for the board of prisoners. Rollins sued Lake county on the warrants. The county defended by contending that the warrants were void because issued after the county indebtedness had reached the limit fixed by the Constitution. The controversy finally reached the Supreme Court of the United States, and it was there argued, as it has been here, that the prohibition expressed in the Constitution did not apply to "compulsory obligations"; but that court sustained the defense made by the county, and refused to assent to the argument that the Constitution recognized a difference between indebtedness incurred by the voluntary contracts of the county and that form of debt denominated as "compulsory obligations." Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060.

At the hearing we were urged to adopt a construction which would enable counties to incur involuntary indebtedness, and in support of this plea it was argued that counties may at times experience difficulty in adequately performing the duties imposed upon them without exceeding the $5,000 indebtedness limitation; and, furthermore, it was suggested that some county may at some time in the future find itself temporarily weakened, or even paralyzed, by the restrictions laid upon it by article 11, § 11, of the Constitution. This argument is best answered by quoting the language employed by Mr. Justice Lamar when disposing of a similar argument advanced against the Colorado Constitution in Lake County v. Rollins, 130 U. S. 662, 672, 9 Sup. Ct. 651, 653 [32 L. Ed. 1060]:

> "If it was a mistaken scheme, if its operation has proved or shall prove to be more inconvenient than beneficial, the remedy is with the people, not with the courts."

[2, 3] Questions of policy and questions of what is best to insert in the Constitution must be regarded as having been conclusively settled when the legal voters adopted the amendment. The oath of the judiciary is to construe the Constitution as it is, and not as it might have been. Hagan v. Limestone County, 160 Ala. 544, 49 South. 417, 37 L. R. A. (N. S.) 1027; Gray on Limitations of Taxing Power and Public Indebtedness, § 2055.

However, this amendment to our Constitution does not involve a novelty, nor does it present an untried experiment. The Constitutions of some of the other states contain similar provisions, which, when presented to the courts for interpretation, have been construed to apply to both voluntary and involuntary indebtedness. People v. May, 9 Colo. 80, 10 Pac. 641; Barnard v. Knox County, 105 Mo. 382, 16 S. W. 917, 13 L. R. A. 244; Grand Island & N. W. Co. v. Baker, 6 Wyo. 369, 45 Pac. 494, 34 L. R. A. 835, 71 Am. St. Rep. 926; Gray on Limitations of Taxing Power and Public Indebtedness, § 2059.

[4] Any debt contracted by Curry county in holding the special election would be an involuntary indebtedness incurred in the performance of a duty and obligation imposed by a law of the state, and therefore such a debt is prohibited if it exceeds the $5,000 limitation fixed by the Constitution. The organic law prevents the county from voluntarily assuming the debt, and it also restrains the Legislature from compelling the county to assume the debt if the maximum limit of indebtedness will be exceeded. Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; 7 R. C. L. 952.

The next question for determination is whether, on the admitted facts, the special election will create an indebtedness in excess of $5,000. It will not be necessary to decide whether article 9, § 3, of the Constitution, applies to the taxes levied for roads and schools; but for the purposes of this investigation we shall assume that the Legislature cannot divert tax moneys levied for state or school or road purposes. See Northup v. Hoyt, 31 Or. 524, 528, 49 Pac. 754; Shattuck v. Kincaid, 31 Or. 379, 394, 49 Pac. 758; Miller v. Henry, 62 Or. 4, 10, 124 Pac. 197, 41 L. R. A. (N. S.) 97; Guest v. City of Brooklyn, 8 Hun (N. Y.) 97; Mason v. Purdy, 11 Wash. 591, 40 Pac. 130. We shall therefore first exclude all taxes levied for the state, and also those levied for schools, roads, and bridges. The remainder of the levy was for "county tax, general 4.1 mills." This levy will produce $19,037.60 for general county purposes.

[5] Although the record does not reveal how much of the levy for general county purposes has actually been collected, nevertheless, after the levy is made, the payment of the taxes is regarded as a legal certainty, and for that reason our calculations must assume that Curry county has collected $19,037.60 for general county purposes. Security Co. v. Baker County, 33 Or. 338, 347, 54 Pac. 174. The record does not show how much of this amount has already been expended; but it is fair to assume that only such sum has been paid out as is proportionate to the expired portion of the year.

[6] It is true that the budget shows that the county plans to expend the whole amount raised for general county purposes; and, if the county carries out its plans, it will be impossible to hold the special election without exceeding the $5,000 indebtedness limitation. In other words, if the county is permitted to do what it has planned to do, it will pay out all the tax money for the items mentioned in the budget, and there will be no money available to pay the cost of the election. The Legislature, however, by the enactment of chapter 422, Laws 1917, has in effect said to Curry county: "If your plans require all your money, then you must change your plans; and, instead of using all your money as you have planned, you must set aside a sufficient sum to pay for the special election and only the balance remaining is available for your plans." Miller v. Henry, 62 Or. 4, 7, 124 Pac. 197, 41 L. R. A. (N. S.) 97. Some of the items appearing in the budget are for voluntary purposes, while the others are for involuntary obligations, and most of the involuntary obligations were originally imposed by the Legislature. The

legislative authority which imposed most of the involuntary obligations included in the budget also created the duty of holding the special election, and the duty lately created is not necessarily of a lower rank than the obligations previously imposed. If there is not enough money to pay for both the voluntary and involuntary items, the latter will, of course, take precedence over the former; and if perchance because of a lack of funds the county cannot perform all the obligations imposed upon it without exceeding the debt limitation, nevertheless the necessity of obeying the Constitution is paramount and controlling.

However, it is not probable that the expenditure of $1,200 for the special election will be followed by the direful consequences suggested by the answer. The pleadings do not mention and no account has been taken of the revenues coming to the county from sources other than taxes. The fees paid to the various county officers for the county during the year undoubtedly aggregate a considerable sum, and probably are more than enough to pay for holding the special election. If the income from fees and other sources aside from taxes is sufficient to pay for the election, then all the general county taxes will be available for the purposes mentioned in the budget, and the county will be able to carry out its plans without exceeding the indebtedness limitation. The answer fails to show that the Constitution will be violated if the election is held; and therefore the demurrer to the answer was properly sustained, and the petitioner was entitled to a peremptory writ commanding the defendants to prepare for the election.

(84 Or. 507)

MILLER v. STATE INDUSTRIAL ACC. COMMISSION.

(Supreme Court of Oregon. June 12, 1917.)

1. MASTER AND SERVANT 🔑417(5) — WORKMEN'S COMPENSATION ACT—EXPEDITING APPEALS.

By Workmen's Compensation Act (Laws 1913, c. 112) § 32, providing that an appeal from a decision of the Industrial Accident Commission shall have precedence over all other cases, except criminal cases, the Legislature did not intend that such appeal should be expedited to the extent of disarranging the orderly transaction of business in the circuit court, or that cases already set for trial with witnesses under subpœna should be displaced for such purpose.

2. MASTER AND SERVANT 🔑417(5) — WORKMEN'S COMPENSATION ACT—APPEAL TO CIRCUIT COURT—HEARING DE NOVO.

Under the Workmen's Compensation Act, providing that on hearing of an appeal to the circuit court, the court, in its discretion, may submit to a jury any question of fact involved, and that the proceedings shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced, on appeal to the circuit court from an order of the Industrial Accident Commission, the court properly considered other evidence than that submitted to the commission on the original hearing, thus making the hearing practically a de novo trial.

3. MASTER AND SERVANT 🔑417(9) — WORKMEN'S COMPENSATION ACT—JUDGMENT ON APPEAL FROM INDUSTRIAL COMMISSION.

On appeal to the circuit court from an order of the Industrial Accident Commission in proceedings by an injured servant for compensation under the Workmen's Compensation Act, the court improperly entered judgment for the servant based on conclusions of law that in deciding what amount should be awarded the court was not limited to compensation as provided by the Workmen's Compensation Act; that the court was entitled to hear and consider only such testimony as would have been competent, relevant, and material had the case been an action at law to recover damages for a personal injury; that in fixing the amount to be allowed the servant, the court was not limited by any schedules of the act, nor by any provision for monthly payments, etc.; and that in making an allowance for surgical and medical services, the court was not limited to the surgical scale established by the commission under the act.

4. MASTER AND SERVANT 🔑417(9) — WORKMEN'S COMPENSATION ACT — FINDINGS OF CIRCUIT COURT—DEFINITENESS.

On appeal from judgment of the circuit court on appeal to it from an order of the Industrial Accident Commission in an injured servant's proceeding for compensation under the Workmen's Compensation Act, court's findings for the servant *held* not sufficiently definite to enable the Supreme Court to enter final judgment; the conclusions of law and judgment below being erroneous.

In banc. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Proceedings for compensation for injuries under the Workmen's Compensation Act by George E. Miller, the employé. From an order of the State Industrial Accident Commission disallowing the claim, claimant appealed to the circuit court, which entered judgment for claimant, and the commission appeals. Cause remanded to the circuit court, with directions to take further proceedings.

See, also, 159 Pac. 1150.

While working as a carpenter upon a building in Portland plaintiff fell, striking upon his head in such a manner as to produce a partial facial paralysis. The employer and employé had both voluntarily accepted and were acting under the provisions of chapter 112, Laws 1913, commonly known as the "Workmen's Compensation Act." The plaintiff in pursuance thereof filed a claim for compensation for the injury above mentioned. After an informal investigation, the commission disallowed the claim upon the ground that the injury existed prior to the accident described. The claimant then appealed to the circuit court for Multnomah county, where, after a hearing, a judgment was entered in favor of plaintiff, from which the commission appeals.

Geo. M. Brown, Atty. Gen., and J. A. Benjamin, Asst. Atty. Gen., for appellant. James H. McMenamin, of Portland, and Eugene Bland, of Findlay, Ill., for respondent.

BENSON, J. (after stating the facts as above). [1] The first point for consideration is the fact that the trial court did not give this appeal precedence over certain other cases already set for trial upon days certain, although such cases were not a part of the criminal docket. The act under consideration in section 32 thereof provides that "such appeal shall have precedence over all other cases except criminal cases." We cannot believe that the Legislature intended that such appeals should be expedited to the extent of disarranging the orderly transaction of business in the circuit courts; or that cases already set for trial, with witnesses under subpœna, should be displaced for that purpose.

[2] The next assignment of error challenges the power of the circuit court to consider other evidence than that submitted to the commission upon the original hearing. The compensation act as it existed at the time of the appeal contained among others the following provision:

> "Upon the hearing of such an appeal the court in its discretion may submit to a jury any question of fact involved in such an appeal. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced."

Under a very similar statute the Court of Appeals of Maryland in Frazier v. Leas, 127 Md. 572, 96 Atl. 764, holds that the language of the act necessarily implies the taking of testimony by the appellate court and the doctrine there announced was reiterated in American Ice Co. v. Fitzhugh, 128 Md. 382, 97 Atl. 999. We conclude that there was no error in making the hearing practically a de novo trial.

We come then to a consideration of the action of the court in treating the appeal as an original action for damages and giving judgment accordingly. After making findings of fact, the court also filed conclusions of law, among which are the following:

> "That for the injuries resulting from the fall referred to in finding VIII the plaintiff is entitled to damages in the full legal sense of that term to the amount of $366.33 to be paid out of the fund created under the provision of said Workmen's Compensation Act.
>
> "That in deciding what amount should be awarded to plaintiff, the court is not limited to compensation as provided by the statute creating the State Industrial Accident Commission (Laws 1913, c. 112), but acts as a jury, and may take into consideration all the elements of damage that a jury might consider.
>
> "That upon the hearing of the appeal herein the court was entitled to hear and consider such testimony only as would have been competent, relevant, and material had the case been an action at law to recover damages for a personal injury.
>
> "That in fixing the amount to be allowed to plaintiff for his injuries, the court is not limited by any of the schedules contained in said act, nor by any provision for monthly payments therein contained, nor by any of the methods provided by said act for computing compensation.
>
> "That in making an allowance for surgical and medical services in such cases as this, the court is not limited to the surgical scale established by the defendant commission under section 23 of said Workmen's Compensation Act."

These conclusions were followed by a judgment for the claimant in the sum of $366.33 and the additional sum of $75 as physician's fees. We are entirely at a loss to determine the theory or authority upon which the court based such a view of the law. There is nothing in the statute itself to justify such a contention, and our attention has not been called to any authority which might sustain it. Its effect would be to repeal the compensation act by the simple process of appeal. Under the provisions of the statute, an appeal from a decision of the commission does not give the appellate tribunal any new cause of action, or any different law upon which to base its judgment.

[3] The judgment is therefore clearly erroneous. We have no record of the testimony taken in the circuit court and as to the facts of the case are limited to the findings. Upon the questions of injury and disability these findings are as follows:

> "That the result of such striking of plaintiff's head as set out in finding VIII was partial facial paralysis, so that plaintiff for a long time could not control the muscles of the left side of his face, and the control of the left eye was diminished. Such partial paralysis had largely disappeared at the time of the trial and will probably entirely pass away within a few months. During the continuance of such partial paralysis the plaintiff regularly continued at work as a carpenter on said building until it was completed without diminution of wages. That plaintiff's face was not at all paralyzed prior to said accident.
>
> "That at the time of the accident plaintiff was working as a carpenter, but did not habitually earn his living solely at that trade; nor was he able to find carpenter work during the entire period of his partial facial paralysis. That during part of the period of plaintiff's disablement he worked as an itinerant vendor and canvasser.
>
> "That said condition of partial facial paralysis to a certain extent but not entirely disabled plaintiff for the performance of the work of a carpenter for a period of several months, and entirely disabled him for a period of, viz., one year, as an itinerant vendor and canvasser."

[4] These findings are not sufficiently definite to enable us to enter a final judgment, and the cause will therefore be remanded to the circuit court, with directions to take such further proceedings, not inconsistent herewith, as will enable that court to fix claimant's compensation in accordance with the provisions of the compensation act as it existed at the time of the hearing.

(84 Or. 483)

WAKEFIELD, FRIES & CO. v. PARKHURST et al.

(Supreme Court of Oregon. June 12, 1917.)

1. ASSIGNMENTS 🔑50(1)—CONSTRUCTION—INTENTION OF PARTIES.

An order drawn on a specific fund may operate as an assignment of such fund.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99–105.]

2. ASSIGNMENTS 🔑134—EVIDENCE—BURDEN OF PROOF.

The burden is upon one alleging that a fund has been assigned to him to prove that fact, and that the alleged assignor parted with control over the fund.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 229–231.]

3. ASSIGNMENTS 🔑50(1)—EVIDENCE—SUFFICIENCY.

A letter written by the lessee of buildings appointing a corporation his agent to collect rents of buildings named, and authorizing such agent, after paying expenses of operation, to turn over the balance to the owner, was not an assignment of the fund to the owner, but was an instruction to the agent as to disposal of the fund, which direction could be modified or revoked, although the lessee later recognized his moral obligation to apply his rentals to the payment of his debts to the owner.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99–105.]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Interpleader by Wakefield, Fries & Co. to determine the ownership of a fund between Alfred L. Parkhurst and H. Moumal and others. From the decree, Alfred L. Parkhurst appeals. Affirmed.

This is an interpleader suit brought by Wakefield, Fries & Co., a corporation, to determine the ownership of a fund in its hands. The right of interpleader is admitted by the defendants. The controversy is between the appellant, Alfred L. Parkhurst, and the respondents Chamberlain, Thomas, and Kraemer. It appears from the record that Parkhurst is the owner of lots 1 and 4 in block 18 of Couch's addition to the city of Portland; that the defendant Moumal was his lessee; that Moumal had sublet the premises to sundry tenants; that in March, 1915, Moumal was in arrears in a considerable sum in the payment of the rent due Parkhurst; that the latter was demanding payment of this debt. A conversation was had about March 15th between L. E. Crouch, attorney for Parkhurst, and the defendant Moumal. Moumal expressed his willingness at this interview to turn over the lease or the rentals accruing to him from the premises, and Mr. Crouch insisted that this should be done. On March 19th, several days after this interview, the defendant Moumal gave the following letter to Wakefield, Fries & Co.:

"I hereby appoint you my agent for the purpose of collecting all of the rentals from that certain building and premises situated and being upon lots one (1) and four (4), block eighteen (18), Couch's addition to the city of Portland, Oregon.

"And hereby authorize and direct that you take full charge of said building and premises and rent the same out to such persons and upon such terms as to you may seem best for my interests; and that out of the funds collected by you from rentals, you will pay the necessary incidental expenses of operation, and the balance you will turn over to Alfred L. Parkhurst, as rental for said premises, under and by virtue of the lease thereof, which I hold.

"And to carry out the terms of said lease and make all the payments and fulfill all the covenants therein as far as is possible, hereby authorizing and directing you to do any and all things which are necessary or requisite to carry out the terms of said lease as fully and to the same extent as I could, or might do, if personally attending thereto."

Thereafter Wakefield, Fries & Co. continued to collect the rents, turning over the net proceeds to Parkhurst. On August 30, 1915, Moumal sent the following notice to plaintiff:

"You are instructed to pay to Chamberlain Thomas Kraemer Humphreys 400–7 Chamber of Commerce Bldg. this city the money now in your hands and hereafter collected as rentals for the building owned by Alfred L. Parkhurst at Second and Couch streets."

The defendant Moumal followed this up with an assignment, executed under date of September 9, 1915, of all moneys in the hands of plaintiff or thereafter collected by plaintiff, to Chamberlain, Thomas, Kraemer, and Humphreys. On September 10th, the defendant Moumal notified plaintiff in writing that its authority to collect rents for him was revoked. On August 30th, the fund in the hands of plaintiff amounted to $433.32, and thereafter plaintiff collected $86. Being in doubt as to whether the defendant Moumal had the power to make a new disposition of these rentals and direct their payment to Chamberlain, Thomas, and Kraemer, plaintiff paid the money into court and brought this interpleader suit. The decree of the lower court adjudged the fund to Chamberlain, Thomas, and Kraemer, and the defendant Parkhurst appeals.

L. E. Crouch, of Portland, for appellant. Otto J. Kraemer, of Portland (Chamberlain, Thomas & Kraemer, of Portland, on the brief), for respondent.

McCAMANT, J. (after stating the facts as above). [1-3] This record raises one controlling question: Did Moumal's letter of March 19, 1915, operate as an assignment of the rentals to be collected in the future by plaintiff? Did he thereby lose control over the fund to such extent as to nullify his subsequent attempt to divert the fund to payment of a debt which he owed Messrs. Chamberlain, Thomas, and Kraemer? It has been repeatedly held by this court that an order drawn on a specific and clearly designated fund may operate as an assignment of such fund. McDaniel v. Maxwell, 21 Or. 202, 27 Pac. 952, 28 Am. St. Rep. 740; Willard v.

Bullen, 41 Or. 25, 33, 67 Pac. 924, 68 Pac. 422; Morris v. Leach, 82 Or. 509, 511, 162 Pac. 253. In Commercial National Bank v. Portland, 37 Or. 33, 39, 54 Pac. 814, 60 Pac. 563, an order was held ineffectual to operate as an assignment of the fund involved in that case. The question is one of intention of the parties. Pacific Coast Co. v. Anderson, 107 Fed. 973, 977, 47 C. C. A. 106. In 3 Pom. Eq. Jur. (3d Ed.) § 1282, it is said:

> "A mere letter, communication, or other mandate to the agent, depositary, or debtor, directing him to pay the fund to a designated person, will not of itself operate as an assignment, but it may be withdrawn or revoked at any time before the arrangement is completed, by information given to the intended payee by or on behalf of the drawer. What shall amount to the present appropriation which constitutes an equitable assignment is a question of intention, to be gathered from all the language, construed in the light of the surrounding circumstances."

In the light of the principles announced in these authorities, can we gather from the letter of March 19, 1915, an intention on the part of the defendant Moumal to assign the rentals to be collected from his tenants, and to surrender at that time dominion over the fund arising from such collection? It is true that there was a debt owing from Moumal to Parkhurst. It is also true that Moumal recognizes a moral obligation to apply his rentals on the payment of this debt. He testified:

> "The money belonged to Mr. Parkhurst; it didn't belong to me. I considered the money belonged to the building, and the building belonged to Mr. Parkhurst."

On the other hand, the letter was not given to Mr. Parkhurst or his attorney. It was handed to Wakefield, Fries & Co. several days after Mr. Parkhurst's attorney had asked for an adjustment of the matter.

In its form the letter is a mere mandate or instruction to Mr. Moumal's agent, directing the latter to dispose of Moumal's funds in a particular way. Such a direction may ordinarily be modified or revoked. It is true that plaintiff was collecting rentals for the defendant Parkhurst, but Mr. Moumal testifies he selected plaintiff to act in the premises for other reasons; he had known the plaintiff firm for fifteen years; being about to leave for Alaska and being unable to give personal attention to the matter, he selected plaintiff to perform the service specified in his letter of March 19, 1915. Mr. Moumal further testifies clearly and emphatically that, at the time when the letter of March 19th was given to plaintiff, Mr. Guild, secretary of plaintiff, expressly stated that the letter could be recalled and the authority revoked at any time. Mr. Guild does not deny this testimony.

Moumal's testimony that the fund belonged to Parkhurst proves that at the time of the trial he recognized the injustice done Parkhurst by the diversion of the fund to other purposes. This testimony cannot infuse into his letter of March 19, 1915, a vitality which it does not possess. The intention which is material in the construction of this instrument is the intention at the time when it was given. The burden devolved upon the defendant Parkhurst to prove that the fund in question had been assigned to him, and that Moumal had parted with control over it. We think that the lower court did not err in its conclusion that the defendant Parkhurst failed to sustain this burden.

The decree is affirmed.

McBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

(84 Or. 488)

WIGAN et al. v. LA FOLLETT et al.

(Supreme Court of Oregon. June 12, 1917.)

1. APPEAL AND ERROR 🔑907(2)—PRESUMPTION OF ERROR—EXCLUSION OF TESTIMONY.

In the absence of evidence or tender thereof to show former statements inconsistent with witness' testimony as allowed by L. O. L. §§ 861, 864, it cannot be presumed on appeal that any such testimony was excluded to appellant's prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2913, 2915, 2916.]

2. WITNESSES 🔑414(2) — CORROBORATION BY UNSWORN STATEMENTS.

A witness' former statement not under oath was not competent under L. O. L. §§ 861, 864, allowing a party to show former inconsistent statements of his witness, to strengthen his evidence given in court, which was weak, although not adverse or prejudicial, but merely unsatisfactory to defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1288.]

3. SALES 🔑3—CONSTRUCTION OF CONTRACT—SALE OR OPTION.

Agreement relating to raising of hops by defendant and purchase thereof by plaintiff, *held* to be a mutual agreement, and not a mere option in plaintiffs' favor, and binding plaintiffs to accept the crop if of specified quality, although the quantity was less than that named in the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 6-19.]

4. SALES 🔑54—CONSTRUCTION OF CONTRACT AS A WHOLE.

In construing contract of sale, the whole agreement is to be considered, and not merely one clause of it, in the light of prevailing conditions and circumstances within parties' contemplation at the time of execution.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 152.]

5. SALES 🔑182(1) — QUESTION FOR JURY — CONFLICTING EVIDENCE.

Where evidence was conflicting as to quality and inspection of hops which plaintiff had contracted to purchase, such questions were for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 492.]

6. SALES 🔑153 — DELIVERY — NECESSITY OF NOTICE BY SELLER.

Contract provision requiring seller to give ten days' notice of proposal to deliver was rendered ineffectual by the buyer's going to place of delivery and inspecting and refusing the crop.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 358–366.]

7. SALES 🔑168(4)—DELIVERY—NECESSITY OF TENDER BY SELLER.

Where buyer upon inspection rejected goods, it was unnecessary for a seller to tender goods and load same as specified by contract, since this was to be done after acceptance as the buyer might direct.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 406.]

8. TRIAL 🔑194(13) — INSTRUCTION — "CONSTRUCTION" OF CONTRACT.

Instruction that jury should give terms of contract for purchase of hops "such a reasonable construction" as placed upon them by persons engaged in that business, *held* not erroneous, the word "construction" referring to the evidence of the different witnesses, and not leaving to the jury the construction of the contract regardless of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 462.

For other definitions, see Words and Phrases, Construction.]

9. SALES 🔑364(7) — ACTION ON CONTRACT — INSTRUCTIONS—INSPECTION.

Instructions submitting disputed fact as to whether buyer of hops had reasonable opportunity for inspection *held* proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1072.]

10. SALES 🔑176(4)—EXTENT OF BUYER'S INSPECTION.

If buyer rejected hops after partial inspection, seller was not obliged to offer further opportunity for inspection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 440.]

11. TRIAL 🔑296(11) — INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

An instruction that seller could recover difference between amount realized from sale of hops after buyer's refusal to accept and the contract price, *held* not erroneous as giving the seller the right to sell hops for small fraction of their value when construed with other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 715.]

12. SALES 🔑340—BUYER'S REFUSAL TO ACCEPT—SELLER'S CHOICE OF REMEDIES.

Upon buyer's refusal to accept goods, the seller may keep the property subject to buyer's order after making tender thereof and sue for balance of purchase price, or may sell goods for best price obtainable and recover difference between amount obtained and contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927–942.]

Appeal from Circuit Court, Yamhill County; H. H. Belt, Judge.

Action by Edgar Clare Wigan and others against C. M. La Follett and another. Judgment for plaintiffs for $104.10, and plaintiffs appeal. Affirmed.

On account of the failure of the defendants to raise the quantity and quality of hops described in a certain contract of sale, plaintiffs brought this action to recover the sum of $2,100, advances made by them to the defendants for the purpose of raising the hops. The agreement was executed March 10, 1913, and the material part necessary to detail here provided that the defendants, mentioned therein as the "vendor," should complete the cultivation of about 20 acres of land then set out to hops on the farm of defendant C. M. La Follett, situated at Wheatland, Or., harvest, cure, and bale the hops grown thereon in the years 1913, 1914, 1915, 1916, and 1917, in a careful and husbandmanlike manner, bargain and sell, and between the 1st and 31st days of October of such years deliver to the plaintiffs, designated in the contract as the "purchaser," at the agreed price of 14 cents per pound, 30,000 pounds of hops to be grown upon such premises "in bales of about 185 to 205 pounds each, in new 24-ounce bale cloth five pounds tare per bale to be allowed, in entire lots f. o. b. boat, at Wheatland, Or.," as the purchasers might direct. Such hops were not to be of the first year's planting nor affected by spraying or mold, to be of good color, fully matured, cleanly picked, free from damage by vermin, and in good order and condition, otherwise known as "prime quality," and the purchasers were to have preference and selection both as to the quantity and quality over all other persons who might thereafter make contracts in relation to said hops. It was also stipulated:

> "That the vendor shall serve notice in writing on the purchaser, or his authorized agent, at Salem, Or., at least ten days before the date on which the vendor proposes to tender the delivery of said hops; but such notice shall not be sent until the entire lot is actually in bale and ready for delivery."

The purchasers agreed to buy 30,000 pounds of said hops, and pay 14 cents for each pound thereof, less advances made and interest thereon, conceding the right of the plaintiffs to inspect the same before acceptance, and of accepting—

> "any part less than the whole of the hops so bargained should for any cause the quantity of hops of the quality, character, and kind above described and which shall be raised, picked and harvested from said premises and tendered to him for acceptance be less than the amount bargained for."

It was further provided that to enable the vendors to cultivate and harvest the crop, 7 cents for each pound of hops which might be grown upon said lands, not exceeding $2,100 of the purchase price, should be advanced, $600 about April 1st, and $1,500 on or about September 1st, for each contract year. Paragraph V of the contract is in part as follows:

> "The parties hereto further agree that should any breach be made in the terms of this contract by the purchaser, the vendor not being in default, the vendor may recover from the purchaser, as liquidated damages, a sum equal to the difference between $4,200.00 and the value of thirty (30,000) thousand pounds of hops of the quality and in the condition above specified and hereby contracted, at the market price thereof in Salem, Oregon, on October 31, 1913, 1914, 1915, 1916, 1917, less the amount of all ad-

> vances made by the purchaser to the vendor by the terms of this agreement, with interest thereon at the rate of 6 per cent. per annum, and the purchaser agrees to pay the said damages on demand, and should any breach be made in the terms of this contract by the vendor, the purchaser not being in default, the purchaser may recover from the vendor, as liquidated damages, a sum equal to the difference between $4,200.00 and the value of thirty (30,000) thousand pounds of hops of the quality and in the condition above specified and hereby contracted, at the market price thereof in Salem, Oregon, on October 31, 1913–14–15-16–17, and in addition thereto all moneys which the purchaser may have advanced to the vendor in pursuance hereof and interest on the advances as above provided, and the purchaser agrees to pay the same upon demand [there follows a provision that the purchasers shall have a lien upon the hops as security for the advances which they may make and for such damages as they may sustain by reason of the default of the vendor and authorizes them to foreclose the same as a mortgage if such default be made]; but the vendor shall not be responsible for any default in the provisions of this contract, except to repay advances and interest, by reason of the shortage of the crop of hops to be raised upon said premises, if such shortage be occasioned by unfavorable seasons and could not be, for this reason, prevented by him: Provided, however, that nothing in this agreement contained shall be construed as a waiver by either party of the right to sue for the specific performance of this agreement, or as the exclusion or waiver of any other right or remedy which such party may have at law or in equity, or which may be vouchsafed him by this agreement. * * *"

In pursuance of this contract plaintiffs advanced to defendants the sum of $600 on April 1, 1914, and $1,500 on September 1, 1914. In that year defendants raised and harvested from the farm described 28,085 pounds of hops. The plaintiffs claim that these hops were not of the quality specified in the contract, but were moldy, not cleanly picked, not of good color, and were broken and the product of the first year's planting; that they were of the grade designated by the hop trade as "commons" and "mediums." After the hops were baled and stored in defendant La Follett's warehouse the agents of the plaintiffs went to his farm for the purpose of inspecting and, as they contend, of accepting and paying for the hops. They inspected eight samples at this time, which, according to their contention, proved to be uncleanly picked, broken, moldy, and not of the quality described in the agreement. They assert that further privilege of inspection was denied them, unless they would consent to accept the whole of the hops. Plaintiffs duly demanded a return of the $2,100 which was refused by the defendants. Consequently, on November 4, 1915, plaintiffs commenced this action setting forth the contract, asserting the breach of the same, the advances made, the failure of the defendants to raise the quality or quantity of hops specified therein, and their failure to permit the plaintiffs to inspect the hops. The defendants filed an answer admitting the advances, denying that the hops did not comply with the quality stipulated in the contract, or that they refused to permit the plaintiffs to inspect said hops, and denying any failure on their part to fulfill the terms of the agreement, and alleging as a further answer and counterclaim that they fully performed the contract on their part and produced 28,085 pounds of hops; that plaintiffs inspected the same on October 31st of that year and arbitrarily and wrongfully rejected them, after which the defendants sold the hops at the best price obtainable, to wit, $1,936. They further allege that they sustained general damages in the sum of $1,000; that they were entitled to a commission of $140 for selling such hops, and pray for a judgment of $1,050.90. A reply was filed putting in issue the allegations of the answer. The action was tried to the court and jury resulting in a verdict in favor of the plaintiffs for $104.10. From a judgment entered thereon plaintiffs appeal, assigning errors.

John H. McNary and Roy F. Shields, both of Salem (McNary, Smith & Shields, of Salem, on the brief), for appellants. Thos. Brown, of Salem, and W. T. Vinton, of McMinnville (Carson & Brown, of Salem, and McCain, Vinton & Burdett, of McMinville, on the brief), for respondents.

BEAN, J. (after stating the facts as above). The first contention made by the plaintiffs is that the court erred in its refusal to permit W. B. Magness, a witness for the plaintiffs, to answer a question asked for the purpose of laying the foundation for showing that the witness had made contradictory statements. Referring to the time of the inspection of the hops in question this witness testified as follows in answer to interrogatories by plaintiffs' counsel:

> "Q. You may state whether or not there was mold in this sample. A. There was a light trace of mold, three or more berries. Q. Did Mr. La Follett look at this sample? A. Not that I know of. * * * Q. How many berries did Mr. Durbin show you that were moldy? A. Two or three; I couldn't say exactly. * * * Q. Didn't Mr. Durbin show you off the top of the sample, some hops that were moldy? A. I couldn't say whether he showed me hops off the top or whether he split that sample; I couldn't say. I forget. Q. Didn't you tell me yesterday about noon in the office of Mr. Conner of this city, there being present Mr. Shields, Mr. Durbin, and myself and Mr. Conner's stenographer, that Mr. Durbin showed the samples that he drew, the last sample rather, and asked you to look at it, and that you did look at this sample, and you found lots of black mold in the top of it? A. No, I never told you I found lots of black ———."

Objection being made by counsel for defendants to such question, the court sustained the same. The witness had, however, practically answered it, and such answer was not withdrawn from the consideration of the jury, nor was any motion made to strike out the same. It is the contention of the plaintiffs that they were surprised by the unfavorable impression created by the last answer of the witness. That the purpose of the question was twofold: First, to refresh the mind of the witness in order that he might correct his testimony; or, second, if denied, to permit the plaintiffs to produce other evidence excusing their mistake in calling him, and thereby destroy the effect of his adverse testimony. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may show that he has made at other times statements inconsistent with his present testimony as provided by section 864. L. O. L. § 861.

[1, 2] Under the conditions disclosed by the record it would seem that the plaintiffs would have been entitled to other evidence, if such could have been produced, to show that the witness had at the time indicated made a statement inconsistent with the testimony he had given. In the absence of such evidence or tender thereof it cannot be presumed that there was testimony excluded to the prejudice of the plaintiffs. Error is not inferred. But there is a stronger reason why no error appears in this connection. The statement of the plaintiffs' witness, made at another time and not under oath, was not competent to strengthen the evidence given on the stand which was weak, though not strictly speaking adverse or prejudicial to the plaintiffs. It was unsatisfactory to the plaintiffs. The witness testified that he saw "a light trace of mold on three or four berries." This did not serve as a foundation for the introduction of unsworn declarations made at another time by the witness, who was not a party to the action, as direct proof to substantiate the fact that the hops were affected by a lot of black mold. To admit such declarations would be going farther that the Code intends or permits. This question is fully discussed in the following cases: Langford v. Jones, 18 Or. 307, 326, 22 Pac. 1064; State v. Steeves, 29 Or. 85, 103, 104, 43 Pac. 947; Dillard v. Olalla Min. Co., 52 Or. 126, 134, 94 Pac. 966, 96 Pac. 678; State v. Yee Gueng, 57 Or. 509, 515, 112 Pac. 424; Rhodes v. State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429. There was no error in the ruling of the court in this respect.

[3] The second and third assignments of error relate to the refusal of the court to strike out all evidence in support of the defendants' counterclaim and to eliminate the same from the consideration of the jury and the refusal of the court to direct a verdict in favor of plaintiffs as demanded in the complaint. These two assignments may be considered together, because if the defendants' counterclaim fails, then the plaintiffs are entitled to the full amount of the advances made. In the first place the plaintiffs submit that the defendants failed to perform the contract by raising only 28,085 pounds of hops, or less than 30,000, the stipulated amount. By reference to the contract we find:

(1) "The purchaser to have and there is hereby conceded to him the right of inspecting the same before acceptance and of accepting any part less than the whole of the hops so bargained should for any cause the quantity of hops of the quality, character, and kind above described and which shall be raised, picked, and harvested from said premises and tendered to him for acceptance be less than the amount bargained for;" (2) the entire crop, whatever the amount, is mortgaged to secure the advances the purchaser may make, and such damages as he may sustain by reason of the default of the vendors, and the agreement authorizes a foreclosure and allows attorney's fees therefor in the event of such default; (3) the agreement further provides that "the vendor shall not be responsible for any default in the provisions of this contract, except to repay advances and interest, by reason of the shortage of the crop of hops to be raised upon said premises, if such shortage be occasioned by unfavorable seasons and could not be, for this reason, prevented by him."

To begin with it seems that the contract is a mutual one and binds the purchasers to accept and pay for the crop raised on the premises, as well as the vendors to sell the same, although there should be less than 30,000 pounds, the maximum amount bargained for. It was a mutual adventure. It is not a mere option in favor of the purchasers. The clause relating to the purchasers' accepting less than the number of pounds named appears to be worded thus in order to provide for the acceptance of such part of the crop raised as is of the quality specified in the contract and for the rejection of the balance.

The clause providing that the seller shall not be responsible for any default, except to repay advances and interest, by reason of the shortage of the crop of hops occasioned by unfavorable seasons and without the fault of the vendors, is the closing part of the paragraph containing the various stipulations that should prevail in the event of any breach of the contract, and modifies the whole of such covenants as to a breach on the part of the sellers. The fair intendment of the latter clause is to absolve the vendors from any fault on account of such a failure to raise the full amount named, if they should exercise an ordinary degree of care and skill in the production of the hops and make an honest effort to produce the 30,000 pounds, although the crop might be short of that amount of contract hops. The trial court properly instructed the jury to this effect over the objection and exception of counsel for plaintiffs. See Livesley v. Johnston, 45 Or. 30, 52, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; Lachmund v. Lope Sing, 54 Or. 106, 102 Pac. 598; Kinzer Const. Co. v. State (Ct. Cl.) 125 N. Y. Supp. 46; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Buffalo, etc., Co. v. Bellevue Land & Impr. Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; Ontario, etc., Co. v. Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231.

The agreement as to advances refers to "seven cents for each pound of hops which may be grown on said lands and which are by this agreement to him bargained and sold," and then names the maximum amount. Why this surplusage or dual stipulation, if it was not contemplated that less than the larger number of pounds mentioned would be raised and delivered? Moreover, the plaintiffs have by their own conduct and declarations, as shown by the evidence, placed such a construction upon this part of the contract, for when their agents went to the La Follett farm October 31, 1914, and inspected the hops there was no controversy about the quantity of the crop. The dispute arose over the quality. The plaintiffs, according to the statement they then made, were willing to accept and pay for all the hops which were up to the standard specified by the agreement. It is true that the contract states as a general rule of damages the difference between a certain sum and the market value of the maximum amount of the hops mentioned thereon. In the event of their being a less quantity raised, by computation this rule is easily applied.

[4] In making a memorandum of the agreement the parties used a lengthy, ready-made form in print, adapted to nearly all conditions. In construing the same it is not a question as to what one clause of it indicates, but what the whole agreement means, viewed in the light of the prevailing conditions and circumstances which were within the contemplation of the parties thereto at the time of its execution. It is the contention of the plaintiffs that the nonliability clause only refers to the matter of damages which might be claimed by them. According to the construction which we have given to the contract it is incumbent upon the plaintiffs to carry out the same, unless there is a default on the part of the vendors; in other words, if the defendants, as claimed by plaintiffs, should be deprived of the benefit of their contract they would within the meaning thereof become responsible for a default by reason of a shortage of the crop which, as the evidence tended to show could not have been prevented by them, and held liable for a portion of the penalty. This would not be in accordance with the agreement of the parties.

[5] The motion on behalf of the plaintiffs for a directed verdict for the amount claimed by them depended upon the evidence in support of defendants' counterclaim. That introduced on the part of the latter tended to show that during the year 1914 they cultivated, picked, cured, and baled in a careful and husbandmanlike manner on the premises named in the agreement 28,085 pounds of "prime hops" of the kind specified in the contract, and had the same in the storehouses of defendant La Follett at Wheatland, Or., in good order and condition, on October 31, 1914; that at this time plaintiffs' agents went to the warehouse and stated to Mr. La Follett on behalf of plaintiffs that "we've come down to take in your hops"; that they inspected the hops, examining samples taken from eight bales, stating they could not take them as they did not suit them and were not up to the contract, but that they would pay two cents more than any one else for them; that defendant La Follett tendered the hops to the plaintiffs and demanded the money for them; that this offer was refused by plaintiffs who arbitrarily rejected the hops in violation of their contract. Such was the evidence to sustain the allegations of defendants' affirmative answer. The testimony on behalf of plaintiffs, which is in direct conflict with the main part of defendants' evidence, tended to show that the agents of the plaintiffs went to Mr. La Follett's farm on the day mentioned, the last day for the delivery of the hops as per the contract, for the purpose of inspecting, accepting, and paying for the hops in question according to the terms of the contract; that the hops were "dirty picked" and moldy, "not a sprinkling of mold, but moldy"; that they were not prime hops, but were "poor mediums to mediums"; that plaintiffs' agents stated that they proposed to take all the hops that came up to the terms of the agreement as to quality, and that they were there for that purpose; that there were two ways of settling the matter, one was for plaintiffs to pay two cents a pound more than any other dealer, or the proposition of absolutely rejecting the hops; that they did not accept the hops for the reason that they did not find any "prime hops." There were several witnesses and considerable testimony on both sides. There was a direct conflict in the evidence raising a question for the determination of the jury—therefore, there was no error in the refusal of the trial court to direct a verdict in favor of the plaintiffs for the amount demanded.

There was also a dispute as to the matter of inspection of the hops which stands upon the same footing as the quality of the crop. The question was properly submitted to the jury. By their verdict they found that the hops were "prime hops," as specified in the agreement; that the plaintiffs had a fair opportunity to inspect them and wrongfully rejected them, thereby breaching their contract.

There was some evidence, now complained of by plaintiffs that some of the hops tendered were "baby hops" or the product of the first year's planting, but the defendants' testimony indicated that a few hills were reset where some had died, and the jury found that the quantity of young hops did not lower the whole crop below the standard of "prime hops." This disposes of that contention.

[6, 7] It is also suggested by plaintiffs that the defendants were required to give them ten days' notice of their proposal to deliver the hops. This provision was rendered ineffectual by the plaintiffs' going to the place stipulated for the delivery, and inspecting

the crop, declaring that they were ready to accept them if they were in accordance with the specifications of the contract. They were there, therefore no notice to bring them to the place would have been of any avail. The evidence on both sides tended to show that the plaintiffs went to the warehouse at Wheatland to inspect and pass upon the quality of the hops, and the only bone of contention involved the quality of the crop. The purchasers agreed to pay for the hops "after the delivery and acceptance thereof by him at Wheatland, Or." 4 Ency. Pl. & Pr. 629. If, as the jury found from the testimony, the plaintiffs rejected the hops, it was unnecessary and would have been futile for the vendors to have loaded the same onto the boat. This was to be done after the acceptance, as the buyers might direct. They did not so order. See Livesley v. Krebs Hop Co., 57 Or. 352, 97 Pac. 718, 107 Pac. 460, 112 Pac. 1; Catlin v. Jones, 48 Or. 158, 85 Pac. 515; Krebs Hop Co. v. Livesley, 55 Or. 227, 104 Pac. 3.

[8] It is insisted by plaintiffs that they were entitled to an instruction to the jury with reference to the quality of the hops. This is granted. The court charged the jury upon this phase of the case as follows:

> "This action is brought upon a written contract which has been introduced in evidence, and which the court will consider and construe, and you are bound to follow the construction which the court places upon the written contract, for that is the law. * * * Now as to the quality of these hops contracted to be delivered, the contract says that these hops, first, are not to be the product of the first year's planting; second, not to be affected by spraying or mold; third, they should be of good color, fully matured, cleanly picked; fourth, free from damage by vermin, properly dried and cured, not broken, in good order and condition, otherwise known as prime quality. You are to accept the definition of prime quality as laid down in this contract by the parties themselves. You are, however, to consider these terms as used in this contract in the ordinary meaning and acceptation of those terms. You are to give them such a reasonable construction and meaning as are placed upon them by persons who are engaged in the hop business."

The plaintiffs criticize the latter part of this instruction and urge that it would have the effect of leaving to the jury the construction of the contract. We do not think the charge taken as a whole would have that effect. In other words, the latter sentence of the instruction containing the word "construction" refers to the evidence of the different witnesses in the case who were growers and buyers of hops, several of whom had been in the hop business for a number of years. These witnesses fully explained and discussed pro and con the different classifications of hops, including the kind named in the agreement, so that as applied to the evidence we do not believe it was possible for the jury to misunderstand or be misdirected by the charge which, as we read it, is plain and was proper. The point is not well taken. It was in strict conformity with the rule announced by Mr. Justice McNary in Netter v. Edmunson, 71 Or. 604, 614, 143 Pac. 636. This instruction was in substance the same as plaintiffs' request (assignment No. VI), save as to the latter part of such request, which is in conflict with the views we have expressed above.

[9, 10] The evidence on the part of the defendants tended to show that the plaintiffs had all the chance to inspect the hops that they desired, and after they had examined samples taken from eight bales they informed defendants they could not take the hops, as they were not up to the contract. Defendant La Follett testified in effect that after such inspection and rejection he merely told the agents of the plaintiffs that, "If you don't intend to take them, I don't want you to go through and cut them up." The court charged the jury upon this point in substance as follows:

> "Under this contract the plaintiffs have the right of inspection of these hops at any time prior to the full performance of this contract. * * * If you find from the evidence that the plaintiffs wrongfully rejected the hops and stated to the defendants that they would not accept the hops, after they had made an examination of a portion of the hops contracted to be delivered, then there would not be any obligation on the part of the defendants to offer a further opportunity for inspection, for the reason that the law does not require a party to do vain or idle things. If you believe, however, that the defendants refused the plaintiffs the right of reasonable inspection of these hops, then your verdict should be for the plaintiffs."

It appears that this disputed fact was fairly submitted to the jury. We find no error in the charge or refusal to instruct.

[11, 12] As a rule of damages in the case, over the objection and exception of counsel for the plaintiffs, the court instructed the jury as follows:

> "If you believe from the evidence that the plaintiffs wrongfully and arbitrarily refused to accept the hops mentioned in this contract, and that such hops were of the kind and character as described in the contract, and that the defendants had performed all the conditions of the contract on their part, then your verdict should be for the plaintiffs in such a sum of money as is equal to the difference between the contract price of these hops less the amount for which the hops resold for in the open market, plus the sum of money advanced, viz. $2,100; in other words, if you believe the defendants are entitled to prevail they would be entitled as damages to the difference between the sum of money they would have received had the contract been performed and the sum of money which they actually did receive for the hops."

It is claimed by plaintiffs' counsel that under the given instructions defendants were at liberty to sell the hops for a small fraction of their value. But the court further charged to the purport that if the jury should find that there had been a default on the part of the buyers, that the growers had performed all the terms of the contract, that the buyers had refused to accept the hops, and that the hops were of the kind and character described in the contract, then the growers might treat the hops as belonging to the buyers and go upon the market and resell them for the best obtainable price; that it was the duty of the grower in this respect to act in good faith and obtain the highest and best price, and in this connection the jury should consider as to what was the market value of the hops at the time; that the defendants would be obliged to sell the hops at the market value or in excess thereof. Taking the charge as a whole we do not understand the same as argued by counsel. The case of Daniels v. Morris, 65 Or. 289, 298, 130 Pac. 397, 132 Pac. 958, is authority for the instruction given. In that opinion Mr. Justice Burnett, speaking for the court, said:

> "When a buyer refuses to take and pay for property offered by the seller in performance of an executory contract for the sale thereof, the latter has the choice of either of two remedies. He may keep the property on hand subject to the order of the buyer, after making tender thereof, and maintain an action for the balance of the purchase price, or he may sell the goods for the best price obtainable, and if that is less than the contract price sue the buyer for the difference."

There was conflicting evidence upon the trial as to the market value of hops during November and the first part of December, 1914, the testimony concerning which ranged from seven to eleven cents a pound. It is also explained on behalf of defendants that the price being low during the month of November, the market was inactive, and that for a time the defendants were unable to make a sale of the hops. Their contention also is that after a crop has been rejected by a buyer it is difficult to make a sale thereof, especially in the vicinity of where the hops have been condemned; that Mr. La Follett, who attended to the sale on behalf of the defendants, was unable to make a sale in the Salem market, and was obliged to seek a sale in Portland, which he succeeded in making the first part of December. The jury might reasonably believe from the evidence that for the same cause a broker, in making a purchase, would exact a different grading of the product, which would account for the reason why some of the hops in question sold for seven cents, and nine bales for four cents per pound. The evidence tended to show that a fair endeavor was made on behalf of the defendants to make the best sale possible of the rejected hops, and apparently the jury so found.

From a careful reading and consideration of all the instructions given by the trial court to the jury, it appears that the questions at issue were fairly submitted to that tribunal.

Finding no error in the record, the judgment of the lower court is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(85 Or. 78)

THARP v. JACKSON.*

(Supreme Court of Oregon. June 12, 1917.)

1. EXECUTORS AND ADMINISTRATORS 🔑221(3)—ACTION ON QUANTUM MERUIT—EVIDENCE.

In an action on a quantum meruit for services rendered a decedent as stenographer, testimony that an agreement was made between decedent and plaintiff whereby he agreed to pay her $50 a month for her services, the entire payment to be made five years after she entered his service, was admissible as material to the measurement of damages.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865, 1866, 1871.]

2. EVIDENCE 🔑276 — DECLARATIONS OF DECEDENT—STATUTE.

Such testimony was admissible under L. O. L. § 710, providing that the declaration, act, or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1135.]

3. WITNESSES 🔑163—DECLARATIONS OF DECEDENT—PLAINTIFF AS WITNESS TO DECLARATIONS—STATUTE.

Plaintiff was entitled to testify to decedent's declarations under L. O. L. § 732, specifying persons who cannot testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 670.]

4. WITNESSES 🔑175(1)—ACTION AGAINST ADMINISTRATRIX—DECLARATIONS OF DECEDENT—ADMISSIBILITY.

Plaintiff's testimony as to decedent's declarations made the declarations admissible on behalf of defendant administratrix.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 711, 713, 720, 721.]

5. EXECUTORS AND ADMINISTRATORS 🔑221(3)—ACTION FOR SERVICES—EVIDENCE.

In the absence of evidence that all business transactions at decedent's office were noted on certain calendars for the years 1909 to 1913 inclusive, the calendars, on which decedent had made notations of the business transacted in his office from day to day, there being many days on which no notations were made, had no tendency to prove the small volume of work done at the office, and were properly excluded.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865, 1866, 1871.]

6. EXECUTORS AND ADMINISTRATORS 🔑451(2)—ACTION ON QUANTUM MERUIT—EVIDENCE AS TO VALUE OF SERVICES.

In an action on a quantum meruit against decedent's administratrix for services rendered decedent as stenographer, though evidence of a contract between plaintiff and decedent was admissible, the agreement was not indispensable to recovery by plaintiff, and plaintiff was entitled to have the jury consider other testimony bearing on the reasonable value of her services.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1879.]

7. LIMITATION OF ACTIONS 🔑46(7)—STATUTE OF LIMITATIONS—DEFERRED PAYMENT.

Where a stenographer agreed to work for decedent for $50 a month, payable at the end of five years, the payment did not become due until such time, and the statute of limitations did not run on the stenographer's cause of action until six years thereafter.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 246.]

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on petition for rehearing, see 165 Pac. 1173.

8. **Executors and Administrators** ⚷=221(5) —**Rendition of Services—Sufficiency of Evidence.**

In a stenographer's action against an administratrix for services rendered decedent, evidence *held* sufficient to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 903½, 1874, 1876.]

Department 2. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by Ada Tharp against Aura D. Jackson, as administratrix of C. S. Jackson, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action against defendant, as administratrix of the estate of C. S. Jackson, deceased, brought to recover the sum of $2,161.53 alleged to be due plaintiff for services rendered the decedent between February 10, 1908, and December 23, 1913. Plaintiff alleges that between these dates she officiated as stenographer and office clerk in Mr. Jackson's office, and that her services were reasonably worth the above sum for which she asks judgment. The answer denies the rendition of the services, and affirmatively pleads the statute of limitations, and payment. The jury found for the plaintiff in the sum of $550. From a judgment in plaintiff's favor following the verdict, the defendant appeals.

George Neuner, Jr., of Roseburg (Neuner & Wimberly, of Roseburg, on the brief), for appellant. H. T. Bagley, of Hillsboro, and Arthur Langguth, of Portland (John T. Long, of Roseburg, on the brief), for respondent.

McCAMANT, J. (after stating the facts as above). [1] Error is assigned on the admission of evidence over the defendant's objection to the effect that an agreement was entered into between C. S. Jackson and plaintiff, whereby he agreed to pay her $50 a month for her services; the entire payment to be made five years after she entered his services. This testimony is objected to on the ground that the action is based on quantum meruit and that evidence of a contract on the subject constitutes a variance. It is well settled in this jurisdiction that such testimony is admissible as material to the measure of damages. West v. Eley, 39 Or. 461, 465, 65 Pac. 798; Chamberlain v. Townsend, 72 Or. 207, 213, 142 Pac. 782, 143 Pac. 924.

[2] This evidence is also objected to on the ground that the declarations of a decedent are inadmissible against his personal representatives except where they relate to his real property. The testimony was admissible under the express provisions of section 710, L. O. L., which is as follows:

> "The declaration, act, or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

[3, 4] Plaintiff was entitled to testify to the declarations of the deceased under section 732, L. O. L. Her testimony on the subject made the declarations of the deceased admissible on behalf of the defendant, and the circuit court was liberal in admitting his declarations offered by the defendant.

[5] On plaintiff's objection, the court excluded calendars for the years 1909 to 1913, inclusive, on which the deceased had made certain notations of the business transacted in his office from day to day. There were many days on which no notations were made on the calendars. The claim of the defendant with reference to this testimony is defined in the offer of her counsel:

> "We offer these calendars in evidence as entries made in the regular course of business by the deceased. The purpose is to show the dates on which he worked at his office and when he was at his ranch and the amount of work that was carried on at the office, as going to show the amount of work, for the purpose of showing the reasonable value of services performed by the plaintiff."

The calendars had no tendency to prove the small volume of work done at the office in the absence of evidence that all business transacted at the office was noted on the calendars. The bill of exceptions contains no such evidence. The calendars were properly excluded.

Before bringing this action, plaintiff presented her claim to the defendant as administratrix, and the claim was rejected. It is provided by section 1241, L. O. L., that in such case the claim shall not be allowed by a jury "except upon some competent or satisfactory evidence other than the testimony of the claimant." This statute has been construed by this court in Goltra v. Penland, 45 Or. 254, 264, 77 Pac. 129. The instructions given by the circuit court were in harmony with this construction of the statute, and it was not error to refuse defendant's requests 1, 3, and 7, which were directed to this same subject.

[6] The defendant's fifth request asked the court to charge that plaintiff could not recover unless she proved the contract with the deceased to which she testified. The sixth request was an instruction to disregard the evidence of the reasonable value of plaintiff's services if the jury should find that an agreement was entered into. Both of these requests were properly refused. The action was on quantum meruit. While evidence of the agreement was admissible, the agreement was not indispensable to a recovery by plaintiff. Plaintiff was entitled to have the jury consider other testimony bearing on the reasonable value of her services.

Plaintiff testified that under her arrangement with the deceased her compensation was not to become due until February 10, 1913. Her testimony was to the effect that Mr. Jackson had a number of large cases which he did not expect to finish for several years, and that therefore this unusual arrangement was made on the subject of her compensation. The defendant pleaded the statute of limitations. The court instructed the jury as follows:

> "You can consider the agreement for another purpose, and that is to determine when, if at all, any amount became due, * * * under her agreement, if she had any. Now, the law would provide that for her work if the amount became due, as alleged in the defendant's answer, and six years had elapsed before the commencement of the action, although she had earned it, she could not recover, because the statute of limitations would apply and defeat the action; but, if the payment was deferred, then of course it would not become due until such time as the agreement provided for."

[7] This instruction correctly stated the law.

[8] The defendant moved for a nonsuit and for a directed verdict. These motions were based chiefly on the contention that there had not been sufficient corroboration of plaintiff's testimony to entitle her to a verdict. A number of witnesses testified that she performed services for the deceased, and his letters to her justified the inference that she was to be paid for these services. There was also received in evidence a check drawn by the deceased in favor of plaintiff on which was written, "In full of all claims to date." This check was dated April 18, 1914; it was cogent evidence that plaintiff had a claim against the deceased on that day. The check was for $30, and plaintiff had refused to accept it. There was sufficient corroboration of plaintiff's testimony to sustain a verdict in her favor, and the court did not err in submitting the case to the jury.

We find no error, and the judgment is affirmed.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(84 Or. 513)

STATE ex rel. GEHLHAR, Dist. Atty., v. BOYER, County Clerk.

(Supreme Court of Oregon. June 12, 1917.)

1. STATUTES 🔑23—PASSAGE—SIGNATURES OF OFFICERS OF HOUSES—CONSTITUTION.

Under Const. art. 4, § 25, providing that a majority of all the members elected to each House shall be necessary to pass every bill or joint resolution, and that all bills or joint resolutions so passed shall be signed by the presiding officers of the respective Houses, every bill presented to the officers for their signatures shall in its entirety as presented have received the vote of a majority of the members of each House.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 26, 27.]

2. STATUTES 🔑35½—REFERENDUM BY LEGISLATURE—CONSTITUTION.

By Const. art. 4, § 1, the Legislature can of itself refer to the people any and all laws enacted by it, provided that the act shall be first passed as other bills are enacted; less than a majority of the whole membership of the Legislature having no authority to refer a bill.

3. STATUTES 🔑283(1)—PRESUMPTION.

Where the journals of the Legislature are silent on the subject, the Supreme Court will presume that the Legislature observed the constitutional requirement that an amendment by one branch of the Legislature was concurred in by constitutional majority of the other branch.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 382.]

4. STATUTES 🔑23—PASSAGE AS AMENDED—CONSTITUTION.

Under Const. art. 4, § 25, providing that a majority of all members elected to each House shall be necessary to pass every bill or joint resolution, and that all bills or resolutions so passed shall be signed by the presiding officers of the respective Houses, where a bill consisting of four sections passed the House, and was sent to the Senate, and there amended by adding section 5, providing that the act should be submitted to the people at the next general election, etc., and, as thus amended, was passed by the Senate and sent back to the House, and on the question, "Shall the House concur?" the yeas and nays were demanded, when 28 voted yea, 26 voted nay, 6 were absent, and 1 was excused, the names of those voting and those absent or excused being entered in the journal, and the bill being signed by the Speaker of the House and the President of the Senate, the bill never passed the Legislature, not having been approved in its amended shape (Laws 1917, p. 457) by a majority of the House.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 26, 27.]

In Banc. Appeal from Circuit Court, Marion County; Geo. G. Bingham, Judge.

Suit by the State of Oregon, on the relation of Max Gehlhar, as District Attorney of the State of Oregon for Marion County, against U. G. Boyer, County Clerk of the County of Marion, State of Oregon. From an order dismissing the suit, plaintiff appeals. Decree ordered to be entered reversing the order below and enjoining defendant.

This was a suit brought in the circuit court to enjoin defendant from placing upon the ballot for the special election held June 4, 1917, a measure, the object and tenor of which were to require the assessors of the various counties of the state to assess certain lands claimed by the Southern Pacific Railroad Company, the title to which has been in controversy between that company and the United States. The facts are as follows: The records of the legislative assembly show that a bill consisting of four sections passed the House on February 14, 1917, and was sent to the Senate and there amended by adding another section (numbered 5), which is as follows:

> "This act shall be submitted to the people of the state of Oregon at the next general election, or any special election called before such general election, and when ratified at such election shall be in full force and effect."

The bill as thus amended was passed by the Senate and sent to the House, and upon the question being put, "Shall the House concur?" the yeas and nays were demanded. Upon the roll call, 28 members voted yea, 26 voted nay, 6 were absent, and 1 was excused; the names of those voting as well as those absent or excused being entered in the journal. The bill was signed by the Speaker of the House and President of the Senate and approved by the Governor. See Laws 1917, p. 457, c. 238.

The relator claims that by virtue of the provisions of section 25, art. 4, of the Constitution, the bill never became a law by reason of the fact that it did not receive a majority of the votes of the members elected to the house of representatives. Said section is as follows:

> "A majority of all the members elected to each House shall be necessary to pass every bill or joint resolution; and all bills and joint resolutions so passed shall be signed by the presiding officers of the respective Houses."

The complaint recited the facts above set forth, and further alleged that the ballot title of the bill had been duly certified to the defendant, who was about to place it upon the ballot to be voted upon at the ensuing special election, and prayed that he be enjoined from so doing. There was a general demurrer to the complaint, which being sustained, and the plaintiff electing to stand thereon, was followed by an order dismissing the suit, from which order plaintiff appeals.

Martin L. Pipes, of Portland (Max Gehlhar, of Salem, on the brief), for appellant. Frank S. Grant, of Portland, and L. E. Bean, of Eugene, for respondent.

McBRIDE, C. J. (after stating the facts as above). Much of the argument here is based upon the proposition that the courts will not interfere to enjoin the passage of a bill on the ground that the measure is unconstitutional, and upon that point counsel cite 14 R. C. L. 433; Lewis v. Denver City Waterworks Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; Murphy v. East Portland (C. C.) 42 Fed. 308; Chicago v. City, 85 Neb. 733, 124 N. W. 142, 19 Ann. Cas. 207; State v. Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582; Pfeifer v. Graves, 88 Ohio St. 473, 104 N. E. 529. In our judgment the matter so discussed is not involved in this case. The question is, not whether the measure submitted would be constitutional if passed, but whether the measure has in fact passed the Legislature. The provisions of the Constitution bearing directly upon the matter at issue are: (1) Section 25, art. 4, above quoted. (2) Section 19, art. 4:

> "Every bill shall be read by sections, on three several days, in each House, unless in case of emergency two thirds of the House where such bill may be depending, shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of a bill by sections on its final passage shall in no case be dispensed with, and the vote on the passage of every bill or joint resolution shall be taken by yeas and nays."

And (3) the following excerpt from section 1, art. 4, as amended June 2, 1902:

> "The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted."

[1] On principle it would seem plain that the intent of the framers of the Constitution was that no bill should become a law without the assent of a majority of all the members elected to the Legislature. Laying aside the technical and extremely refined definitions of some of the courts of the words "final passage," used in section 19 of article 4, supra, wherein it has been held that such words mean something less than the last legislative vote upon the bill in its completed form, section 25 of article 4 is complete in itself. It provides, first, that "a majority of all the members elected to each House shall be necessary to pass every bill or joint resolution;" and, second, that "all bills and joint resolutions so passed shall be signed by the presiding officers of the respective Houses." Analyzing this section, we inquire, "What bills are the officers of each House required to sign?" The answer must be, "Bills passed by a majority of the members of each House." The plain intent of the section quoted is that every bill presented to the officers for their signatures shall in its entirety as presented have received the vote of a majority of the members of each House; and to say that it means anything less or different from this would be a perversion of language and logic.

[2] It is suggested that the Legislature can of itself refer any or all laws enacted by it to the people, and this is true. Const. art. 4, § 1; Libby v. Olcott, 66 Or. 124, 134 Pac. 13; Thielke v. Albee, 76 Or. 449, 150 Pac. 854. But the right of the Legislature to submit a measure to the vote of the people is conditioned that the act referred shall be first passed "as other bills are enacted" (section 1, art. 4, supra); the evident intent of the section being that less than a majority of the whole membership of the Legislature should have no authority to refer a bill to the electorate.

The line of reasoning here adopted would seem to render unnecessary a consideration of what constitutes the "final passage" of a bill within the meaning of section 19 of article 4 of the Constitution. Counsel for defendant cites authorities tending in a greater or less degree to hold that the words "final passage" have a technical signification differing from their lexicographical meaning, and that as used in our Constitution the final passage of a bill is the vote by which each House adopts a bill after it has passed the first and second readings, been read the third time, and put on its final passage; and that after a bill has been so passed in one House and amended and passed in the other it is not necessary that a concurrence in the amendment shall be by a constitutional majority.

The first case cited by counsel is Johnson v. City of Great Falls, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974, which latter publication embraces in the note to the principal case a full citation of the authorities bearing upon the subject. The principal case does not consider the effect of a lack of a constitutional majority as affecting the validity of an amended bill, but holds that, under a provision of the Montana Constitution similar to section 19 of article 4 of our Constitution, it is not necessary that the yeas and nays be taken upon such amendment. The question as to whether a failure of a constitutional majority of the members to concur in an amendment would render it invalid was not involved or considered. The principal reason given by the Montana court is that to require a calling of the yeas and nays upon concurrence would logically require, in addition, that the bill as amended should be read three times, and go through all the preliminaries of an original bill, and thereby delay and embarrass legislation. The first conclusion would seem to be a non sequitur, and as to the second it may be observed that less haste in the enactment of bills would not be an unmixed evil—perhaps a positive benefit. The other cases cited are to the same effect, and we find no case in which it appears affirmatively from the journal that the concurrence was by less than a majority of the whole membership of the concurring body. As against the views thus enunciated, we find a body of decisions,* fewer, perhaps, in number, but certainly logical in reasoning, which hold that the failure of a majority of the membership of the concurring body to vote in favor of the amendment renders the bill void. Norman v. Kentucky Board of Managers, etc., 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 557, is a case very similar to the one at bar. The following is a statement by the court of the facts and the substance of its opinion thereon:

> "The act originated in the Senate, and passed that body upon a yea and nay vote, entered upon its journal, by the required majority. It then went to the other House, where, after being amended, it passed upon a like vote, entered upon its journal, by a like majority. It then came back to the Senate, where the amendments were concurred in without a yea and nay vote, and without the vote of a majority of the members elected. It is conceded by the counsel for the appellees, and seems plain, that this mode of proceeding did not conform to the Constitution. It complied with it in neither letter nor spirit. The object of the section above cited was to have the assent of a majority of all the members elected to each House to all the provisions of the act, and that this should appear by a yea and nay vote entered upon its journal. If a bill, after passing one House in the proper manner and then, after amendment, passing the other House in like manner, could come back to the House in which it originated and be adopted by a majority of those voting, or a quorum, it would defeat this object and render the section ineffectual. Let us look at it practically. An appropriation bill of $100 originates in the Senate and is properly passed. It goes to the House, where it is amended by making the sum $10,000, and is then properly passed by it. It returns to the Senate for concurrence, and is adopted as amended by a majority of those present without a yea and nay vote. Can it be well contended that this would be a compliance with the Constitution? If so, then, there being 38 Senators, it would require 20, or a majority of them, to pass a bill for a trifle; but after being amended in the House, so as to perhaps bankrupt the treasury, it could be concurred in by the Senate by the votes of 11 members, or a majority of a quorum; and in case of the House, with its 100 members, it would require 51 to pass the bill, if it originated there, but only 26, or majority of a quorum, to concur in it after it had been changed in like manner by the Senate. Further illustration seems needless. It is true it has been held that the 'final passage' of a bill means when it first passes the body, and not when it returns to it, after amendment, for adoption; and it is said that the constitutional provision as to the number of votes, and the entry of the yea and nay vote on the journal, does not apply to amendments or the reports of conference committees. If so, then, no matter how material the change, a majority vote of a quorum may pass the bill. The words 'final passage,' as used in our Constitution, mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill, or what is first introduced, and which may by reason of amendment become the least important. If so, then the body may pass what is practically a new bill in a manner counter to both the letter and spirit of the Constitution. When the bill was voted on in the Senate as amended, and after its return from the House, there never was any further action by the Senate. It was the final vote, and therefore its final passage; and, being so, a majority vote of all the members elected, with an entry by yea and nay vote upon the journal, was necessary to its constitutional enactment. The bill, as approved by the speakers of the two Houses and by the Governor, never was passed by the Senate by a majority of all its members, nor by a yea and nay vote."

It is difficult to escape the logic of this opinion. To like effect, see Cohn v. Kingsley, 5 Idaho, 416, 49 Pac. 985, 38 L. R. A. 74; Stephens v. Labette Co., 79 Kan. 153, 98 Pac. 790; and note to 16 Ann. Cas., supra. But our view of the effect of sections 1 and 25 of article 4 renders a discussion of the above question largely academic, and we do not feel that it is necessary to pass upon it in this case.

It is urged that it has been the frequent practice of the Legislature, ever since the adoption of the Constitution, to concur in amendments without the yeas and nays being called and by less than a majority vote of the whole membership. The most that can be said is that the journals are silent as to these particulars. It may be conceded for the purposes of this case, illogical as the concession may seem, that the taking of an aye and nay vote upon an amendment is unnecessary, and that the final passage of a bill in the meaning of the Constitution is the vote by which it passed before it is amended by the other branch of the legislative body; but there still remains section 25, requiring, in effect, a majority of all the members elected to pass a bill, which in that section evidently means a complete bill ready for the signatures of the respective officers. We do not, after a diligent search of the journals, find a single instance, outside of the present, where it is shown that an amendment by one branch of the Legislature was concurred in by less than a constitutional majority of the other.

[3, 4] We find a multitude of instances where the record is silent on the subject, and in such cases the courts will presume that the constitutional requirement was observed. State v. Rogers, 22 Or. 348, 30 Pac. 74; McKinnon v. Cotner, 30 Or. 588, 49 Pac. 956; Cortland v. Yick, 44 Or. 439, 75 Pac. 706, 102 Am. St. Rep. 633. Here the record is not silent. It shows upon its face that only 28 members of the 60 elected voted in favor of the measure. Until some system of logic can be invented which will demonstrate that to pass a bill it is necessary only to pass a part of one, and that 28 and 31 are synonymous, we cannot hold that this measure ever passed the Legislature. Counsel for plaintiff has refrained from a discussion of the constitutionality of the act, and we do not place our decision upon that ground. We merely hold that it never passed the Legislature, and was therefore ineligible to a place on the ballot. The Constitution provides two methods by which measures may be referred to the people for their decision. One is by petition signed by 5 per cent. of the legal voters, and the other is by an act passed by the constitutional vote of the Legislature. In State ex rel. v. Olcott, 62 Or. 277, 125 Pac. 303, we held that the courts had jurisdiction to ascertain whether a referendum petition contained a sufficient percentage of names of legal voters to entitle the measure to be put upon the ballot; and, following the same line of reasoning, we have the right to ascertain whether such constitutional prerequisites have been complied with as will entitle the measure here involved to be voted upon at the June election. They have not.

The act never passed the Legislature, and a decree will be entered here reversing the decree of the circuit court and enjoining the defendant from placing the proposed measure upon the ballot.

BENSON, J., absent.

(85 Or. 68)

STEWART v. MANN et al.*

(Supreme Court of Oregon. June 12, 1917.)

1. CONTRACTS 🔑310—DISCHARGE BY BANKRUPTCY.

Where an orchard company, which had contracted to sell orchard lands, went into bankruptcy, the bankruptcy did not impair the obligations of the company's contract with its vendee, nor lessen his privileges under it, and did not foreclose his interest in the land; he not being compelled to take title on less favorable terms than those for which he stipulated.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1447.]

2. VENDOR AND PURCHASER 🔑212—ASSUMPTION OF VENDOR'S LIABILITIES.

Where an orchard company contracted to sell orchard lands, the contract containing stipulations, and went into bankruptcy, and a third person purchased the lands of the orchard company subject to the liens and incumbrances of its prior contracts of sale, expressly agreeing to assume them as part of the purchase price, the third person placed himself precisely in the situation of the company at the outset of the transaction between it and its vendee, and was bound to perform the company's covenants; if he desired to avoid such result, he should have foreclosed his contract with the party who with himself originally owned the land as tenants in common, whereby he might rid his own half of the land of the obligations of his agreement to sell his half to his cotenant, who organized the orchard company.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436–439.]

3. VENDOR AND PURCHASER 🔑212—BREACH OF CONTRACT BY VENDOR'S SUCCESSOR.

Where one cotenant agreed to sell orchard lands to another, and the latter organized an orchard company and conveyed the whole tract to it, and it contracted to sell to plaintiff on certain terms and became bankrupt, the first cotenant buying the lands at trustee's sale subject to the company's contracts of sale, expressly assuming them, and plaintiff vendee preferred a claim for damages for the neglect of the company and the first cotenant to cultivate the orchard lands as required by the orchard company's contract to sell, and the first cotenant repudiated the obligations originally resting upon the company, his conduct constituted what plaintiff was entitled to consider a breach of the contract to sell the orchard lands.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436–439.]

4. VENDOR AND PURCHASER 🔑337—FORECLOSURE OF VENDEE'S LIEN.

A vendee acquires an estate in land under an executory contract of sale in proportion as he pays the purchase price and is not in default in performance of his covenant; the vendor holding the legal title to such extent in trust for the vendee. When the seller repudiates or fails to perform, the vendee has the right to get out of the land what he put into it by foreclosing his vendee's lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985–990.]

5. VENDOR AND PURCHASER 🔑97—RESCISSION—PLACING IN STATU QUO.

Where land was contracted to be sold, and, on the vendor corporation's bankruptcy, an original owner of the lands as cotenant bought at trustee's sale, subject to the company's contracts to sell, expressly assuming such liens and incumbrances, when such purchaser sought to rescind the company's contract to sell, he should have put the buyer in statu quo.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 161, 162, 166.]

Department 2. Appeal from Circuit Court Washington County; Geo. R. Bagley, Judge.

Suit by Walter P. Stewart against S. M. Mann, Minerva F. Mann, and the Pacific Trust Association, Limited, a corporation. From the decree, plaintiff appeals. Decree reversed, and decree entered in accordance with the prayer of the complaint, with an exception.

This is a suit to foreclose a vendee's lien upon realty described as tract 54 and the east 110 feet of tract 53 of the Chehalem Mountain Orchards. It appears from the record that in May, 1910, the defendant Mann and one Reimers were the owners as tenants

*For opinion on petition for rehearing, see 165 Pac. 1169.

in common of some land of which the abovementioned parcels are a part. At that time Mann contracted in writing to sell his moiety to Reimers on certain terms. While the title was in this condition, Reimers organized the Chehalem Mountain Orchards Company, a corporation, and to it deeded the whole tract. The company in turn entered into a contract with the plaintiff to convey to him the parcels first mentioned. He was to pay certain installments quarterly. The company on its part, among other things, was to maintain and care for the orchards upon the land "in a scientific manner, by approved methods, and to replace all trees that failed to grow within four years from the date of the agreement," and the plaintiff was let into possession. Subsequently the company went into bankruptcy, and at a sale by the trustee the defendant Mann bought in the whole property, including that which the plaintiff had agreed to purchase, and took from the trustee a deed which recited all the incumbrances upon the tract, and the fact that designated parts of it were subject to certain contracts of sale, embracing the one here in dispute, and contained this condition:

> "All of which liens and incumbrances as above set forth the party of the second part [Mann], for himself, his heirs, executors, administrators, and assigns, hereby expressly agrees to assume as a part of the purchase price thereof."

The plaintiff paid various installments of the purchase price, some to the company, subsequently others to the trustee, and finally still others to the defendant Mann, in pursuance of the latter's notification and that of the trustee, all in due time as required by his contract. There were yet other installments to be paid, but, at the time he made the last payment to Mann, Stewart did so under protest, and claimed to him that neither he nor the company had properly complied with the stipulation for the cultivation and establishment of the orchard, and contended that there should be an abatement of the purchase price to cover these shortcomings. Mann responded by returning to the plaintiff all money which the latter had paid directly to him, and repudiated any obligation on his part to make good the fault of the company respecting the orchard. This suit followed, by which Stewart seeks to impress upon the land a lien in his favor for all the money he has paid, after deducting the amount returned to him by Mann. The defendant, answering, recites the history of the transactions and claims to have bought the land free of all obligations whatever on his part to sell the same to the plaintiff, and says, further, that they entered into an oral contract, after the trustee's sale, whereby he agreed to transfer the title to the plaintiff upon payment of the sums described in his contract with the company, but that the plaintiff, after having made several payments to Mann, refused to pay further, whereupon the latter returned to the former all the payments he had made to Mann directly, which the plaintiff has retained ever since, with the result, as Mann contends, that the latter is the owner in fee simple of the property. He alleges, however, that he is willing to convey the land to the plaintiff when the latter pays the amount stipulated by the oral agreement. The reply traverses the answer. The circuit court entered a decree substantially requiring specific performance on the part of Mann, conditioned upon Stewart's finishing the payments mentioned in the contract with the company, but that in default thereof plaintiff should be utterly foreclosed of all title, and that Mann should be considered the owner in fee simple. The plaintiff has appealed.

Geo. Arthur Brown, of Portland (Ray B. Compton, of Portland, on the brief), for appellant. Leroy Lomax, of Portland, for respondents Mann.

BURNETT, J. (after stating the facts as above). [1, 2] The bankruptcy of the company did not impair the obligations of the contract with the plaintiff, nor lessen his privileges under the same. It did not foreclose his interest in the land. He was not compelled thereby to take title on less favorable terms than those for which he stipulated. In buying at the sale and taking the conveyance from the trustee, with the condition inserted therein, as above quoted, Mann placed himself precisely in the situation of the company at the outset of the transaction between it and the plaintiff. The defendant contends that Reimers did not assign to the company his contract for the purchase of Mann's undivided half of the land. That, however, cannot avail Mann in the present juncture, for he took the deed mentioned with the condition stated, and this binds him to perform the covenants of the company. If he had desired to avoid this result, it was his business to foreclose his contract with Reimers, whereby he might have rid his own half of the land of the obligations of the agreement between himself and Reimers. With them would have fallen plaintiff's interest in the Mann half, for that interest depended upon and was derived from the Reimers contract. Mann avoided this course, however, and bought in the whole tract on the terms already described, which estops him from shirking the obligations of the company under its covenant with the plaintiff. Cummings v. Jackson, 55 N. J. Eq. 805, 38 Atl. 763; Hill v. Minor, 79 Ind. 48; Crawford v. Edwards, 33 Mich. 354; Miller v. Thompson, 34 Mich. 10; Goos v. Goos, 57 Neb. 294, 77 N. W. 687; Hadley v. Clark, 8 Idaho, 497, 69 Pac. 319; Selby v. Sanford, 7 Kan. App. 781, 54 Pac. 17; Mississippi Valley Trust Co. v. Hofius, 20 Wash. 274, 55 Pac. 54.

[3] The result is that the situation is equivalent to that existing between the company

and the plaintiff at the outset. The plaintiff was not in default in his payment. He preferred a claim for damages for the neglect of the company and of Mann to cultivate the orchard as required by the contract. This was not a breach of the stipulation on the part of the plaintiff. It is not necessary to determine whether the demand was well or ill founded. However, it seems to have provoked the defendant Mann to repudiate the obligations originally resting upon his predecessors in title, something he had no right to do, having assumed them as already shown. His conduct constitutes what Stewart is entitled to consider a breach of the contract on the part of Mann. In the language of Mr. Justice Vann, in Elterman v. Hyman, 192 N. Y. 113, 126, 84 N. E. 937, 942, 127 Am. St. Rep. 862, 871, 15 Ann. Cas. 819, 824, as applied to Stewart:

> "He accepts 'the situation which the wrongdoing of the other party has brought about,' and tries to get out of the land what he paid on it under the contract. * * * The vendee does not rescind when without fault he goes into a court of equity and insists on a right springing from the contract and payment thereon pursuant to its terms. He does not repudiate the contract, but stands on it and affirms it as the foundation of the right he seeks to enforce, as fully as if he sought entire specific performance. He does not abandon his equitable ownership by trying to assert it in the only way that it can be asserted. The contract has been performed by him, wholly it may be, or in part, as in the case before us, and as, owing to the fault of the vendor, he cannot have the full performance to which he is entitled, he asks for partial performance by the enforcement of the trust created by the contract and payment as provided thereby. He does not sue for money had and received, but to enforce a lien on land into which the money went. Nor does he rescind the contract, which is the source of his lien, by seeking to enforce it to the only extent now possible, owing to the breach by the vendor; but he demands that equity should give him the interest in the land that he acquired by the contract and payment. The denial of that right would be an encouragement to wrongdoing, and to hold that an attempt to foreclose the equitable lien is a rescission of the contract would deny the right in all cases, including those in which the vendee is in possession and has made improvements."

[4] The doctrine of the cases is to the effect that a vendee acquires an estate in land under an executory contract for the purchase of the same in proportion as he pays the purchase price and is not in default in the performance of his covenant. The vendor holds the legal title to that extent in trust for the vendee. When the seller repudiates or fails to perform the contract, the vendee has the right to get out of the land what he put into it, by foreclosing his equitable lien upon the premises. His right to do so is well recognized by the authorities. Gerstell v. Shirk, 210 Fed. 223, 127 C. C. A. 41; Howard v. Orchard Company (D. C.) 228 Fed. 523; Brede v. Terrace Company, 158 App. Div. 494, 143 N. Y. Supp. 583; Stockwell v. Melbern (Tex. Civ. App.) 185 S. W. 399; Tyler v. Cate, 29 Or. 515, 45 Pac. 800; Feldblum v. Laurelton Land Co., 135 N. Y. Supp. 349; Ihrke v. Continental Life Ins. & Invest. Co., 91 Wash. 342, 157 Pac. 866, L. R. A. 1916F, 430. This latter case is one almost precisely like the instant contention in every particular. The subject is treated in a very exhaustive opinion written by Mr. Justice Fullerton, of the Washington Supreme Court, and is well worth reading in connection with the matter involved.

[5] When Mann sought to rescind the contract, he should have put the plaintiff in statu quo; he did this only in part, by merely returning what the plaintiff had paid directly to him. Stewart had a right to accept the situation thus thrust upon him, and, by foreclosing his vendee's lien, compel the defendant Mann, so far as his rights in the premises were involved, to make complete restoration to the plaintiff, so as to place him where he was in the beginning; in other words, to complete the process of rescission by repayment of the full sum the plaintiff had already invested in the land.

The result is that the decree of the circuit court is reversed, and one here entered in accordance with the prayer of the complaint, except that no interest can be allowed prior to the date of this decree. Sargent v. Am. Bank & Trust Co., 80 Or. 16, 154 Pac. 759, 156 Pac. 431.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(53 Mont. 566)

STATE v. WOOD. (No. 3964.)

(Supreme Court of Montana. May 26, 1917.)

1. PHYSICIANS AND SURGEONS ⇨2—LICENSES—"EXCEPTIONS"—CONSTRUCTION.

Rev. Codes, §§ 1594–1606, provide that every person who practices osteopathy in the state must secure a license from the board of state examiners, and provide a penalty for violation of the statute. Section 1605 defines the practice of osteopathy, and subdivision "b" provides that nothing in this section shall restrain any legally licensed physician or surgeon in the practice of his profession. Section 1597 provides that the secretary of the board of osteopathic examiners may, upon examination, grant a certificate to practice osteopathy until the next meeting of said board, when the temporary certificate shall expire. The practice of medicine and surgery is regulated by sections 1585–1593. Section 1591 defines "practicing medicine or surgery," and then provides that the section shall not be construed to restrict any legally licensed osteopathic practitioner practicing under the laws of the state. *Held*, that the provision in section 1591 does not permit an osteopathic practitioner to practice surgery without a certificate from the state board of medical examiners, and the provision in section 1605b does not exempt physicians or surgeons from the operation of the statute prohibiting the practice of osteopathy without the required license, and neither of the compensating provisions are "exceptions" within the meaning of that term as applied to statutory construction, as an "exception" takes out of an engagement or enactment "something that would otherwise be a part of the subject-matter of it."

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2.]

2. Indictment and Information ⇨111(1)—Statutory Offenses — Negativing Exceptions — Practicing Osteopathy Without License.

In a prosecution for practicing osteopathy without a license under Rev. Codes, §§ 1594–1606, as section 1605b, providing that such sections shall not restrain legally licensed physicians and surgeons in their practice, did not constitute an exception, an indictment, alleging that the defendant was not a practitioner of medicine and surgery licensed to practice, did not negative an exception, and hence was not bad for negativing one exception and failing to allege another exception found in the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 295.]

3. Indictment and Information ⇨111(1)—Statutory Offenses — Negativing Exceptions — Practicing Osteopathy Without License.

As the completed offense of practicing osteopathy without a license is clearly defined in the statute without reference to provisions of section 1597, exception in section 1597 was not any part of the definition of the offense, and it was not necessary to negative it, but, if plaintiff had the temporary certificate provided for therein, it was a matter of defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 295.]

Appeal from District Court, Tergus County; Roy E. Ayers, Judge.

B. J. Wood was convicted of practicing osteopathy without a license, and, from the judgment and from an order denying his motion for new trial, he appeals. Affirmed.

Morris & Hartwell, of La Crosse, Wis., C. J. Marshall and W. H. Smith, both of Lewiston, for appellant. Frank Woody, of Butte, J. P. Donnelly, of Havre, and S. C. Ford, of Helena, for the State.

HOLLOWAY, J. B. J. Wood was convicted of practicing osteopathy without a license, and has appealed from the judgment and from an order denying his motion for a new trial.

The three specifications of error raise but a single question, viz.: Was it necessary for the state to plead and prove that, at the time the alleged offense was committed, the defendant did not have a certificate issued by the secretary of the board of osteopathic examiners authorizing him to practice osteopathy until the next meeting of the board? If it was necessary to allege the fact, it was necessary to prove it, and, conversely, if it was not necessary to allege it, it was not necessary to offer any proof concerning it. The fact is not alleged, and the state did not offer any evidence upon the subject; hence these appeals.

[1] The practice of osteopathy is regulated by sections 1594–1606, Revised Codes. A state board of osteopathic examiners is created and its duties defined. Every person who practices osteopathy in this state is required to secure from such board a license authorizing him to do so. Section 1596 provides:

"It shall be unlawful for any person to practice osteopathy in this state without a license from said board."

And section 1601 prescribes the penalty for a violation of the statute. Section 1605 defines the practice of osteopathy, and subdivision "b" concludes as follows:

"Provided, however, that nothing in this section shall be construed to restrain or restrict any legally licensed physician or surgeon in the practice of his profession."

Section 1597 provides:

"The secretary of the board of osteopathic examiners may upon examination, grant a certificate to an applicant to practice osteopathy until the next meeting of said board when he shall report the facts, at which time the temporary certificate shall expire," etc.

The indictment upon which defendant was tried charges him with practicing osteopathy for compensation "without first having obtained a certificate or license from the state board of osteopathic examiners of the state of Montana entitling him so to do," and the charging part of the indictment concludes:

"He, the said B. J. Wood, not being then and there a practitioner of medicine and surgery regularly and duly licensed to practice under the laws of the state of Montana."

It is the contention of appellant that the provision of section 1597 relating to one who has a temporary certificate to practice osteopathy, and the provision of section 1605b relating to licensed physicians and surgeons, each constitutes an exception to the statute which defines the offense of practicing osteopathy without a license, and, since the state negatived one of these exceptions, it was incumbent upon it to negative the other, and, having failed to do so, the indictment does not state a public offense and will not support a judgment of conviction; and, since the state did not prove that defendant did not have such temporary certificate, the evidence is insufficient to sustain the verdict.

We are not prepared at this time to accept the rule announced by the Kansas City Court of Appeals, in State v. Huxoll, 191 Mo. App. 304, 178 S. W. 866, as applied to the facts of that case; but assuming, for the purposes of these appeals only, that the rule correctly states the law, and that, "where an indictment is unnecessarily particular in its negatives, the state is concluded by it if it fails to specifically negative all the exceptions," we are confronted in this instance with the inquiry: Does this case fall within the rule? Does this indictment negative one exception found in the statute, and fail to negative another one found therein?

"An exception takes out of an engagement or enactment something that would otherwise be part of the subject-matter of it." Bouvier's Law Dictionary.

If the concluding portion of subdivision "b," § 1605, quoted above, is an exception, then a physician or surgeon is not within the prohibition of the penal statute and may lawfully practice osteopathy as such in this state without a license from the state board of osteopathic examiners. That this was not the intention of the lawmakers is practically a demonstrable fact. The practice of medicine and surgery is regulated by sections 1585–1593, Revised Codes. Every person who practices medicine or surgery is required to secure a certificate from the state board of medical examiners, and every person who violates the statute is guilty of a misdemeanor. Section 1590 excepts from the provisions of the statute skilled and experienced midwives, commissioned surgeons of the army and navy in the discharge of their official duties, and physicians or surgeons, from other jurisdictions, in actual consultation here. Section 1591 defines "practicing medicine or surgery," and then proceeds:

> "Provided however, that nothing in this section shall be construed to restrain or restrict any legally licensed osteopathic practitioner practicing under the laws of this state."

A "physician or surgeon," within the meaning of these statutes, is one who has received from the state board of medical examiners a certificate authorizing him to practice medicine and surgery. An "osteopathic practitioner" is one who has received from the state board of osteopathic examiners a license authorizing him to practice osteopathy.

In State v. Dodd, 51 Mont. 100, 149 Pac. 481, we considered these statutes at length and concluded that the practice of medicine and surgery does not include the practice of osteopathy, and that the practice of osteopathy does not include the practice of medicine or surgery; that the Legislature has grouped all persons practicing the healing art into two distinct classes, (1) physicians and surgeons, and (2) osteopathic practitioners, and that the so-called proviso added to section 1591 above "did not affect the status of osteopathic practitioners in the least. They were confined thereafter, as theretofore, to the practice of osteopathy and forbidden to practice medicine or surgery without the certificate from the state board of medical examiners required of everyone who seeks to engage in such practice." We are more than ever confirmed in the correctness of those conclusions. The so-called proviso found in section 1591, and the like provision in section 1605b, were doubtless enacted out of abundance of caution and to emphasize the legislative intention that neither school of practice should be held to infringe upon the other.

[2] Having determined that the provision in section 1591 does not permit an osteopathic practitioner to practice medicine or surgery without a certificate from the state board of medical examiners, it follows that the compensating provision in section 1605b does not permit a physician or surgeon to practice osteopathy without a license from the state board of osteopathic examiners, and, since the provision in section 1605b does not exempt physicians or surgeons from the operation of the statute prohibiting the practice of osteopathy without the required license, it is not an exception within the meaning of that term as applied to statutory construction. It follows that the indictment under review does not negative any exception, and that the rule invoked by appellant has no application here.

[3] Assuming that the provisions of section 1597 constitute an exception, was it necessary for the state to negative that exception by pleading and proving that this defendant did not have a temporary certificate from the secretary of the state board of osteopathic examiners authorizing him to practice osteopathy until the next meeting of the board? In Territory v. Burns, 6 Mont. 72, 9 Pac. 432, this court announced the rule as follows:

> "The criterion which determines the necessity to negative such exception is that it be a constituent or ingredient of the offense. In other words, that such exception is necessary to its complete definition. When the exception is not a part of the definition of the offense, and in this way does not, therefore, become a part of the enacting clause, it is a matter of defense."

The rule has since been approved in State v. Williams, 9 Mont. 179, 23 Pac. 335, and in State v. Tully, 31 Mont. 365, 78 Pac. 760, 3 Ann. Cas. 824, and is approved by the authorities generally. Ferner v. State, 151 Ind. 247, 51 N. E. 360; Hale v. State, 58 Ohio St. 676, 51 N. E. 154; Smith v. People, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158. A further citation of the authorities will be found in the note to Devine v. Commonwealth, 13 Ann. Cas. 364; in 14 R. C. L. 188; and in 22 Cyc. 344.

The completed offense of practicing osteopathy without a license is clearly defined in the statute without reference to the provisions of section 1597. The exception is not any part of the definition of the offense, and it was therefore not necessary to negative it. If the defendant had such temporary certificate, it was a matter of defense.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(53 Mont. 502)

STATE ex rel. FORD, Atty. Gen., v. SCHOFIELD et al. (No. 4005.)

(Supreme Court of Montana. May 15, 1917.)

STATUTES 🔑89—VALIDITY—LOCAL AND SPECIAL LAWS—CREATION OF COUNTY.

In the state's proceeding to test the validity of Senate Bill 76, creating Carter county and providing for its organization and government (Laws 1917, c. 56), the Attorney General contending that the bill violates Const. art. 5, § 26, forbidding special legislation upon enumerated subjects, including locating or changing county seats, regulating county or township affairs, and all other cases where a general law can be made applicable, *held*, that demurrer to the complaint will be sustained, and the proceeding dismissed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 97.]

Sanner, J., dissenting.

Proceeding by the State of Montana, on the relation of S. C. Ford, Attorney General, against T. F. Schofield, James Monroe, and George Hobbs. Demurrer to the complaint sustained, and proceeding dismissed.

S. C. Ford, of Helena, Frank Woody, of Butte, Walsh, Nolan & Scallon, of Helena, and Geo. W. Farr, of Miles City, for relator. Jones & Jones, of Harlowton, Booth & Dousman, of Baker, and Gunn, Rasch & Hall, Galen & Mettler, and E. G. Toomey, all of Helena, for respondents.

HOLLOWAY, J. From the adoption of the Constitution in 1889 until 1911 we had no general statute for the creation of new counties, but during that period 13 new counties were created, each by special act of the Legislature. By chapter 112, Laws of 1911, there was written into the statutes of this state a general law of uniform operation, providing for the creation, organization, and classification of new counties. That act was amended in 1913, and the amended act superseded by another of the same general character, in 1915. Chapter 139, Laws 1915. Under these acts 12 counties were created, organized, classified, and are now existing political subdivisions of the state. Without expressly repealing the general law, the Fifteenth Legislative Assembly passed Senate Bill 76—a special act—creating Carter county and providing for its organization and government. This act became a law without the approval of the Governor, pursuant to section 12, article 7, of the Constitution. The present proceeding was instituted to test the validity of the act, and it is the contention of relator that it violates the provisions of section 26, article 5, of the Constitution. That section forbids special legislation upon any one of the 34 enumerated subjects, among them locating or changing county seats, regulating county or township affairs, and concludes:

> "In all other cases where a general law can be made applicable, no special law shall be enacted."

Assuming the mandatory and prohibitory character of this last provision, respondents insist nevertheless that it is addressed to the Legislature exclusively; that whether a general law can be made applicable in any given case must be determined by the Legislature from facts and circumstances as they are made to appear to it, and that the courts cannot review the evidence before the Legislature, and therefore cannot overrule or reverse the legislative determination; that the enactment of a special law upon a given subject is a legislative determination that a general law cannot be made applicable to it; and that such determination must of necessity be final and conclusive. Adjudicated cases sustaining these propositions generally are cited almost without number.

The concluding sentence of section 26 above is not an absolute prohibition in the sense that the preceding section is. Section 25 is absolute in its terms. It means that under no possible set of circumstances may a law be revised or amended by reference to its title only, and any act passed in violation of its provisions is absolutely void. The concluding sentence of section 26 does not prohibit special legislation altogether, but does seek to curtail it. It forbids special laws in all cases where general laws can be made applicable. But who shall determine whether a general law can be made applicable in any given instance? Upon this question the decisions are in hopeless conflict, and no useful purpose can be served by reviewing them at length. The cases cited by respondents hold that the question is one exclusively for legislative determination, while cases cited by relator hold with equal emphasis that it is one for decision by the courts. We might relieve ourselves of much work and worry by accepting one theory or the other, and, blindly following precedent, content ourselves with merely citing the authorities. The decisions of other state courts are not binding upon us. They are useful or persuasive with us, or they are not, according to whether the reasoning appeals to our judgment or fails to do so. We are not at liberty to abdicate in favor of some other tribunal, but conceive it to be our duty to determine every controversy presented to us according to our own best judgment, enlightened to the utmost extent possible by the learning and experience of other courts and by textwriters who have specialized upon particular subjects.

In this instance we find ourselves unable to agree entirely with either theory established by the adjudications to which reference has been made. We have on our statute books a general law, of uniform operation throughout the state, which forbids gambling. If the Legislature should be unwise enough to substitute for this law another of the same character, but which by its terms applied only to certain named counties, excluding all others, we imagine no one would hesitate to pronounce such an act unconstitutional and void; and neither can we imagine that it could be urged with any semblance of reason that it was for the Legislature to determine finally that a general anti-gambling law cannot be made applicable throughout this state. It is inconceivable that there is such a different standard of morality prevailing in different sections of the state that a police regulation of this character cannot be made to operate uniformly. Examples might be multiplied to illustrate the view that it cannot be exclusively a legislative question to determine in every instance whether a general law can be made applicable.

On the other hand, we think the theory that it is a judicial question in every instance equally fallacious. To illustrate by an extreme case: Suppose there is a county in this state, no portion of which is adapted to agriculture, but which does contain extensive grazing areas; that in the remainder of the state agricultural development has progressed to that point where a herd law is imperatively demanded, and the Legislature is responsive to the demand and seeks to promote the welfare of the state by the enactment of a suitable law restraining live stock from running at large. If the Legislature ascertains that the facts are that the range county is so far bounded by mountain ranges and rivers that stock running at large therein will not jeopardize the interests of any other section, then it would seem that common sense would dictate to the lawmakers that a statute be enacted restraining live stock from running at large, but excepting from the operation of its provisions the range county. Such an act would meet the demands of every section of the state, promote the general welfare, and infringe the rights of no one; but it would be special legislation. A herd law could be passed which would be general and uniform in its operation throughout the state, and which, in addition to promoting the interests of 40 counties, would also destroy the principal industry of the one. Indeed, it is conveivable that a general law can be enacted upon any subject of legislation; but, if this be the sense in which the language is employed in the concluding sentence of section 26, then its ultimate purpose is to prohibit special legislation altogether.

We believe there are many subjects of legislation, which, from their inherent character, are subject to regulation by general laws, and that the courts are as advantageously situated as any other department of government to say so; on the other hand, there are certain subjects which may or may not lend themselves to regulation by general laws, depending upon extrinsic facts and circumstances which the Legislature is peculiarly fitted to ascertain and determine, but which the courts have no means available to ascertain. Upon the first class of subjects, the courts can and must determine the applicability of general laws; upon the second, the Legislature must be left free to act.

The creation of new counties involves a question of public policy exclusively. It would have been perfectly competent for the people, in adopting their Constitution, to have made provision that the state should be divided into the 16 counties then in existence, and prohibited the formation of any new counties thereafter. It would have been a very unwise thing to do, and it was not done. The debates of the constitutional convention disclose an attempt to write into our fundamental law a property restriction upon the creation of new counties; but the attempt failed, and the sense of the convention, so far as it is disclosed, was in favor of the widest liberality towards growing communities aspiring to local self-government. In the creation of new counties there are certain considerations which address themselves to the Legislature, common to all alike—the financial ability of the community to support county government and the effect which the withdrawal of one portion of a county may have upon the capacity of the old county to continue its organization. If these and like questions were the only ones which could arise, the applicability of a general law to the creation of new counties would seem a demonstrable fact; but they are not. In the early history of the state we had certain sections of vast territorial extent, but with small population and little taxable wealth; others with congested population and vast wealth, but with little territory tributary. In many of the states on the plains it might be possible to lay off counties with a foot rule—to follow township and range lines and achieve practical results; but in a mountainous country, with navigable streams, such as this, so simple a plan could not well be applied. The topography of the country, the accessibility of one portion to another, the lines of transportation, the stability of the community, the opportunities for growth and development, are considerations which must enter into the discussion of any plan for county organization here.

As remarked before, it was possible for the first state Legislature to enact a general law for the organization of new counties. The same general law enacted in 1915 could have been enacted in 1891, but it would have been a useless piece of incumbrance upon the statute books. It would have prohibited the formation of any new counties for many years, and would have retarded the development of the state to an almost unlimited extent. It was likewise possible to enact a general law with such liberal provisions that any aspiring community in the state, then or thereafter, could have secured separate county government. But the possibility of enacting a general law for new county organization is not the test prescribed by the Constitution. In order to bar special legislation, the general law must be applicable, and in our opinion that word was employed in a very general and comprehensive sense. The framers of our Constitution were not idle dreamers. They were eminently endowed with practical common sense. Their discussions in convention disclose a fixed purpose to avoid legislating, and to confine their efforts to the enunciation of those fundamental principles deemed essential to the stability and general welfare of the commonwealth. They recognized that the Constitution was intended to be, not a grant, but a limitation, of power, and they left the legislative department free to exercise its lawmaking function, subject only to such limitations as were deemed necessary to be imposed. They wrote with peculiar perspicuity and terseness, and never intended their language to be given a strained or unreasonable interpretation. When they referred to a general law as applicable to a particular case, they meant a law in its practical operation adequate to the purpose for which it was intended. In this sense, whether a general law can be made applicable to the creation of new counties depends upon a multitude of extraneous facts and circumstances, which the Legislature, operating without the fixed rules of judicial procedure, is peculiarly qualified to ascertain and pass upon, but which the courts can but inadequately ascertain, if at all.

Our conclusion upon this branch of the case is that with respect to the particular subject—the creation of new counties—it was peculiarly the province of the Legislature to determine at all times between 1889 and 1911 whether a general law could be made applicable, and that the failure or refusal to enact a general statute upon the subject is tantamount to a decision that such a statute could not be made applicable.

But it is said that our experience under the general law has demonstrated its applicability, and that a decision of the question has been set at rest by the Legislature itself. At first blush this suggestion seems to afford a solution for the problem presented; but no act of a legislative assembly is irrepealable, and though the general law may have served the purpose intended during the six years succeeding its enactment in 1911, it was altogether competent for the last legislative assembly to determine that it has spent its force and is no longer adequate to the purpose for which it was enacted. It might have determined that with the creation of the 12 new counties, the physical and topographical conditions of the state no longer admit of its practical application, and that at the present state of our history and development no general law upon that subject can be made to serve the best interests of the commonwealth. Had it so declared by repealing the general law, we should not deem it within the province of this court to attempt to interfere, and if, with the general law repealed, it had then passed the special act creating Carter county, we should have accepted its determination that a general law could not be made applicable as conclusive upon us.

But it is insisted that the general law was not repealed, and that under its provisions new counties may now be created, if they can meet the requirements which its terms impose. But if no community in the state can now or hereafter meet those requirements, instead of being a law for the creation of new counties, it becomes a law prohibiting the formation of new counties. In other words, it has ceased to fulfill the purpose for which it was enacted. It has ceased to be applicable to the subject in the constitutional sense.

If the Legislature possessed the power and authority, by repealing the general law, to say that a general statute cannot now be made applicable to the creation of new counties, it likewise possessed the authority to declare the same result by the enactment of this special law. We will not indulge the presumption that the legislative assembly wittingly violated the Constitution; but, assuming that it is necessary to do so in order to uphold the validity of the act in question, we will presume that due consideration was given to the concluding sentence of section 26, and that the enactment of this special law was the means employed to express the legislative determination that the general law is no longer applicable to the creation of new counties under the conditions as they now exist. The same conclusion might have been expressed more lucidly by repealing the general law outright; but, if the determination was reached, the particular means by which it was expressed is of no moment.

In passing, we may observe that there are certain provisions contained in the act creating Carter county which are clearly invalid; but they refer to incidental matters, and may be eliminated without impairing the act as a whole. It is inconceivable that they could have operated as inducements to the passage of the act, or that without them the measure would not have received favorable consideration at the hands of the Legislature.

The demurrer to the complaint is sustained, and the proceeding is dismissed.

Dismissed.

BRANTLY, C. J. I concur in the conclusion reached by Mr. Justice HOLLOWAY, but do so on the ground that I am not satisfied that the injunction found in section 26, article 5, of the Constitution, is addressed to the judicial department of the government. The creation of new counties is a matter of public policy. The propriety of creating one at any time depends upon fact conditions as they exist at that time. These the Legislature can more readily ascertain and weigh than the courts. I therefore incline to the opinion that the injunction is addressed exclusively to the Legislature, and hence that the act in question must be upheld.

SANNER, J. (dissenting). Heartily subscribing to the doctrine, so often announced by this court, that in testing the constitutionality of an act of the Legislature the question is not whether it is possible to condemn, but whether it is possible to uphold, and accepting, for the most part, the reasoning of Mr. Justice HOLLOWAY in the above opinion, I am nevertheless unable to assent to all of it or to the conclusions announced. Briefly stated, my reasons are these:

The injunction expressed in the final clause of section 26, article 5, is prohibitory (Constitution, § 29, art. 3) and—if the Constitution is to have any force at all—is binding upon the Legislature, the courts and every other agency engaged in the government of this state. The language of section 26, article 5, is simple, direct, and plain; no resort to authority for its interpretation is required; he who runs may read it. Its purport is that in certain enumerated cases no special act shall ever be passed, nor shall such act be passed in any other case to which a general law can be made applicable; in other words, the prohibition is absolute as to the 34 enumerated cases and conditioned in every other only upon the fact that a general law can be made applicable to the subject-matter. Why the prohibition was inserted is perfectly clear. To pass an act for a given case is easy; to frame general legislation, which shall operate justly upon divergent conditions, requires time and thought; unchecked legislation has always tended to degenerate into the easier courses of specialism, log-rolling, action upon the theory that the legislators have favors to exchange, instead of duties to perform; and the purpose of the prohibition is to furnish the check necessary to prevent just this sort of degeneration.

Confessedly, the act creating Carter county is a special one. When it was passed we had, and I think still have, a general law upon the statute books relative to the creation of new counties; so "applicable" to the subject has that law been that 12 new counties have been created under it. Its enactment and successful operation furnish proof that the subject is one amenable to treatment by general law; and that fact stands established unless the Legislature, with power so to do, has declared that the fact no longer exists. I do not question at this time that the Legislature could have so declared. What the opinion asserts, and what I deny, is that, by passing the special act creating Carter county, the Legislature did declare the general law no longer operative, thus in effect repealing it, and did declare that no general law could be made applicable to the subject under present conditions. This not only invokes the disfavored doctrine of implied repeal, but effects such a repeal of a general law by a purely special act, a proceeding almost unheard of in the annals of jurisprudence; it is not in my opinion the natural inference from the enactment of the special law, such inference rather being that, since Carter county could not meet the requirements of the general law, a special case should be made of it without regard to the general law; the written record of the legislative session shows that the general law was deemed applicable to the subject of new counties, because the Legislature declined three specific proposals (House Bill 51; House Bill 322; Senate Bill 68) for its amendment; the presence in the special act of provisions admittedly unconstitutional shows affirmatively that in its enactment the Legislature was not thinking of the Constitution; and finally, although every theory on which courts have relied in avoidance of provisions similar to section 26, article 5, is invoked by the respondents, the view that the special act operates as a general law was not exploited in the briefs or argument.

A study of the authorities cited by the respondents discloses much blind following of precedents which take no account of the "mandatory and prohibitory" character of constitutional provisions such as ours are declared to be; and these authorities lead logically to the result, which many of them express, that in every instance the applicability of a general law is a legislative question—a proposition that cannot be maintained. Then, too, some of these authorities go to the length of saying that the criterion, which is to be applied exclusively by the Legislature, is the applicability of a general law to the particular case, instead of the amenability of the subject presented by the particular case to treatment through general law. Such reasoning begs the whole question, and makes advisory only what the Constitution explicitly says is mandatory and prohibitory; under it the Legislature could properly except a particular citizen or a particular county from the operation of the laws against homicide, upon the ground that in its judgment they do not apply to him or to it, which is an absurdity on its face.

Respondents lay emphasis on the propositions that this court has decided the creation of new counties by special act to be permissible under the Constitution, that by the rule of ejusdem generis the concluding clause of section 26, article 5, can have no application to the subject of new counties, and that this section came to our Constitution from the act of Congress approved July 30, 1886, (24 Stat. 170, c. 818), with interpretations, judicial and congressional, which permit the creation of new counties by special act. The decisions of this court, to which appeal is made, were rendered before any general law for the creation of new counties was passed, before it was known that such a law could be made applicable. So far as these utterances are not pure dicta they are justified by the knowledge then possessed upon the subject; possibilities, considered with reference to human action, are always conditioned upon human capacity, and this in turn upon knowledge; what is not known to be possible is, for the time being, impossible; and if, as the above opinion asserts, and as I believe, the question of the applicability of a general law to the subject of new counties was in the first instance for the Legislature, the fact could not be known to the court until the experiment was tried. The rule of ejusdem generis cannot be applied to the provision in question, for the reason that the preceding clauses of the section refer to many subjects of legislative action, some of which belong to the same general class as the creation of new counties. The argument, whatever its sanction, based upon the source of section 26, is answered by the fact that section 26 did not come from the act of Congress approved July 30, 1886; it came bodily, with one slight amendment, from the proposed Constitution of 1884, as the debates of the convention which formulated our present Constitution disclose.

To my mind, the opinion written by Mr. Justice HOLLOWAY correctly assumes that the act creating Carter county cannot be upheld on any theory other than that adopted in the opinion; and, as I think it cannot be so upheld, I must conclude that it cannot be upheld at all.

(53 Mont. 518)

STATE v. McQUITTY et al. (No. 4015.)

(Supreme Court of Montana. May 15, 1917.)

Proceeding by the State of Montana, relator, against I. S. McQuitty, Frank Williams, and John Foster. Proceeding dismissed.

S. C. Ford, of Helena, for relator. Jones & Jones, of Harlowton, Booth & Dousman, of Baker, and Gunn, Rasch & Hall, E. G. Toomey, and Galen & Mettler, all of Helena, for respondents.

PER CURIAM. There is involved herein the validity of the special act creating Wheatland county. By stipulation of the parties, the same judgment is to be entered herein as in cause No. 4005, State ex rel. Ford v. Schofield et al., 165 Pac. 594, just decided. Upon the authority of that case, this proceeding is dismissed.

Dismissed.

(53 Mont. 538)

SOMMERS v. GOULD. (No. 3771.)

(Supreme Court of Montana. May 23, 1917.)

1. Elections 🔑307—Contest—Attorney's Fee.

If the court were correct in holding that contestant did not make out a prima facie case, it rightly taxed against him a reasonable attorney's fee and costs.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 333.]

2. Elections 🔑295(1)—Contest—Disqualification of Voters—Prima Facie Proof.

In a contest suit, on the ground of two illegal votes, between candidates for the office of mayor, plaintiff *held*, under evidence, to have made out a prima facie case.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297.]

3. Elections 🔑72—Qualification of Voters—Statute.

Under express provisions of Rev. Codes, §§ 462, 3231, to be a legal voter one must have resided within the state one year, within the town 6 months, and within the ward 30 days, immediately preceding an election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 67, 68, 70.]

4. Elections 🔑295(1)—Voters—Residence—Determination.

The residence of a voter is to be determined from his acts and intents, which may be established by circumstantial evidence and declarations which are a part of res gestæ.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297.]

5. Elections 🔑291—Right to Vote—Presumption from Registration.

From the fact that Webb registered in ward 1, there arose a presumption in favor of his right to vote there.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286.]

6. Elections 🔑291—Right to Vote—Presumption from Registration—Evidence to Overcome.

Slight proof of the lack of any necessary qualification to vote is sufficient to overcome the presumption arising from registration or voting.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286.]

7. Elections 🔑295(1)—Contest—Prima Facie Case.

Contestant, by proving that T. and his family resided in ward 3, made out a prima facie case against his right to vote in ward 1, in view of Laws 1915, c. 122, rule 8, providing that where a man's family resides is presumed to be his place of residence.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297.]

8. Elections 🔑289—Contests—Correctness of Returns—Proof—Pleading.

Where neither the correctness of the canvassing board's return nor the validity of any votes so returned was questioned by the answer, contestant was not required to show the number of legal votes cast for his candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 285.]

9. Pleading 🔑127(2)—Contest Suit—Admission.

In a contest suit, admission by contestee that board returned that W. received 82 votes was tantamount to an admission that he received that number of votes.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264, 267.]

10. Elections 🔑267—Correctness of Result—Returns—Prima Facie Evidence.

Election returns of canvassing boards are prima facie evidence of the correctness of the result.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 242, 243.]

Appeal from District Court, Madison County; W. A. Clark, Judge.

Contest suit by Fred W. Sommers against Merton S. Gould. From a judgment dismissing the case, and awarding costs and an attorney fee to contestee, contestant appeals. Reversed and remanded.

M. M. Duncan, of Virginia City, and Henry C. Smith, of Helena, for appellant. Lew. L. Callaway, of Great Falls, and Callaway & Beckett, of Virginia City, for respondent.

HOLLOWAY, J. At the election held in the town of Twin Bridges in April, 1915, A. J. Wilcomb and Merton S. Gould were rival candidates for the office of mayor. The canvassing board returned that Wilcomb received 82 votes and Gould 83, and a certificate of election was thereupon issued to Gould. Fred W. Sommers contested Gould's election, upon the ground that 2 illegal votes were cast and counted for Gould in ward 1, and that such votes were cast by Eli Twitchell and Roland A. Webb, neither of whom, it is alleged, was a resident of that ward at the time. Gould answered, and denied that he had any knowledge or information sufficient to form a belief as to whether Wilcomb received 82 legal votes, or any greater number than 79, admitted that the canvassing board returned that Wilcomb received 82 votes, and denied that any illegal votes were cast or counted for him. Upon the trial it was admitted that Twitchell and Webb were both registered in ward 1 and both voted in that ward. Touching the qualifications of these two voters, the contestant offered evidence to the following effect:

Webb is a single man, about 23 years old. For 7 or 8 months prior to the election in question he was working on a ranch about 10 miles from Twin Bridges. During that time he came to Twin Bridges occasionally, and stopped either at the Duella rooming house, in ward 3, or at the Stark Hotel, in ward 2; but in either instance he occupied a room provided for him by his employer.

Sommers testified that he has lived in Twin Bridges for 20 years, and in ward 1 for 8 years; that at the time of this election he was an alderman for ward 1; that there are only about 80 voters in the ward, and that he knows them all personally; that he knows Webb; that he knows that Webb did not live in ward 1 for at least a year prior to the election in April, 1915.

Wilcomb testified that he has lived in Twin Bridges continuously for 17 years; was mayor of the town from May, 1913, to May, 1915; that he lived in ward 1 at the time of the election in question; that he is well acquainted in the town, which has a population of only about 500; that he has known Webb for 5 or 6 years; that he knew him first when he lived on a ranch near Twin Bridges, but outside the corporate limits of the town; that he knew him afterwards, when he lived in Sheridan and Rochester; that in the summer of 1914 he worked in ward 1 and took his meals at a hotel in that ward, but had his room and slept in ward 3; and that he has never lived in ward 1 to the knowledge of the witness.

Gallahan, a judge of election in ward 1, testified that Webb came to the polling place on election day, ostensibly for the purpose of voting; that, when asked where he roomed, he replied at the Stark Hotel; that, when questioned concerning his right to vote in ward 1, "He said he did not know whether he had a right to or not," and, when asked upon what theory he sought to vote in that ward, he replied, "We have some lots up town;" that he left, but returned soon afterwards, and discussed his right to vote further, but again went away; that he came for the third time, and, having taken and subscribed the statutory oath required of challenged voters, received his ballot and cast his vote.

Concerning Twitchell's residence, Sommers, Wilcomb, and Harvey testified that Twitchell has a house in ward 1, where he lived for a year or more prior to the fall of 1914; that he then moved his family into two small rooms in ward 3, where they have since lived, and where they cook, eat, and sleep; and that, since they moved, their house in ward 1 has been rented to other parties, who have occupied it. After they moved, and before election, Twitchell asked Wilcomb whether an elector, who removes after registering, must re-register in order to vote, and Wilcomb understood from the circumstances that Twitchell was referring to himself.

Upon this evidence, offered by the contestant, the court held that a prima facie case of nonresidence had not been made out against either Webb or Twitchell, excluded evidence as to how either voted, and entered judgment dismissing the contest, and awarding contestee his costs and an attorney fee, amounting in the aggregate to $323.90. From the judgment, and from an order denying a new trial, contestant appealed.

[1] The term of office involved herein has expired, and the controversy now involves only the question of costs. If the court was correct in holding that contestant did not make out a prima facie case, it was correct in taxing against him a reasonable attorney fee. Doty v. Reece, 53 Mont. —, 164 Pac. 542.

[2, 3] Whether contestant shall be held for this judgment for costs depends upon the answer to the inquiry: Did he make out a prima facie case that Webb and Twitchell were not legal residents of ward 1 when they voted therein on April 5, 1915? To constitute either of these men a legal voter, he must have resided within the state a year (section 462, Rev. Codes), within the town 6 months, and within the ward 30 days, immediately preceding the election (section 3231, Rev. Codes). It would be extremely difficult to give a comprehensive and accurate definition of the term "resident" as used in our election laws. The statute does not attempt to define it, but does prescribe certain rules for determining in the first instance whether a voter is a legal resident of the precinct or ward where he votes. Section 24 of an act approved March 8, 1915 (Laws 1915, p. 263), sets forth 11 rules designed to aid registration and election officers in determining the residence of a prospective voter. Of necessity, these rules are very general in their terms, and furnish but uncertain assistance at the best. Rule 1 provides:

> "That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning." Page 273.

Under rules 4 and 5 a person will not be deemed to have lost his residence by reason of his absence for temporary purposes only. Rule 8:

"The place where a man's family resides is presumed his place of residence."

Rule 9:

"A change of residence can only be made by the act of removal joined with the intent to remain in another place. There can only be one residence. A residence cannot be lost until another is gained." Page 274.

[4] The residence of a voter is to be determined from his acts and intent; but this fact, like any other fact involved in a civil action or proceeding, may be established by circumstantial evidence, and any declarations of the voter touching the subject, if a part of the res gestæ, or any declarations in disparagement of his right to vote, if made at or before the election, may be received in evidence. People ex rel. Boyer v. Teague, 106 N. C. 576, 11 S. E. 665; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; 15 Cyc. 292; 9 R. C. L. 1032.

[5, 6] From the fact that Webb registered in ward 1, there arose a presumption in favor of his right to vote there. To overcome this presumption involved the proof of a negative, and in such case the same high quality of evidence is not required as is ordinarily necessary to prove an affirmative fact. The rule generally recognized is that slight proof of the lack of any necessary qualification to vote is sufficient to overcome the presumption arising from registration or voting, and calls for evidence in affirmation of the voter's qualifications from the party who would benefit from the vote. People v. Pease, 27 N. Y. 45, 84 Am. Dec. 242; Beardstown v. Virginia, 76 Ill. 44; 5 Ency. of Evidence, 116. To determine the sufficiency or insufficiency of evidence to establish the residence or nonresidence of a voter requires a more or less arbitrary application of the rules of law to the facts presented, and though the evidence tending to impeach Webb's right to vote in ward 1 is not very clear and convincing, we think it is sufficient to make out a prima facie case. State ex rel. Hopkins v. Olin, 23 Wis. 309.

[7] The evidence touching Twitchell's residence is much more substantial. His family resided in ward 3, and, when this fact appeared, the contestant made out a prima facie case against his right to vote in ward 1. Carwile v. Jones, 38 Mont. 590, 101 Pac. 153; rule 8, above.

[8-10] It was not necessary for the contestant to show the number of legal votes cast for Wilcomb. Neither the correctness of the canvassing board's return nor the validity of any votes so returned is questioned by the answer. The admission that the board returned that Wilcomb received 82 votes is, under the circumstances, tantamount to an admission that he received that number of votes. Until impeached, the returns furnish prima facie evidence of the correctness of the result so returned. 15 Cyc. 418.

The judgment and order are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(53 Mont. 546)

BUHLER et al. v. LOFTUS et al. (No. 3770.)

(Supreme Court of Montana. May 26, 1917.)

1. APPEAL AND ERROR 🔑193(6)—QUESTION PRESENTED—SUFFICIENCY OF COMPLAINT.

Where the complaint was not tested by special demurrer, but merely by objection to introduction of evidence, the appellate court is confined to the inquiry whether it states sufficient facts to warrant relief demanded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1355.]

2. CONTRACTS 🔑259—CANCELLATION—FRAUD—POWER OF COURT.

The power vested in courts to cancel contracts on the ground of fraud is extraordinary, and will be exercised only where the complainant, free from fraud himself, has been deceived to his injury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1153–1172.]

3. CANCELLATION OF INSTRUMENTS 🔑37(6) — FRAUD — NECESSITY OF SPECIFIC ALLEGATIONS.

In suit to cancel a contract, the ultimate facts constituting fraud relied on must be specifically alleged, so that the court may know whether, if proved, they will warrant relief demanded, and that adversary may know the particular charge.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

4. FRAUD 🔑12 — MISREPRESENTATION — FUTURE EVENTS.

Generally, a misrepresentation as to what will be done in the future, or a statement of intention, will not warrant cancellation of contract.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14.]

5. FRAUD 🔑11(1) — MISREPRESENTATION — OPINION.

Generally, a mere expression of opinion, however erroneous, will not warrant cancellation of a contract.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12.]

6. CANCELLATION OF INSTRUMENTS 🔑37(6)—FRAUD IN INDUCEMENT — SUFFICIENCY OF ALLEGATIONS.

To warrant cancellation of a contract for fraud, pleading must show defendant's false representations, which plaintiff believed in, and acted upon to his damage.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

7. FRAUD 🔑12 — MISREPRESENTATION — FUTURE EVENTS.

A misrepresentation may be with reference to the future, but so related to present conditions that its affirmation will be fraudulent.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14.]

8. CANCELLATION OF INSTRUMENTS 🔑37(6)—SUFFICIENCY OF COMPLAINT — FRAUD — FUTURE EVENTS.

Complaint alleging defendant's misrepresentations, inducing plaintiffs to execute notes and mortgage in payment for stock, *held* sufficient to state a cause of action for cancellation of instruments.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

9. Pleading ⇨34(3) — Construction—Inferences.

Whatever is necessarily implied in or is reasonably to be inferred from an allegation is to be taken as directly averred.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 69.]

10. Corporations ⇨80(8) — Fraudulent Sale of Stock—Future Events — "Act Fitted to Deceive."

False representations that a company would be ready for business within two months made to induce the sale of stock was a fraud, within the meaning of Rev. Codes, § 4978, defining what shall constitute actual fraud, and was an "act fitted to deceive," within meaning of subdivision 5.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 256.]

11. Cancellation of Instruments ⇨37(1) —Complaint—Necessity of Jurisdictional Clause.

The addition of an allegation that plaintiff has no adequate remedy at law is unnecessary, since the question of whether the particular case is an equitable one depends upon the specific averments, and the jurisdictional clause is a mere conclusion of law.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-68, 71.]

12. Cancellation of Instruments ⇨37(4)—Complaint—Offer to Return Consideration.

Where complaint seeking cancellation of mortgage and notes given in purchase of stock offered to return the stock to defendants, this was sufficient allegation of an offer to restore the consideration.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 72, 73.]

13. Appeal and Error ⇨959(1) — Discretion of Court—Amendments to Pleading.

The court's action in allowing amendments to equitable pleadings is not subject to review, unless abuse of discretion to adverse party's prejudice is affirmatively shown, in view of Rev. Codes, § 6589, placing the power to allow amendments within the trial court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826.]

14. Evidence ⇨378(1)—Letter—Necessity of Authentication.

Where letters offered in evidence were not shown to have been signed by their purported authors or identified as genuine, they were inadmissible for any purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648, 1655.]

15. Evidence ⇨332(2) — Production of Part of Judicial Record.

Where only a part of a judicial record was offered in evidence, which did not disclose issues nor show what was finally adjudicated, it was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1238.]

16. Pleading ⇨162—Nature of Reply.

The office of a reply in an equity suit is to join issue on or avoid new matter alleged in answer, and it cannot aid the complaint by supplying an omission broadening its scope or adding a new ground of relief.

17. Pleading ⇨381(3)—Issues—Evidence—New Matter Alleged in Reply.

Evidence to prove new matter alleged in a reply was inadmissible in an equity suit, since the reply could not properly allege new matter.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1261-1279.]

18. Appeal and Error ⇨931(6)—Presumption — Findings Rejecting Incompetent Evidence.

It will be presumed that the court, in making formal findings after consideration of the evidence, rejected incompetent evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3766.]

19. Appeal and Error ⇨694(1)—Questions Presented — Bill of Exceptions — Sufficiency of Evidence.

Where appeal is from the judgment only upon a bill of exceptions, question presented upon assignment of insufficiency of evidence is whether there is any substantial evidence to support findings, and not whether the trial court abused its discretion in denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915.]

20. Trial ⇨396(1) — Findings Supported by Pleadings.

In suit to cancel mortgage and notes given for purchase of stock, findings *held* responsive to pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935.]

21. Appeal and Error ⇨1050(1)—Harmless Error—Admission of Evidence.

Where foreign and domestic law upon a particular subject were the same, any error in manner of admitting proof of foreign law was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

22. Bills and Notes ⇨343 — Bona Fide Purchase — Mode of Transfer — "Holder in Due Course."

Where defendant took a written assignment of a negotiable note and a mortgage, he was not a holder in due course of the note, under the Negotiable Instruments Law, Rev. Codes, § 5906, since he took it with full knowledge that it was a mortgage note, collectible only under Rev. Codes, § 6861, and that such note was subject to all equities in favor of maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 853-855, 864, 865.

For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

23. Bills and Notes ⇨318—Assignment—Defense Against Assignee.

A recorded assignment of a note and mortgage did not deprive the maker of the right to impeach the note on the ground that it had been secured by fraud.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 754.]

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

Suit to cancel mortgage and notes by A. J. Buhler and another against W. J. Loftus and others. Decree for plaintiffs, and defendants Loftus appeal. Affirmed.

J. E. Erwin, of Dixon, Ill., and C. W. Pomeroy, of Kalispell, for appellants. F. H. McDermont, of Davenport, Wash., and Brennen & Kendall, of Kalispell, for respondents.

BRANTLY, C. J. The plaintiffs, A. J. and J. M. Buhler, are father and son. On October 14, 1913, the latter executed and delivered to the defendant W. J. Loftus, a resident of Chicago, Ill., his promissory note, negotiable in form, for the sum of $2,000, due and payable three years after date, with interest at 8 per cent per annum. To secure the payment of the note he executed and delivered to Loftus a mortgage upon certain lands owned by him and situate in Flathead county. The mortgage was duly recorded on October 23d. The $2,000 was the purchase price, agreed to be paid to Loftus by A. J. Buhler, of 100 shares of the capital stock of the American Mortgage Insurance Company, a corporation organized under the laws of the state of South Dakota and having its principal office at Chicago. The purpose of the organization of the corporation was to loan money upon the security of first mortgages on farm lands. It was authorized to do business throughout the United States. Hereafter it will be mentioned as the company. It was capitalized for $1,000,000, divided into shares of the par value of $10 each. Loftus was one of the agents of the company to sell shares of its stock and also to appoint local agents to negotiate loans for the company upon a commission. The plan pursued was that any one, desiring or agreeing to become a local agent, was required to purchase from the company 125 shares of its stock at $20 per share. He was then required to enter into a written contract to cover a term of 10 years, by the stipulations of which he was appointed the exclusive agent in certain designated territory, in consideration of his performing certain duties for, and assuming certain obligations to, the company. Loftus went to Polson, in Flathead county, the residence of the plaintiffs, to arrange for the appointment of one A. D. Maynard, also a resident of Polson, as local agent. Maynard being away from home, Loftus entered into negotiations with the Buhlers. The negotiations resulted in the purchase by A. J. Buhler of 100 shares from Loftus personally at $20 per share; the latter agreeing to accept the note and mortgage of J. M. Buhler in place of cash, and giving the assurance that A. J. Buhler would be appointed agent. The action of Loftus was ratified by the company, and the appointment was made on October 20th. It was understood at the time that the two Buhlers and F. H. McDermont, an attorney at law then residing at Polson, should each have a one-third interest in the business transacted under the appointment; A. J. Buhler alone being responsible to the company under his contract. The company was not then ready to begin negotiating loans, but was to begin within two months thereafter. It never did any business, however, for the reason that a sufficient number of shares of stock had not been and could not be sold to realize money enough to enable it to make loans. The note was made payable at the City National Bank at Dixon, Ill. On January 6, 1914, W. J. Loftus assigned the note and mortgage to defendant John H. Loftus, a brother residing at Dixon, as part payment of a debt due the latter. The assignment was recorded in Flathead county on May 16, 1914. On May 25, 1915, plaintiffs brought this action to obtain a decree directing a cancellation of the note and mortgage, on the ground of fraudulent representations by Loftus whereby plaintiff J. M. Buhler was induced to execute and deliver them. As ground for relief, the complaint alleges:

> "(5) That it was represented to plaintiffs, at the time said plaintiff A. J. Buhler entered into said agency contract, by the defendant W. J. Loftus, and the president of the defendant the American Mortgage Insurance Company, H. A. Luther, that the said defendant company, although not fully organised, had not sold all of its capital stock, and was not quite ready to commence business, or to make and accept farm loans in the territory above described, but would be ready for business and accept loans in said territory within about two months from the date of making and entering into said contract, and that the said defendant loan company would allot to plaintiff A. J. Buhler, from month to month, that proportion of its available funds as the number of shares of its capital stock purchased by plaintiff A. J. Buhler bears to the total number of shares of its capital stock then sold for loaning purposes, which would amount to, as a loaning fund, at least $100,000 annually."

It is then alleged in substance:

(6) That in order for plaintiff A. J. Buhler to secure the appointment as the sole and exclusive agent of the company, and to secure his approval of the contract, it was represented by Loftus that said Buhler was required to purchase at least 100 shares of the capital stock of the company at $20 per share, or a total of $2,000.

(7) That in consideration of A. J. Buhler securing the contract, and that he would be furnished with money for the making of loans in the said territory, Buhler purchased the 100 shares for the sum of $2,000, and gave in payment therefor his promissory note, payable to the order of Loftus, and that it was signed and indorsed by J. M. Buhler.

(8) That thereafter, and on the same day, the plaintiff J. M. Buhler, to secure the payment of the note, and for no other purpose, executed and delivered the mortgage.

(9) That thereafter, on or about November 3, 1913, the company issued and delivered to A. J. Buhler the shares of stock, having on October 20th approved the contract and delivered the same to him, thus constituting him its sole and exclusive agent in the said territory.

(10) That by reason of the statements and representations before mentioned A. J. Buhler was induced to purchase the shares, to enter into the contract, and to make the promissory note and mortgage and deliver the same to W. J. Loftus.

(11) That the representations were wholly false and untrue, that they were then known by the company and Loftus to be false and untrue, that they were made with the intent and purpose of inducing the plaintiff A. J. Buhler to purchase the stock, and to secure from him and J. M. Buhler the note and mortgage, that the company was at all times unable to sell a sufficient amount of stock or otherwise to raise money with which to begin business, or to carry out its contract and agreement with A. J. Buhler, that it has never at any time furnished said

Buhler with any money to make farm loans, that the company was insolvent and without funds with which to carry on business, and unable to perform any of the terms of its agreement with A. J. Buhler, and that it was well known to both Loftus and the company, when the note and mortgage were delivered to Loftus, that the company must at an early date go out of business and be dissolved.

(12) That the mortgage was recorded in the office of the clerk of Flathead county on the —— day of November, 1913.

(13) That by reason of the facts heretofore alleged the mortgage and note were given to W. J. Loftus without any consideration, and are wholly null and void, that the company has wholly failed to perform any of the terms of the contract with A. J. Buhler, that the shares of stock are entirely worthless, and that the plaintiffs herein offer to return them to the defendants.

(14) That on May 16, 1914, in the state of Illinois, the defendant W. J. Loftus made a pretended assignment of the note and mortgage to his codefendant John H. Loftus, which was thereafter recorded in the office of the clerk of Flathead county.

(15) That John H. Loftus is not a bona fide purchaser under the laws of the state of Illinois.

The company, though named as defendant, was not served with summons and did not appear in the action. The answer of the defendants Loftus denies all the allegations of the complainant charging fraud or misrepresentation by W. J. Loftus, and alleges that after the 100 shares of stock were sold to A. J. Buhler he authorized the company to transfer 33 shares to F. H. McDermont. In a pleading designated as a reply the plaintiffs allege in effect that the note and mortgage are void for the reason that neither W. J. Loftus nor the company had complied with the laws of Montana (chapter 85, Laws 1913, p. 367), relating to investment companies and stockbrokers, enacted for the protection of investors, etc. The court called a jury to aid in ascertaining the facts, and submitted special interrogatories. Some of their findings the court adopted. It made formal findings on all the issues in favor of plaintiffs, and decreed to them the relief demanded. The defendants have appealed.

It would extend this opinion beyond any reasonable limits, were we to give special notice to all the assignments made and argued by counsel. Many of them are not of sufficient merit to deserve even passing notice. We shall discuss only those which counsel seem to deem of controlling importance.

[1] We notice, first, the contention that the complaint does not state a cause of action. This question was presented at the opening of the trial by an objection by defendants to the introduction of evidence. Much of the argument on the assignment is more appropriately addressed to an inquiry whether the pleading is ambiguous and indefinite. Since it was not tested by special demurrer, however much it may be subject to criticism for defects in these particulars, this court is now confined to the single inquiry whether it states sufficient facts to warrant the relief demanded.

[2-6] It is argued that the representations by which plaintiff A. J. Buhler was induced to enter into the contract of agency were mere matters of opinion or related to what was to happen in the future, and that, though they turned out to be false, they did not constitute fraud, entitling him and his coplaintiff to have the mortgage and note canceled. It is true, as counsel contend, that parties are allowed under the law the greatest freedom of contract; that this is essential to the welfare of the community; that in their negotiations parties must be left to investigate for themselves and rely upon their own judgment; that the power vested in the courts to cancel contracts on the ground of fraud is extraordinary, and will be exercised only in cases in which the complaining party, free from fraud himself, has been deceived to his injury by his adversary; that the ultimate facts constituting the fraud must be specifically alleged, in order that the court may know whether, if proved, they will warrant the relief demanded, and that the adversary may know the particular charge he is to meet; that a misrepresentation as to what will be done in the future, or a statement of intention, or, generally, a mere expression of opinion, however erroneous, is not sufficient; but that the representation must relate to a present or past state of facts. In other words, in order to make out a case of fraud, the pleading must allege facts embodying the following essential elements: (1) That the defendant made a representation or statement, intending that plaintiff should act upon it; (2) that the representation was false; (3) that the plaintiff believed it; and (4) that he acted upon it to his damage. Butte Hardware Co. v. Knox, 28 Mont. 111, 72 Pac. 301, and cases cited; Power & Bro., Ltd., v. Turner, 37 Mont. 521, 97 Pac. 950; Ott v. Pace, 43 Mont. 82, 115 Pac. 37; Henry v. Continental B. & L. Ass'n, 156 Cal. 667, 105 Pac. 960; Crocker v. Manley, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196; Southern Dev. Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; 2 Pomeroy's Eq. Jur. § 878.

[7] The fact concerning which the statement is made, however, may be with reference to the future, but so related to present existent conditions that its affirmation as a fact will constitute a fraudulent representation within the rule of the cases cited. On this subject we find this in the text of Mr. Pomeroy:

> "That the fact, however, concerning which the statement is made, is future, does not itself prevent the misrepresentation from being fraudulent. The statement of matter in the future, if affirmed as a fact, may amount to a fraudulent misrepresentation, as well as a statement of a fact as existing at present." 2 Pomeroy's Eq. Jur. § 848.

In support of this statement the author cites, among other cases, Piggott v. Stratton, 1 De Gex, F. & J. 33, 49, and Hutton v. Rossiter, 7 De Gex, M. & G. F. 22, 23. To these may be added Pickard v. Sears, 6 Ad. & E. 469, Fall River Nat. Bank v. Buffinton, 97

Mass. 498, and Chouteau et al. v. Goddin et al., 39 Mo. 229, 90 Am. Dec. 462. In the first of these cases Lord Chancellor Campbell said:

> "I apprehend that the injunction is to be supported on the well-established doctrine that if A. makes a deliberate assertion to B., intending it to be acted upon by B., A. is estopped from saying it was not true. If it turns out to be false, A. is answerable for the damage which may have accrued to B. from having acted upon, and B. is entitled, in respect of anything done in the belief that it was true, to object to any denial of it by A."

In the note to the text of Mr. Pomeroy, supra, this remark is made referring to the cases cited:

> "Some of these cases may be referred to the doctrine of equitable estoppel; but it is plain that, where the representation is that of a fact in the future, and not a mere promise, and it is relied upon, and turns out to be false, the rights and remedies of the injured party are the same as those which arise from the fraudulent representation of an existing fact."

Under this rule, the representation, we apprehend, will operate as an estoppel in favor of the injured party, or may be availed of by him as a ground for the cancellation of a contract entered into upon the faith of it, according to the attitude occupied by the parties in the particular controversy, and the character of the relief sought.

[8, 9] The complaint is not a model of clearness and orderly statement; but, assigning to the several parts of it their obvious meaning and purport, and construing it as a whole under favor of the familiar rule that "whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as directly averred" (Phillips on Code Pleading, 352; Bayliss on Code Pleading, 49; County of Silver Bow v. Davies, 40 Mont. 418, 107 Pac. 81), we think it alleges sufficient to bring it within the rule stated by Mr. Pomeroy, supra.

The purpose of the negotiations had between the parties was that A. J. Buhler should become the exclusive agent for the company in the territory mentioned. The representation which operated as the inducement is alleged in paragraph 5. It is in effect a categorical statement that, while the company was not then ready to begin business, it was in such a condition that it would be ready in about two months and prepared to furnish the funds required to enable A. J. Buhler to negotiate loans in its behalf. In paragraphs 6, 7, and 8 is alleged the consideration demanded by Loftus for the contract, the purchase of the shares of stock which was made a condition precedent to the appointment, and the execution of the note and mortgage to secure the consideration to be paid, instead of paying it in cash. Paragraph 9 recites the approval of the negotiations by the company, the issuance of the shares of stock, and the final appointment for which the consideration was promised. Paragraph 10 alleges in effect that, by reason of his belief in and reliance upon the alleged statements of Loftus and Luther, the president, A. J. Buhler was induced to purchase the shares and to enter into the contract of appointment for the consideration demanded. Paragraph 11 alleges that the representations stated in paragraph 5 were wholly false, that they were known by Loftus and the president of the company to be such, that they were made with the intention to deceive and defraud the plaintiffs and to induce the execution of the note and mortgage, and that the company was unable at any time to sell its stock or to raise money otherwise to make loans or to furnish A. J. Buhler money for that purpose, in that it was insolvent at the time the contract was made.

[10] If the representation had been in the form of a promise merely that the company would furnish A. J. Buhler money within two months of the date of appointment, it being able at the time and intending to do so, its failure to keep the promise would have been a breach of the contract. The plaintiffs, however, understood—and it was the intention of Loftus that they should understand—that the company had then approached a condition of readiness such as to enable it within two months to engage in the business which it was organized to conduct. This was tantamount to an affirmation of a matter in the future as a fact existing at the time the contract was made, and was the inducement upon which he effected the sale of the stock and the execution and delivery of the note and mortgage. It amounted to the suggestion as a fact of that which was not true, by Loftus, who did not believe it to be true, and was therefore a fraud, within the meaning of subdivision 1 of section 4978 of the Revised Codes. In any event, his statements amounted to an "act fitted to deceive." Id. subd. 5.

[11] It is argued that the complaint is insufficient, also, in failing to allege in specific terms that plaintiffs are without an adequate remedy at law. Whether the particular case alleged is one of equitable cognizance depends solely upon the specific averments upon which the demand for relief is predicated. The addition of the jurisdictional clause does not aid it in any way. It is merely a conclusion of law to be drawn by the court, not by the pleader, from the specific facts alleged. The allegation of it is therefore wholly unnecessary. 16 Cyc. 222.

[12] It is also argued that it does not appear that the plaintiffs have offered to restore to the defendants the shares of stock. This argument is without merit. The concluding clause of paragraph 13 is sufficient allegation on this subject. Maloy v. Berkin, 11 Mont. 138, 27 Pac. 442.

[13] During the course of the trial the court permitted certain amendments to be made to the complaint. It is argued that this was error, in that the effect of the

amendments was to make the complaint state a cause of action; whereas, before they were allowed, it was fatally defective. There was no error. The power to allow the amendments at any stage of the trial is within the discretion of the trial court, and its action in this behalf is not subject to review by this court, unless it is affirmatively shown that it abused its discretion to the prejudice of the adverse party. Rev. Codes, § 6589: Bennett v. Tillmon, 18 Mont. 28, 44 Pac. 80; Merrill v. Miller, 28 Mont. 134, 72 Pac. 423; Sandeen v. Russell Lumber Co., 45 Mont. 273, 122 Pac. 913; De Celles v. Casey, 48 Mont. 572, 139 Pac. 586. Though the defendants demanded a postponement of the trial, because of the allowance of one of the amendments, they presented no affidavit showing that they were surprised, or that they were not ready and able to produce all the evidence they desired. Indeed, it is apparent that they introduced all the evidence they had at their command.

[14] Error is predicated upon the admission in evidence of Exhibits D and F. The first was a letter addressed to the stockholders, ostensibly by H. A. Luther, president of the company, under date of April 21, 1914, conveying the information that at the annual meeting of stockholders held in Chicago on April 7, 1914, it had been determined to surrender the Chicago office and remove general headquarters of the company to Aberdeen, S. D.; that a committee had been appointed, whose chairman was W. S. Narregang, of the latter place, himself a stockholder, to suggest a feasible plan to conduct the business of the company; and that all letters addressed to the company should be addressed to Narregang until May 23d, to which date the meeting of April 7th had been adjourned to reconvene at Aberdeen. It contained what purported to be resolutions adopted at the April meeting. Exhibit F was a letter written to A. J. Buhler by Narregang on August 13, 1914, stating in effect that the company was going out of business, and was not in a position to make any loans of any kind. These were introduced, as tending to show that the company was in a failing condition, and hence that the representations of Loftus were false. They were not shown by any evidence to have been in fact signed by their purported authors, or identified as genuine. They were, therefore, not admissible for any purpose.

[15] Like objection was made to the introduction of Exhibits H and I. The first consisted of an order by the circuit court of the Fifth judicial district of South Dakota, made on May 13, 1914, appointing one Arthur M. Cole temporary receiver to take charge of the property and assets of the company, in an action entitled S. W. Narregang v. American Mortgage Insurance Company. The second was a copy of the register of actions in the cause, disclosing the different proceedings had in it until it ended. Both were exemplified as required by section 7911 of the Revised Codes. They were introduced to show that the company had been forced into the hands of a receiver as an insolvent, and that it had thereafter been dissolved. Both these exhibits were mere fragments of the record, and did not tend to show for what cause the receiver was appointed, nor what was adjudicated by the final judgment. They were not, therefore, competent for any purpose. The order was interlocutory, and did not adjudicate anything. The register of actions merely indicated that certain steps had been taken in the action. Assuming that the final judgment in the action would have been admissible for the purpose intended (the company was not made a party to the present action), it could be made available only by the production of an exemplified copy of the entire record, or so much of it as would disclose the issues made by the pleadings and what was finally adjudicated in the action.

[16, 17] In support of the allegations in their reply, the plaintiffs were permitted to introduce the deposition of Hon. William Keating, the state auditor and investment commissioner of Montana, to show that neither W. J. Loftus nor the company had been licensed to transact business of any kind in Montana. It is not necessary to inquire whether the sale of the shares of stock to plantiffs was a doing business in the state, within the meaning of the statute relating to investment companies, supra, sought to be invoked by plaintiffs, or whether, if the sale of the shares was void, the plaintiffs were entitled for this reason to have the note and mortgage canceled. The allegation of new matter in the reply to impeach the sale transaction constituted a distinct departure in the pleadings, and presented an issue upon which no relief could be predicated. The office of a reply is to join issue upon the counterclaim, or the new matter of defense alleged in the answer, or to avoid it, as the case may be. It may, in a particular instance, aid the answer; but it cannot aid the complaint, by supplying an omission therein or broadening its scope, by adding to it a new ground of relief. Thornton v. Kaufman, 35 Mont. 181, 88 Pac. 796; Waite v. Shoemaker, 50 Mont. 264, 146 Pac. 736; Doornbos v. Thomas, 50 Mont. 370, 147 Pac. 277; Bliss on Code Pleading, 437; 9 Cyc. 747. The objection to these items of evidence should have been sustained.

Other rulings upon the admissibility of evidence are also assigned as error. None of these require special notice, save those which had reference to the means of proof of the unwritten law of the state of Illinois relating to the nature of the right acquired by the assignee of a trust deed or mortgage and the note secured by it. We shall notice these later when we come to inquire whether John H. Loftus became the owner of the note and mortgage free from equities in favor of plaintiffs.

[18] Counsel strenuously insist that the rulings just noticed entitle defendants to a reversal of the decree. If the court had adopted the findings of the jury without further consideration, and rendered its decree thereon, the argument of counsel would perhaps have some plausibility. Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717. This, however, the court did not do. The formal findings were made after careful consideration of the evidence by the court, and after argument by counsel for defendants on their motion asking the court to reject the findings of the jury and adopt findings in favor of defendants. Under the circumstances, we may presume that the trial judge based the findings upon so much of the evidence as was competent and substantially material, rejecting such as ought to have been rejected. Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123; Lane v. Bailey, 29 Mont. 548, 75 Pac. 191; State v. Driscoll, 49 Mont. 558, 144 Pac. 153.

[19, 20] The next assignment we will consider is that the evidence is insufficient to justify the findings. Since the appeal is from the judgment only upon a bill of exceptions, the question presented by the assignment is, not whether the trial court abused its discretion in denying defendants a new trial, but whether there is any substantial evidence to support the findings as made. We shall not undertake to state and discuss the evidence with reference to the different findings in detail. It is sufficient to say that, with the exception of the finding of the specific date at which the receiver was appointed, and the finding that neither W. J. Loftus nor the company had been licensed to do business in Montana, to which reference will be made later, the findings are responsive to the general scope and meaning of the allegations of the complaint, and are supported by substantial evidence. It is true that it is alleged in the complaint that the note was that of A. J. Buhler, and that it was signed and indorsed by J. M. Buhler, and that the evidence shows that it was signed by J. M. Buhler only, and not indorsed by him. This is not a material variance, as counsel contend. The note and mortgage were given by J. M. Buhler to secure the appointment of A. J. Buhler as the exclusive agent of the company, and to enable the latter, as between the two, to have an interest in the commissions earned in the business. It appears incidentally, also, that it was the intention of A. J. Buhler that one-third of the shares of stock, when issued, should belong to F. H. McDermont, one of counsel for plantiffs, who, as between him and the Buhlers, was to have a one-third interest in the commissions earned in the business. It is insisted, therefore, that it appears that McDermont owns an interest in the stock, and hence that this condition of the evidence constitutes a material variance. The certificates themselves, however—one for 67 shares and the other for 33 shares—were at the time of the trial still owned by A. J. Buhler, and were then tendered by him to the defendants. There was, therefore, no variance in this regard. The fact that the plaintiffs and McDermont had an agreement among themselves to share in the commissions to be earned is not of consequence.

It is insisted that there is no evidence tending to show that the stock is of no value. While, as we have said, the evidence introduced by plaintiffs, heretofore referred to as tending to establish the fact that the company was insolvent and that the stock was worthless, was incompetent, the defendant W. J. Loftus during the giving of his testimony admitted, in effect, that when the contract with A. J. Buhler was made, and he secured the note and mortgage, the company was in a condition of insolvency. According to his testimony, the company was organized and commenced selling stock in the spring of 1912. Though at the time the contract was made it had been engaged for more than a year in the attempt to accumulate sufficient cash from stock subscriptions to begin business, and had nominal assets to the amount of $175,000, it had accumulated but a small amount of cash; the great bulk of its assets consisting of subscription notes payable on the condition that all the stock had been subscribed for. The officers of the company were making every effort to get the stock disposed of, but had failed to do so, and he attributed this condition to a stringency in the money market. He admitted, however, that the company had gone into the hands of a receiver in May, 1914, at the suit of Narregang, one of the largest creditors. Taking the testimony as a whole, it furnishes some basis for the inference that the stock was not worth $20 per share, nor any other amount. Aside from this, however, the main purpose of the transaction was to secure for A. J. Buhler the appointment as exclusive agent of the company upon the implied assurance that it was practically ready to begin business. The purchase by him of the stock was not as an investment, but to qualify himself to secure the appointment, so that he would thereafter have a profitable business; and it is clear from all the evidence that, but for the assurance of the appointment, he would not have bought the stock. True, he was awarded the appointment; but it was without value, and the purpose he had in view failed of accomplishment entirely. In fact, the net result was that he did not get what he contracted for, and that W. J. Loftus secured a sale of stock owned by him personally at double its nominal value; whereas, when questioned as to its actual value, he was not willing to go further than to say that it had a value of about $16, basing this opinion upon his estimate of outstanding conditional subscription notes. On the whole, we think that the evidence, direct and circumstantial, is sufficient to justify the findings, so far as they are material and responsive to the allegations of the complaint. In view of this conclusion, the finding touching the matter of failure by Loftus and the company to obtain license under the statute, supra, may be eliminated and disregarded as immaterial. The same disposition may be made of the criticism of the finding as to the exact date when the receiver of the company was appointed.

[21] It remains to inquire whether John H. Loftus took the note and mortgage free from all equities in favor of J. M. Buhler. Since the assignment was made in Illinois, counsel for the plaintiffs assumed that the assignee's rights were to be determined by the unwritten law of that state, and offered evidence to prove it. The mode adopted was this: Mr. Kendall, one of counsel for plaintiffs, testified in effect that he had become acquainted with the decisions of the Supreme Court of Illinois by reading the opinion in the case of Bouton v. Cameron, as published in 205 Ill. 50, 68 N. E. 800, and other cases. Thereupon the opinion was admitted over the objection, among others, that Mr. Kendall had not disclosed sufficient knowledge to lay the foundation for its admission. The means by which such proof may be made are prescribed by section 7908 of the Revised Codes. See, also, Ridpath v. Heller, 46 Mont. 586, 129 Pac. 1054. We shall not stop to determine whether the evidence was properly admitted. Assuming that the law of the state of Illinois is as counsel undertook to show, the law on the subject in this state is the same, and the conclusion reached by the trial court would have been the same, though the evidence had been rejected. The note did not refer to the mortgage and upon its face was negotiable. If it had been transferred to John H. Loftus by indorsement, without mention of the mortgage, what rights he would have acquired would have depended upon the solution of a different question from that before us, viz. whether, in view of the restrictive provision found in section 6861 of the Revised Codes, he would have acquired the rights of a holder in due course under the Negotiable Instrument Law (Rev. Codes, § 5906).

[22] The transfer, however, was made by written assignment of the note and mortgage both; W. J. Loftus indorsing the note without recourse. John H. Loftus, therefore, took it with full knowledge that it was a mortgage note, collectible by him only as such, under the provisions of section 6861, supra. It therefore did not come into his hands as "a courier without luggage," but as a nonnegotiable instrument, subject to all the equities existing in favor of J. M Buhler at the time he received it. This was expressly so held by this court in Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598, and that case is conclusive of this.

[23] Though the recorded written assignment gave J. M. Buhler constructive notice that John H. Loftus had become the owner of the note, it did not serve in any wise to cut off Buhler's right to impeach the note on the ground that it had been secured by fraud.

The judgment is affirmed.

Affirmed.

SANNER and HOLLOWAY, JJ., concur.

PITCHER, Com'r of Finance, v. MISS WOLCOTT SCHOOL ASS'N. (No. 8849.)

(Supreme Court of Colorado. June 4, 1917.)

TAXATION 🔑242(7)—EXEMPTION—"SCHOOLS" FOR PROFIT.

Under Const. art. 10, § 5, and Rev. St. 1908, § 5545, providing that lots with the buildings thereon used solely and exclusively for schools shall be exempt from taxation, buildings and grounds owned by a domestic corporation and used exclusively for purpose of schools conducted for profit are exempt from taxation; the term "schools" being broad enough to include institutions run for profit.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 400.

For other definitions, see Words and Phrases, First and Second Series, School.]

White, C. J., dissenting.

En Banc. Error to District Court, Denver County; John A. Perry, Judge.

Suit by the Miss Wolcott School Association against Clair J. Pitcher, Commissioner of Finance, ex officio Assessor and Treasurer of the City and County of Denver. From a judgment for plaintiff, defendant brings error. Affirmed.

James A. Marsh and Jacob J. Lieberman, both of Denver, for plaintiff in error. William N. Vaile, of Denver, for defendant in error.

TELLER, J. The defendant in error is a corporation organized under the laws of this state for the purpose of conducting a school. It owns several buildings, and the grounds upon which they are located, which are admitted to be used for school purposes. In a suit for that purpose, it secured a permanent injunction against the assessment of said property for taxes.

Exemption from taxation is claimed under section 5 of article 10 of the state Constitution, and section 5545, R. S. 1908. The former reads as follows:

> "Lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law."

The statutory provision exempts, with other property:

> "Buildings used exclusively for religious worship, for schools or for strictly charitable purposes, with the grounds whereon the same are situated."

For the plaintiff in error, it is urged that the term "schools," as used in the Constitution and the statute, must be interpreted as including only schools not conducted for profit; and that the property of the defendant in error, it being admittedly a corporation for profit, is not exempt.

In Cathedral of St. John v. County Treasurer, 29 Colo. 143, 68 Pac. 272, this court had under consideration the constitutional and statutory provisions in question in this case, and it was there held that a building and grounds used for a theological school were exempt, notwithstanding the fact that the bishop of the diocese, who was an instructor in the school, resided with his family on the premises. It seems to have been conceded that the school property was exempt, unless its occupation as above stated removed it from the exempted class. The case is authority for a liberal construction of the provisions for exemptions, the court pointing out in the opinion that the purpose of the legislation was "to foster educational institutions by relieving their property, within prescribed limits, from the burden of taxation. This being the end to be attained, the meaning of the law must be ascertained by a construction within its spirit, purpose, and policy not opposed to its letter."

The letter of the provisions under consideration includes schools without any limitations, and it is urged with some reason that there was no necessity to mention schools if intended for public schools only, since they are public property, and exempt by article 10, § 4, of the Constitution, and by section 5545, R. S. 1908.

In several state Constitutions, institutions conducted for profit are in terms excluded from an exemption class which would otherwise include them. The absence of such provisions in our Constitution gives force to the claim that no such limitation was intended. The term "schools" is broad enough to include institutions run for profit, and we find no reason for limiting its plain meaning.

The Constitution of Missouri and that of Nebraska exempt property used exclusively for schools, in substantially the same language as is used in our Constitution, and in both states the exemption has been held to apply to private schools. In State v. Johnston, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A. (N. S.) 171, the point was conceded and the case was decided on a question of the occupation of a part of the property as a residence. It was held, as in the case of Cathedral v. Treasurer, supra, that the property was exempt although thus occupied.

In Rohrbough v. Douglas County, 76 Neb. 679, 107 N. W. 1000, a commercial college was held to be exempt under the term "school."

Schools conducted for profit have been held exempt under statutes or constitutional provisions which exempt "academies, seminaries, and scientific institutions." Indianapolis v. Sturdevant, 24 Ind. 391; Detroit Home & Day School v. Detroit, 76 Mich. 521, 43 N. W. 593, 6 L. R. A. 97.

To the Minnesota statute (Gen. St. 1878, c. 11, § 5), which exempts colleges, seminaries, etc., is added the clause, "not leased or otherwise used with a view to profit." In Ramsey County v. Stryker, 52 Minn. 144, 53 N. W. 1133, of this limitation it is said:

> "It manifestly refers to other uses of the property than the appropriation and operation of the same for the legitimate purposes of an institution of learning."

The court held that it was not necessary to an exemption that the institutions "be conducted free of charge, or that the tuition or compensation received from their patrons might not exceed the expenses incurred in the operation or management of such institutions."

In the Michigan case above cited, it was said:

> "Exemption from taxation is the only form of encouragement that our laws provide. * * * The advantage of multiplying the facilities of learning has been rightly regarded as worth to any decent community very much more than can be counted in money."

In Cathedral v. County Treasurer, supra, this court said:

> "The fundamental object of the law was to exempt property used for school purposes from taxation."

This gives to the word "schools" its ordinary meaning, and we find no authority for limiting it to a particular class.

The judgment is affirmed.

Affirmed.

WHITE, C. J., dissents.

LLOYD et al. v. LOWE. (No. 8839.)

(Supreme Court of Colorado. June 4, 1917.)

1. MORTGAGES ⟹280(5)—TRANSFER OF PROPERTY—ASSUMPTION OF INCUMBRANCE—PRESUMPTIONS.

That defendant agreed to purchase land subject to a trust deed raises no presumption that he agreed to assume and pay the incumbrance.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 746.]

2. MORTGAGES ⟹280(3)—ASSUMPTION OF INCUMBRANCE—MISTAKE.

If the scrivener by mistake contrary to the contract of the parties and without their knowledge inserts a clause in the deed binding the grantee to assume a mortgage, the mortgagee cannot avail himself of it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 742, 744.]

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. MORTGAGES 🔑280(3)—TRANSFER OF PROPERTY—ASSUMPTION OF INCUMBRANCE.

Where plaintiffs, who held a note secured by a trust deed on land which was afterwards conveyed to defendant, were not misled because the deed contained a covenant contrary to contract obligating defendant to pay off the deed of trust, such covenant is not, being without consideration, binding on defendant, although he retained the deed after learning of its fraudulent insertion and subsequently conveyed the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 742, 744.]

4. MORTGAGES 🔑280(3) — AGREEMENT TO ASSUME—VALIDITY—ESTOPPEL.

That defendant took possession, paid taxes, etc., and offered the land for sale, did not estop him to deny knowledge of assumption clause in his deed as to parties not misled.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 742, 744.]

Error to District Court, Mesa County; Charles Cavender, Judge.

Action by W. H. Lloyd and another against E. E. Lowe. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

McMullin & Sternberg, of Grand Junction, for plaintiffs in error. J. E. Simonson and W. G. Simonson, both of Denver, for defendant in error.

ALLEN, J. This was an action upon a promissory note brought by plaintiffs in error, plaintiffs below, as the owners, holders, and payees of the note. The makers of the note, to secure the same, had given a trust deed upon certain land then owned by them. Subsequently they conveyed the land to the defendant in error, defendant below, by a deed which contained, after the usual covenants of title and against incumbrances, the following assumption clause:

> "Except * * * a certain trust deed to the amount of $1,000, which party of the second part assumes and agrees to pay."

This action was brought to enforce against the defendant below a personal liability upon the note on account of the foregoing assumption clause. The trial court gave judgment for the defendant.

The trial court found and the evidence established, that the assumption clause was inserted in the deed contrary to the agreement between defendant and his grantors, by mistake of the scrivener, and that defendant was not present when the deed was prepared. The evidence further discloses, and it is not disputed, that the defendant purchased the land upon a contract in writing between himself and his grantors. The contract, introduced in evidence, does not contain any agreement with reference to the assumption of the trust deed by the purchaser, the defendant, but the trust deed is not mentioned in the written agreement otherwise than in and by a recital therein that the land is "subject to a mortgage of $1,000 now of record." The undisputed evidence was that defendant never assumed nor agreed to pay the trust deed nor the note secured thereby, and that he first saw the clause in the deed, in which it was recited that he assumed and agreed to pay the trust deed, after this action was commenced.

[1] The fact that the defendant agreed to purchase land "subject to a mortgage" raises no presumption that there was an agreement to assume and pay the incumbrance.

> "An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt, to make him personally liable." Elliott v. Sackett, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678.

In this connection we may add, in the language of the opinion in the case of Demaris v. Rodgers, 110 Minn. 49, 124 N. W. 457, that:

> "There can be no question that if defendant accepted the deed containing the assumption clause with knowledge of its presence, and without protest or objection, it would be binding upon him, even though he had not previously agreed to pay the outstanding debt."

The defendant in this case denies that he accepted the deed at all. But, assuming that the evidence clearly shows that he did accept the deed, it also shows that he accepted it without knowledge of the assumption clause, and therefore cannot be bound under the rule stated in Demaris v. Rodgers, supra. The fact that he did not read the deed had no bearing either upon his liability or his defense. It does not charge him with negligence. In Elliott v. Sackett, supra, the court said:

> "Elliott had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches, in not observing the provisions of the deed, as should preclude him from relief."

[2] Under the facts of this case, as thus far noted, the defendant is relieved from liability under the general rule thus stated in section 1075, Devlin on Deeds (2d Ed.):

> "If the scrivener by mistake inserts a clause in the deed binding the grantee to assume a mortgage, where neither of the parties intended to place this liability upon the grantee, and did not know of the insertion of the clause, the mortgagee cannot avail himself of it."

The rule above stated has been frequently followed and applied. Had the evidence in this case clearly and indisputably disclosed that the defendant had no knowledge or notice of the assumption clause in his deed until after this action was commenced, he would be relieved of liability, and the judgment in his favor would have been unmistakably correct. Stead v. Sampson (Iowa) 155 N. W. 978; Haskins v. Young, 89 Conn. 66, 92 Atl. 877; Bradshaw v. Provident Trust Co., 81 Or. 55, 158 Pac. 275; Parker v. Jenks, 36 N. J. Eq. 398; Stevens' Institute v. Sheridan, 30 N. J. Eq. 23.

[3] There was evidence in the case, how-

ever, that the defendant three months before suit was brought was apprised of facts from which he might be charged with notice of the assumption clause, and that he did nothing to repudiate or disaffirm the contract imposed upon him by the assumption clause in the deed. Upon the proposition that it is the duty of a grantee to disaffirm the contract promptly, and that he is liable to the mortgagee under these circumstances if he does not disaffirm the deed or contract, the plaintiffs in error cite the case of Sutter v. Rose, 64 Ill. App. 263, affirmed in 169 Ill. 66, 48 N. E. 411. It may be conceded that the case cited supports their contention, but it appears to us that a better rule is followed in a later and very recent case, that of Johnson v. Maier (Mo. App.) 187 S. W. 143. The syllabus, in accord with the opinion, contains the following paragraph:

> "Where plaintiffs, who held a note secured by a deed of trust on land which was afterwards conveyed to defendant, were not misled because the deed contained a fraudulent covenant obligating defendant to pay off the deed of trust, such covenant is not, being without consideration, binding on defendant, though he retained the deed after learning of its fraudulent insertion and subsequently conveyed the land."

The court in the opinion there said:

> "The argument in behalf of plaintiffs is that, if the defendants conveyed the land after they discovered the clause was therein, such conduct amounted to a ratification thereof, irrespective of how it got there. There might be some merit in this contention if the plaintiffs were thereby misled to their injury; but, in the absence of any such question, the basis of defendant's liability in this case is that they for a valuable consideration assumed and agreed to pay plaintiffs' debt."

In the case at bar there were no facts either pleaded or proven to show that plaintiffs were misled to their injury by reason of the defendant's failure to disaffirm the deed or the assumption clause therein within a reasonable time after he had knowledge or notice thereof. In the absence of such facts the only basis of the defendant's liability, as purchaser of the land in question, is as stated in the Missouri case last cited, which is in accord with the decisions already rendered in this state. In the case of Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652, the court quoted, with approval, from Pomeroy's Eq. Jur. as follows:

> "The ground of grantee's liability adopted by the courts of a large majority of the states is that of contract. * * * It is strictly legal, arising out of a contract binding at law."

The decision or rule as stated in Starbird v. Cranston, supra, is undoubtedly based upon the broad doctrine that when one person makes a promise for the benefit of a third person, the latter may maintain an action upon it. See section 758, Jones on Mortgages (5th Ed.); Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Bay v. Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467. In Gill v. Robertson, 18 Colo. App. 313, 316, 71 Pac. 634, 635, it is said:

> "It is the law in this jurisdiction that the obligation which the grantee in a deed assumes, to pay an incumbrance upon the land, arises out of contract purely."

In the case at bar it is clearly established by the evidence that there was no contract to pay the trust deed or the note secured thereby, made by and between the defendant and his grantors. There being no contract to that effect, there was no contract under which the plaintiffs, as mortgagees, could be beneficiaries, and no contract upon which they could sue. The defendant did nothing to mislead the plaintiffs, and his defense, that the assumption clause was inserted in the deed without his knowledge or consent and contrary to his agreement with his grantors, was therefore good under the doctrine of the case of Johnson v. Maier, supra.

[4] An assignment of error is predicated upon the trial court's sustaining defendant's demurrer to the plaintiffs' replication. In substance, the replication alleged that after the defendant accepted the deed he took charge and possession of the property, paid taxes thereon, and exercised acts of ownership over the same; that he offered the land for sale; that he sold the land; and that by such conduct the defendant is estopped to deny knowledge of the assumption clause, and is estopped to deny that he assumed and agreed to pay the indebtedness represented by the mortgage, and is estopped to deny that the assumption clause was inserted in the deed with his knowledge and consent.

As an estoppel relied on in avoidance of defendant's defense, the allegations of the replication were clearly insufficient. In this connection we can adopt the language of the opinion in the case of C. F. & I. Co. v. Lenhart, 6 Colo. App. 511, 516, 41 Pac. 834, 835, as follows:

> "If there is an estoppel here at all, it is an estoppel by conduct. But conduct alone does not create an estoppel. If no rights have been affected by the conduct, there is no one in whose behalf the doctrine of estoppel can be invoked. To create the estoppel some other person must have changed his position on the faith of the conduct. * * * But there can be no estoppel in favor of one who has not been misled, or to whom the assertion of the truth would do no injury."

The same language was approvingly quoted in Ayer v. Younker, 10 Colo. App. 27, 31, 50 Pac. 218, and the same doctrine was enunciated in Loan & Trust Co. v. Canal Co., 3 Colo. App. 73, 32 Pac. 178.

As before stated, the plaintiffs were not misled to their injury. Neither the replication nor the evidence discloses that plaintiffs have changed their position on account of the conduct of the defendant, or that their rights have been affected. Furthermore, the conduct of defendant, as pleaded, was not such conduct as would warrant the plaintiffs in assuming that defendant agreed to pay the trust deed and note.

No prejudicial error appearing in the record, the judgment of the district court is affirmed.

Affirmed.

WHITE, C. J., and BAILEY, J., concur.

ZANCANNELLI v. PEOPLE. (No. 8712.)

(Supreme Court of Colorado. June 4, 1917.)

1. CRIMINAL LAW 🔑1186(6) — APPEAL AND ERROR—CONFESSION OF ERROR.

Ordinarily, where the Attorney General files a confession of error in the Supreme Court, the judgment will be reversed without comment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3218.]

2. JURY 🔑131(16) — EXAMINATION OF PROPOSED JURORS—IMPROPER RESTRICTIONS.

While a person is not necessarily disqualified to act as a juror by reason of a previously formed or expressed opinion with reference to guilt or innocence of accused under Rev. St. 1908, § 3691 et seq., it was error in the prosecution of a striking coal miner for murder to exclude questions to proposed jurors to elicit the condition of their minds with respect to the strikers or coal operators and the subject-matter of the prosecution, as such questions were proper not only to determine whether there was a ground for challenge for cause, but to enable defense to decide whether to make use of a peremptory challenge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 580.]

En Banc. Error to District Court, Las Animas County; Granby Hillyer, Judge.

Louis Zancannelli was convicted of murder, and he brings error. Reversed and remanded.

O. H. Dasher, of Trinidad, Fred W. Clark, of Greeley, and Horace N. Hawkins, of Denver, for plaintiff in error. Leslie E. Hubbard, Atty. Gen., for the People.

PER CURIAM. Zancannelli, hereinafter referred to as defendant, was convicted upon the charge of having murdered one Belcher at the city of Trinidad, and sentenced to life imprisonment. He brings the cause here for review relying upon many alleged errors.

[1] The killing took place during the period of the recent industrial conflict in the coal fields between the owners of the coal mines and their employés, and was, the state claimed, incident thereto. The Attorney General neither filed the information nor participated in the prosecution, and in this court has filed a confession of error. Ordinarily, under such circumstances, we would enter judgment of reversal without comment. The nature of the case, however, is such that we think a good purpose will be served by briefly stating the facts and commenting upon the same.

The deceased was a detective in the employ of the mine owners, and the defendant was a striking coal miner, and an inmate of the temporary shelter of such miners known as "the Ludlow Tent Colony." The prosecution introduced evidence to the effect that the defendant had stated that he had killed the detective "for the good of the union." The defendant claimed, and offered to prove, that several large coal mining companies operating in the district were actively interested in the prosecution, and at their request and employment the Hon. Jesse C. Northcutt appeared in the case and aided the district attorney. A petition, supported by affidavits, was filed by defendant alleging interest and prejudice on the part of A. W. McHendrie, judge of the court, and asking that another judge be called in to try the case, which was sustained. Thereafter, by an act of the Legislature, an additional judge was provided for the district, and the Governor appointed the Hon. Granby Hillyer to the position, and a like petition for change of judge was filed against him. The petition was denied, and, upon trial, the jury failed to agree, and was discharged. Fifteen days thereafter the defendant was again placed on trial before Judge Hillyer, and was convicted, as hereinbefore stated.

The evidence on the part of the prosecution was to the effect that defendant had shot Belcher as charged in the information, while that on the part of defendant was to the contrary and tended to show that one of two other men, whom it was claimed had been seen fleeing from the place, was the guilty party, and that the arrest and prosecution of defendant was the result of mistaken identity. Several of the proposed jurors stated, upon examination by the prosecution, that they had formed, expressed, and then held, opinions concerning the guilt or innocence of the defendant; that such opinions and impressions were based upon hearsay, rumors, conversation with other persons, newspaper articles, etc.; but that notwithstanding such opinions they could give the defendant a fair and impartial trial according to the law as it should be given to them by the court under the evidence submitted in the case. Some of the proposed jurors stated that they had never formed or expressed any opinion concerning the case. Upon examination by the defense, each of the proposed jurors was asked the following question in words or substance:

> "Can you start out on the trial of this case giving to the defendant the benefit of the legal rule that a defendant must be presumed to be innocent until he is proven to be guilty?"

To this question an objection was interposed by the prosecution, which, when propounded to those who had previously stated that they had not formed or expressed an opinion concerning the case, was overruled by the court, and they were required to answer; but when propounded to those who had stated they held opinions, or had formed or expressed opinions concerning the guilt or innocence of the defendant, the objection was sustained and the juror not permitted to answer. The defendant exhausted his peremptory challenges, and several of the veniremen, to whom the question was propounded and who were not permitted to answer, served as jurors in the case over the objection and exception of defendant. Substantially every question propounded by the defense to elicit the condition of mind of the jurors respecting the defendant, the parties to the prosecution, and the subject-matter of the action, was ruled out by the court as improper. As an example we set forth the following, to which the court sustained objections and refused to permit the jurors to answer, viz.:

> "Have you any bias or prejudice touching the striking coal miners, either for or against them?"
>
> "Have you taken an active part on either side of the recent coal strike?"
>
> "Have you favored or advocated forcible deportation of the striking miners in this county?"
>
> "As you sit there now, do you think you know what ought to be done in this case or what verdict ought to be rendered?"
>
> "Have you ever talked with any one who was a mine guard, about the strike matters?"
>
> "Have you any bias for, or prejudice against, an organization, without intimating which way, known as the United Mine Workers of America?"
>
> "Are you a member of any organization that during the recent troubles advocated forcible deportation of miners?"
>
> "In the recent coal miners' strike, which extended over a number of months, were you an active partisan on either side, or did you, like the ordinary citizen, take nothing but a passing interest in it?"
>
> "Have you participated in any of the exchange of shots in any of the so-called battles which have occurred in this county during the existence of the strike?"
>
> "Are you desirous of serving on this jury?"
>
> "Have you read any of the literature sent out by the coal companies touching the Zancannelli case?" (Coupled with the offer, which was refused, to show that the coal companies had distributed literature which repeatedly stated, not only that the defendant was guilty, but that he had confessed guilt.)
>
> "I assume, Mr. Moore, that living at Model there, you were not an active participant or partisan one way or another in the industrial struggle?"
>
> "Have you had any part in the industrial conflict here in Colorado at all?"
>
> "Did you act as a deputy sheriff to go out in the armored cars the Colorado Fuel & Iron Company had?"
>
> "Do you know whether or not the coal companies were paying for your services there?" (This to a juror who said he was one of the so-called deputy sheriffs in the battles between miners and company men.)
>
> "Do you know how the sheriff came to summon you, a man who had been in these battles, as a juror in this case?"
>
> "From what you have heard and read of the account of the trial that was had here just a few days ago, do you feel that you know what verdict should have been rendered in the trial?"
>
> "Is it or not true that you would dislike to decide a case contrary to what they [the coal companies hiring Judge Northcutt to prosecute] thought it ought to be decided?" (This to a juror who had said that his business associations with the coal companies would tend to bias him in his verdict, and who none the less was held by the court to be a competent juror when defendant's fifteen challenges had been exhausted. This juror was one of the jurors who, over defendant's protest, tried the case.)
>
> "The law is, Mr. Hudson, that at the outset of a trial any defendant in a criminal case is in law presumed to be innocent, and it is the duty of the jurors to give to the defendant the benefit of that presumption of law, until, or unless, the evidence should show guilt beyond a reasonable doubt. Is your frame of mind such that you can start out on the trial of this cause giving to the defendant the benefit of that rule of law that he shall be presumed to be innocent until the contrary appears beyond a reasonable doubt?"

Some other questions which the court refused to permit defendant to ask of jurors and have the same answered are the following:

> Of Juror Pittinger:
>
> "Is not your frame of mind such that you would require this defendant to prove himself to be innocent of the crime?"
>
> "Is it or not true that you now, looking at this defendant, regard him as a guilty man, and is not your frame of mind such that you can in no way give him the benefit of the presumption of innocence at the outset of the trial?"
>
> Of Juror Bramlett:
>
> "Is your frame of mind such that you would require him to prove himself not guilty?"

The court would not permit jurors to answer the following:

> "Do you understand what is meant by the presumption of innocence?"
>
> "Do you believe in the doctrine of the presumption of innocence of the defendant?"
>
> "If the evidence to your mind was evenly balanced as to guilt or innocence, which way would your verdict be?"
>
> "Would you hesitate to return a verdict of not guilty if the evidence failed to convince you beyond a reasonable doubt that the man was guilty?"

Further illustrative of what took place in the impaneling of the jury, we note the following:

Juror Cherry, a Trinidad business man, in answer to the questions propounded by the district attorney, stated that he had an opinion and that the evidence would have to be clear before he could lay it aside. In answering questions propounded by defendant's counsel he stated:

> That he had "a pretty good idea what the facts are; that it would require clear and convincing evidence to change his mind; that he would start into the trial with that opinion strongly in his mind; that he followed the former trial through the papers with considerable interest; that he had an opinion as to what the verdict should be; that he had a fixed opinion which would have to be changed by very clear evidence, and had an opinion as to who killed Belcher."

Thereupon, in response to leading questions by the court, the prospective juror stated that he would decide the case solely on the evidence, and the challenge of defendant was overruled. Upon re-examination the juror stated that he would not lay aside his opinion until he heard clear, strong, and convincing evidence to the contrary, and that he had expressed his opinion a number of times. The court then refused to permit inquiry as to bias or prejudice for or against the striking coal miners, or as to whether the juror was an active partisan in the coal strike, or whether he had advocated forcible deportation of the miners. Defendant then asked: "Can you start into the trial presuming defendant to be innocent of any crime?" To this question the juror said, "I object to the question." The court sustained the objection. The defendant then asked of the juror if he were in defendant's place, looking for fair and unbiased jurors, if he would accept a juror who had the same frame of mind as the prospective juror then had. To this the juror replied, "I object," and the court sustained the objection.

In considering these questions, and the action of the court in the premises, and its prejudicial effect upon the defendant's rights, it should be borne in mind that the defendant was a striking coal miner, a member of the United Mine Workers of America, which was conducting, on one side, the industrial conflict, and that the theory of the prosecution was that defendant had committed the murder because deceased was a detective employed by the coal operators, who were conducting the other side of that conflict, and that the killing was done for the "good of the union."

[2] While a person is not necessarily disqualified to serve as a juror in a crimnal case by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused (section 3691 et seq., R. S. 1908), it would seem always important to ascertain the state of the proposed juror's mind as to the defendant's rights under the law, for, without this, how would it be possible for the court, within the meaning of the law, to be satisfied that the juror has no other interest or motive in the case than to render a true, fair, and impartial verdict? However, be that as it may, the defendant had a right to propound questions to the proposed jurors to show not only that there existed proper grounds for a challenge for cause, but also to elicit facts to enable him to decide whether or not he would make a peremptory challenge. Union Pacific Ry. Co. v. Jones, 21 Colo. 340, 40 Pac. 891. The principle applicable is well stated in Jones v. People, 23 Colo. 276, 280, 47 Pac. 275, 276, in the following language:

> "Such questions were proper, not alone for the purpose of informing the parties to the end that they might intelligently exercise their right to challenge for cause, but for the stronger reason that counsel were entitled to be fully informed of the state of mind of the jurors with reference to the matter, in order that the parties should be fully advised in exercising the right of peremptory challenges."

Subsequent developments in the trial demonstrated more clearly the error of the court in excluding answers to the questions propounded by defendant to jurors on their voir dire. After the jury had been sworn to try the case, but before any evidence was introduced or the opening statements made, the defendant presented to the court his verified petition setting forth that further matters touching the qualifications of Juror Burkhart had come to his knowledge and that of his counsel since the jury had been sworn, and prayed permission of the court to further interrogate the juror concerning the same. The petition was supported by the affidavit of one Rollins, a barber, a resident of Trinidad, to the effect that while the first trial of defendant, upon the same charge, was in progress, he and Burkhart had made a bet as to the result thereof, which affiant had lost and paid to Burkhart; that about the 31st of March, 1915, when the second trial of defendant was called, and in which the conviction here involved was secured, affiant and Burkhart had made another bet upon the result of the trial; and that after this second bet was made "the said Juror Burkhart later offered to make another bet with this affiant on the result of the jury trial which is now in progress, and stated to this affiant that if the said Burkhart was accepted as a juror there would be either a hung jury or a hung Dago," but affiant, having learned from the said Burkhart that he had been summoned as a juror, made no further bet with him. The defendant, upon presenting the petition and affidavit in support thereof, asked the court to permit him to re-examine the juror as to such matters. No counter evidence or showing was made, but the court denied the request, and held that no further examination of the juror could be had. The defendant then made the following separate requests: (1) That he be permitted to inquire of the juror, either in the presence or without the presence of the other jurors, whether or not he had a wager on the trial; (2) that defendant be permitted to introduce evidence showing the truth of the matters alleged in the petition; (3) that defendant be permitted to introduce a challenge to the juror; (4) that issues of fact be made up on the matters and either tried by the court or by triers; (5) that the jury be discharged; (6) that Juror Burkhart be discharged and another juror called to fill the panel. Each request was denied.

In his motion for a new trial defendant again brought to the attention of the court the aforesaid matter, and the original petition and affidavit were made a part of such motion. The people presented, in opposition to the motion on this point, the affidavit of Juror Burkhart in which he admitted having made a bet with Rollins upon the result of the first trial of defendant, but denied having made a bet upon the result of the second trial, in the following language:

> "Affiant further states that during the second trial of the said cause, and during the selection of the jury, this affiant was summoned on the jury, and that after he was summoned, in passing up the street, and by the shop of the said Rollins, he, the affiant, opened the door and jokingly remarked to the said Rollins, 'Now, I bet you four to one on the result of the Zancannelli jury,' whereupon the said Rollins, in a like spir-

> it, accepted the challenge, and was then and there told in a jesting way by this affiant that he, the said affiant, was summoned on the jury, and therefore he had the advantage of the said Rollins, or words to that effect, whereupon the said Rollins jestingly responded, 'Well, if you are on the jury, you have the advantage, and all bets are off,' which said remark terminated the conversation of the said Rollins and this affiant, relative to the said bet; that no amount was mentioned, and no money posted, and nothing further said relative thereto."

And in this affidavit Burkhart further says:

> "It is true this affiant made some jesting remark about the possibility of there being a 'hung jury or a hung Dago,' but said remark was made in mere jest, and not as expressing a wish, opinion, or desire of this affiant. Affiant at the time had no idea that he would be accepted as a juror in said cause. Affiant did not desire to serve on said jury, but desired more to devote his time and attention to his business, and in addition to his wish of attending to his work, he felt that his opinion relative to the facts in said cause was such that he would not be an acceptable juror; that during his voir dire examination, he stated all the facts pertaining to his said opinion, which he supposed would exclude him, but in this behalf affiant's judgment seems to be in error, as he was thereafter accepted on said jury and served on the same."

Upon the hearing of the motion for new trial, the court permitted the defendant to call and examine Burkhart in relation to the matter in question, and he testified in part as follows:

> "Q. You are the same juror who made, on the first trial, a wager or bet with Mr. Rollins? A. I am. Q. After that trial resulted in a mistrial you called upon Mr. Rollins, did you not, and he paid you the amount of money which you won on that bet? A. I did. Q. After the first trial was over, the trial which resulted in a mistrial, and prior to the day that you were summoned as a juror, you made another wager with Mr. Rollins, did you not, before you had been summoned as a juror? A. I offered to make a wager. * * * Q. Well, whatever occurred was before you were summoned as a juror? A. Yes, sir. * * * Q. The evening before you were summoned as a juror your version of it is that you had this conversation that you would bet him two to one, but that if you should be summoned as a juror, the bet was off? A. Yes, sir. * * * Q. I repeat to see if I understand you correctly. The conversation occurred the night before you were summoned as a juror, and then you bet him two to one on the result of the verdict, but with the proviso that if you were summoned as a juror that the bet wouldn't go, is that correct? A. Yes, sir. I went on to state at the time that if I was on the jury I would bet him four to one; he says, 'If you are on the jury, all bets are off.' * * * Q. You stated several times, Mr. Burkhart, that that was before—that is, this second conversation and conditional bet was made before you were summoned on the jury. I will ask you, if that is correct, why you stated in this affidavit as follows: 'That during the second trial of the said cause, and during the selection of the jury, this affiant was summoned on the jury, and that after he was summoned, in passing up the street, and by the shop of the said Rollins, he (the affiant) opened the door and jokingly remarked to the said Rollins, "Now, I bet you four to one on the result of the Zancannelli jury."' Why did you say it was after you were summoned on the jury in your affidavit, when you stated several times here that it was before you were summoned on the jury and that the bet was conditional? A. I don't remember just about what it was, and I don't remember whether it was Wednesday or Thursday or Friday morning I was to appear; I don't remember anything about it; I paid no attention to that or to the wager at all. Q. Now, Mr. Burkhart, if it was after you were summoned as a juror you wouldn't have made the statement, would you, that it was conditioned? A. I didn't make that statement; I say Mr. Rollins made that statement. I said, 'If I am on the jury it will be four to one.' Q. Four to one what? A. That it would be a hung jury. Q. Or what else? A. Or a hung Dago. As I say, I paid no attention to it whatever. Q. When you made the remark that you would hang the defendant or hang the jury if you were on the jury, did you mean it that way? A. I wouldn't hang an innocent man; no. Q. You called him a Dago? A. He isn't. Q. Did you call him a Dago? A. That is the remark I made. Q. You meant the defendant? A. I did."

To appreciate the full force and effect of the disclosures above, it is essential to bear in mind that Juror Burkhart had, upon his voir dire, said that he had certain business relations with the coal companies said to be interested in the prosecution, and that such relations might embarrass him in rendering a verdict, and if it appeared that such companies were desirous of prosecuting the cause, or in some way engaged or assisting therein, it might tend to bias or prejudice him, and that he did not feel, because of his business relations with the companies, that he should be required to serve as a juror, and that the court would not permit him to answer the following question propounded by defendant, "Is it not true that you would dislike to decide a case contrary to what they thought it ought to be decided?" or to answer the question, "Can you personally as a juror at the outset of the trial give to the defendant the benefit of that rule of law" that he shall be presumed to be innocent until the evidence establishes his guilt? and that the juror stated that he had made up his mind that some of the witnesses in the previous trial had testified truthfully, and others untruthfully, and that such opinion still remained with him, and that it would take something more than weak evidence to get him to discard it.

The errors above noted invalidated the proceedings almost at their very beginning. Moreover, the errors are so numerous, so obvious, and so fatal to the validity of the proceedings that unless they were written into the record as they are, under the seal of the trial court, we could not believe that such things had occurred in the trial of a cause in a court of record.

The judgment is reversed, and the cause remanded.

Mr. Justice GARRIGUES desires it stated that he concurs in the judgment of reversal on the sole ground that the Attorney General has confessed error.

(13 Okl. Cr. 468)

BANDY v. STATE. (No. A-2661.)

(Criminal Court of Appeals of Oklahoma. June 2, 1917.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION 🔑176—VARIANCE—PRELIMINARY COMPLAINT—TIME OF OFFENSE.

A prosecution in a felony charge is begun with the filing of the preliminary complaint before the committing magistrate. The proof introduced by the state must therefore establish the commission of the offense prior to the filing of this preliminary complaint. Proof tending to show the commission of the offense subsequent to the filing of the same would not be admissible. It therefore follows, that a criminal action begun on the 25th day of June by filing the charges before the committing magistrate cannot be established by proof that the offense was committed on the 25th day of July thereafter.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548.]

2. CRIMINAL LAW 🔑223—PROSECUTION—INFORMATION—JURISDICTION.

Under the law, the accused is entitled to an examining trial before a committing magistrate; and an information thereafter filed in the district court must be based upon this examining trial; otherwise the district court acquires no jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 463, 465.]

Appeal from District Court, Marshall County; Jesse M. Hatchett, Judge.

O. E. Bandy was convicted of a felony and appeals. Reversed.

Kennamer & Coakley, of Madill, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. O. E. Bandy was convicted in the district court of Marshall county on a charge of selling intoxicating liquor, and his punishment fixed at imprisonment in the state penitentiary for three years, and a fine of $1,000.

Numerous assignments of error are brought. We find it necessary, however, to consider only one.

The preliminary complaint upon which the examining trial was held was filed June 25, 1915, and the warrant was issued on that day. The crime was alleged to have been committed on the 25th day of June, 1915. An examining trial was had and the accused held by the magistrate for trial before the district court. The testimony introduced on behalf of the state fixes the date of the sale of the whisky as in July, long after the complaint was filed with the magistrate. The witness who is alleged to have purchased the whisky says it was the 25th day of July, 1915.

[1, 2] The information charges the sale as having been made on the 25th day of June. This cause was begun June 26th. This is fatal to the conviction. Proof of the commission of the offense at any time within the statute of limitations prior to the filing of the preliminary complaint is ordinarily sufficient to warrant a conviction, but proof that the offense was committed after the filing of the preliminary complaint would not warrant a conviction. Testimony showing the latter would not be admissible. The Constitution and statute provides for a preliminary examining trial where prosecution is to be had by information in the district court. The accused is entitled to an examination and trial on the charge laid prior to the beginning of the proceedings, and not subsequent to the beginning thereof. If this plaintiff in error is to be prosecuted for selling whisky in July, the preliminary should not have been held in June. This proposition is too patent to require discussion.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

DOYLE, P. J., and MATSON, J., concur.

(13 Okl. Cr. 466)

ROBINSON v. STATE. (No. A-2643.)

(Criminal Court of Appeals of Oklahoma. June 2, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW 🔑1183—APPEAL—REDUCTION OF SENTENCE.

Under Proc. Crim., section 6003, Rev. Laws 1910, this court in the furtherance of justice has the power to modify any judgment appealed from by reducing the sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195–3198.]

Appeal from County Court, Oklahoma County; Gilliam H. Zwick, Judge.

George Robinson was convicted of a violation of the prohibitory law, and he appeals. Modified and affirmed.

O. L. Price and Homer Hurst, both of Oklahoma City, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, George Robinson, was tried and convicted in the county court of Oklahoma county upon an information charging that he did have in his possession 12 bottles of beer with intent to transport the same in violation of law. The jury failed to fix the punishment, and he was by the court sentenced to be confined in the county jail for 60 days and to pay a fine of $100. No brief has been filed and no appearance made for the plaintiff in error.

The evidence for the state shows two police officers arrested the defendant in the city of Oklahoma City and he had in his possession 12 bottles of beer. As a witness in his own behalf, he testified that the beer was given to him by Frank Mervin, and that it was for his own use; that his parents died while he was young; that he spent about six years at an orphans' home in Oklahoma City, and then went to work; that he was injured and was then sent to the county poor farm. It further appears that he was tried and convicted in the municipal court for the same act charged in the information. No material error appears in the record; but, in view of the facts disclosed, we are of the opinion that substantial justice requires a modification of the punishment imposed.

It is therefore ordered that the judgment and sentence be modified to 30 days' confinement and a fine of $50, and thus modified the judgment is affirmed.

ARMSTRONG and MATSON, JJ., concur.

(13 Okl. Cr. 458)

BELVIN et al. v. STATE. (No. A-2211.)

(Criminal Court of Appeals of Oklahoma. June 2, 1917.)

(Syllabus by Editorial Staff.)

ASSAULT AND BATTERY ⚿95—QUESTION FOR JURY—PRINCIPAL.

Whether a defendant jointly convicted with another encouraged and aided such other in an assault and battery *held*, on the evidence, a question for the jury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 141.]

Appeal from District Court, Garvin County; R. McMillan, Judge.

C. A. Belvin and Arthur Inman were convicted of assault and battery, and they appeal. Modified and affirmed.

Carr & Field, of Pauls Valley, for plaintiffs in error. S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiffs in error, C. A. Belvin and Arthur Inman, were jointly informed against and tried for the crime of assault with intent to kill one C. M. Wall, and were convicted of assault and battery, and their punishment fixed each at a fine of $100 and 30 days' confinement in the county jail. From the judgments rendered on the verdict, they appeal.

It appears that the plaintiffs in error were farmers, residing seven or eight miles east of Pauls Valley; that Belvin was a man with a large family, consisting of his wife and seven or eight children; that he had lived in that community for more than 30 years; that he is an uncle of the defendant Inman; that the complaining witness, C. M. Wall, also lived in the same neighborhood; that on the day on which the assault occurred the defendant Inman and the complaining witness Wall had an altercation; that evening Inman went over to Belvin's house; from there the two got on Belvin's horse and rode over across the farm to where Belvin's brother lived; on the way over they passed by Wall's home; in a short time they returned and met Wall and his wife at the well by the roadside, where they were watering the horses; Inman made some remark to Wall about the trouble they had that day and got off the horse and assaulted Wall.

The evidence for the state tends to show that Belvin encouraged and aided Inman in the assault.

The only question in the case is the sufficiency of the evidence to sustain the verdict against the defendant Belvin. Upon the record before us, the question was one of fact for the jury to determine; however, upon the suggestion of the Attorney General, the judgment and sentence of 30 days' confinement and $100 fine imposed on the defendant Belvin will be modified to the payment of a fine of $100 and the costs. As thus modified, the judgment as to the defendant Belvin is affirmed. The judgment and sentence against the defendant Arthur Inman is affirmed.

(13 Okl. Cr. 511)

SHAW v. STATE. (No. A-2526.)

(Criminal Court of Appeals of Oklahoma. June 11, 1917.)

(Syllabus by the Court.)

1. LARCENY ⚿64(6)—EVIDENCE—POSSESSION OF RECENTLY STOLEN PROPERTY—EFFECT.

The possession of recently stolen personal property is a circumstance to be considered in connection with other competent evidence in the trial of a larceny case; but such possession alone is not sufficient proof of the crime to warrant a conviction, when a reasonable explanation of the possession of same is made and the circumstances tend to support the explanation.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 175.]

2. LARCENY ⚿55—SUFFICIENCY OF EVIDENCE.

When the whole evidence fails to establish the commission of the offense charged, a verdict and judgment of guilty is contrary to the evidence.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169.]

Appeal from District Court, Comanche County; Cham Jones, Judge.

Virgil Shaw was convicted of larceny, and appeals. Reversed.

J. F. Thomas and J. A. Hughes, both of Lawton, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Virgil Shaw was convicted in the district court of Comanche county, on a charge of larceny, and his punishment fixed at imprisonment in the state penitentiary for a term of two years. To reverse this judgment, he has brought this appeal.

The proof offered on behalf of the state tends to show that Priscilla Scott, a negro woman living in Lawton, Okl., owned a red calf about three months old; that she had loaned the same to a neighbor, who had tied it with a rope near his house in Lawton; that on the night of September 17th the calf was stolen; that the calf was found at the home of the plaintiff in error in the mountains about 25 miles from Lawton; that plaintiff in error was seen about 2 o'clock in the afternoon driving a wagon in the direction of his home with the calf in question in the wagon. After reaching home, this calf, together with two or three others, was offered for sale to different neighbors; among them, Deputy Sheriff W. T. Herring. The calf was kept in a pasture along a public highway. When prosecuting witness went to the place and claimed the calf, she was told by the plaintiff in error that he had purchased it from a negro man in Lawton and that he had paid $8 for it. He would not give it up, so she instituted a replevin suit. A redelivery bond was executed by the plaintiff in error, and the calf retained by him until such time as investigation showed conclusively that the calf had been stolen from the negro woman. It was then returned to her by him.

At the close of the state's testimony, a demurrer to the evidence was interposed and a motion requesting the court to advise the jury to return a verdict of not guilty on the ground that the evidence failed to establish the crime of larceny against plaintiff in error. This motion was overruled, and exceptions reserved.

The plaintiff in error took the witness stand in his own behalf and introduced a number of witnesses. He testified that he bought the calf at a certain place in Lawton from a negro man; that the negro man helped him load it in the wagon; that he paid $8 for it and hauled it home; that he did not steal it and did not know that it was stolen; that he left Lawton about 2 o'clock in the afternoon. He introduced a number of witnesses who testified that they saw him on his way home, one or two of whom testified they tried to buy the calf from him; that he told them he bought it in Lawton and had paid $8 for it. He offered other testimony stating that he had tried to find the negro from whom he purchased the calf, but had been unsuccessful.

The propositions urged in the brief are based upon the contention that the court erred in overruling the demurrer to the evidence and refusing to advise the jury to bring in a verdict of not guilty, and that the verdict and judgment are contrary to the evidence.

We think that the court should have sustained the demurrer to the evidence and should have discharged the plaintiff in error at the close of the state's testimony. The only thing established by the state's testimony is the fact that the plaintiff in error was in possession of this calf 25 miles away from Lawton; that it was held in a small pasture near the home of the plaintiff in error in full view of the public highway; that it had been offered for sale to the deputy sheriff residing in the community and others; that he hauled it from the city of Lawton to his home in the daytime along the public road with no apparent effort at any time to conceal the same or to mislead any one as to his claim of ownership.

[1] The possession of stolen property is always a circumstance to be considered in connection with the charge of larceny, but possession of a stolen animal alone is not sufficient proof of the crime to warrant a conviction when a reasonable explanation of the possession of the same is made and the circumstances tend to support the same. Cox v. Territory, 2 Okl. Cr. 668, 104 Pac. 378; Howard v. State, 9 Okl. Cr. 337, 131 Pac. 1100.

[2] The proof offered by the state fails to disclose conduct on behalf of the plaintiff in error which indicated that he had stolen this calf. It would be unreasonable to believe that a man would drive into a city the size of Lawton, steal a calf in broad daylight and haul the same home, stop along the road and talk to different individuals concerning the calf, then place it in a pasture near a public highway, and send for a deputy sheriff and offer to sell it to him.

In out judgment, the court should have sustained the demurrer and motion to advise the jury to return a verdict of not guilty. The verdict and judgment are also contrary to the evidence.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

DOYLE, P. J., and MATSON, J., concur.

(13 Okl. Cr. 470)

WILSON v. STATE. (No. A-2666.)

(Criminal Court of Appeals of Oklahoma. June 2, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW ⟹1159(3) — APPEAL — CONFLICTING EVIDENCE.

When there is a clear conflict in the testimony introduced in the trial court by the state and the accused, an appeal to this court on the ground that the verdict is contrary to the evidence is useless. It is the duty of this court to uphold the judgment of the trial court when the evidence tends reasonably to support the verdict of the jury and the judgment rendered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Virgil Wilson was convicted of assault with intent to kill, and appeals. Affirmed.

Brown & Brown, of Ardmore, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error was convicted in the district court of Carter county on the charge of assault with intent to kill, and his punishment fixed at imprisonment in the state penitentiary for one year and one day.

The only assignment urged in the brief is based upon the proposition that the verdict is contrary to the evidence.

The proof introduced on behalf of the state tends to show that the plaintiff in error shot Clarence Bracheen with a pistol; that the parties had been attending a dance near Wirt, in Carter county, and had been drinking. Three witnesses on behalf of the state testified that the plaintiff in error shot Bracheen without provocation or justification; that afterwards Bracheen shot the plaintiff in error. Three witnesses testified on behalf of the plaintiff in error that Bracheen shot him first and without reasonable cause; that he shot Bracheen in self-defense. Other testimony was offered by the plaintiff in error tending to support his contention.

The question of fact thus raised was for the jury to determine.

If the plaintiff in error was acting in self-defense when he shot Bracheen, he should have been acquitted. If, on the other hand, he assaulted Bracheen without justifiable or excusable cause and shot him, then he should have been convicted. The jury was impanneled to determine this particular proposition, and it was within its exclusive province to so do. After the jury had made its findings, the verdict was approved by the trial court and a new trial denied. Under the law in this state, it is not only within the province of the trial court, but it is his duty, to set aside a verdict which is unjust. He is on the ground, hears all of the witnesses, sees them and observes their demeanor, supervises the trial, and is minutely familiar with every detail of the same. He not only has the power to set aside an improper verdict, but it is his absolute duty to do so. It is not so on appeal. The functions of the appellate court are in this respect limited.

The law is such that, upon appeal, this court is not warranted in disturbing a judgment of the trial court because the verdict is against the weight of the evidence as it appears in the record. It is our duty to uphold the judgment if there is competent testimony tending reasonably to support the finding of the jury and the judgment rendered. This has been held in almost innumerable cases, and a contrary doctrine has never been announced in any case by this court.

This record presents, as aforesaid, the sole proposition that the verdict is contrary to the evidence. The contention is without merit. It may be that the verdict is contrary to the weight of the evidence considering the number of witnesses who testified and the manner in which they are supported. Upon that proposition, we are not called upon to pass. There is ample testimony in the record, however, from which a legitimate conclusion of guilt could be drawn. There is therefore nothing for us to review.

The judgment is affirmed.

DOYLE, P. J., and MATSON, J., concur.

(13 Okl. Cr. 520)

JACKSON v. STATE. (No. A-2655.)

(Criminal Court of Appeals of Oklahoma. June 11, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS ⟹236(4)—OFFENSES—EVIDENCE—IDENTITY—SUFFICIENCY.

When a person is charged with unlawfully conveying intoxicating liquors from one place within the jurisdiction of the trial court to another place therein, and the proof fails to identify the defendant as the person committing the offense, by positive evidence or by circumstances which exclude every other reasonable hypothesis than that of guilt, a judgment of conviction cannot be sustained.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 305, 306.]

Appeal from County Court, Okmulgee County; Mark Bozarth, Judge.

H. W. Jackson was convicted of unlawfully conveying intoxicating liquor, and appeals. Reversed.

E. M. Carter, of Okmulgee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, H. W. Jackson, was convicted in the county court of Okmulgee county, on a charge of unlawfully conveying intoxicating liquors from one place to another in said county, and his punishment fixed at a fine of $400 and imprisonment in the county jail for 120 days.

The state introduced seven witnesses, none of whom connect the plaintiff in error with the crime charged.

Witness Thompson, conductor on a St. Louis & San Francisco Railroad Company passenger train, testified that a negro giving his name as H. J. Jackson was a south-bound passenger on his train a few days before this crime is alleged to have been committed; that this negro lost his grip and gave him his name and address; that he was not able to say that the H. W. Jackson on trial and H. J. Jackson, his passenger, were one and the same.

Witness Burns was also a conductor on the St. Louis & San Francisco Railroad Company's passenger train running between Sherman, Tex., and Sapulpa, Okl. This witness testified that defendant, Jackson, was on his train at Sherman, Tex., and told him he was going to get off at the railroad crossing north of Okmulgee; that he never saw the negro any more after passing the crossing. This conductor did not see any suit case with the defendant and did not see him leave the train.

Witness Chisholm was a porter on Burns' train. He testified that he knew the defendant Jackson; that he did not see him get off the train and did not know whether he had any suit case with him or not.

Witness Black, a deputy sheriff, testified that he sometimes knew the defendant and sometimes did not; that he captured 40 quarts of whisky, a case of beer, and a number of pint bottles of whisky; that the whisky was put off the train at the railroad crossing; that he started towards where it was; that some one started away with a case of beer on his shoulder; that he ordered him to stop and fired his gun in the air; that the party dropped the case of beer and ran; that he could not say that this man carrying the whisky was H. W. Jackson, the defendant on trial; that he was about the same size as defendant and resembled him.

This is the only testimony in the case, introduced by the state, which tends to connect the plaintiff in error with the crime of conveying whisky, and, in our judgment, is insufficient to establish the crime charged.

There are certain assignments of error based upon the instructions of the court and the action of the county attorney in attempting to introduce improper evidence. These raise no new questions and it is unnecessary to discuss them. The failure to connect the plaintiff in error with the crime charged by positive proof, or by circumstances which would exclude every other reasonable hypothesis except that of guilt, is fatal to this conviction.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

DOYLE, P. J., and MATSON, J., concur.

(13 Okl. Cr. 560)

MOORE v. STATE. (No. A-2404.)

(Criminal Court of Appeals of Oklahoma. June 18, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS ⟹236(5) — POSSESSION WITH INTENT TO SELL—SUFFICIENCY OF EVIDENCE.

For evidence *held* to be insufficient to sustain a conviction for having possession of intoxicating liquors with intent to sell the same, see opinion.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 307.]

Appeal from County Court, Tulsa County; Conn Lynn, Judge.

Dud Moore, convicted of a violation of the prohibitory law, appeals. Reversed.

George T. Brown, of Tulsa, for plaintiff in error. The Attorney General, and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Dud Moore, and Arthur Clark were jointly charged and tried upon an information charging that they did have possession of certain intoxicating liquors with intent to sell the same. At the close of the state's case, both defendants moved the court to instruct the jury to return a verdict of not guilty, for the reason that the testimony introduced was insufficient to show that the defendants or either of them were guilty as charged. The motion was sustained as to the defendant Arthur Clark, and he was discharged; as to plaintiff in error the motion was overruled, and the jury found him guilty and fixed his punishment at a fine of $250 and 90 days' confinement in the county jail. A motion for new trial was filed and overruled. From the judgment rendered in pursuance of the verdict, an appeal was perfected.

The only serious question in the case is: Does the evidence authorize a conviction? The state introduced four witnesses. W. M. McCullough, sheriff, and Frank Bowlin, his deputy, testified that they searched the premises upstairs on Third street, in the city of Tulsa, known as the "Stag," and there found a quart bottle of whisky, three bottles partly full of whisky, three quarts of gin, and two dozen bottles of tonine. They described the place as containing a bar or lunch counter, an ice box and cooking stove in the rear, also a pool table; that there were cigars and a lunch outfit; that at the time they found three or four white men and two negroes in the room, and the negroes were eating breakfast; that at the time of the raid the plaintiff in error had been in the custody of the sheriff for more than a month as a prisoner in the county jail, serving a sentence for gambling; that the warrant issued on the information in this case was served on the plaintiff in error in the county jail, and he was released about a month later.

G. T. Williamson testified that he owned a one-fourth interest in the building known as the "Stag"; that Bud Moore and Bob Allison had a written lease the year before, and he supposed they occupied the premises; that he had no contract with Dud Moore for the occupancy of the premises; that the rent was paid by various persons; that Dud Moore did not pay him any rent in July, and did not know whether he paid the rent for the month of August during which month the raid was made upon which this prosecution is based; that he did not know the whereabouts of Dud Moore for the months of July, August, and September, during which time the evidence shows the defendant was a prisoner in the county jail.

W. G. Williamson testified that he owned a one-half interest in the building known as the "Stag"; that under the written lease it was rented to Billy Miles, and after the expiration of that lease he never collected the rent. This was all the evidence in the case.

We do not think the evidence is sufficient to show that plaintiff in error did have possession of the liquors in question. He is charged with doing an act which as a prisoner in the county jail at the time he could not do except through others. It appears that the information in this case was filed the day the raid was made, but for some reason, not apparent, the names of the parties present when the raid was made were not indorsed upon the information as witnesses. In order to make a prima facie case, it was necessary for the state to show that the plaintiff in error had some interest in the place raided, and had knowledge of the fact that the intoxicating liquors seized had been placed there. The general rule is that all the averments necessary to constitute the offense charged must be proved.

In Mater v. State, 9 Okl. Cr. 380, 132 Pac. 383, it is said:

> "In a prosecution for having possession of intoxicating liquors with intent to sell same, the burden was on the state to prove that the place where the liquor was found was in defendant's possession or under his control, or that the intoxicating liquor was his, or that he had possession of same either as owner or employé."

Because the evidence, as a matter of law, is insufficient to sustain the verdict, the judgment is reversed.

(13 Okl. Cr. 507)

WATKINS v. STATE. (No. A-2658.)*

(Criminal Court of Appeals of Oklahoma. June 9, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS 🔑138—UNLAWFUL CONVEYANCE—INTENT.

It is unlawful for any person to convey from place to place within this state intoxicating liquors which said person has previously purchased within this state, and it is immaterial whether the person so purchasing such liquor and conveying the same intended to use such liquor lawfully or unlawfully. Intent is not a material ingredient of the offense of conveying intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148.]

Appeal from County Court; Oklahoma County; Wm. H. Zwick, Judge.

Earl Watkins was convicted of unlawfully conveying intoxicating liquors, and he appeals. Affirmed.

Charles H. Ruth and Geo. P. Glaze, both of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. There is no dispute in the testimony in this case. The evidence on the part of the state is to the effect that the appellant was seen riding in a Ford car from the home of his brother at 228 East Fifth street, in Oklahoma City, to his own residence at 320 East Third street. When he drove up to the latter residence a city detective and a city attorney in another car came up to him and asked him if he had any whisky with him. He replied that he did not, but upon searching a half pint bottle of whisky was found in his hip pocket wrapped up in a handkerchief. This bottle was unopened. Another city detective who had been stationed at 228 East Fifth street had just before that time seen the appellant leave that place in the automobile. He came from that direction at the time he was accosted and the whisky discovered. The appellant took the witness stand in his own behalf and testified that he had bought this whisky some two or three hours before he was apprehended from a negro porter at the corner of Third and Broadway in Oklahoma City, and had carried it with him in his pocket around over town to various places up until the time of his arrest. Upon his own statement he is clearly guilty of a violation of the law.

It is contended that there was error committed by the trial court in permitting the court stenographer to read from his stenographic notes certain testimony given by this defendant at another trial covering this transaction which was instituted on behalf of the city of Oklahoma City. Various grounds are asserted why this evidence should not have been permitted to be introduced, but, in view of the fact that the defendant himself took the witness stand and testified to exactly the same state of facts disclosed in the previous proceeding, if there had been error in its introduction, it was cured by his subsequent testimony.

It is also contended that the court erred in giving the following instruction:

> "You are instructed that by the term 'lawful purchase,' as used in these instructions, is meant the purchase of intoxicating liquors from a point outside of the state of Oklahoma to be shipped to a place within the state of Oklahoma, which purchase would be an interstate shipment and in which event the purchaser would have a lawful right to carry or transport said intoxicating liquors from the office of the common carrier at its destination, to his home or place of business."

In view of the testimony of the defendant that he got the liquor from a bootlegger in Oklahoma City, the giving of this instruction was perhaps unnecessary in this case irrespective of the fact of whether or not it is a correct definition of a lawful purchase under our Constitution and laws. This case was not defended upon the theory that the appellant was conveying a lawful purchase of liquor, but upon the theory that, having purchased it for his own use, although unlawfully, he had a right to convey the same from place to place. Such is not the law of this state. The testimony of the defendant amounts virtually to a plea of guilty, and it would be a travesty upon justice to reverse a judgment in the face of his own testimony.

It is argued that, if the construction is given to the statutes that, before a person will be permittted to convey intoxicating liquors from place to place in this state, he must purchase the same outside of the state, and have them shipped to him by means of interstate commerce, one neighbor could not borrow whisky from another for medicinal pur-

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*Rehearing denied September 25, 1917.

poses and carry it to his home. Argument of that kind might appeal to the court where such a state of facts existed, but this is not a case of that kind. If a man may purchase a half pint of whisky from a bootlegger and carry it indiscriminately from place to place within this state, he may purchase a quart, or a gallon, or five gallons, or any other quantity, and carry it about with him over the state. The purpose of our prohibitory liquor statutes goes to absolutely destroy the manufacture, sale, and trafficking in intoxicating liquors within the boundaries of this state, and incidental to the destruction of that traffic the Legislature saw fit to make it a crime for any person to carry about with him any liquor so unlawfully purchased. It is no defense that he has purchased such liquor for his own use, and does not intend to dispose of it. When he purchases liquor in this state he does so at his own peril, and if he is caught in the act of conveying same he is guilty of crime.

The judgment is affirmed.

(13 Okl. Cr. 460)

PARKER v. STATE. (No. A-2611.)

(Criminal Court of Appeals of Oklahoma. June 2, 1917.)

(Syllabus by the Court.)

BURGLARY ⚿=20—INDICTMENT—SUFFICIENCY.

The information in the case at bar does not state a public offense under the doctrine announced by this court in Sullivan v. State of Oklahoma, 7 Okl. Cr. 307, 123 Pac. 569.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 51–54.]

Appeal from District Court, Marshall County; George C. Crump, Judge.

Harry Parker was convicted of burglary, and appeals. Reversed.

Rider & Hurt, of Madill, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Harry Parker, was convicted in the district court of Marshall county on a charge of burglary, and his punishment fixed at imprisonment in the state penitentiary for two years.

The charging part of the information, upon which the conviction is based, is as follows:

> "That * * * the said defendant did, * * * unlawfully, willfully, wrongfully, fraudulently, burglariously and feloniously break into and enter by breaking the seal upon and opening a certain freight car, the same being the property of the St. Louis & San Francisco Railroad and in which there was stored and kept certain personal property, with the unlawful, burglarious and felonious intent then and there on the part of him, the said Harry Parker, to commit larceny therein, contrary to the form of the statute in such case made and provided, etc."

The sufficiency of this information was raised by informal demurrer and by proper motion in arrest of judgment.

The objections to this information are discussed at length in the opinion of this court in the case of Sullivan v. State, 7 Okl. Cr. 307, 123 Pac. 569. We deem it unnecessary to consider them again. County attorneys will experience no difficulty in following the doctrine in the Sullivan Case.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer, with leave to the county attorney to file a proper information.

(13 Okl. Cr. 461)

CHILDS v. STATE. (No. A-2622.)

(Criminal Court of Appeals of Oklahoma. June 2, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⚿=1171(1)—ARGUMENT OF PROSECUTING ATTORNEY—NEW TRIAL.

A prosecuting attorney should confine his argument before the jury to a fair discussion of the issues in the case, and improper remarks objected to at the time will be considered and construed in reference to the evidence. If it appears that the improper argument may have determined the verdict, a new trial should be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127.]

2. CRIMINAL LAW ⚿=1171(1) — TRIAL — IMPROPER ARGUMENT—NEW TRIAL.

In his argument to the jury, the assistant county attorney said, "The county attorney of this county knew this defendant was guilty before he filed this information, or this case would never have been brought." Evidence considered, and *held*, that such statement was prejudicial to the substantial rights of the defendant, for which a new trial should be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127.]

Appeal from County Court, Logan County; John D. Chappell, Judge.

Bud Childs was convicted of a violation of the prohibitory law, and appeals. Reversed.

John A. Remy, of Guthrie, and James Hepburn, of Henryetta, for plaintiff in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The information charged that in the county of Logan, on the 9th day of October, 1915, Bud Childs did then and there unlawfully have in his possession "42 quarts of beer, 1½ quarts of whisky, and 1 quart of gin, with the intent then and there to barter, sell, give away, and furnish said intoxicating liquors." Upon his trial the jury returned a verdict of guilty, and he was sentenced to pay a fine of $100 and be confined for 30 days in the county jail. To reverse the judgment an appeal by case-made was duly perfected.

The plaintiff in error, a negro, with his wife and five or six children, lived on a farm owned by him in the southern part of Logan county.

The testimony of the sheriff and one of his deputies shows that on the day alleged they went to his farm, and there in executing a search warrant found at his home intoxicating liquors as described in the information.

Arthur McKee testified that he went to the defendant's place to buy some cows of him, could not make a deal, and asked him if he had anything to drink, he said he had a well of water, and witness said he wanted something stronger, and the defendant said he would try to find him something, and he put a bottle in his automobile, for which he gave him $1.50. Witness was then asked to tell the jury what was it he bought and paid for. He answered:

> "I don't know exactly what it was. I lost it before I got home. When I went to get it from the back of the car, it was gone. I don't know whether I lost it or not. It was not in the car when I went to get it, and I did not taste it. I had been drinking some before I went there."

Sam Rooker testified that he went with Arthur McKee to the defendant's place; did not get any whisky or beer himself, but saw McKee come from the house with a whisky bottle in his hand; did not see McKee with a bottle prior to that time, and did not think McKee was drinking that day; that he was at the defendant's place another time and asked the defendant if he had anything cold to drink, and the defendant gave him a cold bottle, for which he paid 20 cents. The attorney for the state then asked him:

> "Q. I will ask you if he did not say he had some cold beer? A. Don't remember. Q. I will ask you if you didn't ask him if he had some cold beer? (Objection by the court overruled.) A. Don't remember whether I asked him that or not. Q. To refresh your recollection again, I will ask you if, when you were called before the county attorney, you said in that examination you testified that you asked for a cold bottle of beer, didn't you? (The defendant's objections overruled. Exception. No answer.) Q. Tell the jury whether it was beer or not? A. It tasted like beer."

Cecil Harpster testified that he was at the defendant's place some time in the summer and bought two or three cold bottles and drank them, for which he paid 20 cents apiece; that he was unable to say what the stuff was. The assistant county attorney asked the following question:

> "Q. Tell the jury whether it was beer or not? (Defendant objects to the question.) By the Court: Objection overruled. He can tell what it was. (Exception reserved.) A. I called for a cold drink. Asst. County Attorney: I know that this witness knows what he got there, and I want the court to compel the witness to purge himself of contempt of court. By Mr. Remy: To the statement of the assistant county attorney defendant objects, on the ground that said statement was made for the purpose of prejudicing the minds of the jurors against the defendant. By the Court: Objection overruled. (Defendant excepts.) By the Court: Gentlemen of the jury, no evidence of what somebody said or done is to be considered by you in the trial of this case. Consider just what the witness said; that is what you are to consider, not the remarks of counsel."

Two or three other witnesses testified that they had bought something that tasted like beer at the defendant's place, but refused to definitely fix the time.

As a witness in his own behalf, the defendant testified that he lived on his own farm consisting of 240 acres; that he had the liquor in question for his own personal use; that he had received four or five shipments of liquor in as many years for his own personal use, and the liquor in question was a part of one or two shipments that he had received in the last six months. He denied that he had ever sold any intoxicating liquor to any person.

James Stewart testified that he lived on the defendant's place, in a separate house for more than a year last past, and never knew of any person going there to buy liquor of him.

Will Carter testified that he had been working for the defendant for about eight months and never knew of him selling or furnishing liquor to any one.

Three or four farmer neighbors testified that they had known the defendant for from 7 to 15 years. They qualified as character witnesses, and testified that the defendant's reputation for truth and veracity and as to being an honest law-abiding citizen was good.

Two bankers and two merchants of Guthrie testified that they had known the defendant for several years and knew his general reputation for truth and veracity and as being an honest law-abiding citizen, and that such reputation was good.

[1, 2] Of the various errors assigned, we deem it only necessary to consider those relating to the charge of misconduct on the part of the assistant county attorney. The record discloses that the assistant county attorney in his argument to the jury made the following statement:

> "The county attorney of this county knew this defendant was guilty before he filed this information, or this case would never have been brought."

To which statement the defendant objected and excepted at the time on the ground and for the reason that said statement was prejudicial and made for the purpose of prejudicing the minds of the jury against the defendant. The court at the time instructed the jury not to consider anything outside the record in the case.

Considering the fact that there is a direct conflict in the evidence as to the guilt of the defendant, we think that the statement complained of could not be otherwise than prejudicial to the defendant.

It would seem from the record that the witnesses for the state had testified before a court of inquiry conducted by the county attorney who did not personally appear in the trial of the cause. The statement was, under the circumstances, highly improper and well calculated to bolster up the unsatisfactory testimony of the witnesses for the state. If, as his assistant stated, the county attorney knew that the defendant was guilty, he should have been called as a witness so that the defendant could have the benefit of confrontation and cross-examination. A prosecuting attorney should confine his argument before the jury to a fair discussion of the issues in the case, and improper remarks objected to at the time will be considered and construed in reference to the evidence. If it appears that the improper argument may have determined the verdict, a new trial should be granted. Watson v. State, 7 Okl. Cr. 590, 124 Pac. 1101; Mulkey v. State, 5 Okl. Cr. 75, 113 Pac. 533.

There were other improper statements made by the assistant county attorney during the progress of the trial which we think tended to deprive the defendant of a fair and impartial trial upon the law and the evidence in the case.

For the reasons indicated, the judgment is reversed, and the cause remanded for a new trial.

ARMSTRONG and MATSON, JJ., concur.

(13 Okl. Cr. 472)

Ex parte HIGHTOWER. (No. A-2879.)

(Criminal Court of Appeals of Oklahoma. June 6, 1917.)

(Syllabus by the Court.)

1. HABEAS CORPUS 🔑27—GROUNDS—JURISDICTION OF COURT OR JUDGE.

The jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is a proper subject of inquiry on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22.]

2. JUVENILE COURTS—STATUTORY PROVISIONS.

Act of March 24, 1909, to establish juvenile courts and to regulate the jurisdiction and control of delinquent children, provides (sections 4413, 4414, Rev. Laws 1910) that county courts shall have jurisdiction of all cases coming within the provisions of the act, and that a special record book shall be kept by the court for all cases coming within the provisions of the act to be known as the "juvenile record," also a "juvenile docket," and for convenience the court in the control and disposition of such cases shall be called the "juvenile court."

3. INFANTS 🔑18—LIABILITY FOR CRIME—JUVENILE COURT ACT—JURISDICTION OF DISTRICT COURT.

Under the provisions of this act a child under 16 years of age cannot be guilty of the commission of a crime except in cases wherein it is shown and determined by the juvenile court of the county wherein the crime is alleged to have been committed that such child knew the wrongfulness of his acts at the time they were committed, and such a determination is a necessary prerequisite to the jurisdiction of the district court to try a child under the age of 16 years upon an information charging a felony.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18.]

4. INFANTS 🔑16—LIABILITY FOR CRIME—JUVENILE COURT ACT.

This act contemplates an investigation by the juvenile court of complaints against children under 16 years of age with the view of determining whether or not the child committed the acts charged, and, if so, whether or not he knew the wrongfulness thereof in a criminal sense. And if, upon such investigation, the juvenile court finds affirmatively, it is then within its discretion to hold said child to be proceeded with in the manner provided by law in the court having competent jurisdiction of the offense, certifying to such court both finding as to probable cause, and that the child knew the wrongfulness of the acts complained of.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16.]

5. INFANTS 🔑16—LIABILITY FOR CRIMINAL ACT—FINDING OF JUVENILE COURT—EFFECT.

The finding of the juvenile court that the child knew the wrongfulness of his acts, and was capable of committing the offense, and did commit it, does not relieve the state of the burden of proving upon the trial that the child knew the wrongfulness thereof, as provided in Penal Code, subdivision 2, § 2094, Rev. Laws. The only effect the act in question has on said subdivision is to change the word "fourteen" to "sixteen," subsequent to the action of the juvenile court.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16.]

Habeas corpus by Sarah Hightower, mother of Raymond Hightower, a minor, against the Warden of the State Prison. Writ allowed.

On November 28, 1916, there was filed in this court a duly verified petition for writ of habeas corpus, which, omitting title and verification, reads as follows:

"Your petitioner, Sarah Hightower, mother of Raymond Hightower, a minor, represents and states to this honorable court that he is restrained of his liberty and is unlawfully imprisoned and restrained at Granite, by the warden of the state prison at said place. The cause of said restraint according to the best knowledge and belief of your petitioner is: That at the time of the arrest, trial, and conviction of said Raymond Hightower, on the charge of the murder of one Proctor Green on the 23d day of September, 1912, he was arraigned before the Hon. Frank M. Bailey, and entered a plea of not guilty, as is shown by the record of the district court of Grady county, a copy of which is here attached and is marked Exhibit A as a part of this petition. That on the —— day of ——, your petitioner, Raymond Hightower, without the advice of a legal counsel, entered a plea of guilty, and that on said plea was sentenced to serve in the county jail of Grady county, Okl., until he arrived at the age of 16 years, and that he thereafter be confined in the state prison at Granite until he reaches the age of 21 years. That for some reason unknown to petitioner, said petitioner, Raymond Hightower, was not kept in said county jail, as is shown by the record of the district court, a copy of which is here attached, marked Exhibit B, and is made a part of this petition. That during the month of January said petitioner was brought before the district court without advice of legal counsel and entered a plea of guilty to manslaughter, and on said plea was sentenced to serve 7 years at hard labor in the state penitentiary, as is shown by the record of the district court, a copy of which is here attached, marked Exhibit C, and is made a part of this petition. But your petitioner alleges that said restraint is illegal and unauthorized, because at the time of said sentence said petitioner was under the age of 14 years, as is shown by affidavits Nos. 1, 2, 3, 4, marked Exhibit D a part of this petition. Your petitioner further alleges that said restraint is illegal for the reason that the district court had no jurisdiction at the time said sentence was imposed on the said Raymond Hightower. That if any court had jurisdiction it would have been the juvenile court of Grady county, as shown in section 4412 of the statute of 1910 of the state of Oklahoma.

"Wherefore your petitioner prays your honorable court to grant a writ of habeas corpus, and that he be discharged without delay from such unlawful imprisonment.

"Sarah Hightower, Petitioner."

Omitting certificates and seal of the court clerk that the same are true copies, Exhibits A, B, and C read as follows:

"Exhibit A.

"Page 263, Journal F.

"2982. Filed Sept. 23, 1912. J. R. Callaham, Clerk of District Court, Grady County, Okl.

"State of Oklahoma v. Raymond Hightower.

"Now at this time comes into open court the above-named defendant Raymond Hightower, in custody of the sheriff. And plaintiff, state of Oklahoma, being present by its attorney, John H. Venable, and defendant being present in person, and being duly arraigned and information read in open court, said defendant is given 24 hours in which to plead. Said defendant is thereupon remanded to the custody of the sheriff to await the further action of the court."

"Exhibit B.

"Page 271, Journal 5.

"District Court, 15th Judicial District, Grady County, Oklahoma.

"Now at this time comes into open court the above-named defendant Raymond Hightower, in custody of the sheriff. And plaintiff, state of Oklahoma, being present by its attorney, Oscar Simpson, and defendant being present in person and having been arraigned herein on a former day and having at this time entered his plea of not guilty herein, said defendant now withdraws his plea not guilty and enters a plea of guilty herein. Whereupon it is by the court ordered that he be confined in the county jail of Grady county, Oklahoma, until he arrives at the age of 16, and that he thereafter be confined in the state prison at Granite until he reaches the age of 21 years. Whereupon said defendant is notified of his right of appeal herein and is remanded to the custody of the sheriff."

"Exhibit C.

"The prisoner, the above-named Raymond Hightower, defendant, being personally present in open court, and having been legally presented by information for the crime of murder and arraigned, and said defendant having entered herein his plea of guilty to manslaughter, and being asked by the court if he had any legal cause why judgment and sentence should not be pronounced against him, and he giving no good reason in bar thereof:

"It is therefore considered, ordered, adjudged and decreed by the court that the said Raymond Hightower be confined in the state penitentiary at McAlester, in the state of Oklahoma, for the term of 7 years at hard labor, for said crime by him committed, said term of sentence to begin at and from the day of delivery to the warden, and that said defendant pay the costs of this prosecution taxed at $——, for which execution is awarded.

"It is further ordered, adjudged and decreed by the court that the sheriff of Grady county, state of Oklahoma, transport said Raymond Hightower to the said penitentiary at McAlester in the state of Oklahoma, and that the warden of said building do confine and imprison the said Raymond Hightower in accordance with this judgment, and that the clerk of this court do immediately certify under the seal of the court and deliver to the sheriff aforesaid two copies of this judgment, one of said copies to accompany the body of said defendant to the said penitentiary and to be left therewith at said penitentiary, said copy to be warrant and authority for the imprisonment of said defendant in said penitentiary, and the other copy to be the warrant and authority of said sheriff for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last-named copy to be returned to the clerk of said court with the proceedings of said sheriff thereunder indorsed thereon. And thereupon the court notified the defendant of his right of appeal.

"Done in open court on this 11th day of January, 1913.

"[Signed] Frank M. Bailey, Judge."

Indorsed:

"No. 1465. In District Court. Judgment and sentence on plea of guilty. The State of Oklahoma v. Raymond Hightower, Defendant. Filed March 1, 1913. S. L. Newman, District Clerk."

Omitting situs and jurat of each, the affidavits attached are as follows:

"Sarah Hightower, of lawful age, being first duly sworn, deposes and says as follows: I am the mother of Raymond Hightower, who was born December 28, 1899, as shown on the family record of births; and that on the 23d day of September, 1912, the date of the charge against him for the murder of Proctor Green, the said Raymond Hightower's age was 12 years, 8 months, and 25 days. That on the 11th day of January, 1913, he, the said Raymond Hightower, was sentenced for manslaughter to the state penitentiary at McAlester for the term of 7 years at hard labor at the age of 13 years and 13 days."

"Millie Hightower, of lawful age, being first duly sworn, deposes and says as follows: I am the grandmother of Raymond Hightower, who was born on the 28th day of December, 1899, as shown on the family record of births; and that on the 23d day of September, 1912, the date of the charge against him for the murder of Proctor Green, the said Raymond Hightower's age was 12 years, 8 months, and 25 days. That on the 11th day of January, 1913, Raymond Hightower was sentenced for manslaughter to the state penitentiary at McAlester for the term of 7 years at hard labor at the age of 13 years and 13 days."

"Mrs. Laura Roberson, a white woman, of lawful age, being first duly sworn, deposes and says as follows: I was, on or about the 23d day of September, 1912, in charge of our grocery on the corner of First and Idaho at Chickasha, Okl., and witnessed a fight between Proctor Green and Raymond Hightower, when seemingly Raymond was whipped and ran to my store, the Green boy chasing him with an iron something like a car pin. I pushed Raymond in and kept Proctor out. Proctor said to Raymond, 'I'll get you out after while, and when I get you out I'll kill you.' But Raymond stayed in, and after a while Proctor went away, making threats. Raymond scouted out of the back door, and I did not see either of them until after the shooting. I was subpœnaed in the case, and would have made this statement in the court, but the case was dismissed without trial."

A writ of habeas corpus issued, directed to the respondent, Hon. Boone Williams, warden of the state reformatory at Granite, who on December 7th, the day it was returnable, through Sam Everett, assistant warden, produced petitioner in court, and at the same time filed his return thereto. The return shows that the petitioner is held by said

warden on a commitment issued upon the judgment set forth in the petition. The material facts averred in the petition are undisputed therein. After hearing the evidence the decision of the court was announced by the presiding judge, wherein the writ was allowed and respondent was directed to deliver the petitioner into the custody of the sheriff of Grady county, who was directed to hold him in custody until discharged, or his custody changed by due course of law.

Robert L. Fortune, of Chickasha, for petitioner. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for respondent.

DOYLE, P. J. (after stating the facts as above). Counsel for petitioner contends that upon the record showing that no preliminary complaint against him was ever filed in the county court of Grady county, and that no investigation was ever had before said court or the judge thereof sitting as a juvenile court concerning the charge of murder before the filing of the information in the district court of said county charging the petitioner with said crime, that said district court was without power or jurisdiction to arraign him upon said information or require him to plead thereto, and was without jurisdiction to render the judgment and sentence in execution of which under the commitment issued thereon the petitioner has since been and is now held in custody by the warden of the state reformatory. The act of March 24, 1909, creating juvenile courts, in part provides as follows:

"The words 'delinquent child' shall include any child under the age of sixteen years who violates any law of the United States, or of this state, or any city or town ordinance." Section 4412, Rev. Laws.

"The county courts of the several counties in this state shall have jurisdiction in all cases coming within the terms and provisions of this article." Section 4413, Rev. Laws.

"In all counties a special record book shall be kept by the court for all cases coming within the provisions of this article, to be known as the 'juvenile record' and the docket or calendar of the court upon which shall appear the case or cases under the provisions of this article, shall be known as the 'juvenile docket' and for convenience, the court in the trial and disposition of such cases, shall be called the 'juvenile court.'" Section 4414, Rev. Laws.

"Every child who shall have been adjudged delinquent, whether allowed to remain at home, or placed in a home, or committed to an institution, shall continue to be a ward of the court until such child shall have been discharged as such ward by order of court, or shall have reached the age of twenty-one years, and such court may, during the period of wardship, cause such child to be returned to the court for further or other proceedings, including parole, or release from an institution: Provided, however, that notice of all applications to the court for such parole or release shall be given to the superintendent of such institution at least ten days before the time set for the hearing thereof, or the consent, in writing, of such superintendent to such parole or release shall be filed. The court may, however, in its discretion cause such child to be proceeded against in accordance with the laws that may be in force governing the commission of crime." Section 4424, Rev. Laws.

[2-5] In the case of In re Powell, 6 Okl. Cr. 495, 120 Pac. 1022, this act is construed. Upon the question here presented it was said by this court, speaking through Armstrong, J.:

"The Legislature in its wisdom by this law says that a child under sixteen years of age cannot be guilty of the commission of a crime, except in cases where it is shown that such child knew the wrongfulness of his acts at the time they were committed. The acts committed by such child, which in an adult would be a crime, under this statute, constitute juvenile delinquency only, except in cases of a serious character, when the juvenile court is authorized by the act, supra, in its discretion, to cause such child to be proceeded against in accordance with the law that may be in force governing the commission of crime. Prior to the enactment of the law in question, the statutes provided: 'All persons are capable of committing crimes, except those belonging to the following classes: First. Children under the age of seven years. Second. Children over the age of seven years, but under the age of fourteen years, in the absence of proof that at the time of committing the act or neglect charged against them, they knew its wrongfulness.' Section 2034, Snyder's Stat. The juvenile court law under consideration, in effect, provides that children under the age of sixteen are incapable of committing crime. But, in order that no great wrong should be done to society, the Legislature took the precaution to provide that a child brought before the juvenile court on a charge of delinquency, such court might, in its discretion, cause such child to be proceeded against in accordance with the law governing the commission of crime. (See last clause in section 4414, supra.) This provision contemplates an investigation by the juvenile court of the acts complained of with the view of determining whether or not the child committed them, and, if so, whether or not he knew the wrongfulness thereof in a criminal sense. And should the court find affirmatively, it is then within its discretion, under the law, to hold such child to be proceeded with in the manner provided by law in a court having competent jurisdiction of the offense committed, certifying to such court both its finding as to probable cause, and that the child knew the wrongfulness thereof. The finding of the juvenile court, or the county judge sitting as such, that the child knew the wrongfulness of his act, and was capable of committing the offense, and did commit it, does not relieve the state of the burden of proving that the child knew the wrongfulness of his act at the time of the commission thereof, upon the trial before a jury in a court of competent jurisdiction, as provided in subdivision 2 of section 2034, Synder's Statutes. The effect the juvenile court law under consideration has on said subdivision is simply to change the word 'fourteen' to 'sixteen,' subsequent to the foregoing proceedings."

This is not a new provision. By the ancient Saxon law the age of 12 years was established for the age of possible discretion, when first the understanding might open; and from thence until the offender was 14, it was ætas pubertati proxima, in which the child might or might not be guilty of a crime, according to his natural capacity or incapacity. By the common law as it has stood at least ever since the time of Edward III, the capacity of committing a crime within certain limits of age is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. Bl. Comm. 23. In all such cases the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction. 4 Bl. Comm. 24. Under the provisions of this act, a child under 16 years of age cannot be guilty of the commission of a crime, except in cases where it is shown and determined by the juvenile court of the county wherein the crime is alleged to have been committed that such child knew the wrongfulness of its acts at the time they were committed, and such a determination is a necessary prerequisite to the jurisdiction of a district court to try a child under the age of 16 years upon an information charging a felony, and in addition thereto that the child so charged was by the judge of said court sitting as an examining and committing magistrate, held to answer before the district court. The return in this case shows that no such proceedings were had before the juvenile court of Grady county, and that no evidence was taken before said court or the judge thereof as to the petitioner's capacity to commit the crime charged in the information which was filed in the district court of Grady county charging the petitioner with the crime of murder. It follows that the district court of Grady county was without jurisdiction of said information, and was without jurisdiction to render the judgment and sentence under which the petitioner is now held in custody. It further appears from the record that the petitioner was convicted of the crime of manslaughter under said information upon his plea of guilty; that he did not have the benefit of counsel, and no evidence was taken as to the petitioner's capacity to commit the crime charged in the information, or the degree of said crime to which he entered his plea of guilty. The child's plea of guilty might be evidence that the petitioner committed the act charged, but was no proof of the capacity of the petitioner to understand the wrongfulness of the act charged at the time it was committed. The presumption of incapacity can only be rebutted by affirmative proof that the child had capacity to understand the wrongfulness of the act charged against him.

[1] By numerous decisions of this court it is held that the jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is a proper subject of inquiry on habeas corpus, and where it is shown by the return that the petitioner is detained by virtue of a commitment issued upon a judgment of a court of competent jurisdiction, such showing is prima facie only of the fact, and may be impeached by the record of the case, for the purpose of showing that the court or judge was without jurisdiction or power to render the judgment or issue the commitment, and where the record shows such want of jurisdiction to render the judgment or issue the commitment, the petitioner under such showing is entitled to his discharge.

For the reasons stated, we are of the opinion that the judgment and sentence of the district court of Grady county in this case is illegal and void, and that the execution of said judgment deprives the petitioner of his liberty without due process of law. It is therefore ordered that the petitioner be discharged from imprisonment under said judgment and commitment, and that he be remanded to the custody of the sheriff of Grady county to abide the further action of the juvenile court of said county.

ARMSTRONG and BRETT, JJ., concur.

(13 Okl. Cr. 546)

SWAN v. STATE. (No. A-2552.)

(Criminal Court of Appeals of Oklahoma. June 16, 1917.)

(Syllabus by the Court.)

1. HOMICIDE ⚿112(5) — SELF-DEFENSE—INTENT.

An instruction given by the court which charges the jury, "If you believe that the defendant armed himself and sought the deceased for the purpose of provoking and engaging in a difficulty, and in furtherance of such plan did invite and provoke a difficulty, and then and there shot and killed his adversary, the defendant cannot invoke the rights of self-defense," is fundamentally wrong. The difficulty must be prepared for, sought and provoked for, the purpose of and with the intent upon the part of accused to take the life of his adversary. It is therefore necessary, for the court, in submitting a charge of this character, to place the burden of the instruction upon the intent of the defendant at the time.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 149.]

2. HOMICIDE ⚿309(3) — INSTRUCTIONS—DEGREES—EVIDENCE.

When there is no evidence which directly or indirectly raises the issue of negligent homicide or manslaughter in the second degree, instructions submitting the question of guilt or innocence of this crime should not be included in the charge of the court in submitting the issues to the jury. The charge of the court should give the law applicable to the issues raised by the pleadings and the facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 652.]

Appeal from District Court, Stephens County; Cham Jones, Judge.

Denny Swan was convicted of manslaughter in the second degree, and appeals. Reversed.

Womack & Brown, of Duncan, H. H. Brown, of Ardmore, and A. K. Swan, of Tulsa, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Denny Swan, was tried in the district court of Stephens county on a charge of murder and convicted of manslaughter in the second degree. His punishment was fixed at two years in the state penitentiary. To reverse this judgment an appeal was duly brought to this court.

The evidence discloses the fact that Denny Swan, the plaintiff in error, and Bill Hodge, the deceased, were farmers and were engaged in the stock business in a small way; they lived in the same neighborhood near Ara, in Stephens county; they had been friends for some years; that a few weeks before the homicide ill feeling had grown up between them. They lived on adjoining farms and each had complained against the other on account of depredations stock had committed against their growing crops. Other matters also entered into the estrangement.

State's witness O. L. Turner was a farmer and stockman, who lived in the same community. He had rented a pasture from Swan. On the day of the homicide Hodge drove a number of cattle out of his field on to land of Swan and met Turner, who told him the cattle did not belong there. Swan came up and spoke to witness, and after a short conversation, turned to the deceased, Hodge, and said, "What the hell are you doing throwing those cattle over here on me?" Hodge replied that he thought they belonged to him. Swan made a sharp reply, which was not understood by the witness. Hodge answered by saying that Swan's cow had been depredating on him. Swan replied that he had yoked her, and deceased replied, "You did, but you were a long time about it." A few words more were passed between the two, and Swan said, "You God damned fellows have been punching me around a long time." Hodge replied, "What the hell have we been punching you about?" Swan said, "You accused me of horse stealing and a little of everything." Hodge replied, "You damn sure did steal a horse." Swan said, "I did not steal any horse." Hodge said that he did and he knew it. Swan said they had been trying to give him dirt a long time, but could not find anything to give him dirt about. Hodge said, "You have been gambling here a long time." Swan said, "Yes, by God, you have too," and Hodge said something about turning him in for it, and Swan said, "You would have to turn state's evidence if you did." Swan then complained that Hodge's hogs had been bothering him. Hodge said that his hogs had not been over there; that those were his neighbors' hogs. Swan said Hodge was a damned liar. They were about ten feet apart at the time. When Swan called Hodge a damned liar, Hodge did not say anything, but reached back as if to draw a gun. Witness saw the handle of the same plainly. It was a black handle. He put his hand on it. Swan leaned over and said, "What are you going to do?" and stepped back and shot. When the shot was fired Hodge's horse turned around, as did the horse of the witness. Both seemed to be on horseback. When witness looked around Hodge was falling off his horse. Swan was standing about where he was when he shot. Four or five shots were fired rapidly, so rapidly that the witness could not indicate how fast. He said he did not believe he could clap his hands as fast as the shots were fired. He rode up where Hodge had fallen and asked if he was hurt, but received no answer. About the time Hodge fell from his horse, Swan said, "Now try to make another gun play, God damn you." Witness told Swan he was going to get some one there, and he told him to get whom he pleased.

Witness Stewart testified that he lived in the neighborhood and that he went to the scene of the homicide and examined the body for wounds; that there were five wounds, one shot through the arm into the body and two through the body; that he found a pistol five steps east of where the body lay; that it was a 38-caliber Colt with a black handle lying on the ground with the right side up and cocked; that there was mud between the hammer and where the hammer goes in to shoot, and some mud on the handle; that it did not look like any one had bothered it; that it was lying just like it fell; that the ground was soft and it had been raining; that he saw no tracks around the scene of the killing and saw no imprints of shoes or boots.

Sam Sherrell testified for the state:

> That he was working about 190 steps from where the homicide occurred; that he saw deceased and Turner there on horseback; that he did not see Swan until after the shooting, and when the shooting took place, he ran up there and went up within 30 steps of them, turned around the corner of the fence, and went to the house; that he was afoot and running; that he saw the deceased fall from the horse. "Q. Describe to the jury how he fell? A. I will describe it just like I seen it. When the shooting was over I didn't know for a minute whether anybody was shot or not, because Hodge never fell off of his horse until the horse had taken a few steps down the fence. His horse turned and started off in a walk. He dropped his bridle reins that way. He went a little bit forward, his foot came out of the stirrup, his hand came back this way, and he went off backward. I saw the body when I got some closer to where it was. His head was right due east; he was on his side; his face turned north. I never went out there, never heard Turner say anything. When I first seen Swan he was standing there. Q. Did you hear him saw anything else? A. Yes, sir. Q. What was it? A. Well, sir, I seen Denny Swan, if he is the man that killed Will Hodge, the man that shot Will Hodge off of his horse, deliberately walk up to him, take his hand here, and folded his coat back, or held the scabbard in its place and taken something off of him, and turned to Turner and said, 'Why the hell don't you go on?' Turner jerked his horse and kicked him, and turned his horse southeast. Denny walked and throwed that pistol down there, and says, 'Damn you, take that.' Gentlemen, that is the truth. Meantime Turner turned right around up the fence up to the horse, up to the gate. Turner rode out on the west side of the body, Denny holloed to him, 'Is he dead?' Turner said, 'I think he is.' Denny says, 'That is all right if he is dead.' Mrs. Swan was at her mother's."

On cross-examination the witness testified that the defendant never had said anything to him about Hodge; that he had never threatened him in any way or said anything about the matter; that he did not see him to talk with him until after the examining trial; that he was in jail and he could not see him. He admitted that he told a different story at the examining trial and identified the statement that he gave the county attorney before the examining trial, which is as follows:

> "I saw some men talking about 300 yards away, but could hear nothing, heard shots, saw Hodge fall off horse, saw gun go back from his right hand. Flavious Hodge forbade me coming up there; worked for Swan's father. Denny telephoned have dinner ready for him and another man, about dinner that day."

The substance of this witness' testimony at the examining trial is as follows:

> "I was working in a clearing 290 steps away from where the killing occurred. I only saw two men on horses until the shooting was over. I heard the shooting. I saw Hodge fall off his horse. He fell back over his horse's hips. The horse turned this way, and he fell that way. I went to the house as quick as I could. I found Swan at the house. When I got there I found Denny telephoning. I said, 'Where are you going?' He said, 'I am going to Duncan.' Did not talk to Swan's folks that day, but did that night. I was terribly excited. I saw what I took to be a pistol fall to the ground. I did not go to the body; I went along the road close by a little while before it was taken up, and saw his face turned to the north, his head was pointed to the east, and saw out east of his head what I took to be a gun."

On redirect examination he said:

> "I was 200 steps away from the killing. I went up tolerably close to the body. As I went up to the house, Turner rode out there from the gate, and I asked him what it was. I got in about 40 steps of the body. Turner had rode out on the west side of it. Q. Are you going to swear that you saw a gun in that man's hand? A. Yes, sir."

A few other witnesses testified to matters of minor importance.

At the close of the state's testimony a demurrer to the evidence was interposed and a motion to advise the jury to render a verdict of not guilty was filed. Both were overruled and exceptions saved.

A number of witnesses testified in behalf of the defendant to facts tending to establish ill feeling between plaintiff in error and the deceased, the condition of the ground at the scene of the homicide, and the wounds on the body of the deceased. There was practically no conflict in this respect.

The plaintiff in error testified for himself: That he was 35 years old; that he had lived in the community 12 or 13 years on a farm there; that on the day of the homicide he saw Turner riding in the pasture about 100 yards away from his house, talking to some one; that when he got out in the yard he saw it was Hodge with him; that he went out to where they were and spoke to them; that after some conversation he asked Hodge if the cattle had been breaking in on him, and he said they had, and witness asked him what he was going to do with them, and he said he brought them up to throw them in, and witness asked him what he was going to throw them in there for and he said "that there was no son of a bitch's cattle going to eat up his crop, and I told him that my cattle had not bothered him, and he said I had a cow that had been breaking in on him, and I told him, 'Yes; but I had yoked her,' and he said, 'You did, but you have been a long time about it,' and there was something said about the cattle belonging in there, and I said, 'You fellows have been punching me around a long time,' and he said, 'What for?' and I said, 'You accused me of stealing a horse,' and he said, 'Yes; we did accuse you of it, and you stole it, and you know it,' and something was said about gambling and I told him he was threatening to have me arrested for gambling, and he said, 'Yes; you have been gambling a long time, but you are going to get the worst of it this time,' and I told him that if he turned me in he would have to turn state's evidence, that I had never gambled that he knew of unless he was with me at the time, and I told him that these cattle he claimed had been breaking in on him were Turner's and Humphrey's, that I had sold my stalk field to them, and I didn't want their cattle herd-lawed, and he said, 'I don't want to herd-law Turner's and Humphrey's cattle; your cattle are the cattle I am after,' and I said, 'If that is the case, it doesn't make any difference, because this cow I put the yoke on belongs to Turner, and I only had control of her,' and he said, 'If that is the fact, you lied to me.' Then I told him his hogs had been over there, they had been in the yard, and on the porch, and one of them had overturned a churn setting on the gallery, and broke it, and he said they were not his hogs and I called him a damned liar. Q. What did he do? A. He was sitting in this position, he was facing me, and he was on his horse, and as I called him a damned liar he reached his hand back this way, and at the same time he reached his hand back I leaned around like this, I had my hands up like this, and I leaned around that way and seen the gun he had hold of, and I stepped back this way, grabbed my gun, and shot him. Before I shot him I asked him what he was going to do. He made no reply. When I fired it throwed me in a position I would be with this gentleman here, maybe a little further, and as I shot my gun I did not realize the time it was taking, and when my gun was empty his horse had jumped to the fence and had whirled west, and as he run down the fence Hodge came back over his horse and fell over his right hip to the ground. Q. Why did you shoot Hodge? A. Because when he reached for his gun I felt that my life was in danger, and I did it to protect myself. Yes; I saw his gun, the handle of it when he laid his hand on it. I had seen him with a gun on divers occasions before that, and knew that he was in the habit of carrying one. George Rennie had told me of the threat Hodge had made about unloading his official gun in me before that. That was about Thanksgiving Day, the latter part of November. I could not say how long it took me to shoot my gun empty; a man might count two or three. Q. Do you know what Hodge was doing when you went to get your gun? A. He had his hand on it trying to pull it out. I thought he was going to kill me. I had my gun in my right pants pocket. I was in my shirt sleeves. Q. In that conversation down there before the shooting did Hodge curse you any? A. He called me a horse thief, and a liar, and intimated that I was a son of a bitch. When the shooting was over I turned and walked back to the house. In the meantime Turner rode around the corner of the fence and up to the gate, and I cut across and went up to where he and Hodge were. I had a conversation with Turner, I says, 'Shorty, what would you have done if it had been you?' and he said, 'I would not want anybody shooting at me.' I did not pick the pistol up nor make a statement that I did, nor that it was cocked. I saw the pistol. I noticed that the pistol was cocked. I did not go to Hodge's body nor disturb it in any way nor take anything out of his pockets. Q. What else did you tell Turner, if anything, when you got back to the house? A. I told him to go and notify Hodge's folks, and told him how to go."

Witness further said that he knew where the thicket was that Sam Sherrell was working at; that it was south of where the killing occurred, across a 10-acre block of land, 220 yards, and about 40 yards further south; that he never made the remark to Turner about going on that Sherrell testified to, or anything like it; that he had never done anything to Sherrell to intimidate him, never talked to him about his testimony in the case, did not see him after the shooting, until after he testified at the examining trial; that he was in jail from the time he gave up for 14 days.

On cross-examination witness testified in substance:

> "Hodge and I never had any trouble until about 30 days before the killing. That came up when he thought I had hired his hand away from him. He sent for me, and I went down to his house. He said he wanted to tell me that he had it in for me and was going to punch me. After that we had a talk about a horse collar, and he said, 'The less you come about here, the better it will be for you.' I said, 'All right,' and told him to stay off of my place."

There was also proof of violent threats having been made by the deceased against the plaintiff in error. The state offered in rebuttal evidence that the plaintiff in error had also made hostile statements against deceased.

[1] The first assignment of error we shall consider is based upon the contention that the court erred in giving instruction No. 15, which instruction is as follows:

> "You are further instructed, gentlemen of the jury, actual or positive danger is not indispensable to justify self-defense. The law considers that men threatened with danger are obliged to judge from appearances and determine therefrom the exact condition surrounding them, and if in such case, judging from the standpoint of the defendant, a person acts from an honest conviction induced by reasonable evidence, he will not be held criminally for a mistake as to the actual danger.
>
> "However, you are further instructed, gentlemen of the jury, that the right of self-defense is defensive, and not offensive, and no man may by this lawless act create a necessity for acting in self-defense, and thereupon assault and kill his adversary, and then invoke the right of self-defense.
>
> "And therefore, gentlemen of the jury, if from the evidence in this case you should believe that this defendant armed himself and sought the deceased for the purpose of provoking and engaging in a difficulty, and in furtherance of such plan did invite and provoke a difficulty, and then and there shot and killed his adversary, the defendant cannot invoke the rights of self-defense."

It is argued that there is no testimony tending either directly or from circumstances to show that the defendant armed himself for the occasion and sought the deceased for any purpose, much less to enter a quarrel with him and kill him, and that for this reason the instruction should not have been given; that the instruction is so worded as to be argumentative and unfair.

Without discussing these features, this instruction is fundamentally wrong, in that the latter paragraph, which is the gist of the same, makes no mention of the intent with which the difficulty must be provoked, and we find no place in the instructions where this defect is cured. The instruction says:

> "If you believe that this defendant armed himself and sought the deceased for the purpose of provoking and engaging in a difficulty, and in furtherance of such plan did invite and provoke a difficulty, and then and there shot and killed his adversary, the defendant cannot invoke the right of self-defense."

This is not the law. The difficulty must be prepared, sought, and provoked for the purpose and with the intent upon the part of the accused to take the life of the deceased.

In Turnbull v. State, 8 Okl. Cr. 459, 465, 128 Pac. 743, 746, we said:

> "When, in the trial of a person charged with murder, it becomes necessary for the trial court to instruct the jury on the doctrine of seeking or provoking the difficulty, and the proof discloses that the accused did any act or thing which he had a right to do, which could be reasonably construed by the jury to come within the general terms of the court's charge, it is necessary for the court to tell the jury what acts under the law would be justifiable, and discriminate as to acts unlawful and which would deprive him of the right of self-defense, leaving to the jury to determine whether or not, under the facts and the law, the acts [complained of] were lawful or otherwise."

In the same opinion we quoted from the Tennessee case of Foutch v. State, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687. We cannot improve upon the clear enunciation of the court in the Foutch Case, and therefore quote fully and adopt the following therefrom:

> "In order to make a man guilty of murder, who is the 'aggressor' or in 'fault,' or who 'provokes a difficulty' in which his adversary is killed, he must have provoked it with the intent to kill his adversary, or do him great bodily harm, or to afford him a pretext for wreaking his malice upon his adversary. * * * In order to deny to such party the right to rely on the plea of self-defense, it must appear that he was the 'aggressor' or 'in fault' or 'provoked the difficulty' in such way and with such intent as the law contemplates in the use of these terms. It is not every 'aggression' which produces a difficulty that is an unlawful one within the meaning of this phrase, nor is it every 'fault' which a man might commit that precludes him from defending himself when violently assaulted or menaced, nor is it every 'provocation of a difficulty' which robs him of the right of self-defense. Cases already cited and hereinafter cited illustrate the true meaning and show the sense in which these words must be understood. They are really intended to imply the same thing, and what they do mean may be best indicated by suggestion of some things they do not mean, taking them up separately. First, as to the 'aggressor': It is not intended that every one shall be held in law to be an 'aggressor' who says something provoking to another which does cause a difficulty, for oftentimes such an 'aggression' is a just one, and sometimes a necessary one; but, even when it is neither just nor necessary, the use of opprobrious language to another is not for this reason alone an 'aggression,' in the sense of the law, for no mere words, however op-

probrious, will justify an assault, or the overt menace of an assault; and hence, if one only uses such words, and is assaulted or so menaced, he may defend himself; and the same thing is true of one in 'fault.' He might be in such and other supposable 'fault,' and yet not be deprived of a like right of self-defense; as, though one has threatened or abused him, he cannot go to him and assault him for it. So, when he uses to another opprobrious words, that other cannot assault him or menace him by overt act of violence, and deny him the right of defense. As to 'provoking a difficulty': It is not every provocation, just or unjust, which he may offer that will justify an assault upon him, or the menace of one from which he cannot defend himself; and to this also the limitations as to mere words used apply. After all the 'aggression,' the 'fault,' or the 'provocation' depends upon its character and its intent. If it is an assault, or the menace of one by an overt act, or the provocation of a difficulty with intent to inflict death or great bodily harm in the event it is resisted, made of malice to bring about that result and enable the provoking party to wreak his vengeance upon the assailant, that is an 'aggression' or 'fault' and a 'provoking of a difficulty' within the legal sense and meaning of the terms. If the 'combat is provoked,' or 'the occasion to kill is produced,' in the language of the charge, on this account, with this intent, and for this purpose, defendant cannot rely upon the plea of self-defense; otherwise he can. * * *"

See Aldrige v. State, 59 Miss. 250; Cartwright v. State, 14 Tex. App. 486; State v. Perigo, 70 Iowa, 657, 28 N. W. 452; Cotton v. State, 31 Miss. 504; Hash v. Com., 88 Va. 172, 13 S. E. 398.

The proof in this case discloses the fact that this homicide occurred upon the premises of the plaintiff in error; that the deceased was a trespasser in his pasture and driving stock into the same unlawfully; that the plaintiff in error had a right to be where he was; and that under the particular circumstances had a right to remonstrate with the deceased for turning the herd of cattle into his premises. It was vital to his defense that the jury be instructed properly on this proposition. To use the broad language of the court and leave out all question of the intent would practically be saying to the jury that if the plaintiff in error, by word or act, started the harsh conversation shown, he had lost his right of self-defense. There can be no question but that the plaintiff in error had a right to complain of Hodge for turning the cattle in on him and for being on the premises himself. This controversy began with just such complaint having been made, and the rapid exchange of bitter remarks which followed merged into the homicide. It therefore was necessary for the court to put the burden of this instruction upon the intent of the accused at the time and to protect him with a proper instruction explaining to the jury how far he might lawfully go under the circumstances before losing the right of self-defense.

[2] The next assignment complained of is based upon the action of the court in submitting manslaughter in the second degree over the objection and exception of the defendant.

A careful reading of the evidence discloses the fact that there is not a single element of manslaughter in the second degree in this case. The court had no right to submit that issue, and it was error so to do. It is the duty of the courts in trying homicide cases to distinguish under the evidence the degrees of homicide disclosed, and submit only such as the testimony tends reasonably to establish. The instruction of the court should be such that the jury in its wisdom could arrive at the proper determination of the legal issues. When there is no element of manslaughter disclosed by the proof, the court should not give an instruction defining or submitting such issue. The giving of this instruction in this case would be sufficient warrant for the reversal of this judgment. Weatherholt v. State, 9 Okl. Cr. 161, 131 Pac. 185; Ballard v. State, 12 Okl. Cr. —, 154 Pac. 1197. If there is evidence, even though slight, tending to establish manslaughter in the second degree, a reversal would not necessarily follow.

The only remaining assignment which we deem it necessary to refer to is based upon the improper conduct and argument of the special prosecutor. There are nine separate assignments in this connection. We do not feel called upon to enter into an extensive discussion of these assignments. Suffice it to say that, in our judgment, the fair and impartial trial, contemplated by law, could not reasonably be expected to result when conduct such as is complained of and disclosed by the record is indulged in.

It is the duty of the trial courts to confine counsel to proper and legitimate channels, and to so conduct the trial that animosity on the part of the officers of the court should have no weight in determining the great issues involved in a capital case.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

DOYLE, P. J., and MATSON, J., concur.

(12 Okl. Cr. 599; 14 Okl. Cr. 678)

SHOEMAKE v. STATE. (No. A-2360.)

(Criminal Court of Appeals of Oklahoma. Oct. 30, 1915. Rehearing Denied Sept. 25, 1917.)

Appeal from Superior Court, Muskogee County; H. C. Thurman, Judge.

Boney Shoemake was convicted of violating the prohibition law, and appeals. Affirmed.

S. M. Rutherford, of Muskogee, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted on an information charging the unlawful conveyance of 24 quarts of whisky from a point unknown in Muskogee county to a point about 30 feet northeast of the Midland Valley depot in the town of Porum. September 23, 1914, the court rendered judgment and sentenced him to be confined in the county jail for 30 days and to pay a fine of $50 and the costs. The evidence for the state tends to show that plaintiff in error left a train arriving at Porum from Ft. Smith with two grips containing whisky, and, when arrested, said "he had gotten the liquor for sick folks." As a witness in his own behalf, the defendant testified that when he got off the train he did not have any grips; that after walking eight or ten steps Deputy Sheriff McClelland "hollered" at him and said, "I will take those grips and you, too, to Muskogee," and witness answered, "What grips?" that he looked and saw two grips on the ground eight or ten steps from him.

Upon a careful examination of the record in this case, we are satisfied that none of the alleged errors are well taken. It was for the jury to determine to what extent they would give credit to the defendant's testimony.

Finding no error prejudicial to the defendant, the judgment will be affirmed.

(41 Nev. 27)

SHEEHAN et al. v. KASPER. (No. 2256.)

(Supreme Court of Nevada. Sept. 5, 1917.)

1. Waters and Water Courses 🔑177(1)—Canal—Restraining of Destruction.

To entitle plaintiffs to judgment restraining defendant from destroying a canal, ditch, and power line, the canal must have had a valid existence, must have been owned by plaintiffs, who must have acquired a license to construct, maintain, and operate the branch ditch and power line irrevocable at defendant's will, and defendant must have been threatening to fill in and destroy the ditch and power line.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 260-262.]

2. Waters and Water Courses 🔑26—Conveyance of Right of Way.

The federal government, having passed title to plaintiff to a right of way for a canal by statute, could convey no title thereto when it conveyed title to a mill site; and the patentee of the land embraced in the mill site took title subject to the right of way for the canal, and the purchaser of the mill site acquired no greater right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 17.]

3. Corporations 🔑426(1)—Ratification of Acts of Agent.

The unauthorized act of the managing director of a company in granting a license became effectual when ratified by the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702.]

4. Waters and Water Courses 🔑177(1)—Licenses—Presumption of Existence.

In suit to restrain defendant from destroying a canal, ditch, and power line, where the superintendent of the exploration company from which plaintiffs claimed a license to construct the ditch and power line knew of the construction from the beginning of operations, and no protest was made, the court will presume that plaintiffs had a license from the exploration company.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 260-262.]

5. Licenses 🔑58(1)—Parol License Without Consideration—Irrevocable Character.

An executed parol license, though without consideration, is irrevocable.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 116, 119, 121.]

6. Waters and Water Courses 🔑155—Mill Site—Bona Fide Purchaser—Notice.

Where a firm was in open and notorious possession and enjoyment of a ditch and power line for three or four years before defendant, who had lived in the vicinity of the property off and on for ten years, and continuously for one year, bought a mill site through which the right of way for the ditch passed, the firm's possession was sufficient to put defendant on notice.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 161-166.]

Appeal from District Court, Humboldt County; E. A. Ducker, Judge.

Action by J. Sheehan and John G. Taylor, copartners doing business under the name and style of Taylor & Sheehan, against S. B. Kasper. From judgment for plaintiffs, and an order denying his motion for new trial, defendant appeals. Affirmed.

Salter, Robins & Frame, for appellant. Callahan & Brandon, of Winnemucca, for respondents.

COLEMAN, J. Plaintiffs brought suit to restrain the defendant from destroying a certain canal, ditch, and power line. From a judgment and decree as prayed, and from an order denying a motion for a new trial, an appeal is taken.

Plaintiffs contend that they were, at the time the suit was instituted, and for about 50 years prior thereto they and their grantors and predecessors in interest had been, the owners of and in possession of a large tract of land known as the Taylor & Sheehan Ranch, and a certain canal, commonly known as and called "the Humboldt Canal," together with a strip of land 100 feet in width, extending 50 feet on each side of the center line of said canal, all situated in Humboldt county, Nev., during which time they had paid all taxes assessed thereon; that the Glasgow & Western Exploration Company was, in the year 1910, the owner of a tract of land consisting of about 179 acres, which it acquired as a mill site, and through which "the Humboldt Canal" flowed, and that plaintiffs acquired from said exploration company an irrevocable license to construct, maintain, and operate a certain branch ditch and power line over, upon, and across said mill site, which they constructed at a cost of about $45,000; that said Humboldt Canal, ditch, and power line were being used to divert certain waters of the Humboldt river that had been appropriated by plaintiffs with which to irrigate the growing crops on the land so owned by them, of the alleged value of $30,000; that thereafter, and in 1915, and while plaintiffs were in the possession of all the property mentioned, the defendant purchased said mill site and took a quitclaim deed thereto; that defendant threatened to fill in and destroy said canal and ditch and tear down and destroy said power line, and if not restrained would fill in and destroy the same, to the damage of plaintiffs; that defendant is insolvent and unable to respond to plaintiffs in damages. They also contend that they had the right to use "the Humboldt Canal" through which to divert the waters of the Humboldt river for irrigation purposes.

Defendant contests every contention of the plaintiffs, except the existence of their partnership, their ownership of the Taylor & Sheehan ranch, and their right to a portion of the waters of the Humboldt river for the irrigation of their lands.

[1] To enable the trial court to render judgment in favor of plaintiffs as prayed, it was necessary that it find, in addition to the admitted allegations of the complaint, that "the Humboldt Canal" had a valid existence, and that it was owned by the plaintiffs; that the plaintiffs acquired a license to construct, maintain, and operate the branch ditch and power line; that the same was not revocable at the will of defendant; and that the defendant was threatening to fill in and destroy said ditch and power line.

The learned judge before whom the case was tried in the district court filed a written opinion in the case, in which he says that evidence was received to the effect that the Humboldt Canal was started somewhere about the year 1862; that a right of way, as claimed by plaintiffs, was granted by the government to the Humboldt Canal Company for irrigation, and possibly other purposes, and makes his finding accordingly. As we read the record, the witness who testified concerning the grant intended to convey the idea that there was a special act of Congress granting the canal company a right of way, but no such act was offered in evidence or called to the attention of this or the trial court.

The evidence clearly sustains the findings and conclusions of the court; in fact, we do not think this finding is seriously questioned. However, the probability is that there never was a special act of Congress granting to any one the canal in question. It is more likely that the right of way over the public domain for the canal was confirmed in the owners thereof under the act of Congress approved July 26, 1866, which provides that:

> "Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decision of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." U. S. Rev. Stats. 2339; U. S. Comp. Stats. 1916, § 4647.

[2] But no matter whether the right of way for the canal became vested under a specific grant or was confirmed under that portion of the act of Congress quoted, we are clearly of the opinion that the contention of appellant that he acquired title to that portion of the canal which lies within the "mill site" under his deed from the exploration company is unfounded. The government, having clearly passed title to the right of way for the canal, could convey no title thereto when it conveyed title to the mill site. The patentee to the land embraced in the mill site took title subject to the right of way for the canal, and the defendant could and did acquire no better or greater right. Broder v. Water Co., 101 U. S. 274, 25 L. Ed. 790; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Carson v. Gentner, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130; Osgood v. El Dorado Water Co., 56 Cal. 571-581.

We come now to the question of the license from the exploration company for the right of way for the branch ditch and power line. Mr. Taylor, one of the plaintiffs, testified concerning a conversation which he had with the managing director of the company, who was in actual charge of all of the company's affairs in 1910, when his firm was Taylor & Edson, at which time that official granted permission to his firm for the construction of certain works across the mill site, to be used in conducting the water for irrigation purposes. No particular line was contemplated or designated in the conversation between Taylor and the manager of the company for the construction of the works; the only restriction which was imposed being that the then existing plant and railroad should in no way be impaired or interfered with. Thereafter Sheehan purchased the interest of Edson in the then partnership of Taylor & Edson, and the firm became Taylor & Sheehan, the plaintiffs. After Sheehan entered the firm, the plan of irrigating the land which is now in existence was adopted.

[3] It is contended by appellant that there never was a license granted to either the firm of Taylor & Edson or Taylor & Sheehan, and that if such a license was granted to Taylor & Edson it was forfeited by Edson's sale to Sheehan; and that if, in any event, a license was granted, it was revocable, and that he had exercised the right of revocation. Appellant urges that the managing director of the exploration company had no power to grant a license. We do not deem it necessary that this question be determined, for the reason that, conceding that his action in that connection was in excess of his authority, we are of the view that the company ratified his action.

[4] As to the point that the sale by Edson of his interest in the partnership to Sheehan operated to cancel the license, we need only to say that under the facts and circumstances of this case the court will presume that that firm had a license from the exploration company. The record shows that the superintendent of the exploration company knew of the construction by Taylor & Sheehan, at a cost of about $45,000, of their branch ditch and power line and system, from the very beginning of the operations, and that the managing director was upon the premises several times and was told of and saw what was being done, and no protest was made. Subsequent to the construction by the respondent of the works, succeeding representatives of the company went upon the premises, knew of and saw the branch ditch and power line, and no protest was made. Finally, in 1913, one Joseph Ralph appeared upon the scene with a power of attorney, so comprehensive in its terms as to authorize him to do anything that could be done by the company. One of the provisions of that instrument reads as follows:

> "To complete or carry out or vary any contracts or engagements which the company has already approved of or agreed to or entered into, either verbally or in writing, without any person or body for the time being concerned being in any way obliged or permitted to require any evidence whatever that the company has either approved of or agreed to or entered into any such contract or engagement; and also to put an end to any contract into which the company may have entered, and if thought proper to enter into a new contract in lieu thereof."

While acting under this power or attorney, Mr. Ralph was upon the property at least six times, in company with the superintendent of the exploration company, and saw and talked with the superintendent of the company about the branch ditch and other works of the respondents. He made no objection to what had been done by the respondents, notwithstanding the fact that they were in possession of and operating the plant. The uncontradicted evidence is that the managing director of the exploration company, at some time after respondents had completed their branch ditch and power line, said their constructing of the same was "all right." The authorities hold that a license may result from approval of acts of the licensee after they are done, as well as from an express permission granted before they are done. Metcalf v. Hart, 3 Wyo. 513, 27 Pac. 900, 905, 31 Pac. 407, 31 Am. St. Rep. 122; Cumberland Valley Railroad Co. v. McLanahan, 59 Pa. 23-31; Walter v. Post, 13 N. Y. Super. Ct. 371. See, also, Occum Co. v. Sprague, 35 Conn. 496; Hickox v. Parmelee, 21 Conn. 90; Hansen v. Farmers' Co-op. Cr., 106 Iowa, 167, 76 N. W. 652.

[5] But appellant contends that, conceding that a parol license was granted to plaintiffs, there was no consideration therefor, and hence it is revocable at his pleasure. In considering this contention, there must be kept in mind the difference between an executed and an executory license. As to the latter class, so far as we know, the authorities are practically unanimous in holding that they may be revoked, but as to an executed parol license the authorities are divided. See 25 Cyc. pp. 646, 647; 17 R. C. L. p. 578; note to Rerick v. Kern, 16 Am. Dec. 497. Persuasive arguments can be urged to sustain both views, but the question was settled in this state in the case of Lee v. McLeod, 12 Nev. 284, contrary to appellant's contention, and no reason has been advanced which inclines us to overrule that case.

It is contended by appellant that he knew nothing of respondents' claim of a license at the time he purchased the mill site, and that consequently he ought to be treated as an innocent purchaser without notice. Appellant had lived in the vicinity of the property off and on for ten years, and continuously for one year. Respondents were in open and notorious possession and enjoyment of the ditch and power line at and for three or four years prior to the time appellant bought the mill site. This court, in Patchen v. Keeley, 19 Nev. on page 413, 14 Pac. 352, quoting from Judge Story's opinion in Ricard v. Williams, 7 Wheat. 105, 3 L. Ed. 398, says:

> "The law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful."

See, also, Bank of Italy v. Burns, 39 Nev. 326, 156 Pac. 932, 159 Pac. 863.

[6] The possession of plaintiffs was sufficient to put the defendant on notice.

Perceiving no error in the judgment, it is ordered that it be affirmed.

McCARRAN, C. J., and SANDERS, J., concur.

(13 Okl. Cr. 514)

BREWER v. STATE. (No. A-2582.)

(Criminal Court of Appeals of Oklahoma. June 11, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⟹586, 590(2), 1151 — APPEAL—DISCRETION OF TRIAL COURT—APPLICATION FOR CONTINUANCE.

An application for continuance is addressed to the sound discretion of the trial court, and when such application is based upon the proposition that counsel have had insufficient time to prepare for trial, this court will review the record and consider all of the circumstances in connection with the employment of attorneys from the time the arrest was made; and when it is made to appear that capable lawyers have been employed, and have withdrawn from the case because fees were not paid, and that other capable counsel was employed, and a part of the fee paid some time prior to the calling of the case for trial, and the remainder on the date the same was called for trial, but that no effort had been made to prepare the case for presentation to the jury, a reversal will not be granted on the ground that the court abused its discretion in refusing a continuance for the term, which would amount to a delay of six months.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1317, 3045–3049.]

2. CRIMINAL LAW ⟹1183, 1186(1)—CONVICTION WITHOUT FIXING PUNISHMENT — APPEAL — REVERSAL — MODIFICATION AND AFFIRMANCE.

(a) When a person is tried on a charge of murder, and convicted of manslaughter in the first degree, and the jury fails to fix the punishment, this court will review all of the record, with a view of determining the correctness of the findings of the jury, and, if the verdict is a correct and proper one, a reversal will not be granted on the ground that the punishment is excessive.

(b) When a review of all the record indicates that substantial justice would be conserved by modifying the punishment fixed by the trial court to a lesser term of years than that imposed, this court will make such modification, and affirm the judgment as modified. The entire record, the instructions of the court, and all of the circumstances disclosed, will be considered for the purpose of enabling this court to reach a just conclusion on this phase of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195–3198, 3215–3217, 3219, 3230.]

3. CRIMINAL LAW ⟹826, 843—TRIAL—TIME TO PREPARE INSTRUCTIONS.

Trial courts should give reasonable opportunity for counsel to prepare requests for instructions, and to examine and file exceptions to the instructions given, when in good faith counsel seek such opportunity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2008, 2024.]

Appeal from District Court, Wagoner County; George C. Crump, Special Judge.

William Brewer was convicted of manslaughter in the first degree, and appeals. Modified and affirmed.

Joseph S. Dickey, Jr., of Wagoner, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. William Brewer, plaintiff in error, was tried in the district court of Wagoner county on a charge of murder, and convicted of manslaughter in the first degree. His punishment was fixed by the court at 25 years' imprisonment in the state penitentiary.

The homicide occurred at a hotel conducted by C. Silverhorn at Rex, in Wagoner county, on the night of December 24, 1914. It appears that the people in the community had gathered at the hotel for the purpose of having a Christmas tree celebration; that a dance was in progress in the dance hall; that 14 year old Red Pell had been annoying the deceased, whose name was Cartright; that he had been stepping on his feet and spitting on him. Cartright slapped the boy, who went into another room crying, and, upon inquiry, he said that he had been slapped by deceased. The plaintiff in error, Brewer, used vile language, and told the boy to tell Cartright to jump on somebody his size. Janie Pell urged the boy to carry the message to Cartright, which he did. Very soon the Pell boy came back from the dance room, and almost immediately Cartright came in, walked by those congregated, turned around, and asked who it was that wanted to clean up on him. All the witnesses for the state testified that Brewer said he could whip him, and struck Cartright simultaneously with the statement.

The plaintiff in error, testifying in his own behalf, denied striking the first blow. He says that Cartright came in and asked, "Where is the fellow that wanted to clean up on me?" and struck him; that he didn't know who Cartright was talking to at the time. In the scuffle that followed, the parties clinched and fell to the floor. Some effort was made to separate them. Cartright was apparently on top of the plaintiff in error, pounding him. Carl Silverhorn, a son of the proprietor of the hotel, pulled the deceased off of the plaintiff in error, whose face was bleeding when he got up. Mrs. Silverhorn, wife of the proprietor, came into the room and was talking to Cartright, and advised him to go back to the kitchen and wash the blood off his face. A shot was fired, and she started to leave. Two more shots were fired. Cartright followed her into the kitchen, and exclaimed that he was shot or killed, and asked that a doctor be called, which was done. He was sent to a hospital at Muskogee, where he died.

The state's witnesses all testified that Cartright was standing not over 10 feet away, talking to Mrs. Silverhorn, at the time he was shot; that the father of the deceased and other persons were endeavoring to control and hold him. The plaintiff in error himself testified that, when he got up, he drew his gun and saw Cartright coming towards him, as if to assault him the second time, and that he shot then. He says that he knew Cartright was in the habit of carrying a pistol, but did not say that he knew he was armed upon this occasion, or that he made any demonstration as if to use firearms or any other weapon.

The testimony of the plaintiff in error does not disclose a sufficient defense to a charge of murder. Taking his statement as true, this homicide amounted to manslaughter in the first degree. The jury convicted him of that offense, but failed to fix the punishment. A review of the assignments of error and an examination of the record, therefore, will be for the purpose of determining whether or not the conviction of manslaughter should stand.

[1] It is first contended that the court erred in refusing a continuance in this case. The affidavits of the plaintiff in error and his counsel were filed in support of the request for continuance. These affidavits disclose the fact that C. G. Watts, now a district judge, and S. M. Rutherford, of Muskogee, were employed by the plaintiff in error, and after some time they withdrew from the case because their fee was not paid. A

short time prior to the trial Joseph S. Dickey, Jr., was employed. One hundred dollars was paid him on the fee, but the remainder was not paid until the day the case was called for trial. Mr. Dickey had made no effort to prepare for trial, because his fee had not been fully paid. Upon completion of the financial arrangements on the date assigned for trial, a motion for continuance was immediately lodged in the trial court and by the court denied. The cause was assigned for 1:30 in the afternoon, and the trial was begun and concluded. The record shows that all the witnesses desired by both sides were in attendance upon the court, and no contention is made that additional evidence in the defense of the accused could have been made available. The continuance asked for was for the term, which meant a delay of some six months. The motion for continuance is not based upon any statutory ground, but rather addressed to the sound discretion of the trial court. We are not prepared to say, after a careful review of the record, that the court abused his discretion in refusing to grant a continuance until the next term of court. The entire record is to be considered in this connection.

The cases cited and relied upon by counsel indicate that an injustice probably resulted by reason of the court failing to continue those cases. Not so in the case at bar. The verdict of the jury was just. The punishment inflicted by the court may be too severe, but this court can remedy that. No capable jury of honest men could be assembled who would have found a verdict of less than manslaughter in this case under the proof offered. If a delay had been sought for three or four days, in order to enable counsel to prepare to introduce his testimony, we would feel very much inclined to reverse this judgment. No such request was made of the trial court, and we are therefore not called upon to pass upon a record disclosing that condition.

[2] The remaining assignments of error are based upon criticisms of the instructions of the court. The court's instructions are subject to criticism. If this conviction had been murder, it would be necessary to reverse the judgment, on the ground that the instructions do not fairly submit the law of murder. As abstract propositions of law, the instructions in many respects are correct; but, as applied to the facts in this case, there are a number of criticisms which would not permit a judgment for murder to stand. Rules of law must necessarily be applied to the facts in the case they are intended to cover. No good purpose could be served by setting out the instructions at length and discussing them here.

[3] It is next contended that the court erred in refusing to give counsel an opportunity to prepare written requests for instructions at the close of the testimony. The record discloses the fact that the trial court, on the day before the case closed, advised counsel to have their instructions prepared; that, when the evidence was in and the case closed, defendant asked 10 minutes for this work. We think reasonable time should have been granted, but do not find that this is error sufficient to warrant a reversal of the judgment.

Having reviewed all the evidence offered in this case, the instructions of the court, and the proceedings attendant upon the trial, we believe that this judgment should be modified from 25 years to 15 years, and, as modified, affirmed.

It is so ordered.

DOYLE, P. J., and MATSON, J., concur.

(13 Okl. Cr. 484)

HISAW v. STATE. (No. A-2461.)

(Criminal Court of Appeals of Oklahoma. June 9, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW 🔑639(2)—SPECIAL COUNTY ATTORNEY—POWER OF DISTRICT COURT.

The district court has authority to appoint a special county attorney to act in the place and stead of the regular elected county attorney where the latter is disqualified in any particular case. Aside from any statute, this power is inherent in a court of general jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1486, 1487, 1490, 1491, 1493.]

2. CRIMINAL LAW 🔑639(2)—APPOINTMENT OF SPECIAL COUNTY ATTORNEY—RATIFICATION.

Where the regular county attorney is disqualified and a special county attorney is appointed by the regular district judge at his chambers in vacation, and said appointee thereafter qualifies according to law, and his appointment recorded in the court's criminal journal as a part of the proceedings in the particular case for which the appointment was made, and upon the trial the same judge over objection of the defendant recognizes the appointment made in vacation, and permits said special county attorney to proceed as the representative of the state in such case, there is a ratification by the court of the said appointment, which is tantamount to an appointment by the court in the first instance, where no other objection is urged except that the district judge was unauthorized to appoint in vacation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1486, 1487, 1490, 1491, 1493.]

3. INDICTMENT AND INFORMATION 🔑137(1)—SETTING ASIDE INDICTMENT—GROUNDS—EXAMINATION OF WITNESSES.

The grounds upon which a criminal action may be dismissed or an indictment set aside are clearly enumerated in the Code. The fact that the county attorney or his substitute, after the finding of the indictment and prior to the trial, examines certain witnesses under oath in the absence of the accused and with the approval of the county judge is no ground for dismissing an action or setting aside an indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 480.]

4. Criminal Law 🔑629—Indictment and Information 🔑34(4) — Indorsement of Names of Witnesses—Service of List of Witnesses.

Subdivision 2 of section 1, c. 68, Session Laws 1913, permits the county attorney, on approval of the district or county judge where a felony case is pending against any person triable in that county, to call witnesses before him and have them sworn and their testimony reduced to writing at the cost of the county. The names of witnesses thus obtained should be properly indorsed upon the indictment and information, and in capital cases a list of those who are to be used in chief, together with their respective post office addresses, must be served upon the defendant at least two days before the case is called for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420–1429, 1432–1436; Indictment and Information, Cent. Dig. § 141.]

5. Jury 🔑82(2)—Summons Upon Second Venire—Challenge to Panel.

The fact that, after a challenge to a panel had been sustained on account of the bias and prejudice of the sheriff whose deputies summoned the jurors, some of the persons composing it were summoned on a second venire by an unbiased and unprejudiced officer, is no ground for challenge to the second panel.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 307–309, 359, 367.]

6. Jury 🔑82(2)—Second Panel—Fair and Impartial Jury.

Where it is not made to appear that the defendant challenged any of such jurors individually for cause, or that he was required to exercise a peremptory challenge to any of them by reason of which his peremptory challenges were exhausted, this court cannot hold that a fair and impartial jury was not afforded in the trial, or that defendant's substantial rights were invaded by reason of the trial court permitting the names of such jurors to be placed in the trial box over his objection.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 307–309, 359, 367.]

7. Criminal Law 🔑814(15)—Instruction—Accomplice Testimony.

Where the facts are not disputed, and there is no evidence to show that any witness for the state is an accomplice, there is no error in refusing to give an instruction upon the necessity of corroborating an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1860, 1979.]

8. Criminal Law 🔑763, 764(1) — Instruction—Province of Jury.

Defendant requested the following instruction: "You are instructed that if during the course of this trial any evidence has been offered which is capable of two constructions, one favorable to the defendant and one unfavorable, that it will be your duty to give to such evidence the construction most favorable to the defendant." *Held* properly refused as invading the province of the jury in that it tended to deprive the jury of the right to determine the weight of the evidence and the inferences properly to be drawn therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1737, 1742, 1743, 1746.]

9. Criminal Law 🔑1130(3)—Appeal—Brief—Evidence.

Where it is contended that incompetent evidence has been admitted over the objection and exception of the defendant, the brief must not only contain a statement of the evidence complained of, but counsel must also support their assignment of error with some argument and authority to convince this court that the defendant has been prejudiced by the trial court's rulings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2967, 2969.]

10. Remarks of Trial Judge—Reversal.

Record examined, and *held*, remarks of trial judge were not such as to authorize a reversal of this judgment.

Appeal from District Court, Haskell County; W. H. Brown, Judge.

Bob Hisaw was convicted of murder and sentenced to imprisonment for life, and appeals. Affirmed.

On the 13th of February, 1912, Virgil (commonly called Rex) Ray and his wife, Lizzie Ray, who had been married about a month previous to that date, separated. They had been living in a little one-room log house in the Hisaw neighborhood of Haskell county. Rex Ray was a tenant farmer, and prior to his marriage and up to the time of his separation had off and on worked for the defendant Bob Hisaw; the defendant being a farmer and stock raiser of that neighborhood. On the afternoon of February 13, 1912, Rex Ray and his wife and her father, Dick Odom, hauled what little household goods the Rays had up to old man Dick Odom's place. It was there that Rex Ray and his wife finally parted—Rex leaving there with a man by the name of Dink Dukes, another farm hand who had been working in that neighborhood, and when they left they said they were going across the river; this community being in the neighborhood of both the Canadian and Arkansas rivers near the junction of them. The general public never saw Rex Ray alive after dark of February 13, 1912. He was missed from that community. Along in April or May of that year it became rumored that Rex Ray had been killed and his body buried. On the 28th day of June, 1912, Dink Dukes appeared in Stigler, the county seat of Haskell county, and informed the officers that Rex Ray had been killed on the night of February 13, 1912, and his body buried near the Arkansas river in what was known as the Hisaw bottoms, and that Bob Hisaw had shot and killed Rex Ray while he was asleep in bed at the home of one Rile Odom, a brother of Ray's wife, and that Bill Hisaw came with Bob Hisaw when the killing occurred. Dink Dukes also stated that he could go with the officers and find the place where Rex Ray's body had been buried. A complaint charging Bob Hisaw and Bill Hisaw with the murder of Rex Ray was immediately filed by the county attorney of Haskell county, and warrants issued for their arrest. The officers carried these warrants with them when they went down with Dink Dukes to disinter Ray's body. On their way they stopped at the home of Bob Hisaw, but could not find either him or Bill. There had been a picnic in Stigler on that day, which Bill Hisaw was attending. As soon as he heard that Dink

Dukes had disclosed that Rex Ray had been murdered, and that the officers had gone to the scene to search for the body, he got a horse and immediately rode to Bob Hisaw's house, where he had been staying. The officers disinterred Ray's body, and found it wrapped in a blanket and quilt, dressed in a dark coat, an old blue shirt, either one or two pairs of trousers, and one pair of overalls. The flesh was partially decomposed, but a bullet hole was discovered in the head near the nose. These parties did not make a thorough investigation of the body because of its badly decomposed condition. The officers returned to Stigler, and thereupon Rile Odom and his wife, Mary Odom, were arrested in connection with Dink Dukes as being implicated in the murder. About a week or ten days later Bill Hisaw came to Stigler and gave himself up. A month or two thereafter he was tried for the murder and acquitted. Bob Hisaw was not arrested until about October, 1914, when he was captured in McCurtain county, Okl., on a farm about ten miles from the town of Valiant. He was at that time going under the name of R. A. Johnson. The trial of Bob Hisaw took place in December, 1914. Bill Hisaw, Rile Odom, Mary Odom, his wife, Emma Hisaw neé Odom, Lizzie Ray, neé Odom, the widow of Rex Ray, the old lady Odom, the mother, were all witnesses for the prosecution, and testified to a state of facts substantially as follows:

That Rex Ray separated from Lizzie Ray on the 13th of February, 1912, at old man Dick Odom's house, and left traveling a foot with one Dink Dukes. That he was dressed at that time in a dark coat, an old blue shirt, and a pair of overalls over a couple of pairs of trousers, wearing ordinary work shoes. Rile Odom says that he was at his father's house that day and learned of the separation of Rex Ray from his (Odom's) sister, and that along in the afternoon he started home riding horseback. That on his way home he overtook Rex Ray and Dink Dukes, and that they told him they were leaving the country, and were going across the river if they could find some place to ford that night. Odom says that he told them if they couldn't get across the river that night to come and stay all night at his house and wait until next morning and go across. He separated from them near the Hisaw store and post office, their intention being to ford the river, and his to return home. He says that about an hour, or near that time, after he returned home, that Rex Ray and Dink Dukes appeared at his house, stating that they could not find a way to ford the river that night. Odom lived in a small two-room log house not far from the west bank of the Arkansas river. They all went to bed in one room; Rex Ray and Dink Dukes and Rile Odom sleeping in one bed, Rile's wife, Mary, and her two children sleeping on another bed, and Emma Odom sleeping on a pallet close to these beds. They state: That about 12 o'clock that night somebody came to the front of their house and halloed "Hello!" That Rile Odom lighted a lamp and opened the door. That Bob Hisaw and Bill Hisaw came into the room. That as soon as he came in Bob stated, "There is going to be hell here in a few minutes." Rile says that he told Bob that he didn't want any hell there that night. That Bob immediately walked over to the bed in which Dink Dukes and Rex Ray were lying, turned the covers back, and with the remark to Rex Ray, "Wake up, old boy!" commenced to shoot him in the breast with loads from a pistol. That Bob Hisaw shot Rex Ray five times in the breast, and then stepped back from the bed toward the fireplace, remarking in substance to the effect, "Now, I guess you will burn my barn, and poison my horses, and sneak up behind me and cut my throat, and take me away from my little children," to which Rex Ray is alleged to have replied, "No, no, Bob," whereupon Bob said, "Well, I guess you need another," and reloaded his pistol, stepped back to the bed, and fired another load into Ray's head. The witnesses then say that Bob turned around to each of them with his drawn pistol, stating that if they said anything about it they would go the same way. He then directed Dink Dukes and Bill Hisaw and Rile Odom to help him put Ray's clothes on, which was done, and the body wrapped in a blanket and quilt, carried out and placed on a horse which Bob Hisaw led and Dink Dukes rode, holding the body in front of him across the horse, and Bill Hisaw walked beside the horse out to a field about 200 or 300 yards from Rile Odom's house, where the body was thrown into a gap and covered up with brush. Just when and by whom the body was buried does not appear from the record. Rile Odom did not accompany the parties away from the house. Some time after these parties left with the body of Rex Ray they again appeared at Rile Odom's house and washed their hands, stood around and talked, and finally Bill Hisaw and Bob Hisaw and Dink Dukes left. The next morning Rile Odom and his wife and children and Emma Odom all went up to old man Dick Odom's house. They stayed around there two or three days, and afterwards moved to a little house on Bob Hisaw's place, about a quarter of a mile from where he lived, and were still living there at the time of their arrest on the 28th day of June, 1912. Dink Dukes stayed around in that neighborhood for a while, and then disappeared. Bill Hisaw stayed on the farm there with Bob up until the day that Ray's remains were disinterred. Bob Hisaw also stayed there until that time. Old man Odom and his wife and Lizzie Ray testify that on the night of the 13th of February, 1912, Bob Hisaw and Bill Hisaw came to their house. That Bob asked if Rex Ray was there, and was told that he had left that evening. Bob was drinking, and had some whisky with him, and offered them a drink of whisky, and then left. This was about an hour before he is said to have appeared at

Rile Odom's house. Dick Odom and Rile Odom lived about four miles apart. There is some evidence in the record to the effect that Bob Hisaw and Rex Ray had had some trouble over a hog which Bob had either lost or it had been stolen, and there is evidence to the effect that Rex Ray had made threats against Bob Hisaw just a short time before the homicide to the effect that there would be trouble between him and Bob if Bob came over to Rile Odom's to a dance that Rile intended to have, and danced with his (Rex Ray's) wife. It appears that Bob Hisaw and Rex's wife had been neighbors and friends ever since they were boys and girls together. There is also some evidence to the effect that Rex Ray had been married previous to his marriage to Lizzie Odom, and that his first wife had died mysteriously, and that Rex Ray was tried for killing her. This evidence, we presume, was admitted for the purpose of indicating that Lizzie Ray was afraid that Rex would kill her, and that she instigated her brothers and his friends to kill Rex and bury him. On the other hand, the theory of the state is that there was hard feeling between Bob Hisaw and Rex Ray, and that Rex had indicated that he intended to do Bob some injury both to his person and his property, and that Bob was infuriated thereby, and on this occasion was drinking, and concluded he would put Rex out of the way in order to prevent any future trouble. The jury adopted the latter theory of the killing, and there is ample evidence in the record to support the conviction.

The defense relied upon was an alibi, Bob Hisaw testifying that he was at home from a little after dark on the evening of the 13th of February, 1912, all the balance of the night, and that he sat up with a sick child of his until after midnight, and that his wife and Hiram Thomas and Jeff Rainwater, his cousin, and Idus George were all at his house that night sitting up with the sick child. He is corroborated by all of these witnesses, who were shown to be either relatives or very intimate friends of his, at whose places and with whom he counseled and conversed during the time he was scouting from the 28th day of June, 1912, up until October, 1914. Bob explains the fact that he went on the scout by stating that he had heard that the Odoms were going to testify that he killed Rex Ray, and that he did not know just when they would say it was done, and ran off until he could find out what their testimony would be. It appears, however, that after Bill Hisaw was tried and acquitted and the testimony of all these state witnesses became public, even after that time Bob returned to near the scene of the homicide and counseled and advised with those people who afterwards corroborated him in his alleged alibi. This was either late in the year 1912 or early in the year 1913, and yet after all that happened Bob again went on the scout and stayed for a period of over a year, and never did surrender himself to the officers.

This killing, according to the testimony of the state's witnesses, was as cold blooded, cruel, and malicious as any of which we have read. If there ever was a case deserving of the death penalty this is one. A defenseless man shot in the bed while asleep without warning, without opportunity to defend himself, or even to say good-bye, and then after the defendant had shot him five times, and after reloading his pistol, returned to the bed because he was still alive, and put a final bullet into his brain, and then, after threatening the lives of those who were present, compelled some of them to dress the corpse and help load him onto a horse and conceal him in a deep ravine near the Arkansas river, where he was afterwards buried.

A. L. Beckett, of Stigler, R. C. Roland, of Okmulgee, and E. O. Clark, of Stigler, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). [1, 2] The regularly elected county attorney being disqualified by reason of having been employed by the defendant as counsel in his defense, prior to his election to the office of county attorney, the regular district judge of the district while holding court in another county in the district appointed Mr. Guy A. Curry, an attorney of the Haskell county bar, as special prosecuting attorney in this case. This appointment was made some two years after the return of the indictment; the special prosecutor being appointed merely for the purpose of preparing the state's case for, and conducting, the trial.

The counsel for defendant filed numerous motions and took various exceptions, all based upon the action of the district judge in appointing a special county attorney while not in open court in Haskell county. It is contended that our statutes require that a special or substitute county attorney must be appointed by the court, and that an appointment by the presiding judge in vacation is void, and all subsequent proceedings conducted by such an appointed special county attorney are an absolute nullity. Counsel cite the case of Dodd v. State, 5 Okl. Cr. 513, 115 Pac. 632, in support of their contention that this appointment was void. However, in the Dodd Case, the special county attorney was appointed by a district judge who had, prior to the appointment, become disqualified, and the special county attorney himself failed to properly qualify according to the laws of this state.

In this case it is nowhere contended that the district judge making the appointment was disqualified to act, nor that the special county attorney failed to take the required oath of office before acting. On the contrary, it is made to appear affirmatively that the district judge was qualified to make the appointment, and that before taking any action in the case the special county attorney properly qualified.

The sole contention in this case is that the appointment was void because not made in open court and the order entered upon the minutes. Section 1558, Rev. Laws 1910, provides:

> "The district court, whenever there shall be no county attorney for the county, or when the county attorney shall be absent from the court, or unable to attend to his duties, or disqualified to act, may appoint, by an order to be entered in the minutes of the court, some suitable person to perform for the time being the duties required by law to be performed by the county attorney, and the person so appointed shall thereupon be vested with all the powers of such county attorney for that purpose. Such attorney shall be paid a reasonable compensation for his services by the county for which he is so appointed."

The foregoing statute was intended to give the district court the power and authority to appoint temporarily a county attorney to act in the place and stead of the regular county attorney under the circumstances enumerated in the statute. Prior to the adoption of the Harris-Day Code the words "or disqualified to act" were not contained in this statute. They were inserted by the codifiers of that Code. Independent of the statute, however, the court would have the inherent power to appoint a special county attorney under any of the circumstances therein enumerated. It is essential to the very life of the court that the proper officers be in attendance upon it. The power to appoint such officers is necessary for the protection and existence of the court and absolutely essential to the administration of justice and the enforcement of all our laws. It would be an indefensible reproach upon our institutions if crimes should go unpunished and the public business remained unattended to for want of power in a court of general jurisdiction to appoint some one to supply the place of the regular elected officer when absent from court or disqualified to act. The courts of this state are not powerless to this extent. They have the right and power to preserve their life, and the machinery of the court cannot be kept in motion without its proper officers. It is therefore an inherent power of the presiding judge of the court to supply these officers when there is a temporary vacancy or a disqualification in any particular case. We conceive it our duty therefore to give the foregoing statute a broad, practical, and common-sense construction in order to carry into effect the purposes for which it was enacted, and to give expression to this inherent power of courts of general jurisdiction in this state. We admit that it was intended that the special county attorney should be appointed by the court; but should an irregularity in the appointment destroy its effect and render void all the acts of this special officer where it appears conclusively from the record that with the knowledge and consent of the court the officer proceeded to his duty? In this case while the original appointment was made by the judge in vacation, yet when the case was called for trial, and objection made to that appointment, the judge in open court before proceeding to the trial of this case announced that the appointment had been made by him, and permitted the special county attorney thus appointed to proceed as the representative of the state in this action. It is admitted also by counsel for the defendant that the regular county attorney was disqualified in this case; that the special county attorney who represented the state was qualified to act, and the very judge who made the appointment in vacation presided at the trial. It is our opinion, therefore, that the action of the trial judge in permitting the special county attorney to act under these circumstances amounted in itself to an appointment made by the court, and was a specific ratification by the court of everything that the presiding judge had done in vacation and at his chambers. The purpose of having the appointment made by the court is to permit a judicial determination of the fact that some ground exists under the statute which permits an appointment to be made. That such a ground did exist clearly appears from the record of the trial and proceedings in this case. The purpose of having the order of appointment noted in the minutes of the court is to supply a record thereof, and in our opinion it is a substantial compliance with that provision of the statute if the order of appointment be recorded on the journal of the court and made a part of the proceedings of the case, as was done in this instance. In the case of State v. Duncan, 116 Mo. 288, 22 S. W. 699, it was held:

> "Where there was no prosecuting officer in attendance on the trial, the court had the power, aside from Revised Statutes 1889, § 643, to appoint a temporary representative of the state; and the fact that, in the absence of the circuit attorney, the trial court permitted another to represent him was tantamount to an appointment."

And again, section 5908, Revised Laws 1910, provides:

> "If the county attorney fails, or is unable to attend at the trial, or is disqualified, the court must appoint some attorney at law to perform the duties of the county attorney on such trial."

The latter statute permits the court to appoint a special county attorney for the trial of any particular case where the regular county attorney is disqualified. These statutes are merely expressive of the inherent powers of a court of general jurisdiction, and when it is made to appear, as it does in this case, that a contingency arose under which it was proper for the court to appoint a substitute for the county attorney, although the appointment be made in vacation, if afterwards in open court the same judge recognizes the appointment and permits a qualified person to act upon the trial in the place and stead of the disqualified county attorney, there has been a sufficient compliance with the statutory requirements to validate said appointment.

[3, 4] It is also contended that the court erred in denying the motion to dismiss the action because the special county attorney held a court of inquiry in which certain of the witnesses for the state were examined under oath relative to the commission of this offense. Counsel for appellant have cited us to no statute which makes such action a ground for dismissing a criminal action or setting aside an indictment. The grounds upon which an action may be dismissed and an indictment set aside are clearly set out in the statute, and the fact that the county attorney or his substitute examines certain witnesses under oath in the absence of the defendant is not among the grounds enumerated therein. Subdivision 2 of section 1 of chapter 68 of the Session Laws of 1913 permits the county attorney,

> "on approval of the county judge or district judge, [to] issue subpœnas in felony cases and call witnesses before him and have them sworn and their testimony reduced to writing and signed by the witnesses at the cost of the county. Such examination must be confined to some felony committed against the statutes of the state and triable in that county, and the evidence so taken shall not be receivable in any civil proceeding."

We are not concerned with the wisdom or policy of this statute. That was a matter for the Legislature to determine, and, having determined that such examinations were necessary in felony cases, it becomes only the province of this court to construe such statute and pass upon its constitutionality if questioned. In this case it is not contended that the statute is unconstitutional, but only that the county attorney is powerless to hold such an examination in the absence of the defendant, or his counsel, and that his action in so doing is prejudicial to the substantial rights of the defendant in that it has a tendency to intimidate the witnesses thus examined and compel them to testify to facts which they otherwise would not. We cannot appreciate the logic of the reasoning that such an examination would be prejudicial to the substantial rights of a defendant. Upon the trial of a criminal case defendant has a constitutional right to be confronted with the witnesses against him, but prior to the trial the Legislature has the power to provide for the discovery of evidence showing the commission of crime. Neither the defendant, nor his counsel, have the right to be present at a grand jury investigation. It ofttimes happens that after an indictment has been returned, or a preliminary examination into a felony has been had, the county attorney hears of other evidence which, if true, would be valuable in the trial of the case, and for the purpose of permitting the county attorney to examine the witnesses, where such reports come to him, who are supposed to have knowledge of those facts, it is essential to the administration of justice, and the Legislature has seen fit so to provide, that when the district or county judge approves thereof that those witnesses be examined under oath and at the expense of the county. In a capital case it is essential that the county attorney indorse the names of these witnesses upon the indictment or information and serve a list of them with their respective post office addresses upon the defendant at least two days before the case is called for trial. The defendant therefore is provided with a means by which he may be informed as to what witnesses will be used by the state, and in that way have access to determine what their testimony will likely be. This is a privilege that is accorded him by the Constitution, and there was full compliance with that provision in this case. The defendant upon the trial had the right to be confronted with these witnesses who were thus examined in his absence. He had the right to fully cross-examine them as to anything that happened at the proceeding wherein the county attorney had examined them, under oath, and if they had been intimidated or compelled by the county attorney to make disclosures which were not true, or if any undue influence had been exerted upon them at such examination, those matters were proper to be elicited upon the examination at the trial. The objection here interposed, therefore, in our opinion, is directed more to the credibility of witnesses thus obtained, and does not contravene any of the constitutional or statutory rights of the defendant. The court did not err, therefore, in overruling the motion to dismiss the action and set aside the indictment on this ground. Other alleged errors are assigned as causes for reversal based upon the invalidity of the appointment of the special county attorney, but in view of what we have heretofore said it is unnecessary to discuss these assignments.

[5, 6] The regular panel of jurors being insufficient from which to select a jury to try this case the court issued an open venire, directed to the sheriff, for 25 qualified men, to be selected from the body of the county. The defendant contended that these jurors should have been drawn from the regular jury box. This contention is without merit, for the statute specifically provides that:

> Under circumstances such as this "the jury may be completed from talesmen, or the court may direct that an open venire be issued to the sheriff or other suitable person, for such number of jurors as may be deemed necessary, to be selected from the body of the county, or from such portion of the county as the court may order." Section 3693, Rev. Laws 1910.

However, when the special panel of jurors summoned by the sheriff were returned into court, counsel for the defendant moved to quash the panel, upon the ground that the sheriff was disqualified to act, being a probable witness for the state in the case and having offered a reward for the apprehension of the defendant. The court sustained this motion. Thereupon it was agreed between counsel for the defendant and the special county attorney that Mr. Neil B. Gardner should be appointed as a special officer to bring in another jury. The court appointed Mr. Gardner, and he took the required oath in the presence of the court, and received instructions from the court. Mr. Gardner was to serve an open venire of 30 names, and summoned as a part of the panel 18 of the jurors who had previously been summoned by the sheriff. There was no collusion between the sheriff and Mr. Gardner in summoning these particular jurors. The record discloses that Mr. Gardner summoned them without any knowledge that they had theretofore been summoned by the sheriff, without any directions from the sheriff or any other person to summon those particular persons, but that they were mostly farmers living in various parts of the county, some of whom he met upon the streets and some around the courthouse; that in addition to these men he went out over the county and summoned 12 more qualified men. The record also shows that Mr. Gardner made no improper remarks to any of these jurors at the time they were summoned.

Counsel for the defendant interposed a motion to quash the entire panel summoned by Mr. Gardner, which motion was by the court overruled, and thereupon counsel objected to the placing of the names of these 18 jurors, who had previously been summoned by the sheriff, into the jury box for the trial of this case. This motion was also overruled by the court and exceptions taken by counsel for defendant. Both the quashing of this second panel and the action of the court in permitting the names of these 18 jurors to be placed in the box are alleged as grounds for reversal of this judgment. In our opinion, these contentions are without merit. It is not ground for quashing the entire panel that some of the jurors on the panel had been previously served by an officer held to be disqualified to act. When brought into court on this panel they were served by a qualified officer, and one whom both the state and the defendant had agreed upon. The entire panel may only be quashed when it is served by an officer who is disqualified within the meaning of section 5848, Revised Laws 1910, which provides:

> "When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner as if made to a juror."

Was it error, however, for the trial court to permit the names of these jurors to be placed in the box and used upon the trial? Was the action of the court in so doing prejudicial to the substantial rights of the defendant? None of the conditions which were shown to exist in the cases of Harjo v. State, 1 Okl. Cr. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013, and Schuford v. State, 4 Okl. Cr. 513, 113 Pac. 211, are shown to exist in this case. In the Harjo Case it was shown that the officer who summoned the talesmen did not act impartially, but would only select those whom he thought were favorable to the prosecution. In the Schuford Case after the sheriff was disqualified the special officer summoned the very jurors that the sheriff had theretofore summoned, and this was done by express direction from the sheriff. This, of course, was practically a resummoning of the same jury by the sheriff. Not so in this case. These 18 men who were summoned by the special officer were summoned by him without any direction of the sheriff, or without any knowledge on the part of the sheriff that they were being summoned a second time or without knowledge by the special officer that the sheriff had previously summoned any of them. If they were disqualified it was not because of any improper conduct on the part of the officer in summoning them. In our opinion, they stood upon the same basis as any other member of this special panel that was brought in by a qualified officer. If defendant had any legal ground for challenge it was to the individual juror and not to the panel, and after these names were permitted to be placed in the box it was the duty of counsel for defendant to challenge them as individuals. This was not done. Therefore any objection to these individual jurors on the ground that they had previously been served by a disqualified officer was waived. In the case of People v. Vincent, 95 Cal. 425, 30 Pac. 581, the only instance which, after a diligent search, we can find where the exact question here passed upon was ever decided, it was held:

> "The fact that, after a challenge to a panel had been sustained on the ground of bias and prejudice of the deputy sheriff summoning the jurors, a few of the persons composing it were summoned on a second venire, is no ground for challenge to the second panel, but the objections should be made to the individual jurors."

We hold, therefore, that the trial court did not err in overruling the challenge to the panel of jurors served by the special officer, and also that by reason of the failure of the defendant to object individually to the 18 men who had previously been served by the sheriff on the ground that they were disqualified to act he has waived the error, if any, occasioned by the trial judge permitting the names of these men to be placed in the jury box. So far as is disclosed by the record in this case, each of the men who served upon the jury, out of the 18 complained of, were accepted as individual jurors without further objection by the defendant. Neither does the record show that the defendant exhausted all of his peremptory challenges to individual jurors, or that he was required to exercise a peremptory challenge to any of the jurors previously summoned by the sheriff. Under such circumstances this court cannot hold that a fair and impartial jury was not afforded the defendant in the trial of this case.

[7] It is also contended that the court erred in refusing to give instructions Nos. 2 and 3 requested by the defendant, which are as follows:

> 2. "You are instructed that a conviction cannot be had upon the testimony of accomplices unless they be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."
>
> 3. "In this connection you are instructed that an accomplice is one whose connection with the commission of the crime is such that he could be indicted for the offense of which the accused is being tried."

If there is doubt as to whether from the evidence a witness is or is not an accomplice, then the trial court should define an accomplice and leave the determination of that fact to the jury, together with a proper instruction that the defendant cannot be convicted upon the uncorroborated testimony of an accomplice. In this case, however, it was not error for the trial court to refuse to give these requested instructions. We have carefully examined the evidence adduced both by witnesses on behalf of the state and by those for the defendant, and it nowhere appears that any of these witnesses for the state were accomplices under our statutes. The testimony shows that perhaps some were accessories after the fact, and were guilty of a separate and distinct offense from that for which the defendant was tried. Under our Code all persons who are concerned in the commission of a crime whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, are principals. Section 2104, Revised Laws 1910.

> "All persons who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction, or punishment, are accessories." Section 2105, Revised Laws.

There is no evidence in this record to the effect that any of the witnesses who testified for the state either aided, abetted, or encouraged the defendant to commit this crime, although some of them were present when the crime was committed, and after its commission aided and abetted the defendant in concealing the same. Had there been a question of doubt as to whether the evidence shows that these parties were or were not accomplices, then the court should have given the instructions requested, or proper ones along the same lines; but where the fact is not disputed, and there is no evidence to show that any witness for the state was an accomplice, there is no error in refusing to give an instruction upon the necessity of corroborating an accomplice.

[8] It is also contended that the court erred in refusing to give the following instruction:

> "You are instructed that if during the course of this trial any evidence has been offered which is capable of two constructions, one favorable to the defendant and one unfavorable, that it will be your duty to give to such evidence the construction most favorable to the defendant."

This instruction was properly refused because it invaded the province of the jury and tended to deprive the jury of the right to determine the weight of the evidence and the inferences properly to be drawn therefrom. In the case of Dunn v. State, 125 Wis. 181, 102 N. W. 935, the court said:

> "The court was requested to instruct the jury: 'Where evidence is offered which is susceptible of two constructions, one of which tends to guilt and the other to innocence, it is the duty of the jury to adopt the latter.' We are satisfied that this request does not embody a correct rule for the guidance of the jury in considering the evidence before them. It would amount to a direction to the jury that any evidentiary fact submitted to their consideration must be considered as tending to prove innocence if it can possibly be so construed. This would deprive juries of the right to give to evidence the significance which they find and believe to be its natural and reasonable interpretation, in view of all the facts and surrounding circumstances of the case. The duty of interpreting evidence and drawing inferences therefrom in criminal trials is peculiarly within the province and the good judgment of the jury, and should not be infringed upon by artificial rules for determining its weight, and limiting the inferences they might reasonably draw therefrom."

See, also, Kennedy v. State, 40 South. 658.[1]

[9, 10] Counsel for appellant also contend that there was error by the trial court in admitting certain incompetent and irrelevant evidence, and in making certain remarks which are alleged to be prejudicial to the accused. There is embodied in the brief long excerpts from the testimony of several of the witnesses, but it is nowhere pointed out by counsel why the admission of this evidence was incompetent or irrelevant. No reasons are given why the trial court should have rejected the same or wherein the remarks of the trial court injured the accused. Counsel leave it up to this court to guess that the admission of this evidence was prejudicial, and that the remarks of the trial court were injurious. We have examined this entire record, read the evidence carefully, and given due consideration to all the remarks made by the trial court; we cannot say that there was error in this particular which would authorize this court to reverse this judgment.

After a full and careful consideration of all the points urged by counsel for the appellant and assigned as reasons for a reversal of this judgment, we conclude that none of the errors complained of were of such a fundamental nature or so prejudicial as to deprive the accused of that fair and impartial

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[1] Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 147 Ala. 687.

trial which is guaranteed to him under the Constitution and laws of this state.

The judgment is therefore affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(101 Kan. 52)

STATE v. McCULLOUGH. (No. 20702.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Indictment and Information 🔑137(1)—Quashing Information—Formal Defect.

Rule followed that an information charging a criminal offense cannot be quashed for a mere formal defect which does not prejudice the substantial rights of the defendant.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 480.]

2. Indictment and Information 🔑161(1)—Trial Amendment—Discretion of Court.

Rule followed that an information may be amended during the trial on mere matters of form, at the discretion of the court, when the rights of the defendant are not prejudiced thereby.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516, 522.]

3. Indictment and Information 🔑161(4)—Name and Title of Prosecuting Attorney—Amendment.

In the text of an information, the prosecuting attorney gave his name and official title, but at the conclusion of the charge his official title alone appeared, and his signature was inadvertently omitted. *Held*, the defect was one of form, and the information could not be quashed for such defect, and the county attorney's signature could be supplied, with leave of court, at any time during the trial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 518.]

(Additional Syllabus by Editorial Staff.)

4. Indictment and Information 🔑52(2)—Verification by Third Party—Verification by County Attorney.

Where an information was positively verified by another person, it did not require a verification by the county attorney on his mere "information and belief."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 165, 166.]

Appeal from District Court, Sedgwick County; Thornton W. Sargent, Judge.

Ada McCullough was convicted of maintaining a liquor nuisance, and she appeals. Affirmed.

J. C. Milton, of Wichita, for appellant. S. M. Brewster, Atty. Gen., and Ross McCormick, Glenn Porter, and H. C. Castor, all of Wichita, for the State.

DAWSON, J. The defendant was convicted of maintaining a liquor nuisance and her appeal relates to the fact that the county attorney had inadvertently neglected to sign the information and was permitted to sign it after the jury was impaneled.

The information reads:

"I, Ross McCormick, county attorney of Sedgwick county, etc., come now here and give the court to understand and be informed: * * * [Here follows the charge.] * * * Contrary to the form of the statutes, etc. ———, County Attorney."

There was a positive verification of a private citizen appended to the information.

[1-3] The motion to quash raised all manner of objections to the information except the only pertinent one—the want of the county attorney's signature. It was no abuse of the court's discretion to permit the county attorney to attach his signature when this mere formal defect was specifically pointed out. In the text of the information, the defendant was advised that the lawful official, Ross McCormick, county attorney, was the relator who was setting the machinery of the law in motion against her. So did the words "county attorney" at the conclusion of the charge. The defendant does not show how the want of this signature prejudiced her in the slightest degree.

Many graver informalities have been held insufficient to disturb judgments where the court had no doubt about the justice of the net result. See State v. Cooper, 31 Kan. 505, 3 Pac. 429; State v. Bugg, 66 Kan. 668, 72 Pac. 236; State v. Coover, 69 Kan. 382, 76 Pac. 845. Under the inhibitions of the Criminal Code, § 110 (Gen. St. 1915, § 8024), the court could not have sustained the motion to quash; and the defect, being only one of form and not of substance, could be supplied at any time during the trial. Crim. Code, § 72 (Gen. St. 1915, § 7982).

[4] Since the information was positively verified by another person, it did not require a verification by the county attorney on his mere "information and belief." State v. Brooks, 33 Kan. 708, 7 Pac. 591.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 152)

HODGE v. BISHOP et al. (No. 20918.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Appeal and Error 🔑1194(2)—Mandate of Supreme Court—Construction.

A mandate from the Supreme Court directing a trial court to adjudicate a certain matter does not direct that any particular judgment be rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4651–4655.]

2. Appeal and Error 🔑907(2)—Judgment Without Support in Findings—Reversal.

A judgment will not be reversed on the ground that it is not supported by, or is contrary to, the findings, where the judgment is the only one that can be rendered consistent with the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2913, 2915, 2916.]

3. Appeal and Error 🔑1039(1)—Harmless Error—Omission to File Late Pleading.

It is not reversible error to refuse to permit a belated pleading to be filed, when the pleadings on file present all the issues necessary for a complete determination of all matters in controversy.

4. **Appeal and Error** 🔑1001(1)—**Finding of Jury—Setting Aside.**

It is not error to refuse to set aside a finding of a jury, where the finding is supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933.]

Appeal from District Court, Reno County.

Action by L. D. Hodge against Warden Bishop and Flora Bishop, with counterclaim by defendant Flora Bishop. Judgment for plaintiff in part and for defendants in part, and defendants appeal. Affirmed.

C. M. Williams, of Hutchinson, Sam Jones, of Lyons, and D. C. Martindell, of Hutchinson, for appellants. F. L. Martin, Carr W. Taylor, Van M. Martin, and John M. Martin, all of Hutchinson, for appellee.

MARSHALL, J. This is the second appeal in this case. Hodge v. Bishop, 96 Kan. 419, 151 Pac. 1105. The cause was remanded, with directions to the trial court to adjudicate the counterclaim of the defendant Flora Bishop. Immediately after the cause was remanded, the plaintiff asked permission to file an amended answer and cross-petition to the counterclaim of defendant Flora Bishop. This permission was refused. No additional evidence was introduced. The trial court specifically approved the findings of the jury that had been made before the first appeal. These findings were as follows:

"Q. No. 1. Did defendant pay the rent according to the agreement with the plaintiff? A. No.

"Q. No. 2. How much, if anything, did defendant owe plaintiff for rent at the beginning of this suit? A. $400.

"Q. No. 3. Did L. D. Hodge, in January, 1907, say to Warden Bishop that if he found any land in Arkansas that suited him for a farm, for himself and wife, that he could sell that land in controversy and put the proceeds into Arkansas land? A. No.

"Q. No. 4. Did L. D. Hodge, in February, 1907, say to Warden Bishop and his daughter, Florence Bishop, that if they would pay him two-fifths of the crop and $100 per year for two years, and afterwards a less rent, during his natural life, that they could go upon the land in controversy and improve it and make a home for them? A. Yes.

"Q. No. 5. Did Warden Bishop and Florence Bishop in pursuance of said proposition go upon said land in controversy, and pay two-fifths of the crop and $100 per year for two years as rent for said land? A. Yes.

"Q. No. 6. Did L. D. Hodge in 1910 say to Warden Bishop and Florence Bishop that he would only require an annual rent for said land in controversy of one-third of the crop raised upon said land? A. Yes.

"Q. No. 7. Did L. D. Hodge in 1911 say that he would only require the said Warden Bishop and Florence Bishop to pay as rent for said land the remainder of his life the one-third of the crop raised upon said land in controversy? A. No.

"Q. No. 8. Did Warden Bishop and Florence Bishop go upon the land in controversy in pursuance of the proposition of L. D. Hodge made in February, 1907, that if they would pay him two-fifths of the crop raised upon said land and $100 per year for two years, and afterwards a less rent during his natural life, take possession of the same and make lasting and valuable improvements on said land? A. Yes.

"Q. No. 9. If you answer the last question in the affirmative, then what improvements did they make upon said land? A. All with the exceptions of the first cost of old dwellings.

"Q. No. 10. Did Warden Bishop agree to pay L. D. Hodge $5 per acre for all land growing alfalfa? A. No.

"Q. No. 11. Did Warden Bishop deliver to J. W. Brinkerhoff a check for the sum of $103 to pay L. D. Hodge for any balance due said Hodge for rent of said land at the time of the giving of said check? A. Yes.

"Q. No. 12. Did Warden Bishop agree to pay L. D. Hodge the sum of $4 per acre for all land growing cane? A. No.

"Q. No. 13. Was the check given to said J. W. Brinkerhoff, attorney for L. D. Hodge, sufficient in amount to pay said Hodge all rent due him at the time of the giving of said check? A. No."

The court made additional findings of fact as follows:

"That it was agreed by the parties that if the defendant desired to move away from said land at any time before the death of the plaintiff that the plaintiff would pay the defendants for the improvements made by the defendants on said land.

"That the defendants at no time agreed to live on said land until the death of the plaintiff or for any definite time, and they had a right to move off of the land at any time they should choose and collect from the plaintiff full payment for the expenses of their improvements, and the court finds that under the contract the defendants have the right to make such improvements on said farm as are suitable to make it a home for the defendants, and that the defendants have a right to occupy said land for a home throughout the lifetime of the plaintiff, and that they have a right to vacate said farm at any time and collect the cost of their improvements, and that if they occupy the same until the death of the plaintiff that his estate will then be indebted to the defendants for the value of said improvements, said value to be determined as to the date that they were made, and the defendants, having the use of said improvements, are not entitled to collect interest.

"The court finds that the plaintiff did not agree or promise that the title of said land should pass to the defendant Flora Bishop at plaintiff's death or at any other time. Any expression by plaintiff of his intentions that said land should be Flora's did not amount to an agreement that it should be Flora's, and plaintiff was not bound by said statements."

On these findings of the court and the jury judgment was rendered as follows:

"That upon the counterclaim of the defendants, Flora Bishop and Warden Bishop, that their equitable right under their verbal contract with the plaintiff is held and declared to be a lease for and during the life of the plaintiff, unless they voluntarily vacate and surrender the possession of the land in controversy; * * * that by the terms of said lease, the defendants are to pay and deliver to the plaintiff, one-third of all crops grown upon said land delivered upon the market; that the defendant shall have the right to use and occupy all of the said premises and the improvements thereon upon the payment of one-third of the crops as rent until the death of the plaintiff, unless they voluntarily vacate the same; that at the expiration of said lease by the death of the plaintiff or by the vacation of the premises there shall be due the defendants, Warden Bishop and Flora Bishop, for the improvements upon the said premises, the sum of $1,800. Said sum shall not be augmented by interest or decreased by depreciation of the value of the improvements, and the rights of the said defendants under the said lease are hereby quieted against the claims of the plaintiff, which are contradictory or adverse thereto."

[1] 1. The defendants insist that the court erred in overruling their motion for judgment on the findings of the jury. They contend that judgment should have been rendered in their favor in obedience to the judgment of this court on the former appeal. The order of this court was not that judgment be rendered on the findings nor that any particular kind of judgment be rendered. The order was that the trial court adjudicate the counterclaim of Flora Bishop.

[2] 2. All parties to this action complain of the judgment rendered by the trial court. The defendants insist that the district court erred in rendering judgment that the defendants had only a lease on the land in controversy during the life of the plaintiff, and erred in not rendering judgment that the defendants had an equitable interest in the real property and would have the légal title thereto on the death of the plaintiff. They further complain that the court erred in overruling their motion to set aside the conclusions of law.

The plaintiff contends that no judgment should have been rendered in favor of the defendants.

The validity of the judgment depends on the findings. These were based on the evidence introduced on the trial, and, except in one particular not material at this time, that evidence has not been abstracted. It is presumed that the findings of the court were supported by the evidence. The findings are not contradictory; they are consistent with each other. The judgment that was rendered was the only judgment that could have been rendered under the findings made by the jury and by the court.

[3] 3. The plaintiff asks a review of the order denying his application for leave to file an amended answer and cross-petition to the counterclaim of the defendant Flora Bishop. The plaintiff's petition was filed September 15, 1913. Warden Bishop's answer was filed October 17, 1913. In that answer Warden Bishop set out the interest claimed by Flora Bishop in the land, and asked that she be made a party to the action. The plaintiff replied to the answer of Warden Bishop. Flora Bishop was made a party defendant, and afterward filed her interplea, in which she adopted the allegations of the answer of Warden Bishop, although the interplea was not filed until after the cause had been tried. The plaintiff, by Warden Bishop's answer, was informed of the claims and interest of Flora Bishop. The issues between the plaintiff and Warden Bishop were such that the facts in regard to those issues could not be ascertained without at the same time showing the interest of Flora Bishop in the land.

Under these circumstances it was not reversible error for the trial court to refuse to permit the plaintiff to file an amended answer and counterclaim as against the interplea of Flora Bishop.

[4] 4. The plaintiff moved the court to set aside the finding of the jury, numbered 6, on the ground that there was no evidence to support it. An order denying that motion is assigned as error. The plaintiff abstracted that portion of the evidence which tended to support this finding of the jury. The evidence thus abstracted amply supports the finding. Under that evidence it was not error to deny the motion to set aside the finding.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 164)

STRAMEL v. HAWES. (No. 20923.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

ATTORNEY'S LIEN—SUFFICIENCY OF EVIDENCE.

The evidence examined, and found to sustain the judgment.

Appeal from District Court, Edwards County.

Action by Anton Stramel against A. B. Hawes, in which an attorney's lien upon the funds recovered by defendant in the hands of the clerk of the district court was sustained in favor of F. Dumont Smith, motion for new trial overruled, and defendant appeals. Affirmed.

F. L. Slaughter and M. A. Merten, both of Kinsley, for appellant. F. Dumont Smith, of Hutchinson, for appellee.

BURCH, J. The proceeding was one for the enforcement of an attorney's lien on funds in the hands of the clerk of the district court, recovered by the defendant in the case of Stramel v. Hawes, 97 Kan. 120, 154 Pac. 232. After a hearing, the lien was sustained. A motion for a new trial was filed, and, because it was suggested that the district judge was prejudiced, the motion for a new trial was heard by a judge pro tem. The matter was practically retried, and the motion for a new trial was overruled. The chief contention of the appellant is that the employment was covered by a written contract in which the lien claimant's compensation was fixed. The evidence, which need not be recited, failed to sustain the contention.

There is nothing else in the case, and the judgment of the district court is affirmed. All the Justices concurring.

(101 Kan. 9)

TAYLOR v. THISLER. (No. 20408.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. FRAUD 🔑66—ACTION FOR DAMAGES—SPECIAL FINDINGS—CONSTRUCTION.

The proceedings examined, and *held*, that special findings of fact show that the plaintiff's claim respecting the nature of the transaction out of which the action arose was rejected by the jury, and the defendant's claim was accepted; that the effect of the findings was not impaired by any matter made the basis of an assignment of error; and that they are conclusive upon the rights of the parties.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 75.]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR 🔑302(3)—DISCRETION OF TRIAL COURT—OPENING CASE—NEWLY DISCOVERED EVIDENCE.

Where plaintiff during argument filed a written application to open the case for the admission of newly discovered evidence and included a request for cross-examination of defendant with respect thereto, which application was not verified, and on the motion for a new trial the newly discovered evidence was not produced by affidavit, deposition, or oral testimony of any witness, it cannot be determined that the overruling of the request for further cross-examination was an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747.]

Appeal from District Court, Dickinson County.

Action by Nancy E. Taylor against Otis La Porte Thisler, Jr. Judgment for defendant, and plaintiff appeals. Affirmed.

W. S. Roark and Thomas Dever, both of Junction City, for appellant. G. W. Hurd, Arthur Hurd, and Bruce C. Hurd, all of Abilene, for appellee.

BURCH, J. The action was one for damages for false representations relating to the quantity of land embraced in a farm which the plaintiff purchased from the defendant. The verdict and judgment were for the defendant, and the plaintiff appeals.

[1] The case is a very simple one. The plaintiff's claim was that she bargained for a definitely represented number of acres at a stated price per acre. In payment for the land, the plaintiff transferred to the defendant a promissory note which she owned for $15,000, secured by mortgage. The face and the value of the note equaled the price of 150 acres of land, the represented quantity, at $100 per acre, the agreed price. This claim was supported by testimony. The defendant's claim was that he traded the farm without regard to acreage or price per acre, for the note and mortgage. This claim was also supported by testimony. With the verdict for the defendant the jury returned special findings of fact in which the essential features of the negotiations were found to be in accordance with the defendant's claim and so demolished the foundation for the plaintiff's lawsuit.

The plaintiff had a daughter, Mrs. Wibkin, who was her adviser and helper in trying to find a farm. Mrs. Wibkin visited the defendant's land several times, conducted negotiations for it, and otherwise acted for the plaintiff. On one occasion, Mrs. Wibkin went with the defendant to see the land. She inquired about the acreage, and the defendant said his deed called for 150 acres. Subsequently the plaintiff, an agent, Boles, who was acting for both the plaintiff and the defendant, Mrs. Wibkin, and the defendant, all met at the city of Chapman and went from there to look at the farm. Mrs. Wibkin and the defendant rode in the same buggy. She asked if the defendant was sure about the acreage, if he was sure "it was that much," meaning 150 acres. The defendant replied he did not know, he had never surveyed the place, and had no way of knowing except by the deeds; if she thought the acreage would not hold out, he had spent enough of his time and was willing to drop the deal. After inspecting the farm, the four persons mentioned returned to Chapman and went to the hotel there. The defendant narrated what occurred at the hotel as follows:

> "During the time we were there, they were talking about the acreage, and said it didn't hardly seem that there was that much land there, and wanted to know if I would be willing to pay for a survey, or half a survey, I don't remember which. I told them at that time I would not, and if they wanted to survey it they did it at their own risk; it wouldn't make any difference in my trade either way; I was simply trading them this farm of mine for the mortgage that they had on property in Junction City."

In getting a full description of land from the defendant, the mutual agent, Boles, asked him how many acres there were. The defendant replied there were supposed to be 150 acres; the deed and abstract called for 150 acres. At the request of Mrs. Wibkin. Boles made an investigation of the number of acres in the farm, by inquiring of old residents and by telephoning the county clerk. On the trip to the farm from Chapman, Boles rode in the same conveyance with the plaintiff. He narrated the conversation at the hotel in Chapman. The material portion of his testimony follows:

> "However, she asked Mr. Thisler about the acreage. She asked Mr. Thisler if he was sure there was 150 acres. He says: 'I don't know.' She says: 'Will you survey it?' He said: 'No.' She said: 'Will you stand for half of the survey?' He says: 'Mrs. Taylor, I will make a trade with you for your mortgage. If you want to survey that land, you can do so. It is no difference to me whether the acreage runs over or not. I am simply trading for the mortgage.'"

The defendant testified that he did not know, and had never attempted to ascertain, the number of acres in the farm; that he did not at any time, either to the plaintiff or to Mrs. Wibkin, fix a price on the farm by the acre; and that no acre price was ever mentioned between them.

The plaintiff testified the trade for the $15,000 note and mortgage had been talked about before she went to Chapman. She had no conversation with the defendant prior to the one which occurred at the Chapman hotel. She asked the defendant if he was sure there were 150 acres in the farm, besides the railroad and other abatements, and he said there were. He said there were 150 acres. He gave her his price there at Chapman. He told her the price was $110 per acre, and she agreed to take the land at $110 per acre. There was some talk about a survey, and the agent said the snow was too deep. She did not see the defendant again until the deed was drawn. Mrs. Wibkin narrated what occurred on that occasion as follows:

"Q. When was the third conversation? A. I think when the deal was made.

"Q. Where was that? A. At my mother's house.

"Q. Who was present? A. Mr. Thisler and Mr. Boles and myself and Mr. A. P. Trott.

"Q. What was said at that time? A. She said she would take the land. Mr. Thisler said he would take this mortgage in payment.

"Q. The deal had been made so far as the terms were concerned, and they just met there to draw the deed? A. The deal wasn't made that night. Mr. Trott was there to witness the signature.

"Q. I say, the deal had been made and the terms agreed upon before that? A. Yes, sir.

"Q. And they just met at that time to close it up? A. Yes, sir."

The jury accepted the testimony on behalf of the defendant, and found specially that the defendant offered to sell the land to the plaintiff for the lump sum of $15,000, that he received no consideration other than the $15,000 note and mortgage, that he told the plaintiff she could have the land surveyed, that he would trade it to her for the mortgage regardless of the number of acres, and that the plaintiff closed the deal without a survey. There were just two versions of the transaction which closed the trade, a positively stated number of acres at a definite price per acre, and a trade of the farm for the mortgage regardless of acreage and price per acre. Both versions could not be true, and there was no basis in the evidence for a third version. The findings are incompatible with the plaintiff's version. They are in exact accord with the defendant's version and in harmony with the general verdict for him. Therefore the controversy over the nature of the trade is at an end, unless something be discovered to impair the effect of the findings.

There was no instruction to the jury which induced the jury to accept the defendant's version of the transaction rather than the one proposed by the plaintiff.

There was a finding that the defendant represented the farm to contain "150 acres more or less." The finding negatives the plaintiff's claim that the defendant stated positively, in answer to pointed questions, that the farm certainly contained 150 acres. The finding is perfectly consistent with the finding and the evidence that the defendant was trading regardless of acreage. No witness attributed to the defendant the precise words of the finding, and it is clear the jury intended to indicate the indefiniteness of quantity expressed by the defendant's statements referred to above; the phrase "more or less" being picked up by the jury from some deeds offered in evidence. The jury found the defendant owned all the land described in the deed to the plaintiff. It is quite immaterial whether the finding be correct or not. Some special questions submitted by the plaintiff were not propounded to the jury. If they were all answered according to their form favorably to the plaintiff, it would make no difference in the result.

[2] While the cause was being argued, the plaintiff filed a written application to open the case for the admission of some newly discovered evidence, the tenor of which was stated. The application was not verified and was overruled. At the hearing on the motion for a new trial, the newly discovered evidence was not produced, by affidavit, deposition, or oral testimony of any witness, as the Civil Code, § 307 (Gen. St. 1915, § 7209) requires. Greer v. Mercantile Co., 86 Kan. 686, 121 Pac. 1121. Included in the application was a request for cross-examination of the defendant with respect to the newly discovered evidence. Whether or not the case should be opened for the further cross-examination of a witness was a matter within the discretion of the trial court. Since the evidence has not yet been vouched for by affidavit, deposition, or oral testimony of any witness, it cannot be said that the court abused its discretion. Furthermore, the tenor of the newly discovered evidence was that the defendant had represented to the county officials that his farm contained 141 acres instead of 150 acres, and that he had made this representation for the purpose of furnishing data for the assessment and collection of taxes. If the evidence were true, it would make no difference in a lump trade of the land regardless of acreage for a note secured by mortgage.

The deed which the plaintiff accepted was in effect a quitclaim deed, and furnished no contract ground of liability on the part of the defendant for any deficiency in the quantity of land described.

The plaintiff devotes seven pages of the abstract to a "schedule" of rulings adverse to her, relating to the admission and rejection of evidence. Apparently, the plaintiff scheduled all rulings adverse to her, without attempting to discriminate between those which were correct and incorrect, material and immaterial, prejudicial and unprejudicial. The court has looked into the matter just far enough to see that no claim of error can be made with any degree of sincerity respecting ruling after ruling on page after page, and the court is not inclined to conjecture concerning what the plaintiff relies on.

Some other subjects are presented in the briefs, but it is not necessary to extend this opinion to cover them, because they do not relate to anything which would impair the validity of the findings. The transaction was not of the kind upon which the plaintiff predicated her right to recover. The jury so found upon evidence which it chose to accept in opposition to other evidence. With the nature of the transaction established, the rights of the parties were established.

The judgment of the district court is affirmed. All the Justices concurring.

(101 Kan. 156)

SEGELBOHM v. WALDNER et al.*

(No. 20920.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Tenancy in Common 🔑15(1)—Possession of One Tenant—Notice of Adverse Possession.

The ordinary rule that the possession of one tenant in common is the possession of his cotenant in common does not apply where the one holding the title and possession openly and notoriously asserts and exercises such acts of exclusive ownership and exclusive right of disposition as to show clearly and convincingly that the property is being held adversely to any claim of his cotenant to an interest therein.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42, 48.]

2. Tenancy in Common 🔑15(4, 5)—Possession of One Tenant—Notice of Adverse Possession—Limitation of Action.

Where one tenant in common conveys his interest in real estate to his fellow tenant in common, upon an oral agreement that if the grantee should sell the property the grantor was to receive his share of the proceeds, and the latter bequeaths the property to his wife by will, in which testament he asserts that it was exclusively the fruits of his own and his wife's labors, and charges the property with a bequest in favor of a church to be paid when she sells the property, and the will is probated, and the wife enters into possession and remarries, and conveys part of the property to her second husband, and later she and her second husband convey part of the property to a third party—all these acts and circumstances constitute open and notorious notice to the grantor that the property is being held adversely to his claim of interest in it, and, where he takes no steps to assert his interest or to maintain his rights for more than fifteen years thereafter, his action is barred by the statute of limitations.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 45, 46.]

Appeal from District Court, Johnson County.

Action by Josef Segelbohm against Edward Waldner, Michael Krockover, and others. Judgment for defendant Krockover against plaintiff, and plaintiff appeals. Affirmed.

George Horn, of Kansas City, Mo., and John T. Little and C. B. Little, both of Olathe, for appellant. W. L. Wood, of Kansas City, Kan., and S. D. Scott, of Olathe, for appellees.

DAWSON, J. The plaintiff, Josef Segelbohm, claimed a half interest in a tract of land in Johnson county, and brought this action for partition, possession, and for rents and profits.

In 1886, Josef Segelbohm and his uncle, Michael Rosenberg, jointly acquired the property in dispute; the latter holding the legal title. Later, in 1889 and in 1890, written instruments were recorded in the office of the register of deeds, signed by both Rosenberg and Segelbohm, which disclosed that the parties were tenants in common and that each held an undivided half interest in the property. In 1894, Segelbohm departed for Europe; but before leaving he executed and delivered to Rosenberg a quitclaim deed, which, in addition to the ordinary recitals, contained the following:

> "The object of this instrument is to convey all interest of said grantor in said real estate and especially the interest acquired by agreement dated November 16, 1886 referred to in contract between Michael Rosenberg and Josef Segelbohm recorded February 1st, 1889, in book 63 page 4 in said Johnson county and also to especially convey any interest acquired by said last named contract recorded in book 63 page 4 aforesaid and to release the same of record."

In 1898, Rosenberg made a will bequeathing all his property, and specifically mentioning the property involved herein, to his wife, Annie Rosenberg. He charged this particular property with an item of $500 in favor of a Jewish Church, to be paid when his widow should sell it. The will in terms declared that all his property was the fruits of the joint efforts of himself and his wife. Some time later, Michael died, and his will was probated, and pursuant thereto his widow entered into possession. She married Michael's brother, Alexander Rosenberg, in October of the same year, 1898, and on her wedding day conveyed part of the property to Alexander. In 1899, Alexander and Annie conveyed part of the property to a trust company. In 1899, Annie and Alexander were divorced; and in 1900 she was married to the defendant Michael Krockover; and in 1912 she died after bequeathing all her property to Krockover.

Segelbohm filed this action against Krockover and others on September 1, 1914. Among the trial court's findings of fact are:

> "VII. About the first of October, 1894, Josef Segelbohm was about to make a trip to Europe to stay for some time, and, in order to place the title of the said lots so that Michael Rosenberg could sell the same if he had an opportunity, an oral agreement was entered into between Josef Segelbohm and Michael Rosenberg that said Josef Segelbohm should make a quitclaim deed of his interest in said real estate to Michael Rosenberg, and that, if Michael Rosenberg should make a sale of said land, he would send Josef Segelbohm's part of the proceeds of said sale to him, and, in accordance with said oral agreement, Josef Segelbohm, a single man, made

*Rehearing denied July 11, 1917.

a quitclaim deed of said lots to Michael Rosenberg on the 8th day of October, 1894, which was filed for record on October 12, 1894, in the office of the register of deeds of Johnson county, Kan., and Josef Segelbohm soon thereafter went to Europe and remained there for nearly a year, and afterwards returned to Kansas City, Mo. * * *

"XVI. Since the death of Michael Rosenberg in 1898, the plaintiff, Josef Segelbohm, has not been in possession of any part of the said real estate and has not made any improvements thereon, and has received none of the rents or profits from said lands, and has not asserted or attempted to assert any rights of ownership over said property. Said Josef Segelbohm has been a resident of Kansas City, Jackson county, Mo., at all times since some time in 1895.

"XVII. After the death of M. Rosenberg, Annie Rosenberg made statements to outside parties that Joe (meaning the plaintiff) owned an interest in said land."

The trial court likewise made certain conclusions of law:

"I. Prior to November 28, 1890, M. Rosenberg held an undivided one-half interest in the land, in trust for Josef Segelbohm, under an express trust.

"II. By the release executed November 28, 1890, and the quitclaim deed executed October 18, 1894, Josef Segelbohm released the previously existing trust.

"III. The oral contract entered into at the time of making the quitclaim deed October 18, 1894, was an attempt to create an express trust by parole, and is void.

"IV. The making and probating of the will of M. Rosenberg in 1898 was a repudiation of any existing trust and started the statute of limitations.

"V. Admissions made orally to third parties by Annie Rosenberg after the death of M. Rosenberg, and not communicated to Josef Segelbohm, did not toll the statute of limitations.

"VI. Plaintiff's action is barred by the statute of limitations.

"VII. Plaintiff is guilty of laches.

"VIII. Defendant Krockover is entitled to judgment against the plaintiff."

[1, 2] It will thus be seen that the learned trial court found three distinct but insuperable legal barriers to the plaintiff's claim to an interest in this property—the statute of trusts and powers, the statute of limitations, and laches. Any one of these, if pertinent, will sustain the judgment. Let us test the decision by the use of the simplest first, and this is the 15 years' statute of limitations. Civ. Code, § 15 (Gen. St. 1915, § 6905). When Rosenberg made his will bequeathing this particular land to his wife and charged it with an item of $500 in favor of the church to be paid when his widow should sell the property, in the same instrument asserting that the property was exclusively the fruits of his own and his wife's industry, those acts were a clear repudiation of his holding an interest in the property as a trustee or tenant in common for the benefit of his nephew Segelbohm, if such trusteeship or tenancy in common then existed. This occurred in 1898. His will was probated on April 12, 1898. Those facts were notice to Segelbohm that the property was being openly and notoriously held adversely to his pretensions as a tenant in common. Black v. Black, 64 Kan. 689, Syl. ¶ 2, 68 Pac. 662; Donaldson v. Jacobitz, 67 Kan. 244, 72 Pac. 846; Duphorne v. Moore, 82 Kan. 159, 107 Pac. 791; Walline v. Olson, 84 Kan. 37, 113 Pac. 426. See, also, Underwood v. Fosha, 96 Kan. 549, 551, 152 Pac. 638, Ann. Cas. 1917A, 265. That was more than 15 years before Segelbohm began to assert his interest. The other conveyances to third parties which were made over 15 years prior to the commencement of this action were to the same effect. While the ordinary rule is that the possession of one tenant in common is the possession of all his cotenants and as between them no statute of limitations is involved yet the general rule is otherwise where the one holding the title and possession openly and notoriously asserts and exercises such acts of exclusive ownership and exclusive right of disposition as to show clearly and convincingly that the property is being held adversely to any claim of his cotenant to an interest therein. Here there was no concealment in any of these transactions which might make the general rule inapplicable. Disavowal of cotenancy was made by Michael Rosenberg in his will in 1898. Notice of this was given to plaintiff when the will was probated. Disseisin of plaintiff occurred when Rosenberg's widow entered under Rosenberg's probated will the same year. Other acts of disseisin of plaintiff were the later conveyances of the property in derogation of plaintiff's claim of right therein. The oral evidence of witnesses relating to statements made by Rosenberg's widow, not made in the presence of plaintiff, did not change or cure that disseisin. See Schoonover v. Tyner, 72 Kan. 475, 479, 84 Pac. 124; Cribb v. Hudson, 99 Kan. 65, 160 Pac. 1019. It seems clear that the plaintiff's action was barred by the statute of limitations. While laches is usually involved in questions affected by the statute of limitations, it may sufficiently bar a recovery on a period of time of less duration; but neither laches nor the effect of the statute of trusts and powers need to be considered; nor is it necessary to consider whether other provisions of the statute of limitations, of shorter duration than 15 years, would control this case.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 138)

KLIESEN v. EQUITY EXCHANGE & MERCANTILE ASS'N. (No. 20907.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER 🔑187—ACCEPTANCE OF INSTALLMENT—EFFECT.

In a contract for the purchase of property on installments, time being made the essence, the acceptance of payment of the second installment five days late did not operate as a waiver of prompt payment of the next and last installment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375.]

2. VENDOR AND PURCHASER 🔑93—FAILURE TO PAY INSTALLMENT—RESCISSION.

The last payment having been due five days, the vendor notified the bank through which the payment was to be made not to receive it and proceeded to notify the purchaser that he would cancel the contract. *Held*, that he had a right to rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154.]

3. VENDOR AND PURCHASER 🔑98 — RESCISSION BY VENDOR — RESTORATION OF PAYMENTS.

Having within a few days after such notice and refusal offered to return the money received on the contract and demanded possession which was refused, and having in his petition tendered back all payments less rent, the plaintiff thereby sufficiently offered to place the purchaser in statu quo, although the notice contained nothing on that subject.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 163–165.]

Appeal from District Court, Gray County.

Action by W. P. Kliesen against the Equity Exchange & Mercantile Association. Judgment for plaintiff, and defendant appeals. Affirmed.

John Harper, of Cimarron, and F. L. Martin, Van M. Martin, and John M. Martin, all of Hutchinson, for appellant. Madison & Van Riper, of Dodge City, for appellee.

WEST, J. The plaintiff sold the defendant certain elevator property for $3,550, payable $500 cash, $1,550 within 30 days, and $1,500 within 90 days. It was stipulated that the vendor should not be required to furnish an abstract of title, but was to turn over upon final payment deeds from former owners, and a warranty deed executed by him was to be placed in escrow at a certain bank to be delivered upon final payment as stipulated. Time was made the essence of the contract. The purchaser paid the $500 cash, went into possession, and paid the $1,550 five days after it was due; payment being indorsed by the cashier of the bank August 7th, making it six days late. The last payment was due October 1st. A check for the amount was mailed to the bank October 6th. On October 5th, the plaintiff informed the bank that he would cancel the contract and directed it not to receive the money or to turn over the deed. On the morning of October 6th, according to the plaintiff's testimony, he left at the elevator a written notice that he had canceled the contract. On the 8th, the bank acknowledged receipt of the check and advised that the plaintiff had directed that it be not received. The notice left at the elevator was received by the defendant's manager according to his testimony on the 9th, and was as follows:

> "Gentlemen: Have canceled contract to pay for elevator at Copeland. This is the request of a number of the stockholders. I do not want to take advantage of you for your money. All I ask is rent for the elevator and I will give the stockholders their stock for the balance of the money you paid me for rent. Please clean up and turn over next Monday."

Certain personal property was involved in the sale, but by agreement this was taken out of the case. The court found for the plaintiff, and the defendants appeal, and urge that such finding was erroneous and that rescission under the circumstances is inequitable.

It was admitted that within a few days after the 8th of October, and before filing suit, the plaintiff offered to return the money received upon the contract and demanded possession of the property, which offer and demand were refused. The petition tendered the return of the money received less the value of the use of the property. The plaintiff testified that two or three days after the payment was due he learned that there was some misunderstanding among the farmers.

> "I went down there, and was there until the 5th, and I phoned to the bank and asked them if they had received the money, and they said they hadn't, and I told them to not receive it: that I would cancel the contract. * * *"

It is complained that the plaintiff's attitude was not that he desired rescission, but a cancellation of the contract, which meant forfeiture to him of what had been paid; but in his offer before beginning the suit and in his petition he claimed nothing but his rights under a rescission.

[1] It was pleaded and is urged as a defense that the receipt of the second payment five days late amounted to a waiver of time as an essential element. But Cyc. thus lays down the rule:

> "Although time is of the essence of the contract, waiver of default in payment as to one or more installments does not operate as a waiver of the right to insist on payment of subsequent installments as provided in the contract or prevent the vendor from rescinding or declaring a forfeiture for failure to do so. * * * The effect of the acceptance is exhausted upon the payment made, and, as to those following, the provisions of the contract are left to operate with unimpaired force." 39 Cyc. 1395.

In Long v. Clark, 90 Kan. 535, 135 Pac. 673, it was said in relation to waiver of the right to insist on a forfeiture stipulation:

> "It is a general rule that no mere indulgences or silent acquiescence can be construed as a waiver of the right unless some element of estoppel is involved in the transaction." Syl. 2.
>
> "But mere indulgence in a delay, or the acceptance of one installment of the price after it becomes due, does not, as a matter of law, waive prompt payment of subsequent installments, where no element of estoppel is involved." Black on Rescission and Cancellation, § 215, p. 569.

Even forfeitures will be enforced when time is of the essence of the contract, unless to do so would be grossly inequitable. National Land Co. v. Perry, 23 Kan. 140; Shade v. Oldroyd, 39 Kan. 313, 18 Pac. 198; Cue v. Johnson, 73 Kan. 558, 85 Pac. 598.

In Peterson v. Davis, 63 Kan. 672, 66 Pac. 623, it was held that provisions making the time of payment of the purchase price of real estate of the essence of the contract are "to be respected and enforced by the courts like any other stipulation between the parties." In Long v. Clark, the purchaser was to make final payment within six months or forfeit the $400 theretofore paid. An extension of 30 days was granted, but default occurred and continued. After some months, tender was made of the balance due and refused. The purchasers were held not entitled to specific performance, but were allowed to recover $400 of what had been paid, while the vendor was permitted to retain the other $400 as liquidated damages. Reference was made to McAlpine v. Reicheneker, 56 Kan. 100, 42 Pac. 339, wherein a larger sum was forfeited. See, also, Drollinger v. Carson, 97 Kan. 502, 155 Pac. 923.

[2, 3] The parties saw fit to make time essential, as they had a right to do. The last payment was several days too late, and the plaintiff was not obliged to accept it. There is no forfeiture feature, and there is nothing inequitable in giving force to the contract and as a result of the default in payment to put the parties in statu quo as the trial court did.

> "Where time is of the essence of a contract, and one of the parties fails to perform his part of the agreement punctually, at or within the appointed time, the other party, not being himself in default, will thereupon have the right to rescind the contract and treat it as at an end, which right will be recognized and enforced by the courts, unless the circumstances of the particular case show that it would be grossly inequitable to do so." Black on Rescission and Cancellation, vol. 1, § 216, p. 571.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 183)

STATE v. ORTH. (No. 21223.) *

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

RAPE ⇐52(1), 54(1), 59(2, 11)—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

In a prosecution for statutory rape, the evidence and instructions are examined, and it is *held*, that the evidence is sufficient to sustain the conviction, and that the instructions are not subject to the general criticisms leveled against them.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71, 72, 76, 83.]

Appeal from District Court, Sedgwick County.

Felix Orth was convicted of statutory rape, and he appeals. Affirmed.

Dempster O. Potts and W. P. Campbell, both of Wichita, for appellant. S. M. Brewster, Atty. Gen., and Ross McCormick and J. W. Adams, both of Wichita, for the State.

PORTER, J. Felix Orth was charged with statutory rape and convicted on each of four counts in the information. The court sentenced him to the reformatory at Hutchinson for a period of from 5 to 21 years on each count, the sentences to run concurrently. He appeals.

Lena Hermes, the prosecuting witness, is the daughter of a family living in the same neighborhood with the defendant's family. The parents are prosperous farmers and neighbors. The families attend the same Catholic Church, and until the charge was made against the defendant were on friendly terms. The young people attended the same social affairs, and Felix had been keeping company with Lena from some time in the summer or fall of 1914, calling upon her at her home, taking her to parties, and driving around with her at night. On March 30, 1915, she was 18. On November 11, 1915, she gave birth to a child. Until the physician came, none of the family or friends knew her condition. She told the doctor that Felix Orth was the father of the child. The doctor and her father went to the Orths late that night and informed the father of Felix. The young man was sent for and was severely censured by his father for his conduct. He went with the doctor to the home of the prosecuting witness and talked to her alone. She testified that he promised to marry her as soon as she had recovered. He admitted the promise, but said that, after thinking about the dates when he was with Lena and what the doctor had told him about the child, he concluded he was not its father and decided not to comply with his promise. He left home and went to Oklahoma. Lena's brother followed him there, compelled him to return, and he was arrested.

The doctor's testimony is that he said to the defendant:

> " 'Felix, Lena Hermes is the mother of a little child, and she accuses you of being the father.' He said, 'Well, that cannot be, because it cannot be more than 8 months, possibly 8½ months.' I says, 'You admit you had intercourse.' He said, 'Yes.' "

He testified further that Felix's father said in the presence of Felix, "It surprised me that he was hanging around there for so long, and then quit all of a sudden," and that after calling his son hard names he said, "He has got to marry her." The doctor, when asked about the development of the child, answered that, as near as he could judge, "it was about three or perhaps four weeks less than nine calendar months."

As to the conversation with the doctor, the defendant testified:

> "When they came over there, the doctor asked me if I had intercourse with her, and I told him, 'Yes.' He asked me how long ago, and I said, 'About six or seven months.' 'Well,' he says, 'that would make it just about right,' or something like that. I was so scared I didn't know."

He admitted having sexual relations with the prosecuting witness on three different occasions, but denied that he had such intercourse before Easter, 1915, and said he

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⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 11, 1917.

had figured from that time that the child could not be his, because the doctor had said that it was about an eight months' baby. The evidence was conflicting, but apparently the jury refused to accept the defendant's version as to his relations with the prosecuting witness. We are satisfied that there was sufficient evidence to sustain the judgment.

A general complaint is made of the instructions which relate to reasonable doubt and to the credibility of the witnesses. These instructions were what may be termed stock instructions given in every criminal case. They are criticized in the brief from various philosophical and psychological viewpoints. No authorities are cited, and it is not deemed necessary to comment upon the criticism of instructions which have so often been approved.

Complaint is made of an instruction in which the court, after stating the date when the prosecuting witness gave birth to the child, used this language:

> "The question therefore is: Who is the father of this child? Evidence has been introduced tending to show that about the time she became pregnant she had sexual intercourse with persons other than Felix Orth, who denies that he had sexual intercourse with her at that time. The evidence as to her having sexual intercourse with persons other than Felix Orth was introduced solely for the purpose of showing who was the father of her child and whether Felix Orth had sexual intercourse with her before she became 18 years of age."

In this instruction the court charged that "the fact, if it is a fact, that others had sexual intercourse with her before that age, would not be an excuse" or a defense for the defendant. This instruction is complained of because it is said that it "sent the jury off on a cold trail, and they never got back"; that the parentage of the child was not the controlling question in the case; and it is further contended that the instruction misstates the facts as to the evidence, because the court ruled out all testimony offered by defendant for the purpose of showing that the prosecuting witness had sexual intercourse with other persons.

It seems the court did rule out all direct evidence of that character, although attempts were repeatedly made to get it into the record; and one witness for defendant testified to conduct of the prosecuting witness, the only purpose of which was to raise a doubt in the minds of the jury as to her chastity and her relations with persons other than the defendant. The same witness testified that the brother of the prosecuting witness had threatened to see that the witness was sent to the penitentiary if he went on the stand and swore that he had had intercourse with her. We think the court did not err in referring in the instructions to this character of testimony. As to the first criticism of the instruction, it is true that the parentage of the child was only incidentally a question in the case; but it is obvious that the jury could not have been misled by the instruction.

The court instructed that:

> "The uncorroborated testimony of the prosecuting witness, Lena Hermes, if it is uncorroborated, is sufficient, if believed by the jury, to convict the defendant."

The instruction was a proper one, and, besides, the evidence of the prosecuting witness was corroborated to some extent by the admissions of defendant as to his relations with her and admissions made by him in the presence of other persons, as well as by other circumstances in the case.

We find no error in the instructions, in the admission of evidence, nor in the ruling of the court excluding the testimony of other young men in the neighborhood who were asked about their relations with the prosecuting witness.

The judgment is affirmed. All the Justices concurring.

(100 Kan. 189)

DURAN v. ATCHISON, T. & S. F. RY. CO.

(No. 20648.)

(Supreme Court of Kansas. Feb. 10, 1917. Rehearing Denied April 12, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT 🔑222(2) — FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK—RECOVERY.

A laborer was cutting boards in two with an ax when he was directed by his foreman to break them by fastening one end of each in a tripod and stamping on the other end. Theretofore he had cut them with an ax provided by his employer. In breaking as thus directed, he was in a few minutes injured by a splinter from one of the boards flying and striking him in the eye. The foreman testified that he did not want the plaintiff to break them that way because he was liable to hurt himself. The jury, in addition to a general verdict for the plaintiff, found, among other things, that the method thus directed and used was more dangerous than the one the workman had been following, that he did not know the method directed was dangerous, and that its danger was not apparent and obvious to a man of his intelligence. *Held* that, as he did not realize and appreciate the danger of obeying the order, he is not barred of recovery on account of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649.]

Burch, Porter, and Dawson, JJ., dissenting.

Appeal from District Court, Wyandotte County.

Action by Jose Duran against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, for appellant. E. S. McAnany, M. L. Alden, and W. C. Rickel, all of Kansas City, for appellee.

WEST, J. The plaintiff was a common laborer in the defendant's repair shops. Workmen were dismanteling a passenger coach, and the boards removed therefrom were required to be broken up for use in the furnace. The plaintiff began cutting them with an ax, when, as he testified, the foreman came along, took the ax out of his hand, threw it to one side, placed one of the boards under the crosspieces of a tripod under the coach in some way not made clear by the record, and broke it by stamping his feet on it, and told the plaintiff to do it that way and to hurry up. The plaintiff broke the boards that way four or five minutes, and in breaking one of them which was very brittle the splinters flew up and hit him in the face, one of them in the eye. The evidence of another witness was to the effect that the foreman came around where the plaintiff was breaking the boards with the ax, and said:

> "Well, that is too slow, I am going to show another and better way to do it. We have lots of work to-day, and you need to work a little faster."

The foreman testified that the plaintiff had always used the ax before that time to cut up these boards, that about five minutes before the accident he had been there and the plaintiff was breaking them in the tripod, that he told him to quit it, that he did not seem to obey his orders. In response to the question, "Why did you want him to quit breaking them in the tripod? he answered, "Well, I knew it was wrong to break them in the tripod because he was liable to hurt himself."

The action was under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657-8665]), and the jury were instructed that the plaintiff assumed the ordinary risks and hazards of his employment, that is, such risks and dangers as are open and obvious to a person of ordinary discretion, intelligence, and foresight. and that if they believed from the evidence that the risk and danger of injury by a flying splinter was so open and obvious that in the exercise of ordinary care and caution for his own safety the plaintiff would have known of such danger and been able to have avoided the same and escaped injury, and that such danger was one of the ordinary risks and hazards of the employment in which he was then engaged, they must find for the defendant. Further that, if the foreman directed the plaintiff to cease using the ax and to break the boards in the manner alleged which was more dangerous, then the plaintiff would be entitled to recover, unless the danger and hazard in doing the work in that manner was so open and obvious to a person of his apparent intelligence and discretion that he must be held to have assumed the risk. There is no complaint of this instruction. The jury returned a verdict for the plaintiff, and, in answer to special questions, found that splinters are occasionally thrown off or fly when dry boards are broken; that the plaintiff did not know that they are frequently thrown off: that axes had been furnished and kept for use in cutting or breaking up such scraps of lumber.

> "(8) Was it more dangerous to break the scraps of lumber by stepping thereon, than it would have been to use an ax in cutting or breaking the same? Ans. Yes.
>
> "(9) Was the danger of splinters flying and striking the plaintiff when a board was broken by stepping thereon apparent and obvious to casual observation? Ans. No, not to a man of plaintiff's apparent intelligence.
>
> "(10) If you find that the defendant was guilty of any negligence that caused the injury to the plaintiff, state fully of what that negligence consisted. Ans. Failure to stop plaintiff from breaking the boards in the tripod.
>
> "(11) Had the defendant instructed the plaintiff to break the board by stepping thereon, as he was doing, at the time he was injured? If so, what agent of the company had so instructed him? Ans. Yes. Jesse Dix, foreman in charge of the Mexicans.
>
> "(12) Did the plaintiff know that it was dangerous to break boards by bending or stepping on same? Ans. No."

The defendant moved for judgment on the findings, which was overruled. A motion for new trial was also overruled, and defendant appeals.

Our ordinary knowledge of the effects of chopping kindling is invoked in behalf of the proposition that splinters will frequently fly from dry boards when broken either by the foot or by an ax. There is a difference between breaking boards with an ax and cutting them in two with an ax. Plaintiff testified:

> "The lumber had to be cut before I could burn it, because the furnace tender didn't want it to come that length. I got an ax in the shop to cut it with. I started cutting the boards with the ax."
>
> On cross-examination: "Jesse Dix (the foreman) was the one that told me to break the boards, not to chop them. * * * I had been engaged in cutting boards some time before the accident."

He also testified that it was the usual way to take the ax and chop them, and that Mr. Dix had never objected to his using an ax before that day.

> "The boards usually cut were many times dry and many times wet. I had never noticed any splinters flying before. * * * I had broken six or seven with my foot before I was hurt. No splinters flew from those six or seven boards. They were all dry boards."

The foreman testified that he did not want Duran to break the boards in the tripod, and that he had told him to use the ax; that it had always been the custom to use the ax.

> "Two axes were kept for that purpose. I never instructed the plaintiff in any way to break boards by stepping on them. He knew enough to go and get the ax and start to cut them. That is what he did. * * * He had always used the ax to cut these boards before that time."

This evidence was corroborated by the witness Alonzo, and the jury evidently believed their version of the matter rather than the foreman's.

From the plaintiff's evidence and the finding of the jury, we have the case of a Mexican laborer of meager intelligence, used to cutting the boards with an ax, hurriedly ordered by his foreman to break them in a way which by the testimony of the foreman himself was likely to cause him injury. Promptly obeying, the workman received the wound in his eye. The sole defense argued is that the danger of flying splinters was so apparent that he must be held to have assumed the risk.

"The danger arising from breaking boards with either an ax or his feet was one of the ordinary risks of the plaintiff's employment as a common laborer, and for an injury from such cause there can be no recovery," defendant says, and cites Walker v. Scott, 67 Kan. 814, 64 Pac. 615; Gillaspie v. United Iron Works, 76 Kan. 70, 90 Pac. 760; Railway Co. v. Weikal, 73 Kan. 763, 84 Pac. 720; Railway Co. v. Stone, 77 Kan. 642, 95 Pac. 1049; Railway Co. v. Mealman, 78 Kan. 496, 97 Pac. 381; Riverside Iron Works v. Green, 79 Kan. 588, 100 Pac. 482.

In the Walker Case, the employé, who had repeatedly insisted that there was danger of a cave-in, nevertheless went to work in the trench and was held to have assumed the risk. The syllabus limited the application of the rule to the cases in which the dangers are open to common observation, as fully known to the workman as to his employer, and in which "he is capable of knowing and measuring the dangers of such employment." The facts and findings here do not bring this case within the rule thus announced. Weikel was holding a torch for a machinist working on a steel shaft of certain hoisting machinery, using a chisel from which a chip flew striking the torch holder in the eye. The court said he was a young man of intelligence and experience who had worked at the place for some time and must have observed—which his own testimony showed—that chips would fly from a chisel. Gillaspie was injured in a similar way. The court said:

"His opportunity for observation was ample, and his observation was in fact both comprehensive and accurate. He saw and knew the condition of the snap, and knew the causes which had operated to produce the condition in which he found it." 76 Kan. 72, 90 Pac. 761.

In the Stone Case, the plaintiff, having been directed to change the water in an engine, was fatally scalded by reason of a defective blow-off pipe. Because of his knowledge of the pipe—greater than that of any other person—he was held guilty of contributory negligence. Mealman was held to have assumed the risk of using a hand car with a defective brake, because he not only knew all about it, but had without complaint or criticism of its condition called the attention of his foreman thereto and continued to use it. Green was injured by a defective gangplank. He was held to have assumed the risk for the reason that he knew all about the condition of the gangplank over which he had been passing for 10 days without complaint or promise of repair.

In Brizendine v. Railroad Co., 96 Kan. 691, 153 Pac. 495, it was decided that, although the plaintiff had reasonable means of knowledge of the machinery and its condition, the finding of the jury that he did not realize the danger of the situation placed the case within the frequently announced rule that such appreciation must exist in order for assumption of risk to bar recovery. The decisions there cited and followed fully sustain such holding.

Here the jury have, in effect, found that the plaintiff with his degree of intelligence and his opportunity neither knew nor comprehended the danger of doing the work in the way directed by his foreman. Assumption of risk is a legitimate defense in such actions (Barker v. Railway Co., 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. [N. S.] 1121); but we cannot, in the face of the record, assume or take judicial notice that the danger of obeying the order received was apparent and so appreciated or realized by the injured workman that he should fail of recovery because of the risk assumed by such obedience.

The judgment is therefore affirmed.

JOHNSTON, C. J., and MASON and MARSHALL, JJ., concurring. BURCH, PORTER, and DAWSON, JJ., dissenting.

(96 Wash. 699)

NORTH PAC. SEA PRODUCTS CO. v. KING COUNTY et al. (No. 13962.)

(Supreme Court of Washington. May 22, 1917.)

En Banc. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the North Pacific Sea Products Company against King County and others. From the judgment, plaintiff appeals. Affirmed.

Carkeek & McDonald, of Seattle, for appellant. Hugh M. Caldwell and Geo. A. Meagher, both of Seattle, for respondents.

PER CURIAM. Counsel have filed a stipulation herein whereby it is agreed that, as identical questions are involved, the disposition of this case shall be controlled by our decision in United States Whaling Co. v. King County, 165 Pac. 70.

For this reason, the judgment herein is affirmed.

(96 Wash. 698)

RIDPATH v. CLAUSIN. (No. 13719.)

(Supreme Court of Washington. May 2, 1917.)

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Sarah Ridpath against C. B. Clausin, receiver of the E. J. Hyde Jewelry Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Simpson, of Spokane, for appellant. Samuel R. Stern, of Spokane, for respondent.

MAIN, J. This is the second appeal in this case. The opinion upon the former appeal is reported in 88 Wash. 185, 152 Pac. 711. The facts are there stated in detail, and need not be here repeated. Upon the first appeal, the judgment of the superior court, which had been in favor of the plaintiff, was reversed, and a new trial directed. The second trial in the superior court resulted in a judgment in favor of the defendant. It is from this judgment that the present appeal is prosecuted.

Upon the retrial, the law, as stated in the opinion upon the first appeal, was applied, and the plaintiff was denied a recovery, because the evidence failed to show that she had been damaged. It seems unnecessary to again enter upon a review of the case. Upon the facts, as they appear in the present record, and the law, as stated in the former opinion, the plaintiff was not entitled to recover.

The judgment will be affirmed.

ELLIS, C. J., and MORRIS, CHADWICK, and WEBSTER, JJ., concur.

(96 Wash. 123)

In re RICHARDSON'S ESTATE.
BOOTH et al. v. RICHARDSON et al. (No. 13645.)

(Supreme Court of Washington. May 5, 1917.)

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Will contest by William F. Richardson and others against A. A. Booth, as executor of the estate of Frances H. Richardson, deceased, and another. From an order setting aside the probate of the will, and appointing an administrator of the estate, the executor and another appeal. Affirmed.

Robert F. Booth, Henry W. Pennock, and Halverstadt & Clarke, all of Seattle, for appellants. Edward Judd and Wardall & Wardall, all of Seattle, for respondents. William F. Richardson, of Seattle, pro se.

MOUNT, J. This is a will contest. Mrs. Richardson, during her lifetime, executed a will on July 30, 1915. A. A. Booth was, by the terms of this will, made executor, with full control of the property, valued at about $30,000. The executor was directed to pay such income and proceeds of the property to Mr. Richardson, husband of the testatrix, during his lifetime, "as in the judgment of said executor may appear necessary and proper." The will provided that, upon the death of Mr. Richardson, the residue of the estate was to be distributed to certain named legatees, among these being Seattle School District No. 1. On October 20, 1915, Mrs. Richardson, in her own handwriting, revoked the will in the presence of two witnesses.

On December 7, 1915, Mrs. Richardson died in the city of Seattle. Thereafter the will was admitted to probate, and subsequently this contest was filed by Mr. Richardson, upon the ground that the will was revoked by Mrs. Richardson. It was conceded, at the trial, that Mrs. Richardson regularly executed the will, and also that afterwards she executed a revocation of it. But it was contended that she was incompetent to revoke the will at the time she executed the revocation. That was the sole question presented to the trial court. After hearing the evidence upon that question, the court concluded that Mrs. Richardson was competent at the time of the revocation, made findings to that effect, set aside the probate of the will, and appointed an administrator of the estate. This appeal is prosecuted from that order.

The only question presented here is one of fact, whether Mrs. Richardson was competent to make or revoke her will at the time of the revocation. This was a much-disputed question. The trial court was apparently controlled by the testimony of friends, who were with Mrs. Richardson, more or less constantly, about the time she wrote and executed the revocation, and who testified that she understood what she did, and the effect of the revocation, rather than by the statements of doctors, who saw her infrequently about that time, and who expressed the opinion that she was incompetent. The appearance of the revocation itself, written by Mrs. Richardson in her own handwriting, indicates that she knew what she was about. After reading the record quite carefully, we are of opinion that the trial court arrived at a correct conclusion.

The judgment is therefore affirmed.

ELLIS, C. J., and PARKER, FULLERTON, and HOLCOMB, JJ., concur.

(97 Wash. 697)

MARCHETTI v. SAN FRANCISCO OYSTER HOUSE. (No. 13258.)

(Supreme Court of Washington. June 20, 1917.)

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Roger Marchetti against the San Francisco Oyster House. Judgment for plaintiff, and defendant appeals. Affirmed.

Tucker & Hyland, of Seattle, for appellant.

PER CURIAM. Roger Marchetti, the plaintiff, brought an action against the defendant corporation, San Francisco Oyster House, basing his cause of action upon a contract of employment evidenced by the record of a resolution entered in defendant's minute book, as follows:

> "Resolved, that Roger Marchetti be employed as counsel for the company, and that he receive for his services as secretary and counsel of the company the sum of $25 per month."

This minute was signed by Jack Barberis, president, and by Roger Marchetti, secretary; those two being the only stockholders and officers in the corporation, Barberis holding 99 shares and Marchetti 1 share.

The plaintiff claimed the sum of $725 for salary and $91.05 for advances made the defendant, less payments received in the sum of $141.25, leaving a balance due plaintiff of $674.80. The defendant answered there was but $275 due plaintiff on account of salary, inasmuch as he had been discharged after a service of 11 months, on which defendant should be credited in the sum of $211 for moneys paid plaintiff. By way of cross-complaint, defendant alleged plaintiff was indebted to it in the sum of $212.10 for meals, board, and room, in the sum of $86 for moneys converted, and in the sum of $5 for money loaned. The reply admitted the indebtedness of plaintiff for the item of $86, but denied all other allegations of the cross-complaint. On the trial the plaintiff admitted the counterclaim of $212.10 for meals furnished. The cause was tried to a jury, which returned a verdict in favor of plaintiff for $216.40.

The defendant appeals, assigning as error, first, the denial of its motion for an instructed verdict for defendant; and, second, the giving of the following charge to the jury:

> "It will first be your duty to determine whether or not there was a contract made between the plaintiff and defendant corporation in the month of December, 1911. If you determine there was such a contract made, what was that contract? Was it a contract, as claimed by the plaintiff, at $25 for services as secretary and attorney for the corporation, and not terminable at any agreed time whatever? Or, if there was a contract made for a period not to exceed one year?"

We do not find any error in the record under these assignments. There was sufficient evidence to carry the case to the jury, and the instruction was proper, under the issues and evidence in the case.

The judgment will be affirmed.

(96 Wash. 699)

NORTHERN PAC. RY. CO. v. CONCANNON et al. (No. 9771.)

(Supreme Court of Washington. June 6, 1917.)

En Banc. On remand from the Supreme Court of the United States. Affirmed.

See 239 U. S. 382, 36 Sup. Ct. 156, 60 L. Ed. 342; 75 Wash. 591, 135 Pac. 652.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, for appellant. Gordon, Easterday & Askren and Huffer, Hayden & Hamilton, all of Tacoma, for respondents.

PER CURIAM. Upon the facts as stated in the opinion filed in this court on October 7, 1913 (75 Wash. 591, 135 Pac. 652), and after reargument upon the record, we affirm the finding of the trial judge that respondent Concannon had acquired title, to that part of the right of way of appellant now occupied by him, by adverse possession prior to the 28th day of April, 1904.

The judgment of the lower court is affirmed.

(101 Kan. 207)

BEVARD v. SKIDMORE-PATTERSON COAL CO. (No. 21291.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT ⚿373—WORKMEN'S COMPENSATION ACT—PLACE OF INJURY—"ON OR IN OR ABOUT A MINE."

The defendant operates two open-pit coal mines, known as the east mine and the west mine, which are about a quarter of a mile apart. They are separated by an interurban railway, which passes within about 30 yards of the west

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

mine. A workman in the east mine was ordered by his foreman to go on a necessary errand to the west mine. When crossing the railway track the workman was struck by a car, and sustained injuries which proved fatal. In an action for compensation under the Workmen's Compensation Act, the petition, which was otherwise sufficient, presented the foregoing facts. *Held*, a demurrer to the petition was rightfully sustained, because the accident did not occur "on or in or about a mine," within the meaning of section 5900 of the act.

Appeal from District Court, Cherokee County.

Action by Mrs. J. T. Bevard against the Skidmore-Patterson Coal Company. Demurrer to plaintiff's petition sustained, and she appeals. Affirmed.

C. A. McNeill, of Columbus, and Maurice McNeill, of Kansas City, Mo., for appellant. Skidmore & Walker, of Columbus, for appellee.

BURCH, J. The action was one for compensation for the death of a workman. A demurrer was sustained to the plaintiff's petition, and she appeals.

The petition disclosed that the defendant operates two open-pit coal mines, referred to as the east mine and the west mine, which are a quarter of a mile apart. Between the two mines and about 30 yards east of the west mine lies the interurban railway track of the Joplin & Pittsburg Railway Company. The railway had been in operation about 10 years before the mines were opened, and cars passed the west mine at intervals of 30 minutes throughout the day. The workman was a coal shoveler at the east mine and did such other work as was required of him. He was ordered by his foreman to take a coal drill from the east mine to the west mine and there procure a different tool. When crossing the railway track, he was struck by a car, under circumstances which are not described, and sustained injuries which proved fatal. There was no allegation in the petition that the workman took a previously defined route between the two mines, or a connecting way, or a course of travel bearing any relation to the business of working the two mines. There was no allegation of any joint system of operation extending over the two mines, or of any nexus between them. There was no description of the mines which indicated that mining operations or mining hazards overflowed either of the pits in the direction of the railway track.

The first section of the Workmen's Compensation Act reads as follows:

> "If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act." Gen. St. 1915, § 5896.

The plaintiff argues the case as if it were controlled by the specification, "accident arising out of and in the course of employment." Adopting this theory provisionally, there can be no doubt that the accident arose in the course of the workman's employment. When he was injured, he was in the act of performing a duty within the scope of his employment and expressly enjoined upon him by his foreman.

Whether or not the accident arose out of the employment is debatable. "Out of" and "in the course of" employment are distinct things and must not be confused. An accident may occur in the course of employment and still have no causal connection with it, so that it may be said the accident arose out of the employment. The accident must occur because of some peculiar danger incident to the particular employment, and it might be urged here that the employment did not constitute proximate cause. Being run down by a car on an interurban railway track was not a special danger peculiar to the business of mining or to the conduct of a mine employé going from one mine to another with a drill. Precisely the same peril would confront a farm hand going from the country to town with a basket of fresh eggs and vegetables. Agricultural pursuits and employments incident thereto are exempt from the provisions of the act because they are nonhazardous (section 5900), and it would require considerable sophistication to differentiate between the causal connection of employment and accident in the two instances. Indeed, the accident was just as likely to happen to one who was not an employé at all.

A leading English case sustaining the suggested view is that of Dennis v. A. J. White & Co. (1916) 85 L. J. K. B. 862. In that case a plumber's mate employed by a firm of builders was told to go on a bicycle and get some plaster. As he was crossing Sloan Square, in London, a motor car collided with him. He used the bicycle on an average about once a day. Following the judgment of the House of Lords in the case of Plumb v. Cobden Flour Mills Co. (1913) 83 L. J. K. B. N. S. 197, it was held that the accident did not arise out of the employment.

A carefully considered American case which cites pertinent authorities is that of Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310. In that case the decedent was the defendant's chief engineer, having charge of the installation of machinery in and the operation of six plants in different cities which he was obliged to visit. Having spent the day at a branch plant, he returned by train to the city in which the principal plant and his office were situated, and, while preparing to take a street car, slipped and fell on icy ground. It was held the accident did not arise out of his employment.

In the case of Foley v. Home Rubber Co. (N. J. Sup.) 99 Atl. 624, the expression "arising out of" employment was given a very much broader interpretation than in the Michigan case. Foley was a special traveling salesman who, in the course of his employment, found it necessary to visit his employer's London office. He took passage on the Lusitania, and lost his life when the ship was torpedoed by a German submarine. The court held that the common perils incident to travel inhere in employments necessitating travel by sea or by land, that the manner in which the accident is brought about is not at all of the essence of the matter, and that the fact that the Lusitania was lost through an extraordinary peril did not make such peril any less a cause of accident arising out of Foley's employment.

The question just discussed need not be decided, because the provisional theory of the case takes into account only a portion of the workmen's compensation act. The opening words are, "If in any employment to which this act applies." It is necessary to inquire, therefore, to what employments the act applies. The inquiry is answered as follows:

> "This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable." Gen. Stat. 1915, § 5900.

Looking further into the act, a mine is defined as follows:

> "'Mine' means any opening in the earth for the purpose of extracting any minerals, and all underground workings, slopes, shafts, galleries, and tunnels, and other ways, cuts and openings connected therewith, including those in the course of being opened, sunk or driven; and includes all the appurtenant structures at or about the openings of the mine, and any adjoining adjacent work place where the material from a mine is prepared for use or shipment." Gen. Stat. 1915, § 5903.

In framing the act, the Legislature made use of the British Workmen's Compensation Act of 1897, section 7 of which contained the following provision:

> "This act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work. * * *" Statutes 1897, 60 & 61 Victoria, c. 37, p. 57.

Before the Legislature adapted to its purposes the words, "on or in or about," they had been interpreted by various courts of the United Kingdom. Many of the decisions are enlightening because of their perspicacity.

In the case of Fenn v. Miller, 69 L. J. Q. B. N. S. 439, it appeared that a workman was employed to cart water to a mortar mill driven by a steam engine, from a brook which was from 150 to 200 yards from the mill. When proceeding with a cart of water from the brook toward the mill and when about 40 yards from the brook, the cart horse ran away and the workman was injured. The mill and engine constituted a factory, and the question was whether or not the accident occurred in employment about a factory. Lord Justice Smith said:

> "The county court judge has held, as I understand, that inasmuch as the word 'about' is an elastic word, he is entitled to find that a distance of 110 yards is 'about' the mill as being 'in close propinquity' to it, as I interpreted the meaning of the word in Powell v. Brown, or as being 'physically contiguous' to it, as Lord Justice Collins expressed it in the same case. * * *
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> "In Powell v. Brown, an accident happened to a workman engaged in loading a cart belonging to the owners of a factory. The cart was standing in a street close to the entrance to the factory yard, at a place where the factory workmen were habitually accustomed to take timber out of the factory and load it on the factory carts. The question was whether the employment of the workman was 'about' the factory within the meaning of the act, and the court held that the word 'about,' following the words 'on or in,' was an enlarging word. The Legislature thought that the first two words were not large enough to cover all that they were intended to include, and therefore added the word 'about' to enlarge the locality of the accidents included within the act, and so as not to limit the locality to the words 'on or in.' The expression I used was that the word 'about' meant that the employment might be in close propinquity to the factory, and Lord Justice Collins used very similar words—namely, 'physically contiguous to the factory.' There the county court judge had found that the workman was engaged 'about' the factory at the time of the accident, and that finding was right according to the meaning placed by this court on the word 'about.'
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> "In Chambers v. Whitehaven Harbour Commissioners, again, this court held that the words of section 7 of the Workmen's Compensation Act, 1897, pointed to locality. After reading them, I there said: 'The meaning is that at the time of the accident the workman must be employed about one of those specified localities; the locality of the accident must be within the purview of the section.' And afterwards: 'Therefore, in order to bring a particular case within the purview of the act, the employment must be on, in, or about the named locality at the time of the accident.'
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> "There was also the case of Lowth v. Ibbotson, in which a carter in the employment of a miller was injured while delivering sacks of flour from a cart at a distance of a mile and a half from the mill. The county court judge held that he was not at the time of the accident employed 'about' the mill, and this court did not interfere with that finding because it appeared to us to be quite right." Page 440.

Lord Justice Collins said:

> "In my judgment, the word 'about' in the section with which we are dealing is a geographical expression denoting physical contiguity. On the other hand, it is not, I think, used in the sense in which we use it when we speak of a workman being about the business of his employer. There is a broad distinction between the two meanings of the word. A factory assumes the carrying on of a business, and I should say that a carter fetching coals to the factory is 'about the business of' the factory, but is clearly not during his journeys to and fro 'about' the factory. * * *. I should say that where the main purpose of the business carried on in a factory involved the use of land outside the physical limits of the factory, persons so employed outside the factory limits would be employed, not on or in, but about the factory. An illustration of this is to be found in the facts of the case of Powell v. Brown.

* * * To my mind the act does not apply to persons employed about the business of a factory, where such employment does not involve physical contiguity to the factory within such limits as are reasonably necessary for the ordinary business carried on there. * * *" Page 441.

In the case of Coylton Coal Co. v. Davidson, 42 Scot. L. R. 596, it appeared that a carter in the employment of the coal company at one of its pits went with his cart along a private road belonging to the company to a point at which it joined a public road, a distance of 259 yards from the pit, crossed the public road, 22 yards in width, passed through a gate into a railway company's premises, and at a point 123 yards beyond the gate proceeded to load on his cart a quantity of timber from a railway wagon. While engaged in this work he was accidentally injured. The question was whether or not the accident happened on or in or about a mine, within the meaning of section 7 of the Workmen's Compensation Act of 1897. The Lord Justice-Clerk said:

"The carter had left the mine, and although still on business for the mine owner was doing the ordinary work of a carter at a place where no dangers connected with a mine were to be encountered. He had not only left the neighborhood of the mine, but he had left the property of the mineowner, had gone to the other side of the road and entered a place which belonged to another owner, and which was itself a place to which the act applied in respect that the owners of that place carried on another dangerous business, for any accident in which the owners were liable to their own employés. How in these circumstances it could possibly be held that he was still at a place which was 'about' the mine which he had left I am unable to understand. He would have been a trespasser where he was, unless he had gone there on business connected with the railway company, and could not have said, if asked to state his business or to quit the premises, that he was about his master's mine. His only right to stay could be because his master had business with the railway company. But this might equally apply ten miles off or twenty miles off from his master's premises." Page 598.

Lord Kincairney said:

"The question for us is whether the place of the accident was about the company's mine in the sense of the seventh section of the Workmen's Compensation Act. * * *

"None of the dangers incident to a mine could be said to attach to the place of the accident.

"The sheriff-substitute has decided on the ground that the place was connected by use with the pit, but although without such connection it is possible that the statute might not have applied, still it was necessary that the workman should not only be engaged in the course of his employment but also that he should be engaged about his mine." Pages 598, 599.

In the case just referred to, Lord Stormonth Darling delivered the following opinion:

"Speaking solely for myself, I should have thought, if the question had been open, that there was much force in the argument urged by Mr. Campbell to the effect that section 7 of the act refers not to the locality of the accident but to the kind of employment which is to give a right to compensation. The first section has been described by the House of Lords in Lyson's Case, [1901] App. Ca. at page 85, as 'the affirmative or leading enactment,' and it declares that 'if in any employment to which this act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation.' The leading idea of the statute, therefore, is to give compensation to workmen for injury arising out of their employment, even when the employer is entirely free from blame. But inasmuch as the act was not intended to apply to every kind of employment, it becomes necessary to define the employment to which it did apply, and I should have thought that the sole purpose of section 7 was to do so. When the section speaks of employment 'on or in or about' a railway, factory, mine, quarry, and so on, I should have thought that it introduced the idea of locality only as a means of describing particular trades or occupations, and not in order to restrict the area within which accidents occurring in the course of these particular trades were to give rise to a right of compensation. Such a construction of the statute would undoubtedly have enlarged its scope, but it would at least have avoided the obvious anomaly of allowing compensation for injury when sustained by a workman at one part of a job and refusing it when sustained at another part, although the whole job was ordered by his employer and the employer was equally free from blame throughout. Why so much importance should have been attached to the locus of the accident itself I do not know, for a workman is just as much in his master's employment, acting in the course of that employment, when he is loading goods for him at a distance from his master's premises as when he is delivering the goods at his master's door.

"But I am convinced that it is now too late to go back on the series of cases both here and in England, where the words 'on or in or about' in section 7 have been read as referring to the workman's actual presence at the time of the accident. * * *" Page 599.

The statute of this state quoted above (section 5900) answers conclusively for this jurisdiction the question in his lordship's mind why so much importance should have been attached to the locus of the accident. The act is a restricted one. Employments especially and inherently dangerous to life and limb, and none other, were included. The hazards were the necessary and peculiar hazards attending railroading, factory work, mining, and the like. There is no anomaly in distinguishing between trainmen and yardmen working on or about a railroad, and railroad employés working in a distant office building where they are as secure from the peculiar hazards incident to railroading as the employés of a bank. Likewise, a factory drayman, when in the course of his employment elsewhere than at the factory, is no more exposed to extraordinary risk from the nature or condition of the work carried on there than a grocer's drayman. Consequently, the act was extended, not to employment in the course of the employer's business generally, or wherever conducted, but the employer's business at designated places. The superficies of a mine was particularly described (section 5903), and to ignore the plain limitation to locality would be to ignore the principle of classification which lies at the foundation of the act.

The "on or in or about" limitation has been dropped from the British Workmen's

Compensation Act, except with respect to premises on which a principal undertakes to do work which he procures to be executed by subcontractors, and has been omitted from American statutes framed in the light of recent models. The omission accounts for the dearth of helpful American authorities. The radical enlargement of the scope of Workmen's Compensation Acts which the omission accomplishes has been sufficiently indicated.

The court concludes that the word "about," as applied to a mine, fixes the locality of the accident for which compensation may be recovered, and that the accident must occur in such close proximity to the mine that it is within the danger zone necessarily created by those peculiar hazards to workmen which inhere in the business of operating the mine. If the accident occur outside this zone, the distance from the mine, whether very near or very far, is immaterial. In this case the workman was a messenger who had left one mine on an errand and had not arrived at the other. He was injured on the premises of the railway company, which lay between the two mines. The statute defines the term "railway" to include interurban railways (section 5903), and as in the Coylton Coal Company Case, referred to above, the workman could not have accounted for his presence on the railway track, a place itself within the statute, by saying he was about his mine. The petition stated no facts from which it may fairly be inferred that the employés and passengers of the railway company are exposed to the peculiar perils to which mine employés are exposed, and the court declines to assume such to be the fact.

The plaintiff cites the case of Sedlock v. Mining Co., 98 Kan. 680, 159 Pac. 9. In that case the sole question was whether or not the accident arose out of and in the course of employment. The workman was injured in a mine, and the court had no occasion to consider the provision of the statute which is decisive of this case.

Because the petition did not disclose that the accident occurred in or about a mine, the petition failed to state a cause of action, and the judgment of the district court is affirmed. All the Justices concurring.

(101 Kan. 40)

PATTERSON v. UNCLE SAM OIL CO.

(No. 20681.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

JUDGMENT ⟹143(10)—DEFAULT—ABSENCE OF DEFENDANT'S ATTORNEY—SETTING ASIDE.

On the facts stated in the opinion, *held*, that the trial court erred in overruling the motion to set aside a judgment rendered in the absence of defendant's attorney, and in denying a new trial, although the absence of defendant's attorney at the time of the trial was occasioned by his negligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 281.]

Appeal from District Court, Sedgwick County.

Action by Hortense Patterson against the Uncle Sam Oil Company. Default judgment for plaintiff, and defendant appeals. Reversed, and cause remanded, with directions to grant a new trial.

Redmond S. Brennan, of Kansas City, Mo., for appellant. Dedrick & Dedrick and Adams & Adams, all of Wichita, for appellee.

PORTER, J. In this case, the only question to be determined is whether the action of the trial court in refusing to set aside a judgment rendered against the defendant on default was, under the circumstances, reversible error.

Hortense Patterson on the 24th of April, 1915, sued the Uncle Sam Oil Company in the district court of Sedgwick county to recover damages alleged to have been sustained through the explosion of kerosene oil in a lamp. The petition alleged that defendant is a corporation with an established place of business in the city of Wichita; that it had been engaged in the wholesale and retail oil business there and kept large quantities of coal oil and gasoline in storage tanks; that its agents and servants mixed and mingled a large quantity of gasoline with a large quantity of coal oil; that defendant being fully aware that the fluids had been so mixed and mingled, and that the mixture would be used in lamps for illumination, and the merchants and storekeepers would sell it for that purpose, and with full knowledge of the dangerous condition and character of the mixture, sold large quantities thereof to a retail grocer in the city of Wichita, who in turn sold a two-gallon can thereof to the plaintiff for a high grade of coal oil. The petition then alleges the explosion of some of this oil in a lamp at the plaintiff's residence by which she received the injuries complained of. The petition concluded with a prayer for $3,000 damages and costs. It appears, also, that her husband brought suit about the same time against the defendant to recover damages for the loss of services of his wife occasioned the same accident. The answer contained a general denial, to which a reply was filed.

On the 9th of November, 1915, the case came regularly on for trial; notice thereof having been posted in the courtroom. The counsel then appearing for the defendant had his office in Kansas City, Mo. In his absence, the case was called for trial and judgment rendered against the defendant for the sum of $2,000 and costs. On the next day, the attorney for the defendant, who had prepared the answer and had expected to try the case, learned of the fact of the judgment, and within three days of the time the judgment was rendered filed a motion for a new trial on all the statutory grounds; among others, "unavoidable casualty and misfortune preventing the defendant from defending the cause." The motion was supported by the affidavit of the attorney reciting the facts as to his want of notice, and stating that he had recently been attorney in a case pending in the same court in which one Jackson sued the defendant, and he had been informed by the clerk of the assignment of the case for trial in sufficient time to enable him to appear; that, upon his representation that he had another case set for trial in Oklahoma on the same date, the judge of the court had courteously postponed the trial of the Jackson case to a later date in order to accommodate him. He alleged that in the present instance he relied upon the custom of the court and of the clerk, and expected to be notified of the assignment of this cause in sufficient time to enable him to appear, and that if he had been notified by telegraph or telephone he would have appeared within a few hours after such notice. He further alleged that the plaintiff's attorney knew his address, had been in correspondence with him, and had offered to settle this case, together with the action brought by plaintiff's husband for $1,000, and, knowing his address, had failed to give him any notice or opportunity to appear and defend. The affidavit stated that the defendant has a valid defense to the cause of action and was at all times ready to try the case when notified.

It appears from the record that the stenographer was not asked to take any notes of the evidence, and that the case was tried without a jury, and on a very slight showing on the part of the plaintiff. Whether there was any evidence at all to show that the defendant had at any time sold a mixture of coal oil and gasoline as alleged in the petition does not appear from the record.

Affidavits were filed contesting defendant's right to a new trial and showing that no general custom or rule obtained in the district court of Sedgwick county requiring notice of the assignment of cases for trial to be given to nonresident counsel. The motion for a new trial was filed within three days after the rendition of the judgment. At the hearing of the motion, the judge stated that it cost the county $75 a day to keep a jury, and further that he believed he had saved the defendant $1,000, inasmuch as he rendered judgment for only $2,000, although the sum prayed for as damages was $3,000. It appears that the defendant then offered to pay into court $75 to reimburse the county and to pay any costs imposed by the court if a new trial were ordered.

It is very clear that the attorney then representing the defendant was negligent in not having some arrangement through local counsel or with the judge or the clerk by which he would be notified when the case would be set for trial. Ordinarily, the negligence and failure of an attorney to look after a cause will be imputed to the party who employs him. On the other hand, it is very clear to our minds that a great injustice has been done the defendant. If this were an action upon a promissory note to which the defendant had no substantial defense or had set up some mere technical defense, the facts might warrant the strict enforcement of court rules. However meritorious the plaintiff's claim in this case may be —and upon that we express no opinion—the action is one of a class wherein charges are frequently trumped up and relied upon as a basis to recover damages. Of course, no reasonable person believes that a reputable business concern like the defendant is guilty of all the things charged in the petition; that it knowingly mixed and mingled kerosene and gasoline and wantonly put it on the market to be sold and used for kerosene, as is repeatedly alleged in the petition. If a similar action had been brought against a business concern located at Wichita represented by resident counsel, it is conceivable that the same situation might arise. In such a case, if it were shown that defendant's attorney had been caught unawares and was unavoidably absent when the case was called, that defendant had a meritorious defense, it would seem harsh and unjust to deprive the defendant of a right to a trial on the merits, although his attorney was wholly at fault. It is not even suggested that the fact defendant is a foreign corporation represented by counsel living in another state furnishes any ground for a different rule.

Defendant's counsel should have taken measures either by the employment of a local attorney to keep informed when the case would be reached for trial, or have made some other arrangements with officers of the court to that effect. It is necessary that the courts should adopt rules for the dispatch of business, and it rests in the sound judicial discretion of the trial judge when to enforce those rules with strictness and when to waive them in the interest of justice; but it should always be borne in mind that courts are established in the first place to do justice, and not merely to enforce rules of practice and procedure. The terms of court in Sedgwick county, except in the summer months, are close together. A continuance of the case, if it could not have been tried again at the same term, need not have occasioned very great delay; and, as against the slight inconvenience to the plaintiff by a continuance, there should have been taken into consideration the great injustice to the defendant from the refusal of another trial. We think that in exercising its discretion the trial court failed to give sufficient weight and consideration to the rights of defendant and the requirements of justice, and therefore that a new trial should have been ordered.

The judgment is reversed, and the cause remanded, with directions to grant a new trial upon terms to be imposed by the court. All the Justices concurring.

(101 Kan. 115)

SMITH v. PARMAN. (No. 20894.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION 🔑42—IMMUNITY FROM CIVIL LIABILITY—CITY ATTORNEY.

A city attorney, while engaged in the prosecution of a person charged with the violation of an ordinance, is entitled to the same immunity from civil liability with respect thereto as ordinarily attaches to the office of a public prosecutor.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 83–86.]

2. MALICIOUS PROSECUTION 🔑42—PERSONS LIABLE—PUBLIC PROSECUTOR.

Irrespective of his motives, a public prosecutor cannot be held liable in a civil action on account of having instituted or maintained a prosecution in that capacity for an alleged violation of the criminal law.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 83–86.]

Appeal from District Court, Cowley County.

Action for malicious prosecution by Charles W. Smith against John Parman and others. Case dismissed as to defendant Parman, and plaintiff appeals. Affirmed.

C. T. Atkinson, of Arkansas City, for appellant. John Parman, of Arkansas City, for appellee.

MASON, J. Charles W. Smith brought an action against John Parman and others charging them in several counts with having brought malicious prosecutions against him under the ordinances of a city of the second class. Parman filed a plea in abatement alleging that, at the time of the conduct on his part of which the plaintiff complained, he was the city attorney and was acting in that capacity. The trial court held the plea to be good and dismissed the case as to Parman. The plaintiff appeals. It is conceded that Parman was the city attorney at the time the prosecutions complained of were brought. The method by which that circumstance is brought to the consideration of the court is not important. The case involves the question whether a city attorney is liable in damages to the person injured if he maliciously and without probable cause institutes a prosecution against him under an ordinance.

[1] 1. The statute provides for the appointment of a city attorney, but does not define his duties. Gen. Stat. 1915, § 1684. Doubtless, from the practice in this state the duty of prosecuting violators of the city ordinances is implied from the mere name of the office. In the brief of the appellee a copy of an ordinance is set out giving the city attorney control of such prosecutions. While this is not formally in the record, the accuracy of the copy is not questioned. We regard the city attorney, while engaged in the prosecution of persons charged with offenses against the ordinances, as entitled to the same privileges and immunities that ordinarily attach to the office of a public prosecutor. A proceeding of that kind is essentially a criminal action. Neitzel v. City of Concordia, 14 Kan. 447.

[2] 2. In one of the few discussions by textwriters of the liability of a public prosecutor to an action for malicious prosecution, it is said:

> "A prosecuting attorney, being a judicial officer of the state, is not liable in damages for acts done in the course of his duty, although willful, malicious, or libelous."

This text is obviously based upon Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001; the other cases cited in connection with it not bearing directly upon the matter. The reference to the prosecutor as a judicial officer might seem open to question. Much of his work is advocacy. But the important matter of determining what prosecutions shall be instituted is committed in a considerable degree to his sound judgment, and in the exercise of that function he acts at least in a quasi judicial capacity. Judges are exempt from civil liability for official acts even if corruptly done; the reason being that the independence of their conduct is thereby promoted, to the benefit of the public. 15 R. C. L. 543; 23 Cyc. 567, 568; 17 A. & E. Encyc. of L. 725. Grand jurors are given the same immunity with respect to indictments returned by them, for a similar reason. 20 Cyc. 1356; 17 A. & E. Encyc. of L. 1302. The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury. If, while he has a question of that kind under advisement, he is charged with notice that he may have to defend an action for malicious prosecution in case of a failure to convict, his course may be influenced by that consideration, to the disadvantage of the public. Communications made to a public prosecutor relating to offenses against the law are treated as privileged, because "persons having knowledge regarding the commission of a crime ought to be encouraged to reveal to the prosecuting attorney fully, freely, and unreservedly the source and extent of their information." Michael v. Matson, 81 Kan. 360, 366, 105 Pac. 537, 540 [L. R. A. 1915D, 1]. We think the reason for granting immunity to judges and grand jurors applies with practically equal force to a public prosecutor in his relations to actions to punish infractions of the law. There is no great danger that abuse of power will be fostered by this exemption from civil liability, for the prosecutor is at all times under the wholesome restraint imposed by the risk of being called to account criminally for official misconduct (Gen. Stat. 1915, § 3588), or of being ousted from office on that account (Gen. Stat. 1915, § 7603).

The judgment is affirmed. All the Justices concurring.

(101 Kan. 180)

McHENRY v. KANSAS CITY. (No. 21197.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Municipal Corporations ⟹812(2)—Personal Injury—Notice of Injury—Statute.

Under section 1460 of the General Statutes of 1915, before commencing an action for personal injuries against a city of the first class conducted under commission government, it is necessary, within four months, to file a written statement with the city clerk, giving the time, place, and circumstances relating to the injuries sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1697.]

2. Municipal Corporations ⟹812(6)—Personal Injury—Notice—Sufficiency.

The written statement of injuries, which is required by statute as a condition precedent to the maintenance of an action against a city for such injuries, must be sufficiently accurate that the city will not be misled thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1701.]

3. Municipal Corporations ⟹812(7)—Personal Injury—Notice—Discrepancy Between Notice and Petition.

Where a petition alleged that plaintiff sustained injuries by a fall on a public sidewalk and alleged that the accident occurred on January 19, 1916, and a copy of the statutory written statement attached to the petition recited that the injuries were sustained on January 12, 1916, the discrepancy between the dates is one of substance tending to mislead the city, and not a mere defect in the form of the statement, and a demurrer to the petition should be sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1702.]

Appeal from District Court, Wyandotte County.

Action by Marie McHenry against the City of Kansas City, Kansas. Demurrer to petition overruled, and defendant appeals. Reversed and remanded, with instructions to sustain the demurrer to plaintiff's petition.

H. J. Smith, Lee Judy, and Thomas M. Van Cleave, all of Kansas City, Kan., for appellant. Milton Schwind, of Kansas City, Mo., and Paul H. Ditzen, of Kansas City, Kan., for appellee.

DAWSON, J. The plaintiff brought this action for damages against the city of Kansas City on account of injuries which she suffered by falling on a public sidewalk which the city had knowingly and negligently permitted to remain for a long time covered with ice. Her petition alleged that she received these injuries on or about January 19, 1916, and it concluded with the following allegation:

> "Plaintiff further alleges that within four months after said injury complained of she filed with the city clerk of Kansas City, Wyandotte county, Kan., a statement setting forth the time, place, and circumstances of the injuries complained of; that plaintiff failed to state therein the exact date of injury. A copy of said statement is attached to this petition, marked 'Exhibit A.'"

Exhibit A, in part, reads:

> "Statement. In re: Marie McHenry v. Kansas City, Kansas.
>
> "The undersigned claimant states that on or about the 12th day of January, 1916, * * * she * * * slipped and fell on the sidewalk striking the bottom of her spine and coccyx on the ice and hard sidewalk; * * * that the ice had been on said sidewalk for a long period of time prior to the time plaintiff was injured, and a dangerous and defective place existed for pedestrians at said place, etc."

The city's demurrer being overruled below, the cause is here for review.

It will be noted that the statement giving notice to the city of the plaintiff's injuries recites that the accident occurred on or about January 12, 1916. Her petition alleged that it occurred on January 19, 1916.

[1, 2] The statute requiring that the city be notified as a condition precedent to the maintenance of such an action as this reads:

> "No action shall be maintained by any person or corporation in any court for damages on account of injury to person or property unless the person or corporation injured or damaged shall, within four months thereafter, and prior to the bringing of the suit, file with the city clerk a written statement, giving the time and place of the happening of the accident or injury received, and the circumstances relating thereto." Gen. St. 1915, § 1460.

[3] The statement requires that the time of the accident be given. This is only fair. The city should have an opportunity to investigate the facts and merits of the claim, and to prepare its defense against demands which are false, frivolous, or extravagant. For the purpose of such an investigation, an accurate statement of the time is material and important. It is an element of substance and not of mere form in the making of the statement required by the statute. This court is always lenient and liberal as to mere matters of form, and will overlook a defect in the statutory statement which does not or cannot mislead the city. Cook v. Topeka, 75 Kan. 534, 90 Pac. 244. But here the gross discrepancy between the date of the accident and the date alleged in the statement could not fail to prejudice the city and to mislead and frustrate it in any independent investigation of the facts which it may have undertaken. Naturally, the city officials would inquire as to the existence and quantity of ice on the sidewalk on January 12th. The accident occurred seven days later. With our variable Kansas winter climate, it is entirely unlikely that the weather conditions of January 12th would be the same as those of January 19th.

Liberality and leniency may excuse defects in the statement as to the accuracy of the circumstances under which the alleged injuries were sustained, and even a loose description of the place, as in Cook v. Topeka, supra, may be overlooked; but it is not easy to see how a gross discrepancy as to the time of the accident can be excused. The time—not necessarily the hour, but the date—is well known by the plaintiff. Therefore the statute requiring the statement to give the time must be complied with. To say that the claimant may name a false and misleading date instead of the correct one—here the discrepancy was a week—"is not," as the Connecticut Supreme Court says, "to construe the statute, but to repeal it." Gardner v. City of New London, 63 Conn. 267, 28 Atl. 42. In that case, the statutory statement gave the date of the injury as May 5th. The correct date was May 2d, and it was held that the plaintiff could not recover. In City of Fort Wayne v. Bender, 57 Ind. App. 689, 105 N. E. 949, the notice of the injury stated that it occurred on April 18th. The petition and the evidence established that it occurred on April 28th. Judgment for plaintiff was reversed. Other cases to the same effect are Ouimette v. City of Chicago, 242 Ill. 501, 90 N. E. 300, and Carter v. City of St. Joseph, 152 Mo. App. 503, 133 S. W. 851. In Taylor v. Peck, 29 R. I. 481, 72 Atl. 645, a variance of one day between the date alleged in the notice and the date shown by the evidence was held fatal to a recovery. We note that in Murphy v. City of St. Paul, 130 Minn. 410, 153 N. W. 619, a misstatement of one day in the date given in the notice was held not fatal to a recovery. That was a case where the injury was caused by a defective sidewalk. Perhaps a distinction could be based on that point. A defective sidewalk would remain defective until the fact of the defect could be investigated. Ice on a sidewalk would only remain until the weather moderated. See note in Ann. Cas. 1913A, 671.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to plaintiff's petition. All the Justices concurring.

(101 Kan. 189)

STATE v. KING. (No. 21249.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. JURY 🔑131(15)—EXAMINATION OF JURORS—QUESTION.

On the voir dire examination of jurors in a prosecution for murder, counsel for defendant asked a juror whether, in case the evidence showed that about six months before the crime was committed the defendant was intoxicated and made a threat against the deceased, that would be "evidence in your mind that he was guilty of the crime charged against him." *Held*, that an objection to the question was properly sustained.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 579.]

2. CRIMINAL LAW 🔑1172(2)—HARMLESS ERROR—INSTRUCTION.

Besides giving the usual instruction that the jury might properly consider the interest of any witness in the result of the trial as affecting his credibility, the court also instructed:

"You are further instructed that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict; but, in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on the trial, testifying in his own behalf."

Held, that while, ordinarily, the giving of such an instruction under such circumstances is not approved, it cannot be regarded as error, since it was natural for the jury to consider the defendant's interest in the result, as well as their duty to consider it in determining the credit to be given to his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155.]

3. CRIMINAL LAW 🔑775(2)—INSTRUCTIONS—ALIBI.

The instructions relating to the defense of an alibi examined, and *held* sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1833.]

4. CRIMINAL LAW 🔑824(5)—INSTRUCTIONS—DEFENSE.

In a prosecution for murder, defendant offered evidence tending to show that, because of the crippled condition of his right hand, it was a physical impossibility for him to hold and discharge an automatic pistol in the manner charged in the information and as testified to by witnesses for the state. No special instruction submitting this defense was asked. *Held*, that it was not error to fail to give an instruction directing the jury's attention specially thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999.]

5. CRIMINAL LAW 🔑941(1)—NEW TRIAL—GROUNDS—IMPEACHING EVIDENCE.

On the facts stated in the opinion, there was no error in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2330.]

Appeal from District Court, Sedgwick County.

Frank King was convicted of murder, and he appeals. Affirmed.

Geo. McGill, Chas. B. Hudson, and Clyde M. Hudson, all of Wichita, for appellant. S. M. Brewster, Atty. Gen., F. P. Lindsay, of Topeka, and Ross McCormick, Glenn Porter, and H. C. Castor, all of Wichita, for the State.

PORTER, J. The appellant was convicted of the murder of one William Sutton. The abstract he presents is very incomplete and inadequate, but there is a statement that the appellant is without means, and that his counsel was obliged to pay the expense of the appeal, and for that reason did not abstract all the evidence, or all the proceedings. We are not informed as to the degree of murder of which defendant was convicted; and only fragmentary and unrelated portions of the evidence are furnished, although there is a contention that the evidence is insufficient to sustain the verdict and judgment. A supplemental abstract on behalf of the state affords no additional information, except the statement that shortly after the crime was committed nine suspected persons were arrested, charged with the murder, and were given preliminary examinations; that Tom Peel and the appellant were bound over and charged jointly with the crime; that they demanded separate trials; that Peel was acquitted; that at the first trial of the appellant the jury disagreed, and on the second trial he was convicted.

William Sutton was murdered in his grocery store at night by persons who were attempting robbery. Mr. Wilheit, who was in the store at the time, was shot by one of the robbers and seriously injured. He was a witness for the state, and described some of the circumstances and conditions at the time and place of the murder, and testified that the robbers had handkerchiefs across their faces, and he did not recognize either of them. It is contended that he was called as a witness for the sale purpose of affecting the sympathy of the jury, because of his crippled condition. It is sufficient to say that there is no merit in the contention.

Mr. Routan and Mr. Younkin, two other clerks, were in the store and testified. Their testimony is that both of the robbers had handkerchiefs about their faces. Younkin identified the appellant as the one who fired the shot which killed Sutton. He testified that the weapon used was an automatic pistol, which appellant held in his right hand, and witness did not notice anything peculiar in the way the weapon was held, but that appellant was not assisted by the left hand in discharging it. His testimony is that he had known the defendant as a customer during the winter before the crime was committed and had waited on him several times. On the occasion of the murder he recognized appellant as some one he had seen, but could not recall his name until he thought about it afterwards. The court sustained objections to some questions asked of this witness on cross-examination, which furnishes a basis for a contention of error; but a careful examination satisfies us that the court did not unduly limit the cross-examination.

[1] On the examination of the jurors, counsel for appellant asked one of them, in substance, the question whether, in case the evidence showed that about six months before the crime the appellant was intoxicated and was in the company of his wife, and said "he was going to get Mr. Sutton," would that be evidence in your mind that he was guilty of the crime charged against him? The court properly sustained an objection. The juror could not give an intelligent answer to such a question, without knowing in advance what the court would instruct him in regard to his duties as a juror in considering and weighing the evidence. Nor would any answer he might give to the question be of assistance in disclosing his qualifications to sit as a juror. If such a question were proper, then any evidence which either party thought might be offered could, with equal propriety, be submitted in advance to a juror, and his opinion asked as to what effect it would have on his verdict, in the event he was accepted as a juror.

[2] The court gave the usual instruction that the jury are the exclusive judges of the weight of the evidence, the credibility of the witnesses, and might properly consider the interest of any witness in the result of the trial as affecting his credibility. The court also gave the following instruction:

> "You are further instructed that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict; but, in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on the trial, testifying in his own behalf."

It is claimed that this was prejudicial error, and specially so in view of the fact that the court had already given the usual instruction just referred to. A similar instruction has been condemned by other courts, and in a number of states has been held reversible error. Madison v. State, 6 Okl. Cr. 356, 118 Pac. 617, Ann. Cas. 1913C, 484. It has also been held objectionable by the Supreme Court of Illinois in a number of cases, on the ground that it has a tendency to lead the jury to treat the testimony of the defendant differently from that of other witnesses. People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636, and cases cited in the opinion. In State v. Gray, 90 Kan. 486, 135 Pac. 566, it was held that it was not error to refuse an instruction specially cautioning the jury to consider the interest, bias, or prejudice of witnesses for the prosecution in a liquor case, who were connected with or in the employ of the State Temperance Union and had visited the defendant's place for the purpose of procuring evidence. The reasons given in the opinion are that:

> "Care should be taken to avoid magnifying or minifying improperly the testimony of any witness or class of witnesses. No good reason to specially caution the jury appeared, and the general charge was sufficient"—citing State v. Spiker, 88 Kan. 644, 129 Pac. 195.

See 90 Kan. 487, 135 Pac. 566.

In the latter case it was held that there was no reason to specially caution the jury as to the testimony of the two principal witnesses in behalf of the state; it being claimed that the witnesses were persons who had made purchases of intoxicating liquors from the appellant for the purpose of procuring evidence. In State v. Buffington, 71 Kan. 804, 81 Pac. 465, 4 L. R. A. (N. S.) 154, it was held that:

> "An instruction that 'the defendant is a competent witness in his own behalf, and you have a right to consider his evidence and are to give it

such faith and credit as you believe it entitled to receive,' when considered in connection with other instructions given, did not imply that any consideration of defendant's evidence was optional with the jury." Syl. 5.

Ordinarily no good reason can be suggested why defendant's testimony should be singled out specially by an instruction of this character, and more particularly where the court gives the usual instruction as to all the witnesses. Every one knows, however, that jurors, like most all persons who hear an accused testify in his own behalf, naturally take into consideration the very things which the court called attention to in the instruction. In People v. Herrick, 59 Mich. 563, 26 N. W. 767, the instruction to consider the relation the defendant bears to the case was held not error, since that was what any jury would in fact do in such a case; and in Minich v. People, 8 Colo. 440, 9 Pac. 4, the court held that the jury was not only at liberty to consider the interest, but it was their duty to do so. Substantially the same instruction was held not to be error in State v. Bursaw, 74 Kan. 473, 87 Pac. 183. While the giving of the special instruction complained of is not approved, we do not regard it as prejudicial error, since it was proper and natural for the jury to consider the defendant's interest in the result, in determining the weight and credibility of his testimony.

[3] The appellant produced some testimony tending to prove that he was not in Wichita on the night of the murder, and there is a contention that the court failed to instruct upon the defense of an alibi; but in one instruction the court charged that it was the duty of the jury to acquit if they believed from the evidence that defendant was not present at the time the offense was committed, and in another charged that the burden of proving his presence at the time and place devolved upon the state. Instruction No. 12 concludes with these words:

> "So that if, after a full and fair consideration of all the facts and circumstances in evidence, you have a reasonable doubt as to whether the defendant was at the place of the alleged crime at the time of its commission, or was at another place, you are bound to give the defendant the benefit of such doubt and acquit him."

We confess our inability to understand the statement in appellant's brief that the court gave no instruction on the question of an alibi, or the basis for the contention that instruction No. 12 is insufficient. There was no request for any special instruction.

[4] Two physicians testified that the appellant was crippled in the right hand, the thumb being entirely off, and in their opinion that he could not discharge the pistol in the manner described by the witnesses for the state. Another witness, who was not a physician, testified to the same effect. The evidence raised an issue of fact for the jury to pass upon, and there is no force in the claim that the conviction should be set aside as contrary to the undisputed evidence. No instruction was requested submitting this defense, and in view of the general instructions it was not error for the court to fail to give a special one in regard to this claim of defense.

[5] On the hearing of the motion for a new trial, counsel offered to show by a witness that he was employed by the county to investigate the circumstances of the crime; that he talked with Routan, and asked him for a description of the parties who were in the store when Sutton was killed, and that Routan said he was so scared at the time the store was being robbed he could not give an accurate description of the robbers, and did not believe that he would be able to positively identify the men; further, that Routan gave him a different description of the men from that testified to at the trial. The only purpose the evidence could serve would be to impeach Routan as a witness, and no foundation was laid for that purpose at the trial. He was not asked anything about these statements, and therefore the evidence was not such as to entitle the defendant to a new trial.

At the hearing of the motion it was shown that during the progress of the trial one of the jurors went to sleep or dozed; that the court spoke to and admonished him at the time. The juror testified that he only dozed for a second or two, and thought it was the only time he did so during the trial, and he believed he had not missed any of the testimony. The trial court passed upon the evidence, and considered that appellant's rights had not been prejudiced by the occurrence, and we do not think the matter of sufficient importance to call for further comment.

We have considered carefully a number of assignments of error which are not argued in the brief of appellant. We find no substantial ground for reversal, and the judgment is affirmed. All the Justices concurring.

(101 Kan. 187)

STATE v. HARRIS. (No. 21236.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION ⟹190 — INDICTMENT—CONVICTION FOR ATTEMPT TO COMMIT STATUTORY RAPE.

Under a charge of statutory rape, a conviction for an attempt to commit the offense—not an assault with intent to commit—can be had, although no specific acts towards the commission of the full offense are set out.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 596–603.]

2. RAPE ⟹53(1)—ATTEMPT TO COMMIT STATUTORY RAPE—SUFFICIENCY OF EVIDENCE.

A girl 12 years old, corroborated as to certain parts of her story, testified to a completed offense. *Held*, that in view of all the evidence conviction of an attempt to commit the offense was not error.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 78.]

3. CRIMINAL LAW 🔑483—RAPE 🔑38(1)—ARGUMENTATIVE EVIDENCE — IMMATERIAL EVIDENCE.

Medical evidence touching the possibility of self-inflicted or accidental injury which, if expert at all, was merely argumentative, was properly rejected. Likewise evidence touching the possibility of distinguishing between certain kinds of blood stain—the stained clothing involved herein not having been preserved or described.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1071, 1075; Rape, Cent. Dig. §§ 48, 50.]

4. RAPE 🔑38(1)—EVIDENCE—COLLATERAL ISSUES.

Evidence that the defendant's wife and the mother of the injured girl frequented certain Mexican quarters, and received visits from the men there, and that the wife of the defendant ran away with a Mexican, was offered to show a conspiracy between the two women to get rid of the defendant. *Held*, that such evidence was properly rejected because involving a collateral issue, and because it would tend only to affect the credibility of the wife who was not a witness and the other woman whose impeachment was not attempted.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 48, 50.]

Appeal from District Court, Chase County.

Earl Harris was convicted of an attempt to commit statutory rape, and he appeals. Affirmed.

Dennis Madden, of Emporia, for appellant. S. M. Brewster, Atty. Gen., Charles E. Davis, of Cottonwood Falls, and H. E. Ganse and R. M. Hamer, both of Emporia, for the State.

WEST, J. The defendant was charged with statutory rape on a girl 12 years old. He was convicted of an attempt to commit the offense, and appeals, assigning as errors the rejection of certain evidence, giving and refusing certain instructions and the denial of a new trial.

[1] The girl testified to the completed offense and told of certain laceration. Her mother testified to the latter and to blood stains on clothing which was burned. Under the rule already declared by this court a conviction for an attempt—not assault with intent to commit—could be had under the charge of the full offense without the allegation of any specific act towards its commission. In re Lloyd, Petitioner, 51 Kan. 501, 33 Pac. 307, and State v. Guthridge, 88 Kan. 846, 129 Pac. 1143.

[2] Attention is called to State v. Mitchell, 54 Kan. 516, 38 Pac. 810. But there the girl was of age and told a preposterous story entirely uncorroborated, and it was held that a conviction for an attempt only would not be permitted to stand. Here the story, while remarkable, was not impossible, and there was corroboration, which things, added to the tender age of the child, take this out of the rule of the Mitchell Case.

[3] Medical evidence as to the possibility that the injury was self-inflicted or accidental and as to the possibility of distinguishing between different kinds of blood stain was rejected, but without error, because the one if expert at all was merely argumentative, and the other was immaterial, as the stained clothing had not been preserved, and no attempt to describe it was made.

[4] To establish the theory that the defendant's wife had conspired with her sister-in-law, the girl's mother, to get rid of the husband, so that the two women could associate with certain Mexicans, the defendant offered to show by the city marshal that the two associated together and visited certain Mexican quarters, and were visited by the Mexicans, and that the defendant's wife ran away with one of them just before the trial. The girl's mother testified that her sister-in-law was at her house sick when the offense occurred, and that the defendant ate supper there. The defendant was not permitted to testify that his wife went away with a Mexican. The rejected evidence was not only calculated to bring in a collateral issue, but even if admitted would not have tended materially to show that the girl's father, who swore to the complaint, was induced or inspired thereunto by his wife through the instigation of the defendant's wife, and even if he were the defendant's guilt or innocence would not thereby be established or affected—merely the credibility of the wife, who was not a witness, and the mother, whose impeachment was not attempted.

It was not necessary to instruct concerning an overt act towards the commission of the full offense more definitely than was done. The charge given fairly and correctly gave the law of the case.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 141)

RODARMEL v. CAREY SALT CO.

(No. 20915.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT 🔑382 — INJURY TO SERVANT — VALIDITY OF RELEASE — WORKMEN'S COMPENSATION ACT.

Under section 5922 of the General Statutes of 1915, any release of liability by a workman or any agreement for or award of compensation to a workman made under the act is void as against the workman unless it is filed by the employer in the office of the clerk of the district court of the county where the accident occurred within 60 days after it is made.

Appeal from District Court, Reno County.

Action for compensation by Clarence H. Rodarmel, employé, against the Carey Salt Company, employer. Judgment for plaintiff, and defendant appeals. Affirmed.

C. M. Williams, of Hutchinson, for appellant. B. A. Earhart, of Hutchinson, for appellee.

JOHNSTON, C. J. In this action, Clarence H. Rodarmel asks for compensation from his employer, the Carey Salt Company, for an accidental injury to his leg and hip received while he was in the employment of the company. More than two months after the accident occurred, the parties arrived at an agreement and settlement of the compensation plaintiff was to receive for his injury. Payment of the amount agreed upon was made, and the following release was executed:

> "Received of the Carey Salt Company $133.00 making in all, with the weekly payments received by me and the money paid by the Carey Salt Company to the Stewart Hospital and Dr. Brownlee, $287.25, such being the final payment for compensation under Kansas Workmen's Compensation Act and for all damage and injury from the accident which occurred to me August 13, 1915, in the machine shop of the Carey Salt Company and while in their employ."

Afterwards he brought suit, alleging that he had sustained a permanent injury; that an agreement had been made between them that defendant was to pay hospital and medical bills and compensation at $12 per week until he was able to resume work, plus $5 per week for his board during that time; that defendant had paid $133 as wages and board and $154.25 for hospital and medical bills; but that since that time no further payments had been made by defendant. The answer of the defendant set up the settlement, payment, and release. In reply, the plaintiff alleged that the defendant had not filed the agreement and release from liability with the clerk of the district court, as required by the Workmen's Compensation Act. The case was submitted to a jury, and the court instructed that an agreement and release is not binding and effective unless it is filed in the office of the clerk of the district court within 60 days after it is made. It was conceded that the release executed was not filed as required by the act. The jury found that plaintiff was totally incapacitated for 25 weeks by reason of the injury, for which they allowed him $9 per week, and that thereafter there was partial incapacity for 104 weeks, and for that time they awarded him $4.50 per week.

The question presented on appeal is: Did the settlement and release conceded to have been legally made become a nullity through the failure of the defendant to file it with the clerk of the district court? The Workmen's Compensation Act then in force provided that:

> "It shall be the duty of the employer to file or cause to be filed every release of liability hereunder, every agreement for or award of compensation, or modifying an agreement for or award of compensation, under this act, if not filed by the committee or arbitrator, to which he is a party, or a sworn copy thereof, in the office of the district court in the county in which the accident occurred within sixty days after it is made, otherwise it shall be void as against the workman," etc. Gen. Stat. 1915, § 5922.

As will be seen, the provision covers every release of liability and every agreement for or award of compensation, and provides that, if it is not filed in the office of the district court within 60 days after it is made, it shall be void as against the workman. Whether the purpose was publicity for the protection of the employé, or security for employers, or to serve some beneficial public purpose, it was competent for the Legislature to provide that such releases and agreements should be made a matter of record. In case it is not filed, the agreement and release is ineffectual and the parties are set back where they were before a settlement was negotiated. No rights are therefore sacrificed, and the requirement that it shall be filed of record is not a burdensome one.

We think the court ruled correctly, and therefore its judgment is affirmed. All the Justices concurring.

(101 Kan. 87)

WESTLING v. ATCHISON, T. & S. F. RY. CO. (No. 20777.)*

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Master and Servant ⟹278(18)—Action Under Federal Employers' Liability Act—Evidence—Negligence.

The evidence reviewed, and *held* to support the plaintiff's claim that the death of her husband was caused by the negligence of the defendant in the manner alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 969, 971.]

2. Master and Servant ⟹278(18) — Injury to Servant—Evidence.

Instructions examined, and no error found therein.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 969, 971.]

Appeal from District Court, Cowley County.

Action by Elsie Westling, administratrix of the estate of Charles Westling, deceased, against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, for appellant. C. L. Swarts and Jackson & Noble, all of Winfield, for appellee.

WEST, J. Plaintiff recovered a judgment for $12,000 for the death of her husband under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]); he having been killed by a fall from the tender of an engine on which he was fireman, the allegation being that the fall was caused

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 11, 1917.

by violently and suddenly and without notice jerking the tender, throwing the deceased therefrom. The defendant appeals. The complaints presented in the brief are that there was no evidence of mismanagement of the engine and that instruction No. 8 was bad. The answer presented a general denial and plea of assumption of risk.

[1] On behalf of the defendant, a railway mail clerk, a conductor, a brakeman, a rear brakeman, engineer, and two passengers all testified, in substance, that there was no violent jerking or rough handling of the train. The engineer testified that he saw the deceased standing on the coal tender about two or three feet from the side of the tank, that when he missed him he started back, and found him lying about 200 feet from the west end of the curve over which the train had passed. On redirect examination he testified:

> "When I am drifting down the way I was, I have perfect control of the train with the air. I had no trouble stopping. After I saw the fireman was gone, I didn't stop immediately. I looked for him around the train before I stopped. It would take about ten seconds to stop the train, if I wanted to. The reason I didn't stop instantly was because I thought he might be on the train. At the time I looked back and saw him standing on the car in the tender, I hadn't reached the point of the curve. The curve is just about at the public crossing. Just as I released the air I looked back. He was standing there when I had released the air. I just glanced up and saw him. At that time there was no jar or jerk."

A witness for the plaintiff testified that:

> He was riding on the train with his wife. "A sudden lurch of the train attracted my attention at the time. The train stopped after running one-half to three-quarters of a mile after the lurch. The conductor and brakeman got off the train, walked forward, and then ran back. The train was backed up to where the fireman was found. The fireman was dead when found. The fireman was found at about the same place the lurch occurred. We were lurched or jerked back to our seats. It was a sudden starting and stopping. This lurch would have thrown a person standing in the aisle of the coach from their feet. The passengers in the coach remarked that the lurch was very sudden."

A former section foreman of the company, who was on the train, testified:

> "After I left Chautauqua Springs that day, there came a sudden jerk, forward and back. I supposed it was the air brake. It was a sudden quick jerk, forward first, and then jerked backward. It was something very uncommon for a train to do, running like that; it was running 15 or 20 miles an hour. This jerk was of a nature sufficient to call my attention to it. I have been jerked around that way on side tracks, but I never was jerked that way while riding in a coach. When the jerk first happened, I thought it was a car off. The jerk was something unusual in my experience. A man standing in the aisle would have had to grab at something to have stood on his feet. * * * This sudden jerk was the same place where the man was found. The jerk that I have mentioned produced excitement among the passengers."

This witness' wife testified concerning the jerk:

> "It was something very unusual, that I had never had while riding on a train. The jerk went on for a while. It finally stopped. This jerk was the only jerk I experienced while on the train. I heard something said by some one while I was on the train with reference to the jerk. This jerk, it was sudden; I feared it was a wreck." "This jerk was so sudden that I felt it was a wreck, and that was the first thought that came to me, and I went to praying."

A daughter of the witness just mentioned testified:

> "After the train left Chautauqua, there was a very severe jerk. Any one standing would have had to hold onto something to stand on his feet. I was sitting with my mother in the rear coach. It was before the train stopped. After this severe jerk, the train ran a ways and stopped."

Special questions submitted by the plaintiff were answered to the effect that the fireman was thrown off the tender by reason of the sudden and violent jerk of the train, caused by the operation or management of the engine. Questions submitted by the defendant were answered to the effect that the deceased had had five years' experience as a trainman, and had been over the run 26 times a week; that the danger of standing upon the coal in the tender was as apparent to him as to defendant or its other employés in charge of the train; that he was capable of knowing and measuring the danger thereof; also that the negligence of the defendant caused or contributed to the death, that it consisted of a sudden jerk of the engine, and that the deceased was not guilty of contributory negligence. In view of the evidence referred to and the findings, the first contention of the defendant that there was no evidence of mismanagement, or of any unusual jerk or lurch to the tender, and no evidence to support the findings, cannot be sustained. Certainly the testimony on the part of the plaintiff was sufficient basis for finding and concluding that the death was caused by being thrown from the tender on account of the sudden jerk of the engine.

[2] It is argued that the eighth instruction was vicious, because inferentially authorizing the jury to find for the plaintiff if he fell by reason of a lurch or jerk, regardless of whether such lurch or jerk was ordinary or extraordinary, or whether or not caused by the negligence of the engineer in the management of the engine. It is said that it presented the doctrine of res ipsa loquitur, and gave the jury license to find that evidence of a jerk necessarily meant a jerk caused by the negligence of the engineer. The instruction complained of stated that the plaintiff relied upon a chain of facts and circumstances which she claimed were sufficient to charge the defendant with wrongfully causing the death of her husband, and as constituting negligence on the part of the defendant, and continued:

> "A given fact may be proven by circumstances, as well as by direct testimony, and in this case, if you believe the facts and circumstances proven are consistent with each other, and inconsistent with any other reasonable hypothesis than that the defeased fell from said train by reason of a lurch or jerk, if you find that any such lurch or

jerk was made, and was thereby killed, then you would be justified in finding that the deceased fell from such train by reason of such lurch or jerk."

It is stated in the plaintiff's brief that in the other instructions the court explained to the jury that, before the plaintiff could recover, she must prove negligence on the part of the defendant, and show that it and its employés did not exercise ordinary care in the management of the train, and that by reason of the want of ordinary care the fireman was thrown from the tender and killed. Assuming this to be correct, the charge thus given, when connected with the quoted portion of instruction No. 8, seems fairly and correctly to have stated the law of the case, that in order for the plaintiff to recover the jury must believe from the evidence and all the circumstances shown that the lurch was caused by the negligence of the defendant in the operation of its train, and that the fall from the tender was caused by the lurch. See Philadelphia & R. Ry. Co. v. Maryland (C. C. A.) 239 Fed. 1.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 68)

FRITTS v. REIDEL et al. (No. 20738.)*

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. JUDGMENT ⟹190—MOTION FOR JUDGMENT —VACATION.

Where a defendant is permitted to file an amended answer after his adversary's motion for judgment has been sustained, the granting of such permission is, in effect, an informal setting aside of the order sustaining the motion for judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 351.]

2. ATTACHMENT ⟹349—REDELIVERY BOND—SUFFICIENCY OF ANSWER.

An answer pleading a defense to an action on a redelivery bond examined, and *held* sufficient against a motion for judgment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1257-1271.]

3. ATTACHMENT ⟹352—REDELIVERY BOND—ACTION — INSTRUCTION — WEIGHT OF EVIDENCE.

Where the terms of a written redelivery bond are simple and easily understood, and the defense sought to be made against it is one of fraud and misrepresentation, in that the bondsman could not read, and that he had signed it in reliance on the explanation of its terms made to him by the agent of the party seeking to enforce it, and that the bond contained terms not explained to him, the trial court should instruct the jury that the evidence to maintain such a defense should be clear, decided, and satisfactory (Bank v. Reid, 86 Kan. 245, 120 Pac. 339); and the ordinary stereotyped instruction that a "preponderance of the evidence" will defeat a recovery is insufficient, where a more precise statement of the law of evidence relating to a defense based on allegations of fraud and misrepresentation to defeat a written instrument is requested.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1304, 1305.]

Appeal from District Court, Sheridan County.

Action by V. A. Fritts against Joe Reidel and others. Judgment for defendants, and plaintiff appeals. Reversed, and new trial awarded.

John R. Parsons, of Wakeeney, for appellant. W. H. Clark, of Hoxie, for appellees.

DAWSON, J. This was an action on a bond for the redelivery of a mare, which the plaintiff had subjected to an attachment in an action before a justice of the peace. When the justice gave judgment for plaintiff, the attached property was ordered to be delivered to the constable and sold. The mare was withheld and its delivery refused. The defendant bondsman answered that he could not read the English language, and that he had signed the bond at the request of plaintiff's attorney, who at the time told him:

> "All it will mean is that you simply stand as surety that this mare will be here at this place [the debtor's farm] on the day of the trial next Wednesday. * * * That the defendant never knew, until he was sued on said bond, what said bond contained or what said bond meant; * * * that the said redelivery bond signed by him is entirely different from the said oral contract agreed upon by and between said attorney and agent of plaintiff, as to what said bond was to contain and as to what said bond was to mean when reduced to writing; that after said oral contract was made, as to what said bond was to mean as aforesaid, the said attorney did willfully and fraudulently substitute an entirely different contract from the oral contract and agreement made before the signing of the said bond, as to what the said bond when reduced to writing was to contain and was to mean; and that the defendant, without any knowledge whatever of the said fraud on plaintiff's part, signed said redelivery bond in good faith, relying on the honesty of the plaintiff's agent and attorney," etc.

The conditions of the bond were:

> "Now, we, the undersigned, are held and firmly bound to said constable, in the sum of $500, that we will safely keep said property and return the same upon the close of the trial of the above-entitled action, if the same shall be ordered by said court to be returned to said constable or his successors; if these conditions be performed, then this bond be void, otherwise to remain in full force and effect."

The defendant prevailed. The plaintiff assigns errors.

[1] Plaintiff first complains that the defendant was allowed to file a second amended answer, after plaintiff's motion for judgment had been sustained. While apparently no motion was filed to set aside the judgment, the defendant's application to file his answer alleged:

> "That the said defendant has paid the cost ordered to be paid in said action, and that this defendant has a good defense to this cause of action as set out in said defendant's amended answer, which defendant prays leave to file now in this court. That this defendant has never delayed the trial of this cause of action on purpose or otherwise, and is now ready and will go into trial of this action at this term of court, if permitted to file his said amended answer."

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 11, 1917.

It was on this showing that the defendant was permitted to file his second amended answer, and the permission thus given amounted to an order setting aside its previous order sustaining the motion for judgment already entered. This, in effect, was what was done; somewhat informal, and perhaps irregular, but it does not rise to the gravity of reversible error. The court undoubtedly had power to set aside its previous order, and the allowance of belated pleadings was within its discretion. Bank v. Badders, 96 Kan. 533, 152 Pac. 651.

[2] The second amended answer pleaded a defense sufficient to withstand the motion for judgment lodged against it. Plaintiff argues that defendant was presumed to know the law and his legal obligation thereunder. Very true, but the defendant was not bound by the terms of the bond and their legal consequences if he was misinformed of the extent of his obligation by plaintiff's attorney and relied thereon, and did not knowingly or understandingly sign the bond. Perhaps that was not true, but it can hardly be said that his plea did not raise at least a narrow issue of fact for the consideration of the jury, and it could not be arbitrarily overridden on a motion for judgment; nor would it have been proper for the court to usurp the jury's functions by directing a verdict.

[3] Error is assigned on one of the instructions, the substance of which was that it devolved upon the defendant to show by a preponderance of the evidence that the contract (bond) sued on had been fraudulently substituted for another—the one explained to the defendant by the plaintiff's attorney, and that—

> "if he did show by a preponderance of the evidence that the contract sued on had been substituted fraudulently for another which he had meant to sign then the defendant was entitled to judgment."

Plaintiff contends that this instruction was wrong; that the court should have instructed the jury that the evidence of substitution should be clear, decided, and satisfactory. The latter is the correct doctrine applying to cases where a defense of fraud is sought to be maintained against a written obligation signed by the party to be charged therewith. This phase of the law is fully discussed and the cases reviewed in Bank v. Reid, 86 Kan. 245, 120 Pac. 339. Counsel for plaintiff called the trial court's attention to this legal principle before the jury were instructed, and also on the motion for a new trial. Herrald v. Paris, 89 Kan. 131, 130 Pac. 684. The decisions in Hockett v. Earl, 89 Kan. 733, 133 Pac. 852, and Hewey v. Fouts, 91 Kan. 680, 139 Pac. 407, did not intend to modify the general and salutary rule that the consequences attaching to written obligations are not to be lightly sworn away by parol testimony. The terms of the redelivery bond were simple and easily understood. According to defendant's evidence pertaining to what plaintiff's attorney said to him in explaining the nature and terms of the bond, the most that could be said is that the explanation was a little crude and incomplete. There was not much more to the obligation than plaintiff's attorney explained to him. There was no showing that the defendant bondsman made even the slightest attempt to see that the terms of the bond—even so far as he did understand them—were complied with. So far as we can discern from the record, the defendant made default on the bond, even to the extent he intended to be bound. The instruction given did not correctly define the extent of the burden devolving on the defendant before he could defeat his written obligation, and this court is in serious doubt about the justice of the net result.

Therefore the judgment is reversed, and a new trial awarded.

JOHNSTON, C. J., and BURCH, MASON, WEST, and MARSHALL, JJ., concurring.

PORTER, J., concurring specially, holds that, on the defendant's own evidence, the statement of plaintiff's attorney was in substantial accord with the simple terms of the bond, that defendant established no defense, and that judgment should be ordered for plaintiff.

(84 Or. 601)

MARKS v. FIRST NAT. BANK OF ROSEBURG.

(Supreme Court of Oregon. June 19, 1917.)

1. Appeal and Error 🔑237(5) — Reservation of Grounds for Review.

Where plaintiff made no motion for a directed verdict and did not otherwise raise in the lower court the sufficiency of the evidence to support the verdict for defendant, the appellate court will not review the sufficiency thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302.]

2. Appeal and Error 🔑181 — Questions Not Raised Below—Review.

In the absence of some action in the lower court raising and reserving other questions, review is limited to jurisdictional questions and the sufficiency of the allegations of the complaint; Const. Amend. art. 7, § 3 (see Laws 1911, p. 7), not abrogating this statutory rule of appellate procedure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141-1151, 1157, 1158, 1160.]

3. Banks and Banking 🔑154(7) — Recovery of Deposit—Assignment.

In an action by plaintiff in his own behalf and as assignee of three of his relatives to recover from defendant bank an alleged balance of their deposit, exclusion of check drawn by a relative in favor of plaintiff was proper in view of L. O. L. § 6022, providing that a check is not an assignment of the deposit to the payee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 522-525.]

4. Banks and Banking 🔑154(3)—Deposit —Action—Waiver of Demand.

Where defendant bank denied its liability, no demand was necessary in an action to recover an alleged deposit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 508-511.]

Department 1. Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Action by H. P. Marks against the First National Bank of Roseburg. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action brought by plaintiff on his own behalf and as assignee of three of his relatives, to recover alleged balances of their deposits with the defendant. The answer denies the material allegations of the complaint and alleges affirmatively that the deposits claimed had been withdrawn from the bank by T. R. Sheridan, pursuant to authority given him by plaintiff and his assignors. The answer also sets up the defense of account stated. Issue was joined on the affirmative allegations of the answer, and the cause was tried before a jury which found for the defendant. Judgment was entered on this verdict, and plaintiff appeals.

George Jones, of Roseburg (John T. Long, of Roseburg, on the brief) for appellant. O. P. Coshow, of Roseburg, for respondent.

McCAMANT, J. (after stating the facts as above). [1] There are but three assignments of error. The one most insisted on is the entry of judgment for the defendant, plaintiff insisting that there is no evidence to support the verdict. Plaintiff made no motion for a directed verdict, nor did he otherwise raise in the lower court the question on which he now relies. It has been repeatedly held that the jurisdiction of this court is appellate and its province is to correct the errors of the circuit court. If the circuit court has committed no error, this court cannot reverse its judgment. In the absence of some ruling in the circuit court on the question relied on, there is nothing on which error can be predicated. Shmit v. Day, 27 Or. 110, 116, 39 Pac. 870; United States Mortgage Co. v. Marquam, 41 Or. 391, 405, 69 Pac. 37, 41; Stoddard Lumber Co. v. Oregon-Washington Co., 165 Pac. 363, decided May 29, 1917.

[2] The only exceptions to this rule are jurisdictional questions and insufficiency of the allegations of the complaint. Shmit v. Day, 27 Or. 110, 116, 117, 39 Pac. 870. It has been expressly held that this court will not consider the sufficiency of the evidence to justify the verdict in the absence of some action in the circuit court raising and reserving the question. Shmit v. Day, 27 Or. 110, 116, 39 Pac. 870; Nunn v. Bird, 36 Or. 515, 520, 59 Pac. 808. A different rule would be unjust to the adverse party and unfair to the trial court. It often happens that the evidence is insufficient in some respect which can be readily supplied. In such case, it is within the discretion of the trial court to open up the case and receive the missing evidence. A litigant should not be denied the benefit of such procedure by a rule which permits an appellant to contend in this court for the first time that the evidence of his adversary is insufficient to support a verdict.

It is contended that the above rule has been modified by the amendment to article 7 of the Constitution, adopted in 1910 (Laws 1911, p. 7). Section 3 of the amended article authorizes this court to modify a judgment in certain cases, but it does not abrogate the salutary rule of appellate procedure hereinbefore set out.

[3] Error is also assigned on the exclusion by the lower court of a check drawn by E. C. Marks in favor of plaintiff. The check was offered to prove the assignment to plaintiff of the cause of action alleged in the second count of the complaint. A check is not an assignment of the deposit to the payee. L. O. L. § 6022; United States National Bank v. First Trust Bank, 60 Or. 266, 272, 119 Pac. 343. The evidence offered was therefore immaterial and was properly excluded.

[4] Plaintiff testified on cross-examination that he made several demands on Sheridan for his money. On redirect he was asked:

> "Were you making demand upon Mr. Sheridan, or were you dealing with Mr. Sheridan as an individual or as president of the bank?"

On objection by the defendant, the court excluded the testimony sought to be elicited.

We think that the ruling was right. Where, as in this case, a bank disputes its liability to a depositor, no demand is necessary to support the depositor's action. First National Bank v. Peck, 180 Ind. 649, 659, 103 N. E. 643; Pratt v. Union National Bank, 79 N. J. Law, 117, 120, 75 Atl. 313; Holden v. Farmers' National Bank, 77 N. H. 535, 538, 93 Atl. 1040, L. R. A. 1915E, 309; Donijanovic v. Hartman, 169 Mo. App. 204, 211, 152 S. W. 424. It appeared that the demands made on Mr. Sheridan were by letter, and plaintiff testified that the letters were addressed simply to T. R. Sheridan. What was in plaintiff's mind as to the capacity in which he addressed Mr. Sheridan was clearly not evidence. Furthermore, it appeared that plaintiff demanded his alleged deposit from S. A. Sanford, cashier of the defendant. This was sufficient if a demand had been necessary.

We find no error, and the judgment is affirmed.

McBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

(84 Or. 605)

HOLDEN et ux. v. A. F. COATS LUMBER CO. et al.

(Supreme Court of Oregon. June 19, 1917.)

1. WATERS AND WATER COURSES 🔑179(3)—FLOODING LAND—EVIDENCE—ADMISSIBILITY.

In an action for damages caused by changing the channel of a river by digging a ditch across the open end of a horseshoe bend and flooding plaintiffs' land, evidence that the stockholders of both the defendant corporations were identical and that their subscriptions in each corporation were in exact proportion, and that the secretary of both corporations was identical, and that the manager of the defendant lumber corporation was a director of the defendant boom corporation, and was active in negotiations whereby it was sought to obtain plaintiffs' consent to the digging of the ditch, and that the foreman of the actual work of digging the ditch was an employé of the lumber corporation and received his pay from it, and that the boom corporation derived the funds with which to carry on its work from the heaviest stockholder in the lumber corporation and from the lumber corporation, without other evidence of the debts than promissory notes and open account, and that the boom corporation had not handled any logs other than those belonging to the lumber corporation, was admissible as tending to prove the liability of the lumber corporation for acts of the boom corporation in digging the ditch.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 249, 263.]

2. PRINCIPAL AND AGENT 🔑24—EXISTENCE OF AGENCY—JURY QUESTION.

Evidence *held* to warrant submission to the jury of the question whether defendant boom corporation which dug the ditch was the agent of the defendant lumber corporation in doing so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 722, 723.]

3. TRIAL 🔑62(3)—RECEPTION OF EVIDENCE—DISCRETION OF COURT.

The court did not abuse its discretion in permitting the plaintiffs to testify upon rebuttal in regard to the nature and extent of the damage done by the high water, where it appears that this evidence goes to meet unexpected evidence offered by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 150.]

In Banc. Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Action by A. E. Holden and wife against the A. F. Coats Lumber Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Plaintiffs are the owners of 30 acres of farming land in Tillamook county through which the Tillamook river flows, and in its course through the land it makes what may be called a horseshoe bend. The substance of the complaint is that the two defendant corporations wrongfully and without plaintiffs' consent entered upon their land and changed the channel of the river by digging a ditch across the open end of the horseshoe bend and dumping large quantities of earth and rock into the bed of the stream, thereby flooding their land and washing away the soil to their damage in the sum of $2,500. The A. F. Coats Lumber Company, answering separately, denied the allegations of the complaint. The Coats Driving & Boom Company in its answer admits the digging of the ditch, but denies that it acted wrongfully or without the consent of the plaintiffs, and denies that injury resulted therefrom. It then alleges that the ditch was dug with the consent and approval of plaintiffs, and was, in fact, an actual benefit and protection to plaintiffs' land, that the ditch was dug in a careful manner, of sufficient capacity to provide for carrying the ordinary flow of the river, but that during the winter seasons of 1915 and 1916 an unusual and extraordinary flow of water occurred in the river, and extraordinary storms and rainfall ensued, raising the waters of the stream to an unusual height, and that, if plaintiffs' land was flooded and damaged, it was not because of any act of defendants, but because of the unusual floods. A reply being filed, a trial was had, resulting in a verdict and judgment for plaintiffs in the sum of $585, from which defendants appeal.

Veazie, McCourt & Veazie, of Portland, and H. T. Botts, of Tillamook, for appellants. S. S. Johnson, of Tillamook, for respondents.

BENSON, J. (after stating the facts as above). There is a large number of assignments of error, but they may be logically discussed in two groups: Objections to the admissibility of certain evidence; and objections to certain instructions to the jury based upon such evidence.

[1, 2] The theory upon which plaintiffs presented their case was that the boom company was the creature of the lumber company, and simply an instrument in its hands, whereby it performed some of its desired ends. It is conceded that the actual work which result-

ed in the alleged injury was performed by the boom company. Upon the other hand, the defendants insisted that the lumber company could not in any event be held liable for a tort of the other corporation. In support of their contention the plaintiffs called as a witness one B. W. Miller, who testified that he was secretary of both corporations; that during the year 1915 "the Coats Driving & Boom Company was a logging corporation putting in logs to supply the A. F. Coats Lumber Company's mill in Tillamook." This witness also used the following language:

> "The A. F. Coats Lumber Company contemplated that they would have to have logs to run their mill, and in order to do that they bought a certain tract of timber at the head of Buley creek, and it was deemed the most practical way to get them out to have a company that would attend to that part of the work of driving and booming the logs."

The articles of incorporation of both companies were offered in evidence, from which it appears that the lumber company had a capitalization of $50,000 and the boom company a capital stock of $2,000. The minutes of the first meetings of both organizations were introduced, from which it appears that the stockholders of both were identical, and that their subscriptions of stock in the smaller company were in exact proportion to their holdings in the larger. It further appears from the evidence that O. A. Shultz, manager of the lumber company, and a director of the boom company, was active in the negotiations whereby it was sought to obtain plaintiff's consent to the digging of the ditch; that one Peter Jackson, a foreman in the actual work of digging the ditch, was an employé of the lumber company and received his pay from it; that the boom company derived the funds with which to carry on its work, including some miles of logging railroad and equipment, from A. F. Coats, the heaviest stockholder in the lumber company, and from the lumber company itself, without other evidence of debt than promissory notes and open account; and that the boom company had not handled any logs other than those belonging to the lumber company. All of this evidence was admitted over the strenuous objection that none of it tended to prove any liability upon the part of the lumber company. With this contention we cannot agree. It is probably true that no one item thereof is sufficient evidence upon which to base a verdict, but each detail certainly constitutes a circumstance throwing light upon the situation, and when combined they make a sufficient record to justify submission of the question to the jury.

The objections to the instructions, with a single exception, are predicated upon the admissibility of the evidence already discussed, so we need not consider them further.

One instruction, however, is based upon the theory that there was evidence that the earth and rock were dumped into the river by one or both of the defendants; whereas the defendants insist that there is a failure of proof in this respect. An examination of the bill of exceptions discloses abundant evidence that it was done by the boom company in the progress of its work, and therefore the instruction was not erroneous.

[3] It is also urged that the court erred in permitting the plaintiff A. E. Holden, to testify upon rebuttal in regard to the nature and extent of the damage done by the high water, but an examination of the record discloses that this evidence goes to meet unexpected evidence offered by defendants, and, in our judgment, the court did not abuse its discretion in permitting it.

We find no error in the record, and the judgment is affirmed.

(84 Or. 583)

LINDSTROM v. NATIONAL LIFE INS. CO. OF UNITED STATES.

(Supreme Court of Oregon. June 19, 1917.)

1. INSURANCE 🔑379(4)—AVOIDANCE—ESTOPPEL—PHYSICIAN'S FALSE ANSWERS IN APPLICATION.

If an applicant for life insurance makes truthful statements to medical examiner, who, without applicant's knowledge, changes answers to questions in application to make it appear that insured is a safe risk, insurer will be liable on the policy issued in consequence of the deceit of its agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1011–1015.]

2. INSURANCE 🔑641(1)—ACTION ON POLICY—REPLY—KNOWLEDGE OF FALSE STATEMENTS IN APPLICATION—"COLLUSION."

In action on a life policy, reply stating that insured signed application without "collusion" with medical examiner did not allege insured's lack of knowledge of physician's statements therein, the word "collusion" meaning a secret agreement and co-operation for a fraudulent or deceitful purpose; a playing into each other's hands; deceit; fraud.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1626, 1628, 1629.

For other definitions, see Words and Phrases, First and Second Series, Collusion.]

3. INSURANCE 🔑665(3)—ACTION ON POLICY—SUFFICIENCY OF EVIDENCE—KNOWLEDGE OF FALSE STATEMENTS IN APPLICATION.

In an action on life policy evidence *held* to justify inference that insured truthfully answered medical examiner's questions, and the latter changed answers in application without insured's knowledge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711–1716.]

4. PLEADING 🔑433(7)—"AIDER BY VERDICT."

The absence from a written statement of facts constituting a cause of action or defense of a material averment will not be supplied by a verdict, but such finding will cure a defective statement in a pleading, the principle of the rule being that, where pleading is sufficiently general to comprehend matter so essential to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of the statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation is complete or imperfect; but, where a material allegation is wholly omitted, it cannot be presumed that any evidence referring to it was offered on the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1464.]

5. PLEADING 🔑436—AIDER BY VERDICT—ACTION ON LIFE POLICY.

In action on a life policy, where reply stated that medical examiner's misstatements in application were made without "collusion" instead of that they were made without insured's knowledge, a verdict for plaintiff cured the imperfection, since, if the matter had been called to the attention of the trial court, an amendment would probably have been allowed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1482, 1483.]

6. FRAUD 🔑41—ALLEGATIONS IN GENERAL.

A pleading alleging fraud must aver falsity of representations, defendant's knowledge thereof, that they were made with intent to defraud, and that the party seeking relief relied thereon.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37.]

7. INSURANCE 🔑641(1)—ACTION ON POLICY—SUFFICIENCY OF REPLY — FRAUD INDUCING RELEASE.

In action on life policy the reply was insufficient to show that beneficiary was fraudulently induced to execute alleged release, where it failed to charge that insurer knew falsity of representations, or that they were recklessly made, or that they were made with intent to deceive.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1626, 1628, 1629.]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Eda J. Lindstrom against the National Life Insurance Company of United States of America. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

This is an action by Eda J. Lindstrom against the National Life Insurance Company of the United States of America to recover upon a policy of insurance. The complaint alleges in effect that on April 17, 1913, the plaintiff was the wife of Oscar F. Lindstrom; that the defendant then, and at all times thereafter, was and is a corporation, and authorized to do business in Oregon; that on that day the defendant, in consideration of $51.67, executed to Oscar F. Lindstrom a policy of insurance by the terms of which it agreed to pay plaintiff $1,000 upon receipt of the proof of the death of the assured during the continuance of such contract; that on April 3, 1914, and while the policy was in force, Oscar F. Lindstrom died; that within proper time thereafter the plaintiff furnished due proof of such death to the defendant, which failed and refused to pay the sum specified. The answer denies the material averments of the complaint, and for a further defense alleges that Lindstrom's application for insurance became a part of the policy which was issued; that in such request he represented that all answers made to the medical examiner were full, true, and complete; that Lindstrom signed the report of the medical examination, which was made a part of the application, and thereby warranted that the answers which he made to the medical examiner had been read by him; that they were true, full, and complete, and should form the basis for the contract of insurance; that he fraudulently represented he had not within five years employed or consulted a physician for any ailment, and falsely stated he had not been treated for or afflicted with any renal or urinary disease; that he had within such period employed a physician, who gave him an unfavorable opinion in respect to his health as an insurance risk; that at the time of the making of such application Lindstrom was suffering from kidney and vesical diseases, particularly describing them. For a second affirmative defense it is averred generally that, notwithstanding liability under the contract has at all times been and now is denied by the defendant, in order to avoid annoyance and expense it effected a compromise settlement with the plaintiff June 22, 1914, whereby there was paid to and accepted by her as such beneficiary, in full satisfaction of all claims and demands under the policy, $100, which sum she retains with full knowledge of all the facts set forth herein, thereby authorizing the defendant to annul the contract of insurance. The averments of new matter in the answer were denied in the reply, which alleged, in effect, that Oscar F. Lindstrom correctly answered all questions asked him by the medical examiner, giving a full, complete, and truthful statement of his health and physical condition; that the answers so made were written by the medical examiner; that, if the answers set forth in the application are in any respect false, they were so inserted in the application by the defendant's duly authorized agent, after the full and exact truth had been communicated to him by Oscar F. Lindstrom, and became a fraud and deceit on the part of the medical examiner; that Lindstrom signed the application for insurance without fraud or attempt to deceive the defendant, and without collusion on his part with the medical examiner. For a further reply it is alleged generally that the pretended release was obtained from the plaintiff by the fraud of the defendant; that she was induced to sign the release by reason of false, fraudulent, and unlawful representations made by defendant to her to defraud and deceive her; that defendant represented to the plaintiff that the policy of insurance was void because of false representations which had been made by Oscar F. Lindstrom as to his condition of health, thereby causing the policy to be invalid; that the plaintiff relied upon such false and fraudulent representations, and was induced thereby to sign the pretended release, and to accept the sum stated under a misapprehension of law and fact as to her rights in the premises; that thereafter she elected to rescind, and hereby consents that there be deducted from any judgment rendered in her favor against the defendant the sum of $100 so paid to her. The defendant's counsel moved the court to require the plaintiff to make the reply more definite and certain by stating whether Lindstrom's answers to the medical examiner's questions were true or false, to specify what particular acts of fraud and deceit were practiced upon Lindstrom by the medical examiner to obtain his signature to the application, and to detail what false and fraudulent representations were made by the defendant to the plaintiff with respect to the declarations uttered by Oscar F. Lindstrom to the medical examiner as to the condition of his health. This motion was denied and an exception saved. A demurrer to the reply was thereupon interposed on the ground that it did not state facts sufficient to constitute such a pleading. The demurrer was overruled, and the cause, having been tried, resulted in a verdict and judgment for $900 in favor of the plaintiff, from which the defendant appeals.

A. H. McCurtain, of Portland, and Samuel R. Stern, of Spokane, Wash. (Bauer & Greene, of Portland, on the brief), for appellant. Omar C. Spencer and Alfred A. Hampson, both of Portland, for respondent.

MOORE, J. (after stating the facts as above). [1] The demurrer alone will be considered. In order clearly to understand that part of the reply the sufficiency of which is thus challenged, attention will be called to cases cited by plaintiff's counsel holding, in effect, that if a person, in applying for a policy of life insurance, makes truthful statements as to his health and physical condition to a medical examiner, who, without the knowledge of the applicant, fraudulently changes the answers to questions on that subject so as to make it appear the insured is a safe risk, the insurance company so represented by the physician is liable on a policy issued in consequence of the deceit of its agent. Thus in Mutual Reserve Fund Life Ass'n v. Cotter, 81 Ark. 205, 99 S. W. 67, a headnote reads:

> "Where an applicant for life insurance correctly answered the questions propounded to him by the insurance company's medical examiner, but without his knowledge the examiner wrote down incorrect answers, the insurance company is estopped to take advantage of the wrong of its own agent."

In Lyon v. United Moderns, 148 Cal. 470, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672, it was ruled that the trial court properly allowed the plaintiff to prove that the insured made a true statement to the medical examiner that he had the "grippe" and a slight attack of pleurisy; and where there was no pretense that he had actual knowledge of the contents of the report, but was merely asked to sign the statement at the end thereof, the court properly instructed the jury that, if he had had the disease of pleurisy and answered "No," it would be a misrepresentation of a material fact which would avoid the policy, but that if he told the true facts to the medical examiner, and he neglected or omitted to write the answer in his report, the insured was not responsible for such omission or neglect unless he had actual knowledge that the answer had been imperfectly or incorrectly written. So, too, in Pfiester v. Missouri State Life Ins. Co., 85 Kan. 97, 116 Pac. 245, it was decided that an applicant for insurance, without knowledge to the contrary, may assume that the agent has prepared the application according to agreement, that the company has written the policy according to the application, and that he is not negligent in failing to examine such instruments for errors and omissions.

[2] The part of the reply which refers to the answers alleged by the defendant to have been falsely made by the insured to questions propounded at his medical examination is as follows:

> "That if said answers contained in said application * * * are in any respect false or untrue, they were inserted in said application by the duly authorized medical examiner and agent of defendant only after the full and exact truth had been communicated to him by the said Oscar F. Lindstrom, and because of fraud and deceit on the part of said medical examiner; that the said Oscar F. Lindstrom signed the written application without fraud or attempt or intent to deceive the defendant, and without collusion on his part with defendant's medical examiner."

It will thus be seen that the alterations, if any, in the answers to the medical examiner's questions, are not alleged to have been made without the knowledge of the insured. Webster's New International Dictionary defines the word "collusion" used in the reply as follows: "A secret agreement and co-operation for a fraudulent or deceitful purpose; a playing into each other's hands; deceit; fraud." It is possible, therefore, that Oscar F. Lindstrom may have had full knowledge of the medical examiner's alleged scheme to defraud his principal without co-operating in any manner in such agent's deceit. The rules of practice adopted by the circuit court of the state of Oregon for Multnomah county, where this cause was tried, require a party who attacks an adversary's pleading by motion or demurrer also to give a written notice stating the specific question to be considered. Complying with this precept, the defendant's counsel served upon the opposite party a writing which, inter alia, states:

> "You are hereby notified that in arguing the foregoing demurrer we will contend that after the defendant has set forth certain questions and answers claimed to have been made by the assured to the insurance company, that the plaintiff must either affirm or deny the truth of the allegation contained in said answer, and that it is not sufficient reply to plead in the alternative."

It will thus be seen that the particular question now under consideration and the alleged want of knowledge of the insured in respect to his answers as noted by the medical examiner were neither presented to nor considered by the trial court.

[3] The testimony in relation to this branch of the case shows that Oscar F. Lindstrom lived upon a farm near Vernonia, Or.; that on April 10, 1913, W. W. Lindsey, an insurance solicitor, and Dr. J. H. Flynn, a medical examiner, visited the farmhouse in that vicinity of Elon Malmstein, where Mr. Lindstrom was then working; that, upon solicitation for insurance, Mr. Lindstrom went to Mr. Malmstein's house to be examined by the physician; that Mrs. Malmstein was sitting in an adjoining room, between which and the room then occupied by her visitors a door stood ajar; that she could not help overhearing the conversation; that Mr. Lindstrom told the doctor he would not take any insurance unless he successfully passed the examination, saying he had not been well, but was then feeling better, detailing all his supposed ailments, and seemingly magnifying his infirmities. In speaking of Dr. Flynn this witness stated upon oath:

> "He asked a few questions, not so very many. He asked him (Mr. Lindstrom) if his parents were living, how old they were, and a few other questions; * * * but I cannot exactly say the ones that were asked. Then he went on and said that is all the questions you need answer now; I will fill out the rest, and fix it all right."

Mrs. Malmstein further testified:

> "Dr. Flynn examined him, and told him he had only a little bladder trouble, and he said he would give him a bottle of medicine that would cure him in a little while, and he repeated this two or three different times, and he said he was sure that in three weeks' time he would be all right."

This testimony is partially corroborated by that of Mr. Malmstein, who in answer to the question,

> "Did Dr. Flynn make any statements after he came out (of the house) with Oscar Lindstrom about the medical examination?"

replied:

> "Dr. Flynn and Mr. Lindstrom talked some about his condition. Dr. Flynn said he could be accepted all right. He said the little trouble you have is not very much—a little bladder trouble. We can get medicine that will cure you in a little while; about three weeks he would be well."

This testimony was emphatically denied by Dr. Flynn, who stated upon oath that in his report of the medical examination he correctly noted Mr. Lindstrom's answers as he gave them. From the sworn statements of Mr. and Mrs. Malmstein the jury might reasonably have inferred that Oscar F. Lindstrom correctly answered every question propounded to him by Dr. Flynn, to whom he carefully detailed all his supposed physical ailments, and that, without his knowledge, the medical examiner changed his answers and supplied others where necessary, so as to make it appear that Lindstrom's application was a safe risk.

[4] The absence from a written statement of facts constituting a party's cause of action or defense of a material averment will not be supplied by a verdict, but such finding will cure a defective statement in a pleading. Houghton & Palmer v. Beck, 9 Or. 325; David v. Waters, 11 Or. 448, 5 Pac. 748; Weiner v. Lee Shing, 12 Or. 276, 7 Pac. 111; Bingham v. Kern, 18 Or. 199, 23 Pac. 182; Kimball v. Redfield, 33 Or. 292, 54 Pac. 216; Hargett v. Beardsley, 33 Or. 301, 54 Pac. 203; Foste v. Standard Ins. Co., 34 Or. 125, 54 Pac. 811; Hannan v. Greenfield, 36 Or. 97, 58 Pac. 888; Savage v. Savage, 36 Or. 268, 59 Pac. 461; Chan Sing v. Portland, 37 Or. 68, 60 Pac. 718; Investment Ass'n v. Stanley, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; Creecy v. Joy, 40 Or. 28, 66 Pac. 295; Patterson v. Patterson, 40 Or. 560, 67 Pac. 664; Philomath v. Ingle, 41 Or. 289, 68 Pac. 803; Nye v. Bill Nye Milling Co., 42 Or. 560, 71 Pac. 1043; Ferguson v. Reiger, 43 Or. 505, 73 Pac. 1040; Madden v. Welch, 48 Or. 199, 86 Pac. 2; Johnson v. Sheridan Lumber Co., 51 Or. 35, 93 Pac. 470; Hillman v. Young, 64 Or. 73, 127 Pac. 793, 129 Pac. 124.

In Booth v. Moody, 30 Or. 222, 225, 46 Pac. 884, 885, Mr. Justice Bean in discussing this subject observes:

> "The extent and principle of the rule of aider by verdict is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation of the complaint is complete or imperfect. But if a material allegation going to the gist of the action is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict."

[5] The bill of exceptions herein contains as a part thereof the entire testimony, and for that reason it is unnecessary to invoke from the verdict a presumption that evidence was received tending to show that, without his knowledge, incorrect answers were noted by the medical examiner upon Mr. Lindstrom's application for insurance. If the defect in the reply wherein the phrase "without collusion" was improperly used for the expression "without knowledge" had been particularly called to the attention of the trial court, an amendment of the pleading would probably have been allowed; but as the averment referred to was not wholly omitted, and testimony in relation thereto was received, the verdict cured such imperfection.

[6, 7] Another part of the written notice, served with the demurrer, is to the effect that the allegations of fraud in the reply in respect to the representations imputed to the defendant's agent, whereby the plaintiff's execution of the release is asserted to have been induced, are not set forth with sufficient certainty. The part of the final pleading thus assailed reads:

> "That plaintiff was induced to sign said release by reason of false, fraudulent, and unlaw-

ful representations made by defendant to her with intent to defraud and deceive her; that defendant represented to the plaintiff that said policy of insurance was void and of no effect because of alleged and pretended false representations which defendant stated to plaintiff had been made to defendant by said Oscar F. Lindstrom as to his condition of health, and which thereby caused said policy of insurance to be invalid and not binding upon defendant; that plaintiff relied on said false and fraudulent representations, and was induced thereby to sign the pretended release in said answer referred to, and to accept a nominal sum therefor, under a misapprehension both of law and of fact as to her rights in the premises, induced by said false and fraudulent representations so relied upon by her."

It is argued by defendant's counsel that the part of the reply last quoted fails to allege: (1) Whether the representations so imputed to the defendant's agent were made with knowledge of their falsity; (2) that the statements were uttered by him with intent to defraud; and (3) that such narration was relied upon by the plaintiff. In Bailey v. Frazier, 62 Or. 142, 148, 124 Pac. 643, 645, Mr. Justice Burnett, discussing this subject, observes:

> "It has often been laid down as a rule for pleading fraud in this state that the representations must have been false; that the defendant making them knew they were false; that they were made with the intent to defraud; and that the party seeking to be relieved from the fraud must have relied upon such representations."

In addition to the cases cited as supporting the legal principle thus recognized, see, also, McFarland v. Carlsbad Sanatorium Co., 68 Or. 530, 137 Pac. 209, Ann. Cas. 1915C, 555; Cobb v. Peters, 68 Or. 14, 136 Pac. 656; Outcault Advertising Co. v. Buell, 71 Or. 52, 141 Pac. 1020; Corby v. Hull, 72 Or. 429, 143 Pac. 639; Ingram v. Carlton Lumber Co., 77 Or. 633, 152 Pac. 256; Hyde v. Kirkpatrick, 78 Or. 466, 153 Pac. 41, 488.

In Schoellhamer v. Rometsch, 26 Or. 394, 38 Pac. 344, it was ruled that an intent to deceive was not such an essential ingredient of a charge of fraud as to render the complaint omitting that allegation vulnerable to attack after a general demurrer to the initiatory pleading had been overruled. In McFarland v. Carlsbad Sanatorium Co., supra, it was held that a pleading charging fraud should allege that the representations were false, and either known by the person making them to be false, or were made by him recklessly as of his own knowledge without knowing whether or not they were true.

In Colorado Springs Co. v. Wight, 44 Colo. 179, 96 Pac. 820, 16 Ann. Cas. 644, 647, it was decided that a charge of fraud in a pleading which did not either expressly or impliedly allege that the defendant knew the representations to be false or that he intended them to be acted upon was demurrable for failure to state a cause of action. In the notes of that case it is said:

> "Any allegation which necessarily implies knowledge is sufficient. If the term 'fraudulently' is used in the declaration, complaint, or petition, an allegation that the defendant knew the falsity of the representations may be dispensed with. * * * As a matter of pleading, 'fraudulenter without sciens, or sciens without fraudulenter' is sufficient."

An examination of that part of the reply last hereinbefore quoted will disclose that while the adjective "fraudulent" is used to qualify the name "representations" as there first employed, the adverb "fraudulently" is not used to limit or modify the verb "represented," nor is it charged either that the defendant knew the representations to be false, or that they were made recklessly without knowing whether or not they were true, nor is it averred that the representations were made with intent to deceive. These omissions show that the part of the pleading referred to does not state facts sufficient to constitute a reply; and hence an error was committed in overruling the demurrer interposed on that ground. Other errors are assigned, but, believing they will not be repeated, the judgment is reversed and a new trial ordered.

McBRIDE, C. J., and BEAN and McCAMANT, JJ., concur.

(85 Or. 113)

ROGUE RIVER FRUIT & PRODUCE ASS'N v. GILLEN-CHAMBERS CO.*

(Supreme Court of Oregon. June 19, 1917.)

1. CONTRACTS 🔑284(4)—CONSTRUCTION—ARBITRATION.

A construction contract reserving to the owner's engineer the right to inspect the building does not make him the arbiter of compliance with specifications so as to render his acceptance or failure to object binding upon the owner.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1326.]

2. CONTRACTS 🔑305(1)—BREACH—WAIVER.

To constitute acceptance of a building or approval of the work and material a waiver or estoppel, it must appear that the owner knew of the defects which he afterwards complained of, since waiver cannot be imputed in the absence of knowledge.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398-1400, 1467-1475.]

3. CONTRACTS 🔑353(8)—BREACH—WAIVER—INSTRUCTIONS.

In building owner's action against the contractor for damages for defective work, a requested instruction that approval of the building bound the plaintiff after his examination was properly refused as omitting plaintiff's knowledge of the defects, since mere examination does not always impute knowledge especially of latent defects.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1837-1840.]

4. APPEAL AND ERROR 🔑216(1)—SCOPE OF REVIEW—REQUESTS FOR INSTRUCTIONS.

In the absence of request for a proper instruction upon a proposition at issue, it will not be considered on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 630.]

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*For opinion on rehearing, see 165 Pac. 1183.

5. CONTRACTS ⚷=305(1)—BREACH—ESTOPPEL.

Mere inspection of work by the building owner or its agents does not so conclusively estop it as to prevent its recovering damages for hidden defects of construction or amount to a waiver of faults discovered after the completion of the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398–1400, 1467–1475.]

Department 1. Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by the Rogue River Fruit & Produce Association against the Gillen-Chambers Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 151 Pac. 728.

This is an action to recover damages for the faulty installation by the defendant of insulating material in the plaintiff's cold storage warehouse at Medford, Or. It is admitted that the defendant signed specifications for the work, including certain requirements for furnishing and putting in place on the walls and ceilings cork board in two thicknesses, and containing also the following:

> "Guaranty:
>
> "Contractor will guarantee that the transmission of British Thermal Units per square foot per degree Fahrenheit difference in temperature for twenty-four hours, in the insulation herein specified shall not exceed four British Thermal Units, and that same will not exceed that of any other insulation including Union Fiber Company's Lithboard.
>
> "All material and workmanship in connection with the installation of the insulation as above specified shall be guaranteed first class in every respect, and be subject to the inspection of the Rogue River Fruit & Produce Association's representative and the supervising engineer, at any and all times during the construction or installation of the work."

It is stated by the plaintiff that the defendant entered upon the work described and afterwards represented to the plaintiff that it had fully completed the same on its part in accordance with the contract. It is conceded by the defendant that it represented to the plaintiff that it had performed the contract as modified by the latter. The complaint avers:

> "That it was impossible from an inspection of said work so completed to detect that the same had not been properly done in accordance with said contract and specifications, and that thereupon plaintiff, not knowing the contrary thereof, and without any neglect on its part, assumed that said contract had been fully and properly performed by said defendant * * * and paid to said defendant said sum of $7,200 in full performance of said contract on its part and entered into the possession and use of said warehouse as so insulated by defendant."

The specifications required that on the walls the insulation of cork board should be double in thickness, "set in cement plaster or hot asphaltum or pitch, breaking joints with second layer, and after cork has been set in place plaster same with two coats of best cement plaster floated to a smooth surface." The ceiling was to be insulated by placing two layers of cork board on the ceiling, nailing the first to the joists dipping the edges in hot asphaltum, or wiping the same with cement plaster as applied. The second layer was to be dipped in hot asphaltum or set in cement plaster using wooden skewers driven in at an angle sufficient to hold the board in place until the plaster or pitch had set.

The complaint charges that the defendant failed to secure the first layer to the wall in any manner; that it also did not fasten the second layer on the walls and ceiling in any way, or break the joints, and in several other respects did not perform its agreement, with the result that the insulation was faulty and defective and that in many cases the cork material fell away from the ceilings and side walls and cracked so as to make it poor and insufficient for the purpose designed by the contract; and, lastly, that the transmission of heat through the insulation in British Thermal Units per square foot per degree of temperature for 24 hours greatly exceeded the ratio prescribed by the contract. The plaintiff alleges damages amounting to $2,000 on account of the alleged shortcomings of the defendant.

The answer admits the payment to the defendant of the contract price of $7,200, except that the plaintiff retained $1,700 thereof until three months subsequent to the completion of the project, when, as defendant alleges, the balance was paid after a full and careful examination of the job by plaintiff's engineer, final acceptance of its work by the plaintiff, and determination by inspection and test that the transmission of heat would not exceed the limit specified in the stipulation. The imputations of defective and unworkmanlike manner of performing the contract are denied by the answer. It is charged by that pleading, also, that the construction of the building and the putting in of the insulation was at all times under the direction and control of the plaintiff's engineer; that the work was done in accordance with the agreement, "except where variances were necessitated by change of plans of the plaintiff and its engineer with reference to the construction of the building." It is further stated by the defendant:

> "That the method of setting cork board to the walls which was deemed by the defendant most advisable was not permitted by the plaintiff, and defendant was required by the plaintiff to set the cork board to the walls with hot pitch and nails instead of cement plaster."

And generally the answer alleges that the work was done according to contract at all times under the supervision of the plaintiff and its engineers and employés. The defendant also avers a counterclaim against the plaintiff for material sold and delivered to it which is admitted by the reply. Otherwise that pleading traverses the allegations of the answer. The jury returned a verdict for the plaintiff, and, from the ensuing judgment, the defendant appeals.

O. C. Boggs, of Medford (Beach, Simon & Nelson, of Portland, on the brief), for appellant. Porter J. Neff, of Medford (Neff & Mealey, of Medford, on the brief), for respondent.

BURNETT, J. (after stating the facts as above. [1] The first point urged in the brief of the defendant is that:

> "Where construction work is made subject to the inspection of an architect, or engineer, representing the owner, and the architect approves the work and material, issues his certificate thereon, and the same is accepted by the owner, the acceptance is binding, in the absence of fraud pleaded and proved."

The precedents cited to support this contention are where the architect is made the arbiter between the parties as to the fitness of material and manner of doing the required work, and his decision is made final on those subjects. The result of such a stipulation is to create a tribunal for the occasion whose determinations are agreed to be conclusive. In this instance, according to the quoted specifications, no such authority is vested in the architect or other person who has charge of the work on behalf of the plaintiff. It is said that the work shall be subject to the inspection of the plaintiff's representative, which means only that he shall have an opportunity to see the work while it is being performed. It is nothing more than what would be understood in the absence of any express statement on the subject. It is a general rule that a party hiring work done or materials furnished has a right to inspect the same before paying the purchase price to see if they comply with the contract. That is all that can be derived from the stipulation concerning inspection in the present instance.

What, then, is the effect of the acceptance of the work? It must be remembered that the plaintiff was the owner of the building. It was attached to the realty. The materials furnished by the defendant were incorporated as part of the structure. We note, also, the allegation of the complaint to the effect that it was impossible from an inspection of the completed work to detect that it had not been installed properly. Speaking on this topic in Steltz v. Armory Co., 15 Idaho, 551, 99 Pac. 98, 20 L. R. A. (N. S.) 872, Mr. Chief Justice Ailshie says:

> "On the other hand, the mere fact of entering into possession with knowledge of this defect is not sufficient to defeat the owner's right of action for breach of the contract as to the quality of material used, of the class and character of workmanship put on the building, unless an express waiver is shown or such other facts as would amount to a waiver. The owner always has the general possession of the property, and the contractor's possession is only a special and limited possession for the purpose of doing the work for which he has contracted. It often becomes necessary and essential for the owner to take possession of a building or structure, although not completed or imperfectly and defectively constructed, in order to protect himself from still further and greater damages. The fact of such possession should not be a bar to his right of recovery for breach of the contract. (Citing authorities.) Knowledge in a general way of a latent defect, of which the owner had no means of knowing its extent and latent dangers, will not amount to a waiver of the right of action for a breach of the contract, in the absence of other facts tending to disclose an intent to waive the right of action."

[2] In order that the acceptance of the building or the approval of the work and material shall amount to a waiver or an estoppel, it must appear that the one to be estopped or affected by the waiver knew of the defects of which he afterwards complained, because no waiver can be imputed to one who does not know what he is said to have waived. Of course, his knowledge may be proved by direct testimony or by circumstantial evidence; but, in the absence of a stipulation making the decision of the architect final with authority, we cannot say as a matter of law that the acceptance of the work is conclusively binding upon the owner beyond all right to recover for defects subsequently discovered. We can readily understand how the cork board might be attached to the walls by means of a slight application of pitch or asphaltum so as to remain temporarily in place and present an outward appearance of a substantial job and afterwards become detached from the ceiling and walls and be practically worthless. To bar the plaintiff from recovering damages under such circumstances would not accord with fair dealing, there being no showing that it knew the manner in which it was being installed and directly approved the same. Whether the plaintiff knew and with that knowledge adopted the manner of doing the work was a question of fact for the jury which has been decided against the defendant. The principal error assigned by the defendant is predicated upon the refusal of the following instruction:

> "The court instructs the jury as a matter of law that where part of a building being constructed under contract has passed under the inspection of the owner and the architect or his superintendent, and was approved by them in good faith, expressly or by implication, by failure to promptly object thereto, that part which has been so approved is not open to objection by them afterwards, this applies to the entire building if it has been so approved or to the work of a subcontractor so approved. The owners and the architects or his superintendent's objection should have been promptly exercised."

[3] This charge is not by the mark, in that it omits the element of knowledge on the part of the plaintiff of the particular defect in the installation of the materials. It is true it mentions the inspection of the owner and his representatives; but mere examination does not always impute knowledge, especially of latent defects.

The only remaining contention presented in the brief for the defendant is this:

> "A guaranty provision incorporated in a building contract, the terms of which contract require the compliance by a builder with detailed specifications provided by the owner, may be availed of only in the event of default on the part of the builder in observing the requirement of the

specifications. Such a guaranty will not be construed as a warranty that the specifications to which the builder is required to conform and from which he cannot deviate will produce any certain result."

[4, 5] Conceding this to be a correct statement of the law, yet there was no request thus to instruct the jury so far as the bill of exceptions discloses. We remember, also, that the action is predicated upon the allegation of careless and unworkmanlike performance of the contract on the part of the defendant, and the charge of the complaint is that the resulting damage flowed from the shortcomings of the defendant and unnecessarily from a breach of its guaranty. It may be conceded that, where there is no express guaranty of results, a contractor will escape being mulcted in damages if he faithfully complies with the specifications of his contract as to the workmanship and materials. It is also equally true that it is competent for a contractor to adopt plans and specifications submitted in an offer to him and thereupon to guarantee that the desired result will follow the installation of work thus outlined. For want, however, of apt requests to instruct the jury on this subject, and considering that the issue was joined on alleged failures of the defendant to perform its contract in manner and form as stipulated, the question about the effect of the guaranty in this instance properly may be dismissed without further consideration. In brief, the mere inspection of work by the plaintiff or its agents does not so conclusively estop it as to prevent it from recovering damages for hidden defects of construction or amount to a waiver of faults discovered after the completion of the work as the complaint charges.

As against the contentions urged in the defendant's brief, we conclude that the case was fairly submitted to the jury, and that the verdict and ensuing judgment are conclusive upon us. The decision of the circuit court is affirmed.

McBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

(84 Or. 582)

LA GRANDE NAT. BANK v. OLIVER.

(Supreme Court of Oregon. June 19, 1917.)

1. Chattel Mortgages 🔑138(3) — Priorities—Landlord's Lien—Replevin.

Where a landlord had a lien on crops under the terms of the lease to secure promissory notes taken for rent, and gave such notes to a bank for collection, and the bank subsequently with notice of landlord's claim took a chattel mortgage upon the crops, the landlord could have recovered the crops in replevin, alleging himself to be the owner and proving the averment by showing that he had a lien upon the property as against the chattel mortgagee who had actual notice of his claim, although the lien may not have been recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 230.]

2. Landlord and Tenant 🔑246(6) — Lien for Rent—Proceeds of Property.

By virtue of his qualified property in the crop, the landlord was authorized to follow it as far as he could trace it, and to sue at law for substituted property, and it having been converted into money, his right of property attached to the money at his option to the extent of his lien on the crop from which the cash was derived.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 999, 1000.]

3. Set-Off and Counterclaim 🔑34(1) — Subject-Matter—Claims Arising on Contract.

Under L. O. L. § 74, providing that a counterclaim authorized by section 73 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in an action arising on contract or any other cause of action arising also on contract, and existing at the commencement of the action, where a landlord took promissory notes from his tenant secured by the terms of the lease by a first lien on the crops and placed such notes with a bank for collection, and the bank with notice of such lien subsequently took a chattel mortgage on the crops, and when the crops were sold took the money and applied it to the payment of its mortgage instead of crediting it on the notes, in a suit by the bank against the landlord upon a note, the landlord was entitled to assert his claim to the proceeds by way of counterclaim upon an implied contract as for money had and received by the third person to the landlord's use.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 56.]

4. Action 🔑28—Waiver of Tort.

The chattel mortgagee having been fully aware of the landlord's property in the money, and having gained possession of the money which belonged to the landlord, although an action in tort for damages would lie upon such transaction, the landlord had an election to proceed upon an implied contract as for money had and received to his use.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196–215.]

Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by the La Grande National Bank of La Grande against E. W. Oliver. Judgment for plaintiff, and defendant appeals. Reversed for a new trial.

The plaintiff declares in the ordinary form upon a promissory note given by the defendant January 30, 1913, for $1,700, with interest at 8 per cent. per annum, which it avers "is wholly unpaid, except $16.33, paid on March 27, 1913." The amended answer, upon which the case was tried, admitted the execution of the note, but denied that it was wholly unpaid except $16.33, and for new matter stated in substance that the defendant, being the owner of, among others, two notes given by his tenant for rent of the defendant's farm for the years 1910 and 1911, upon the first of which was due $616.64, with interest from October 1, 1910, and upon the other $3,420, with interest since October 1, 1911, deposited them with the plaintiff for collection to his account; that by the terms of the lease the notes were secured by a first lien on all grain that was grown on the demised premises; that at the time he delivered the notes to the plaintiff he also placed the lease in its custody and likewise informed it that according to the provisions of that document the notes were secured by a first lien on the grain; that afterwards with knowledge of all this the plaintiff took a chattel mortgage from the tenant on the self same crop to secure its own claim against him; and lastly, that when the grain was sold the plaintiff took the proceeds and instead of applying them to the payment of the defendant's notes left with it for collection, liquidated its own demand against the defendant, absorbing all the proceeds except $16.33, which it only then credited on defendant's note upon which this action is based. The answer further alleges that at the time the proceeds of the crop were collected there was due upon the defendant's notes deposited by him with the plaintiff $4,109.59, and that after deducting the full amount of the note sued upon, there is due from the plaintiff to the defendant a balance named in the answer for which the latter demands judgment. The reply denied the new matter in the answer. The circuit court refused to allow any proof of the defendant's averments, and directed a verdict for the plaintiff for the full amount of the note described in the complaint, together with an attorney's fee. From the ensuing judgment, the defendant appeals.

James G. Wilson, of Portland (Turner Oliver, of La Grande, on the brief), for appellant. C. H. Finn, of La Grande (W. J. Makelim, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). According to the bill of exceptions the trial judge seems to have proceeded upon the theory that the diversion by the bank of the proceeds of the sale of the grain from the payment of defendant's lien thereon to the liquidation of its own chattel mortgage upon the same crop was solely a conversion sounding in tort which could not be made the basis of a counterclaim in an action arising upon contract.

[1, 2] If the defendant had a lien upon the crop he could have recovered the grain in replevin alleging himself to be the owner thereof and proving the averment by showing the fact that he had a lien upon the property at least as against those who had actual notice of his claim, although the same may not have been recorded. Reinstein v. Roberts, 34 Or. 87, 55 Pac. 90, 75 Am. St. Rep. 564. We note in passing that it is charged in the answer that the plaintiff knew the nature and extent of the defendant's lien upon the grain afterwards included in the plaintiff's chattel mortgage. By virtue of his qualified property in the crop the defendant was authorized to follow it as far as he could trace it and to sue at law for the substituted property. Terry v. Munger, 8 L. R. A. 216, 218, note. It having been converted into money, the defendant's right of property attached to that money at his option to the extent of his lien on the crop from which the cash was derived.

[3, 4] The plaintiff was fully aware of the nature and extent of the defendant's property in the specie, and having gained possession of the money which in equity and good conscience, according to the allegations of the answer, belonged to the defendant, the latter was not compelled to sue in tort for damages arising from the wrongdoing of the plaintiff. He was entitled to bring an action as for money had and received which sounds in contract. As stated in 1 C. J. p. 1033, § 159:

> "The rule is well settled that, where personal property has been wrongfully taken and converted into money or money's worth, the owner may waive the tort and sue the wrongdoer in contract for money had and received, upon the theory that he ratifies the sale as made for his benefit and sues to recover the proceeds as money had and received to his use"—citing many authorities.

In such cases the law implies a promise, or, in other words, a contract, on the part of the recipient of the money to pay it to the one to whom it justly belongs. Some precedents illustrating various conditions under which the action for money had and received will lie are collated in Wagener v. U. S. National Bank, 63 Or. 299, 127 Pac. 778, 42 L. R. A. (N. S.) 1135. True, indeed, it is, that an action for damages would lie upon such a transaction; but the one who is rightly the owner of the money has the election to proceed upon the implied contract as for money had and received, and the authority to choose is vested in him. The other party cannot elect that he himself shall be sued for the tort and not upon the implied contract.

The action here being upon a note is one arising on contract and it is said in section 74, L. O. L., in its amended form, that:

> "The counterclaim mentioned in section 73 must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action. * * * 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

Embodied in the answer, therefore, we have a statement of facts out of which the law raises the implied contract on the part of the plaintiff to pay to the defendant the money derived from the crop which was burdened by the defendant's lien to the extent of that incumbrance. The situation thus is one to which the statute above quoted applies, and the matter stated in the answer amounts to a "cause of action arising also on contract" within the meaning of the Code.

The matter is plain: If we suppose that the lien of the defendant had been foreclosed making the plaintiff a party defendant to the proper proceeding for that purpose, and that in pursuance thereof the grain had been sold, there can be no question to whom the money in the first instance would have belonged at least covering the defendant's lien upon the property. The only disposition which rightly could have been made in such a case would have been first to pay the defendant the amount of his notes which he left with the plaintiff for collection, and next to apply the surplus, if any, to the liquidation of the plaintiff's chattel mortgage. According to the averments of the answer the plaintiff, in substantially such a juncture, diverted the money from the satisfaction of the defendant's lien to the payment of its own inferior claim, thus carrying the proceeds into its own possession with the result that it had and received to the use of the defendant the amount of his notes in its hands to be collected, making itself amenable to an action arising on the contract which the law imputes to it to pay to the defendant what it had thus received. The court was in error in refusing to allow the defendant to prove the allegations of its answer.

The judgment is reversed for a new trial.

McBRIDE, C. J., and HARRIS and McCAMANT, JJ., concur.

(85 Or. 293)

RINER v. SOUTHWESTERN SURETY INS. CO.

(Supreme Court of Oregon. June 19, 1917.)

1. Insurance 🔑514—Indemnity Insurance—Bad Faith.

Where an indemnity insurance policy provided that no action shall lie against the company for any loss or expense under the policy unless for loss or expense actually paid in satisfaction of a final judgment within 90 days from the date of the judgment and after trial of the issue, actual satisfaction of a judgment by the delivery and acceptance of a note did not amount to bad faith, although the insured and his attorneys knew that their satisfaction of the judgment would enable them to compel the insurance company to pay the amount of the judgment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298.]

2. Insurance 🔑665(4) — Indemnity Insurance — Satisfaction of Judgment — Evidence—Sufficiency.

In an action on a policy of indemnity insurance to recover the amount of a loss sustained and paid in satisfaction of a judgment in favor of an injured employé in which it appeared that the judgment was satisfied by the delivery and acceptance of a note, evidence *held* to show that the judgment was in truth satisfied, and that the note was actually given and accepted in payment of the judgment, and that it was clearly intended and understood that the note extinguished the judgment, and that the parties acted in good faith without any agreement that any step in the transaction should be considered in any way different from its outward appearance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722.]

3. Evidence 🔑77(3)—Presumptions—Failure to Produce Witness.

In an action on a policy of indemnity insurance to recover the amount of loss sustained and paid in satisfaction of a judgment in favor of an injured employé by delivery of a note, where it appeared that the defendant knew of the whereabouts of such employé, it is not in a position to claim that the failure of the employé to appear as a witness for plaintiff argues bad faith.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97.]

4. Payment 🔑17 — Sufficiency — Payment by Note.

Although the delivery and acceptance of a note does not extinguish the original indebtedness unless the parties agree to give and accept the note as absolute payment, the agreement need not be expressed in terms, but it is sufficient if it appears from all the facts and circumstances that the parties intended and understood that the note should be received in absolute payment of the antecedent debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77.]

5. Insurance 🔑665(4) — Indemnity Insurance — Satisfaction of Judgment — Evidence—Sufficiency.

In an action on a policy of indemnity insurance to recover loss sustained and paid in satisfaction of a judgment in favor of an injured employé by the delivery of a note, in which it appeared that the judgment was satisfied of record, evidence *held* to show that the parties agreed that the note should extinguish the judgment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722.]

6. Insurance 🔑514—Indemnity Insurance—"Loss Actually Sustained."

The giving of a note in satisfaction of a judgment in an employé's action for injuries amounts to a loss actually sustained by the employer within the meaning of a provision of an indemnity insurance policy providing that no action shall be allowed against the insurance company for any loss or expense under the policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, etc.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298.]

In Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by E. W. Riner against the Southwestern Surety Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed, and rendered for plaintiff.

This is an action on an indemnity insurance policy. The Southwestern Surety Insurance Company issued its policy to E. W. Riner and E. B. Hill, who were partners doing business under the firm name of Riner & Hill, and were engaged in constructing a sewer for the city of Portland. By the terms of the policy Riner & Hill were insured against loss and expense arising from claims for damages on account of bodily injuries accidently suffered by any employé of the insured while engaged in work on the sewer. The insured agreed that, if suit should be brought on account of an accident, they would immediately forward all papers served upon them to the insurance company, and the company agreed at its own expense to settle or defend all such suits. The provision of the policy made most prominent by this litigation is known as paragraph L, and reads thus:

> "No action shall lie against the company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

Abel Markkane, one of the employés of Riner & Hill, was injured while working on the sewer. Markkane commenced an action against Riner & Hill for damages on account of the injury, and on February 18, 1914, he obtained a judgment for $2,588.06. The insurance company defended the action in behalf of Riner & Hill. Riner executed a promissory note on May 16, 1914, in the sum of $2,627.42, payable, with interest at the rate of 7 per cent. per annum, on or before one year after date, to the order of Abel Markkane. The note was accepted by Abel Markkane, and one of his attorneys of record satisfied the judgment. The principal sum named in the note was equal to the principal sum named in the judgment, with interest at the rate of 6 per cent. per annum, the rate fixed by law. Hill assigned all his interest in the policy to Riner, who began this action when the insurance company refused to pay. The parties waived a jury and submitted the cause to the court on the depositions of three witnesses, supplemented by a written stipulation of facts. Acting on the theory that the delivery and acceptance of a note did not constitute loss and payment within the meaning of the policy, the trial court awarded a judgment to the defendant, and the plaintiff appealed.

John C. Shillock, of Portland, for appellant. Chester A. Sheppard, of Portland, for respondent.

HARRIS, J. (after stating the facts as above). The plaintiff takes the position that the execution and delivery of the note was a loss to him, and that the acceptance of the note and formal satisfaction of the judgment amounted to a payment within the meaning of paragraph L of the policy. The defendant contends that the delivery and acceptance of a note is not such a loss and payment as will satisfy the requirements of the contract; and, furthermore, the insurance company insists that, even though it is decided that a judgment can be paid with a note, nevertheless the plaintiff cannot prevail, because: (1) The transaction was characterized by bad faith; and (2) the parties did not expressly agree that the note should be accepted in payment of the judgment.

Some notice must be taken of the evidence before we can determine whether the parties acted in good or bad faith or whether the transaction amounted to a payment of the judgment. Hill was hopelessly insolvent, and, moreover, he was a nominal rather than a real member of the partnership. Riner may also be regarded as an insolvent, although he had not been fully paid for all the work done by him, and he probably owned some tools and equipment. Riner could not pay the judgment, and Markkane could not enforce its payment. Riner was a contractor, and the existence of the judgment hampered him in his efforts to obtain new contracts. It was apparent that it would be to the advantage of both parties if Riner could obtain more contracts for work, because he would then have an opportunity to earn money with which to pay Markkane. A note payable on or before one year after date and the satisfaction of the judgment would not only remove the obstacle that hampered Riner, but it would also extend the time for payment, so that for a year, at least, Riner could not be compelled to pay his indebtedness to Markkane, and at the same time Markkane would be benefited by reason of improving the chance of Riner to earn money with which to pay the indebtedness to Markkane; and, moreover, the judgment carried interest at the rate of 6 per cent. per annum, while the note was to bear interest at 7 per cent. As explained by one of the witnesses, "the moving cause" was to give Riner more time "in order to get around" to pay the indebtedness. No witness undertook to suggest that the note was given or received in bad faith; but, on the contrary, every witness who spoke upon the subject testified that all parties acted in good faith, and that there was no suggestion or understanding that the transaction should be considered any different from what it appeared to be. Riner considered and understood that he paid the judgment with the note. Albert Streiff, one of the attorneys for Markkane, testified:

> That he told Markkane "that at the present time we could not realize anything on the execution," and "that Riner would pay this here judgment by a note. He didn't like to have that judgment hanging over him, as he could not get credit, and that, considering all the circumstances in the case, I advised him to take the note, because I told him that he would get 7 per cent. interest on it, and he could sue on it at any time, and the judgment would not be standing against Mr. Riner, and it would give him another start, and he would be able to realize on the note more readily than if he had the judgment hanging over him. And with this understanding, why Mr. Markkane agreed that he would accept a note."

[1] Undoubtedly the attorneys knew that the insurance company would not be liable on the policy until Riner paid the judgment, and they probably considered that the acceptance of the note and satisfaction of the judgment would enable Riner to compel the insurance company to pay the amount of the policy; but this does not amount to bad faith. If the satisfaction of the judgment was real, and not a mere pretense, and if there was a real delivery and acceptance of the note, and if the parties either expressly

agreed or understood that the note was in truth a payment of the judgment, then the parties acted in good faith, and the additional circumstance that the parties or their attorneys thought or knew that they could then compel the insurance company to pay the policy does not taint the transaction with bad faith.

[2] The evidence supports the conclusion that the judgment was in truth satisfied; that the note was in truth given and accepted in payment of the indebtedness; that the parties clearly intended and understood that the note extinguished the judgment; and that they acted in good faith without any agreement or understanding that any step in the transaction should be considered any different from its outward appearance.

[3] The defendant is in no position to claim that the failure of Markkane to appear as a witness for plaintiff argues bad faith. One of the attorneys for Markkane testified that he did not know the whereabouts of Markkane. It is a significant circumstance, too, that the record shows that one of the attorneys for the defendant stated that he knew where Markkane was; and at the conclusion of the taking of the depositions a continuance of the hearing was granted after counsel for defendant stated that they "would like to have it continued until day after to-morrow, and Mr. Markkane will be here." Markkane did not appear, nor was his absence explained.

[4] Having decided that the parties acted in good faith, the next inquiry is whether there was such an agreement between the parties as the law requires concerning the delivery of a note in payment of a debt. The delivery of the note by Riner and the acceptance of it by Markkane did not extinguish the judgment, unless Riner and Markkane agreed that the note should operate as payment of the judgment. The general rule adopted in most jurisdictions, and followed by this court, is that the delivery and acceptance of a note does not extinguish the original indebtedness, unless the parties agreed to give and accept the note as absolute payment. Black v. Sippy, 15 Or. 574, 576, 16 Pac. 418; Kern v. Hotaling, 27 Or. 205, 215, 40 Pac. 168, 50 Am. St. Rep. 710; Johnston v. Barrills, 27 Or. 251, 256, 41 Pac. 656, 50 Am. St. Rep. 717; Schreyer v. Turner Flouring Co., 29 Or. 1, 4, 43 Pac. 719; Savage v. Savage, 36 Or. 268, 272, 59 Pac. 461; Kiernan v. Kratz, 42 Or. 474, 485, 69 Pac. 1027, 70 Pac. 506; Stringham v. Mutual Ins. Co., 44 Or. 447, 459, 75 Pac. 822; Matlock v. Scheuerman, 51 Or. 49, 58, 93 Pac. 823; 17 L. R. A. (N. S.) 747; Cranston v. West Coast Life Ins. Co., 63 Or. 427, 438, 128 Pac. 427; Jonas v. Hughes, 64 Or. 24, 26, 128 Pac. 998; Seaman v. Muir, 72 Or. 583, 589, 144 Pac. 121; Clarke-Woodward Drug Co. v. Hot Lake Sanatorium Co., 75 Or. 234, 238, 146 Pac. 135; Johnson v. Paulson, 163 Pac. 435, 437; 30 Cyc. 1194.

While the books, including at least two of our own precedents, frequently speak of the rule as requiring the parties to "expressly" agree, nevertheless, as stated in 30 Cyc. 1201, whenever the question has been specifically considered, the decision has been that the parties "agreed," if it is shown that they agreed in terms or that they understood that the acceptance of a note extinguished an antecedent debt. The agreement need not be expressed in terms; but it is sufficient if it appears from all the facts and circumstances that the parties intended and understood that the note should be received in absolute payment of the antecedent debt. A. Leschen & Sons Rope Company v. Mayflower G. M. & R. Co., 97 C. C. A. 465, 173 Fed. 855, 35 L. R. A. (N. S.) 1; Wilhelm v. Schmidt, 84 Ill. 183; Dille v. White, 132 Iowa, 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510; Haines v. Pearce, 41 Md. 221; Hotchin v. Secor, 8 Mich. 494; Riverside Iron Works v. Hall, 64 Mich. 165, 31 N. W. 152; Randlet v. Herren, 20 N. H. 102; Athens First Nat. Bk. v. Green, 40 Ohio St. 431; Macomber v. Macomber, 31 Atl. 753; Ralston v. Aultman (Tex. Civ. App.) 26 S. W. 746; Sayer v. Wagstaff, 14 L. J. Ch. 116; 9 Ency. of Ev. 755.

[5] The evidence shows that Riner clearly understood that the note extinguished the judgment; and the testimony of Streiff makes it plain that Markkane accepted the note as absolute payment. An additional circumstance which speaks strongly for the contention of the plaintiff is the fact that the judgment was satisfied of record; and, when this circumstance is added to all the other evidence, the plaintiff has shown by clear and satisfactory evidence that, within the meaning of the general rule, the parties agreed that the note extinguished the judgment.

The remaining question for solution is whether the payment of the judgment by the note of Riner is a loss actually sustained and a payment of the judgment within the meaning of paragraph L of the policy. As a preliminary to the discussion, we may note in passing that the plaintiff cites Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, and, on the authority of that case, it is suggested that by defending the action prosecuted by Markkane, the insurance company converted the policy into a contract against liability as distinguished from a contract to insure against loss. The doctrine announced in Sanders v. Frankfort, etc., Co. was repudiated by this court in Scheuerman v. Mathison, 74 Or. 40, 57, 144 Pac. 1177. Under the provisions of paragraph L the insurance company is not liable to the assured in any sum unless the latter first pays all or some portion of a final judgment.

[6] The contract does not require that the judgment shall be paid in cash, although a

loss or expense must actually be sustained and paid in satisfaction of a final judgment; and hence, as said in Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663, "payment in property is sufficient compliance with its terms." The defendant contends, however, that the judgment must be paid in cash before it can be said that a loss or expense has actually been sustained. The argument made by the insurance company is completely answered in Kennedy v. Fidelity & Casualty Co., 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673, where the court says:

> "But the whole argument of appellant rests upon the claim that the mere giving of the notes did not amount to a loss actually sustained, for the reason that the maker of the notes and the guarantor might never be called upon to make payment, might become insolvent; that there is no certainty they will ever be paid, and, if not paid, there is no loss actually sustained. This means that the party assured, no matter what his financial condition might be, would be compelled to raise the actual cash within 60 days and pay it to the judgment creditor, or be foreclosed from enforcing the indemnity against the company. If the position is sound, the money could not be raised by borrowing at a bank, or at any other place, upon promissory notes secured either by a signer or by property, because, before the notes became due, the property might become worthless, deteriorate in value, or the parties might become insolvent, and no actual payment ever be made; hence no loss. Fairly construed, the language means simply that the judgment must be paid and satisfied within 60 days from date of its entry, and, when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment."

The editors of American and English Annotated Cases say in a note to Kennedy v. Fidelity & Casualty Company, 10 Ann. Cas. 674, that the rule announced in that case is in accord with the weight of authority, while in a note to the same case the editors of Lawyers' Reports Annotated, 9 L. R. A. (N. S.) 478, say that the rule has the sanction of all the authorities.

An extended research discloses that nearly all, if not all, the courts passing upon the question have ruled that the giving of a note amounts to a loss actually sustained by the person indemnified, within the meaning of a policy like the one held by Riner, where the creditor accepts the note as actual payment and satisfaction of the judgment. Not only the weight of precedent, but also the weight of reason, gives support to the doctrine that the making and delivery of a note may be a loss actually sustained. Seattle & S. F. R. & Nav. Co. v. Maryland Cas. Co., 50 Wash. 44, 96 Pac. 509, 18 L. R. A. (N. S.) 121; Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393. See, also, Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. 364; Wilson v. Smith, 23 Iowa, 252; Gardner v. Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540; Stenbom v. Brown-Corliss Engine Co., 137 Wis. 564, 119 N. W. 308, 20 L. R. A. (N. S.) 956; Herbo Phosa Co. v. Phila. Casualty Co., 34 R. I. 567, 84 Atl. 1097; West Riverside Coal Co. v. Maryland Casualty Co., 155 Iowa, 161, 135 N. W. 414, 48 L. R. A. (N. S.) 195.

The judgment appealed from is reversed, and the plaintiff is awarded a judgment for $2,627.43, less the offset mentioned in the written stipulation filed by the parties.

(175 Cal. 212)

MOORE v. SAN VICENTE LUMBER CO.

(S. F. 7290.)

(Supreme Court of California. May 31, 1917. Rehearing Denied June 30, 1917.)

1. Appeal and Error 🔑1002—Review—Conflicting Evidence.

Where on the vital issues the evidence was in sharp conflict, the verdict is beyond the power of review by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

2. Jury 🔑13(9)—Right to Jury Trial—Actions for Equitable Relief and Damages.

In an action to enjoin the maintenance of a pond as a nuisance and to recover damages for injuries occasioned by the pond and by the breaking of a dam, plaintiff was entitled to a trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 43.]

3. Appeal and Error 🔑1065—Harmless Error—Instructions.

As in such action the jury's function was not merely advisory, plaintiff may question the soundness of instructions in so far as they bore on the legal issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219.]

4. Appeal and Error 🔑1079—Review—Insufficient Discussion of Questions.

A contention in appellant's brief that the court erred in refusing and modifying instructions will not be considered where it is not supported by either argument or citation of authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4262.]

5. Trial 🔑296(8)—Instructions—Cure by Other Instructions.

In an action to enjoin the maintenance of a pond and to recover damages for injuries caused by the pond and by the breaking of a dam, an instruction attacked as denying a recovery unless plaintiff proved both causes of action alleged in his complaint by a preponderance of the evidence, but which might be interpreted to mean that defendant was entitled to a verdict if plaintiff had failed on each count to prove his case, was not misleading, where the court gave other instructions telling the jury in plain terms that plaintiff was entitled to recover if he showed by a preponderance of evidence that he had suffered damage from any of the alleged wrongful or negligent acts charged in the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 711.]

6. TRIAL 🔑295(5)—INSTRUCTIONS—READING AS A WHOLE.

In an action to enjoin the maintenance of a nuisance and for damages, an instruction that in order to find for plaintiff the jury must find that defendant was maintaining a nuisance was not erroneous, where it was part of an instruction dealing only with the subject of nuisance, and could not have been understood as limiting plaintiff's right to recover damages; as the charge must be read as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708.]

7. WATERS AND WATER COURSES 🔑172 — BREAKING OF DAM—TEST OF LIABILITY.

In determining whether the breaking of a dam causing injury to land below the dam was due to negligence, the conduct of defendant in constructing and maintaining the dam must be viewed with reference to the caution which a prudent man would, under the circumstances, have observed, provided he owned the land below.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 233–236.]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Charles Moore against the San Vicente Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John H. Leonard, of Santa Cruz, and Harry Rhys Davids, of Chico, for appellant. Charles M. Cassin, of San Jose, and Charles B. Younger, of Santa Cruz, for respondent.

SLOSS, J. The defendant, San Vicente Lumber Company, operates a sawmill upon land owned by it in the county of Santa Cruz. In connection with its mill it maintains a pond which it has created by the construction of a dam upon its land.

The plaintiff is the owner of adjoining lands, of which a part lie immediately below the dam. This action was brought to enjoin the maintenance of the pond, and to recover damages for injuries alleged to have been occasioned by it, and by a breaking of the dam, to plaintiff's land. Trial was had before a jury, which returned a verdict in favor of the defendant. The court adopted the verdict, and also made findings, upon which it entered judgment in favor of the defendant. The plaintiff appeals from the judgment.

The complaint was in two counts. The first alleges that the construction of the dam backed up the water and flooded a part of plaintiff's lands; that, owing to defective construction, the dam broke in the winter of 1911 and flooded the lower land of plaintiff, depositing thereon a quantity of débris and a number of logs; that, in the removal of the logs, the land was injured greatly; and that, by reason of these occurrences, plaintiff has been damaged in the sum of $10,000. The second count, after repeating many of the matters contained in the first, alleges that the pond became stagnant and caused stenches and poisonous vapors to arise therefrom, to the injury and annoyance of plaintiff and his wife, who resided near by. Damages in the sum of $10,000 were asked on this cause of action also.

[1] The answer denied all of the allegations of injury and of damage. The appellant refers, in his brief, to some testimony tending to support the allegations of his complaint. On the other hand, the respondent points to substantial evidence offered by it to show that plaintiff's land was not injured by the maintenance of the pond or by the breaking of the dam, and that the pond did not create the unwholesome and annoying conditions complained of in the second count. There is no occasion to set out the testimony in detail. It is enough to say that on these vital issues the evidence was in sharp conflict, and that the verdict of the jury is therefore beyond the power of review here.

[2, 3] The only other questions presented are those arising on the instructions to the jury. The suit was more than an equitable proceeding for the abatement of a nuisance, in which the jury's function would be advisory merely. The complaint also set up a legal claim for damages for past injuries, and the plaintiff was entitled to a trial by jury on the issues thus presented. Hughes v. Dunlap, 91 Cal. 385, 27 Pac. 642. He is therefore in a position to question the soundness of the instructions, in so far as they bear on the legal issues.

[4] In his brief the appellant first complains that four instructions requested by him should have been given. This contention is not supported by either argument or citation of authority; counsel contenting himself with the bare statement that "the instructions in question should have been given." We will not give any consideration to a point so presented. Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Gray v. Walker, 157 Cal. 381, 108 Pac. 278. The same observation applies to the claim that the court erred in modifying an instruction requested by the appellant.

[5] It is argued, although in the briefest and most inadequate way, that three instructions requested by the defendant were improperly given. Of the first of these it is said that it directed the jury that the verdict must be for the defendant unless the plaintiff succeeded in proving both causes of action alleged in his complaint by a preponderance of the evidence. Such an instruction would, of course, be erroneous. Where a complaint contains two independent causes of action, plaintiff is entitled to recover if he establishes either. But it is by no means clear that the instruction should be given the meaning attributed to it. The language in which it is cast, while not happily chosen, may be interpreted to mean that the defendant is entitled to a verdict if the jury should find that plaintiff had failed, on each count, to prove his case. The court gave sev-

eral other instructions which told the jury in plain terms that plaintiff was entitled to recover if he showed, by a preponderance of evidence, that he has suffered damage from any of the alleged wrongful or negligent acts charged in his complaint. Under these circumstances the jury could not have been misled by the giving of the questionable instruction.

[6] It was not error to instruct the jury that in order to find for the plaintiff they must find that the defendant was maintaining a nuisance. This was part of an instruction dealing with the subject of nuisance alone, and could not have been understood as limiting the right of the plaintiff to recover damages for any injury not included under that head. It is impossible, of course, for a court to state the entire law in a single instruction. The charge must be read as a whole, and, so reading it in this case, we find no ground for complaint.

[7] The last instruction assailed told the jury that, in determining the issue whether the breaking of the dam was due to negligence, "the conduct of the defendant in constructing and maintaining the dam must be viewed with reference to the caution which a prudent man would, under the given circumstances, have observed, provided he owned the land below." This is a correct statement of the law, as laid down in Todd v. Cochell, 17 Cal. 97.

No other point is made.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 208)

CLAUDIUS v. DAVIE, Mayor, et al.
(S. F. 8369.)

(Supreme Court of California. May 29, 1917.)

CONSTITUTIONAL LAW 🔑83(2)—SLAVERY—INVOLUNTARY SERVITUDE—SELECTIVE DRAFT FOR MILITARY SERVICE.

The act of Congress approved May 17, 1917, providing for the selective draft for military service, is not in violation of Const. Amend. U. S. art. 13, § 1, nor of California Const. art. 1, § 18. prohibiting slavery and involuntary servitude.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151.]

In Bank. Application by Ferdinand Claudius for writ of prohibition against John L. Davie, as Mayor of the City of Oakland, and L. W. Cummings, as Clerk of the City of Oakland. Application denied.

W. R. Dunn, of Oakland, for petitioner.

PER CURIAM. Application for a writ of prohibition, based on the claim that the act of Congress approved May 17, 1917, providing for what is known as the selective draft for military service, is in violation of section 1, art. 13, of the federal Constitution and section 18, art. 1, of the Constitution of this state, prohibiting "slavery" and "involuntary servitude." The claim is utterly without merit.

The application is denied.

(175 Cal. 811)

C. A. HOOPER & CO. v. RAILROAD COMMISSION OF CALIFORNIA.
(S. F. 8355.)

(Supreme Court of California. May 17, 1917.)

WATERS AND WATER COURSES 🔑217—STATE RAILROAD COMMISSION—CERTIORARI.

Writ of review will not lie to compel state Railroad Commission to determine priority of water consumers' rights, where the Commission itself does not consider it necessary to do so.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 306.]

In Bank. Application for writ of review by C. A. Hooper & Co. against the Railroad Commission of the State of California. Application denied.

Samuel Spring and Titus, Creed, Jones & Dall, of San Francisco, for petitioner.

PER CURIAM. In denying the application for a writ of review in this matter it is proper to say that the Railroad Commission has not denied the right of consumers in proper causes to priority in the use of water. On the contrary, it has in its opinion distinctly recognized the existence of such rights, and in its order denying a rehearing has expressly stated that "if petitioner has any such prior rights, they are not interfered with by the order of January 25, 1917." This is clearly true.

Petitioner here seeks by review to have us compel the Commission to determine such priority in a case where the Commission itself does not consider it necessary to do so. Doubtless when proper occasion arises the Commission will determine such priority in accordance with the law.

The application for a writ of review is denied.

(175 Cal. 235)

SANTA et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 7908.)

(Supreme Court of California. June 1, 1917. Rehearing Denied June 30, 1917.)

1. MASTER AND SERVANT 🔑405(4)—WORKMEN'S COMPENSATION ACT—SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.

In proceedings under Workmen's Compensation Act (Acts 1913, p. 279), a pathologist's testimony connecting employé's injury with cause of death *held* sufficient to justify commission's finding that such injury caused employé's death.

2. MASTER AND SERVANT 🔑405(4) — WORKMEN'S COMPENSATION ACT—SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.

Absolute proof or mathematical demonstration is not required to connect an employé's injury with cause of his death, so as to justify award under Workmen's Compensation Act, in view of Code Civ. Proc. § 1826, providing that the law does not require such a degree of proof as, excluding possibility of error, produces absolute certainty, but that moral certainty only is required.

3. MASTER AND SERVANT 🔑417(7) — WORKMEN'S COMPENSATION ACT—FINDINGS OF INDUSTRIAL COMMISSION—REVIEW.

Findings of the Industrial Accident Commission cannot be disturbed where they are supported by evidence upon which a reasonable man would come to the conclusion which was reached, the commission being the final judge of the facts.

In Bank. Proceedings under Workmen's Compensation Act by Mabel Cordova to obtain compensation for death of her husband, Ferdinand Cordova. Opposed by D. Santa, employer, and Georgia Casualty Company, insurance carrier. Award of compensation by Industrial Accident Commission, and employer and insurance carrier bring certiorari. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission, awarding compensation to Mabel Cordova for the death of her husband, Ferdinand Cordova.

[1] Cordova, the decedent, was employed as a painter by the petitioner, Santa. In the course of his work, he fell from a ladder, sustaining a fracture of the pelvic bone. The accident occurred on October 30, 1915, and on November 14, 1915, Cordova died. The only point made in opposition to the award is that there was no evidence that the injury was the proximate cause of death.

It appeared that Cordova was 38 years of age, and had been in good health prior to the accident. After falling from the ladder, he was taken to a hospital, and the injured part was encased in a plaster cast. He remained in the hospital, confined to his bed, and was apparently making satisfactory progress toward recovery, until the 14th day of November, 1915, when he suddenly died. The ensuing autopsy disclosed, as the immediate cause of death, a small rupture of the right ventricle of the heart. The surgeon who performed the autopsy stated that the wall of the ventricle was unusually thin, but that in other respects the heart was in normal condition. He did not discover an embolus. He, as well as the attending physician, inclined to think that the facts did not indicate any causal connection between the injury and the subsequent heart rupture.

On the other hand, Dr. Ophuls, a pathologist, who had made a microscopic examination of the heart, testified, in effect, that while the wall of the ventricle was thin, it was not more so than in many cases of men in normal health; that, in the absence of any sudden or great exertion on the part of the deceased (of which there was no evidence), he would attribute the rupture to a sudden pressure of blood upon the wall of the ventricle, and that such pressure might well have been caused by the lodging of an embolus in an artery leading from the heart to the lungs. Such an embolus could have resulted from the pelvic fracture, and been carried from the point of its origin to the heart. Dr. Ophuls testified, further, that an embolus was easily lost or overlooked in the course of an autopsy, and that the failure to discover one did not necessarily indicate that it had not existed.

This was substantial testimony justifying the commission's inference and finding that the injury had been the proximate cause of Cordova's death. It is true that, on cross-examination, Dr. Ophuls said he could not state that, in fact, there had been an embolus, and that his explanation of the cause of death was "guesswork." But a reading of his entire testimony shows that he did not, by this, mean to say that he was indulging in mere conjecture or speculation. He was giving what, on the facts before him, and in the light of medical science, appeared to be the most probable explanation of the event. The theory that an embolus arising from the injury had caused the death was "guesswork" only in the sense that there was no direct evidence of the existence of such embolus. But, in Dr. Ophuls' view, other conceivable causes were excluded by the conditions which were shown, and the one which he advanced remained as the most probable one. This was a sufficient basis for the action of the commission.

[2] Absolute proof or mathematical demonstration is not required. Code Civ. Proc. § 1826.

[3] The commission is the final judge of the facts, and its findings cannot be overturned where they have the support of evidence upon which a reasonable man could come to the conclusion which was reached. There is such evidence here.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 226)

BOAS v. KNEWING. (S. F. 7265.)

(Supreme Court of California. June 1, 1917.)

SALES 🔑479(1)—CONDITIONAL SALES—REMEDIES OF SELLER—ELECTION.

An agreement for the sale of an automobile provided that the four purchase-money notes were given in consideration of the seller's promise, upon payment at maturity, to sell and transfer the automobile, which was intrusted to the care of the buyer. In case any or all the notes remained unpaid at maturity, the buyer agreed to return the automobile to the seller. The notes were assigned to plaintiff, who, after maturity, notified the buyer that he would replevin the car if payment was not made by a given date. Before such date, the buyer left the car in the seller's garage, and so notified plaintiff. *Held*, that the seller's assignee, by threat to replevin, had elected to take the car instead of bringing suit for the price, and that the buyer was entitled to surrender the car under the terms of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418, 1419.]

Department 2. Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by J. Boas against F. T. Knewing. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel M. Samter, of San Francisco, for appellant. H. U. Brandenstein, of San Francisco, for respondent.

MELVIN, J. The plaintiff appeals from the judgment on the judgment roll.

The suit was by J. Boas upon three certain promissory notes, made payable to H. O. Harrison Company. Each of these notes was dated August 30, 1913, and bore interest at the rate of 6 per cent. per annum. The first one, which was for the principal sum of $500, was payable one month after date; the second, for $500, payable two months after date; and the third, for $1,000, payable four months after date. The defendant pleaded that the notes were of a series of four given for the purchase at a conditional sale of an automobile for the price of $2,500, in accordance with a certain written agreement, which was pleaded, and it was alleged that, following the terms of said contract, the defendant had restored the property, and that the consideration for the notes had thus ceased to have any existence.

The facts as disclosed by the findings are as follows:

By the written agreement of even date with the three notes pleaded and a fourth for $500 and interest payable five months after date, defendant promised to pay to the order of H. O. Harrison Company the sums represented by said notes. The contract recites that the notes are given upon the consideration that the Harrison Company has promised upon payment thereof, principal and interest, at maturity (time being of the essence of the contract), to sell and transfer to F. T. Knewing a certain described automobile, which was on the day of the execution of the contract and notes "intrusted to the care" of said Knewing. It is admitted and agreed by the terms of the contract that the said property so intrusted is the property of H. O. Harrison Company, to remain "in them until they shall make the aforesaid sale and transfer" after payment of the principal and interest of the notes. By this instrument Knewing agrees to return the automobile to H. O. Harrison Company in good order "in case any or all of the above-mentioned notes remain unpaid at maturity." On September 4, 1913, the plaintiff discounted the four notes and they with the contract were duly indorsed and assigned to him. At the time of the filing of this suit (January 3, 1914) the date of maturity of the fourth note had not arrived.

On maturity of the first note, Mr. Knewing, who had been notified of the transfer of the paper to plaintiff, called upon the latter and requested an extension of said note, which was granted, and on October 3, 1913, Mr. Boas wrote to Mr. Knewing, informing him that the time of payment of said note for $500 had been extended until the 10th day of October, 1913. On October 11th plaintiff notified defendant that unless the note was paid by the 14th of that month, at 10 o'clock a. m., he would replevin the car. On the latter date defendant called upon H. O. Harrison Company, requested a further extension, was told that the notes and contract were owned and controlled by plaintiff, and thereupon, before the hour of 10 o'clock a. m., defendant left the automobile in the garage at the rear of the office of H. O. Harrison Company, and separated from said office by a partition. On the following day, upon the discovery of the car in the garage, H. O. Harrison Company notified plaintiff that it was there. On the 15th of October plaintiff received a letter from defendant, dated the 14th, expressing regret that the latter was unable to meet the note and interest. The letter contained also these words:

> "As I wished to save you the trouble and myself the inconvenience of your replevining the car which I held under lease from Harrison Company, I this morning returned the car to them at their place of business at Van Ness avenue."

In his reply Mr. Boas called attention to the fact that the notes had been discounted and that the return of the car did not recover for him the money so paid. "Some settlement of these notes must be made by you at once," he wrote; "otherwise we will be compelled to hand them to our attorney for collection."

Upon the above facts, as found substantially by the court, the conclusions of law and judgment were that plaintiff take nothing and that defendant recover costs.

Appellant interprets that part of the contract of sale, providing for the return of the automobile in case any or all of the notes remain unpaid at maturity, as a provision inserted for the sole benefit of the vendor, and as being in lieu of the usual provision in similar contracts permitting the seller to retake the possession of the chattel which is the subject of a sale on default of the vendee. The vendor (according to appellant's argument) could either enforce or waive the return of the automobile and the buyer, he says, could not force on the seller an election to sue for the price or for the return of the chattel. But under such interpretation of the contract the vendor's assignee by threat to replevin had indicated his election to take the car on the vendee's default rather than to waive the right of resuming possession and to sue for the price. Since plaintiff had thus indicated his election, the vendee was not bound to await an action which could only result in the recaption of the subject of the conditional sale and the superadded burden of costs. He returned the automobile to H. O. Harrison Company just as he had agreed to do in case any or all of the notes should remain unpaid at maturity. This return was not repudiated by the vendor's assignee, and the automobile at the time of the commencement of the action was still in the garage belonging to the original vendor. It has been suggested that the retaking of the property under the terms of an agreement of conditional sale does not in and of itself terminate the contract. Liver v. Mills, 153 Cal. 459, 101 Pac. 299. But here there was default on the part of the vendee, followed by his voluntary surrender on demand, of the chattel. Before resuming custody of the property, the vendor could either sue to recover it or for the purchase price, but he was not entitled to the property and the price also. Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442; Holt Manufacturing Co. v. Ewing, 109 Cal. 353-356, 42 Pac. 435; Muncy v. Brain, 158 Cal. 301-305, 110 Pac. 945; Rayfield v. Van Meter, 120 Cal. 416-419, 52 Pac. 666; Van Allen v. Francis, 123 Cal. 474-480, 56 Pac. 339. It was not necessary that election should be manifested by suit. Indeed, in the Holt Case, the seller's election to surrender title and depend upon payment of the price agreed upon was manifested by the presentation of a claim against the estate of Ewing. So here the demand for the return of the automobile, when complied with, took away the right of Boas to sue for the purchase price.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 208)

WETZEL v. CALE et al. (S. F. 7275.)

(Supreme Court of California. May 31, 1917. Rehearing Denied June 30, 1917.)

1. Bills and Notes 🔑164—Negotiability—Time of Payment.

Under Civ. Code, § 3088, requiring negotiable instruments to be without any condition not certain of fulfillment, etc., a note, authorizing the holder to accelerate the time for payment, is not negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 411-414, 417.]

2. Bills and Notes 🔑246—Guarantor.

A party, signing a note upon its back before delivery to the payee, is a guarantor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 555-558.]

3. Bills and Notes 🔑305—Necessity of Notice—Guarantor.

Under the direct provisions of Civ. Code, § 2807, a guarantor upon a note is liable upon principal's default without demand and notice being given him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 996-1021.]

4. Bills and Notes 🔑446—Accelerating Payment—Exercise of Option.

Where a note authorized the holder to declare the entire amount payable on nonpayment of an installment, commencement of suit is a sufficient exercise of such option and notice thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1302.]

5. Bills and Notes 🔑446—Accelerating Payment—To Whom Available.

Where a note stated that the entire amount might be declared due under certain conditions at the election of the holder, the provision is not confined to the original payee, but extends also to subsequent holders.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1302.]

6. Bills and Notes 🔑521—Consideration—Sufficiency of Evidence.

Evidence *held* to sustain a finding that the note was given to discharge the maker's civil liability to payee, not to escape criminal prosecution.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1821.]

7. Bills and Notes 🔑92(2)—Consideration—Sufficiency.

A note given in compromise of a civil liability claim has a sufficient consideration, although payee might not have recovered as much by suit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 173, 176, 185, 186.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Eva L. Wetzel against F. M. Cale, J. Jerome Smith, and others. Judgment for plaintiff, and defendant Smith appeals. Affirmed.

P. C. Boardman, of San Francisco, and L. D. Manning, of Oakland, for appellant. J. G. Reisner, of San Francisco, for respondent.

SLOSS, J. This is an action upon a note whereby F. M. Cale promised to pay to L. H. Honey or order the sum of $5,000, with interest, in four installments of $1,250 each. The instrument contained a provision that, in case any installment was not paid within five days after it became due, the whole of the principal and interest remaining unpaid should forthwith become due and payable at the election of the holder of the note. Before the delivery of the note by Cale to Honey, Mabel G. Cale and J. Jerome Smith indorsed the note by writing their names on the back of it. Honey indorsed the note and delivered it to the plaintiff. The complaint alleges that the first installment was not paid when due, that more than five days had elapsed since such installment became due, and that the whole of the note, with interest, is now due and payable. Judgment for $5,000, with interest and costs, was prayed. F. M. Cale and Mabel G. Cale defaulted. J. Jerome Smith answered, denying various allegations of the complaint, and setting up certain matters by way of affirmative defense. A jury trial was waived, and the court made its findings and entered judgment in favor of the plaintiff. From this judgment Smith appeals.

[1-3] The complaint contains allegations of presentment and notice of dishonor. These allegations were, however, immaterial. By reason of the provision allowing the holder, upon certain conditions, to accelerate the time for payment of the principal, the note was not a negotiable instrument. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Smiley v. Watson, 23 Cal. App. 409, 138 Pac. 367; Civ. Code, § 3088. The appellant, who had written his name upon the back of it before delivery to the payee, was therefore a guarantor. First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; Rogers v. Schulenburg, 111 Cal. 281, 43 Pac. 899. As such, he became liable upon the default of his principal, without any previous demand or notice. Civ. Code, § 2807; First Nat. Bank v. Babcock, supra; Pierce v. Merrill, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56.

[4, 5] It was not necessary for the plaintiff to allege, or for the court to find, that plaintiff had elected, after an installment had been five days overdue, to declare the entire sum payable. The complaint set forth the facts which authorized the holder to exercise this right, and the commencement of the action to recover the full amount is, in itself, an exercise of the option, and a sufficient notice thereof., Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Bank of Commerce v. Scofield, 126 Cal. 156, 58 Pac. 451; Trinity County Bank v. Haas, 151 Cal. 553, 91 Pac. 385; Stalder v. Riverside, etc., Co., 167 Cal. 560, 140 Pac. 252. There is no merit in the contention that the provision for accelerating payments is available only to the original payee. The instrument is payable to L. H. Honey or order, and expressly provides that the right to declare the principal due for default in payment of an installment is to be exercised "at the election of the holder of this note."

[6, 7] The affirmative grounds of defense set up by Smith in his answer were that there was no consideration for the note, and that the same was obtained from Cale by means of threats of criminal prosecution. The appellant assails as unsupported the court's findings against these defenses. It appears that in October, 1911, John T. Cale, a brother of F. M. Cale, was the owner of six lots in the city of Richmond, Contra Costa county. In that month he conveyed said lots to one McCabe, the deed being executed by F. M. Cale as attorney in fact for John T. Cale. On February 3, 1912, McCabe conveyed the lots to Honey. Thereafter, in June, 1913, John T. Cale executed and delivered a deed conveying the same lots to J. C. Rohlfs, F. R. Cooper, and Fred J. T. Dawson. F. M. Cale took part in this transaction. Rohlfs, Cooper, and Dawson placed their deed on record. Neither the deed from Cale to McCabe, nor that from McCabe to Honey, had then been recorded. When Honey learned of the subsequent conveyance, which, apparently, divested his title (Civ. Code, § 1214), he addressed John T. Cale, demanding that he give the matter his attention. About the same time Honey called the facts to the attention of the district attorney of the city and county of San Francisco, and sought the issuance of a warrant charging John T. and F. M. Cale with a violation of section 533 of the Penal Code. Several interviews were had between F. M. Cale and Honey in the presence of their own attorneys and the district attorney. There is evidence that the district attorney expressed the opinion that there was no criminal intent on the part of either Cale, and that the matter was one that should be adjusted. Honey claimed that he had been damaged in the sum of over $5,000. Cale thought this demand excessive. But he and Honey finally entered into an agreement for the giving of the note in question, and Honey executed a writing in which, after reciting the preceding transactions, he released and discharged John T. and F. M. Cale from all claims for damages. The testimony of Cale was that he gave the note in order to avoid the threatened criminal prosecution. The finding of the court, however, was to the contrary, and the evidence amply supports the finding. Honey had a claim for damages against the Cales, and the court was warranted in believing that he was advancing it in good faith. The compromise of such claim, and his forbearance to sue upon it constituted a sufficient consideration for the note. Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054; Union Collection Co. v. Buckman, 150 Cal. 159, 163, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. The validity of the new promise does not depend on any subsequent inquiry into the legal sufficiency of the demand so compromised. Naglee v. Lyman, 14 Cal. 455; Rohrbacher v. Aitken, supra; Whelan v. Swain, 132 Cal. 389, 391, 64 Pac. 560. It is of no consequence, therefore, that Honey might not have succeeded in recovering as much as $5,000 if he had brought suit. This was the amount agreed upon in settlement of his demand, and the promisor cannot now repudiate his contract upon the ground that he agreed to give too much.

Complaint is made of the failure of the court to find on the allegations of the answer that the plaintiff was not a bona fide holder for value before maturity. But since, as plaintiff concedes, her rights as holder of a nonnegotiable instrument were no greater than those of the original payee, these allegations did not present a material issue.

We find no error in the record.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 230)

BERNARD v. RENARD et al. (S. F. 7024.)

(Supreme Court of California. June 1, 1917.)

1. Landlord and Tenant 🔑110(2)—Acceptance of Tenant's Abandonment.

Where premises are abandoned by the lessee, who denies liability under lease, and landlord assumes actual possession and absolute control of premises and releases them, or attempts to do so, without anything being done to indicate that he is acting for the lessee, the landlord cannot thereafter say that he has not accepted a surrender of the term, and it is immaterial that the lessee refused to accept possession at all, or that the lessor failed to obtain a permanent tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 367–369.]

2. Pleading 🔑127(2)—Answer—Admissions—Action for Rent—Abandonment.

In lessor's action for rents after lessee's abandonment, lessee's answer, alleging that lessor refused to cancel lease, did not show that the lessor had failed to accept the abandonment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264, 267.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Nellie B. Bernard against L. Renard and others. Defendants appeal from judgment for plaintiff and from order denying motion for new trial. Reversed.

Joseph E. O'Donnell and Costello & Costello, all of San Francisco (E. R. Hoerchner, of San Francisco, of counsel), for appellants. Houghton & Houghton, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an action to recover a judgment for money alleged to be due as rent under the terms of a written lease, the defendants being the trustees of the creditors of the lessee corporation (a dissolved corporation), and the sureties on the bond given by the lessee for the payment of the stipulated rent and the observance of the other covenants of the lease. The cause was tried with a jury, which returned a verdict for plaintiff for $7,500. Defendants appeal from the judgment and from an order denying their motion for a new trial.

[1] The action was for rents at $900 per month for the period commencing November 14, 1908, and ending June 14, 1910. The lease was one dated March 6, 1907, of a lot of land and a building to be erected by the lessor thereon, for the term of 10 years; said term to begin when the building was completed and ready for occupancy, at $900 per month for the first five years, and $1,000 per month for the second five years. Before the completion of the building and in February, 1908, differences arose between the parties. During that month, a formal notice of rescission signed by the lessee was left on the premises and received by the lessor. It stated substantially that the lessee, by reason of the fact that it was induced to enter the lease by certain alleged false and fraudulent representations, and also because the building had not been completed as soon as promised, elected to rescind the lease, offered to restore all property in said building and premises, and demanded that the lease be rescinded and surrendered. The lessor on February 17, 1908, sent to the lessee the following notice, viz.:

> "Your notice of rescission I have received and the only answer I have to make to it is that the rescission of a lease requires the action of all parties thereto or the judgment of a competent court. Your building will be ready for occupancy within the next forty days."

On May 14, 1908, the lessor notified the lessee that the building was completed and tendered possession thereof and demanded payment of the first month's rent, and the lessee refused to accept it or any portion thereof, or to pay any rent under the lease. This apparently ended the communications between the parties until the commencement of this action over four years later, November 14, 1912. The lessee never went into possession of the premises and never paid any rent.

Almost immediately after May 14, 1908, the plaintiff began efforts to secure a tenant for the property. She, however, secured no permanent tenant, although she endeavored to do so. It was put into the hands of various real estate agents for that purpose, and there were large signs "painted on the building, placed on it" for the purpose of attracting tenants. Various "To let" signs were placed on the building by plaintiff, the first as early any way as July, 1908. The premises were let by the lessor temporarily to various parties. They were first so let during the latter part of 1908 "for between a month or two months," $324 rental being received. In the spring of 1909, the premises were so let for about three months at $150 a month. Again they were so let to various tenants through a real estate agency, for "a trifle less than" $600. On July 10, 1910, according to the allegations of the complaint, plaintiff finally disposed of said building. During all of the time after June, 1908, plaintiff apparently treated the property as absolutely at her disposal for her own benefit, just as though the lease to the defendant lessee was not in existence. After the refusal of the lessee to accept the premises, no word, oral or written, was conveyed to it to the effect that plaintiff did not hold possession of the premises solely in her own right and for her own benefit and without regard to the lease. No suggestion was made to the lessee that she intended to let the premises for the benefit of the lessee, or at all, and no information was given as to the fact of any of the tenancies. And finally, in July, 1910, as we have seen, the building was permanently disposed of by plaintiff, apparently without any information as to the intention to dispose of it being given to the lessee.

Upon these facts, as to which there is no conflict, it seems clear to us that the doctrine of Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145, is applicable. It is true that the facts of this case differ in some particulars from those of Welcome v. Hess, supra; but they differ in no such way as to make the conclusion arrived at there inapplicable here. The real thing there decided was that where the premises are abandoned by the tenant, who avows his intention not to be bound by his lease, the assumption of actual possession and absolute control of the premises by the lessor, including efforts to let and the actual reletting thereof to others, without saying or doing anything to so qualify his acts as to indicate that he is not acting in his own right and for his own benefit as owner entitled to possession, without saying or doing anything to indicate that he is acting for the benefit of the lessee or reletting on the lessee's account and for his benefit, he will not be heard thereafter to say that he has not accepted a surrender of the term. This is the settled law in this state, although there are cases to the contrary in some other states. The discussion of the question in Welcome v. Hess, supra, was such as to make it unnecessary to consider the matter at length in this opinion. The law on this question was very clearly stated by the District Court of Appeal of the Second Appellate District in an opinion written by Presiding Justice Conrey in Rehkopf v. Wirz et al., 31 Cal. App. 695, 161 Pac. 285, as follows:

> "Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. Bradbury v. Higginson, 162 Cal. 602 [123 Pac. 797]. But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. Baker v. Eilers Music Co., 26 Cal. App. 371 [146 Pac. 1056]; Welcome v. Hess, 90 Cal. 507 [27 Pac. 369, 25 Am. St. Rep. 145]. An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant."

It is clear that the mere fact that the lessee refused to accept possession at all and never went into possession does not present any material distinction, in view of the subsequent acts of the lessor. Nor does it materially affect the matter that the lessor, notwithstanding her efforts in that behalf, failed to obtain a permanent tenant for a term extending beyond the term prescribed by the lease to defendant corporation. Of course, such a letting without any act or word to qualify its effect would have very clearly shown an absolute acceptance of the surrender of the term, just as the permanent disposition by the lessor of the building in July, 1910, showed to a certainty that the lessor was then holding the premises solely in her own right and in no way for the benefit of the tenant. But her efforts to obtain a permanent tenant were just as potent in their effect as showing her attitude with regard to the premises in this connection, as would have been her actual letting in the event of finding such a tenant, and her conduct in this regard together with her conduct generally in relation to the premises from as early as July, 1908, bring the case within the rule we have referred to, notwithstanding her failure to obtain a permanent tenant. The refusal to accept the offer of rescission made in February, 1908, and the subsequent tender of the premises and demand for one month's rent in May, 1908, are also of no importance in so far as the question we are considering is concerned. These things, of course, showed the then attitude of the lessor in the matter and the desire that the lessee should accept the premises under the lease. But even then the lessor did not indicate that in the event of the lessee's refusal to accept possession she would nevertheless continue to regard the property as belonging to the tenant for the specified term. And, as we have seen, her subsequent conduct with regard thereto was a complete negation of any such attitude on her part.

[2] Some reliance is placed by plaintiff in this connection upon certain allegations in defendants' pleadings by way of further answer and defense and cross-complaint. In addition to their denials of the allegations of the complaint in this action commenced November 14, 1912, they sought a conclusion of rescission of the contract of lease on the ground of alleged false representations which induced the making thereof, and in this connection alleged the giving of the notice of rescission in February, 1908, to which we have referred, and that the plaintiff "refused and still refuses to rescind or cancel said lease." So far as the question of surrender that we have been discussing is concerned, the only force that can be attributed to this allegation in the connection in which it is used is, of course, by way of admission of the defendants that there never was any unqualified acceptance by the lessor of possession and control of the premises for her own exclusive benefit, notwithstanding the lease. We cannot read it as intended to have or as having in fact any such meaning, or as being of any importance in the solution of the question we have discussed.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 258)

BRACQUEE v. MOTTET CO. (S. F. 6957.)

(Supreme Court of California. June 1, 1917. Rehearing Denied June 30, 1917.)

1. MASTER AND SERVANT 🔑85—INJURIES TO SERVANT — LIABILITY OF MASTER — NEGLIGENCE.

For injuries received by a servant in the course of his employment prior to enactment of St. 1913, p. 279, the master was not liable in the absence of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 136, 139, 140.]

2. MASTER AND SERVANT 🔑278(1)—INJURY TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.

In an action by a night clerk for injuries received while attempting to remove a boisterous man from the hotel, evidence *held* insufficient to show negligence of the master; instruction given clerk not to furnish the man with accommodations not being an order to assume new and perilous duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 957.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by John Bracquee against the Mottet Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

L. A. Redman and Redman & Alexander, all of San Francisco, for appellant. J. C. B. Hebbard and Hamilton A. Bauer, both of San Francisco, for respondent.

ANGELLOTTI, C. J. On account of personal injuries received in the course of his employment as night clerk of the Hotel Albany in San Francisco on April 26, 1913, plaintiff obtained a judgment for damages against defendant corporation, which owned and operated said hotel. We have here an appeal from such judgment.

[1] As will be noted, the injuries were received prior to the enactment of our law creating a liability on the part of an employer to an employé for compensation for injuries received in the course of and arising out of his employment without regard to negligence. Stats. 1913, p. 279. Hence the resort to an action in the superior court for the damages caused by the injury, wherein, of course, it was essential to a recovery by the employé that there should be alleged and proved some fault or negligence on the part of the employer proximately causing the injury. That in such an action the employer's liability at all is dependent upon some fault or negligence on his part is a proposition too thoroughly settled to require discussion.

[2] The complaint does not in terms allege any negligence on the part of the employer. It does allege that he, "while acting in the course of his employment as such clerk at said hotel, was ordered and directed by defendant not to permit a certain boisterous and objectionable man, who was then and there seeking a room in said hotel, to become a guest therein, and plaintiff was then and there ordered and directed by defendant to remove said man from said hotel," and that while he was attempting to obey said order, he was assaulted by said man, and beaten and thrown down a flight of stairs, thus receiving the injuries. If we assume that this sufficiently shows negligence on the part of the employer, it must be upon the theory that the employer by virtue of his orders to the employé required him to perform new and perilous duties without giving him proper warning of the danger involved. We do not deem it necessary to decide whether the complaint can be held to sufficiently state such a cause of action. The evidence does not measure up to the allegations of the complaint, and, we are satisfied, was insufficient to support the verdict. At the conclusion of the plaintiff's case a motion for a nonsuit was made and denied. It should have been granted. Defendant, however, subsequently introduced its evidence, but this evidence in no degree supplied the defects. At the close of the testimony defendant requested the court to instruct the jury to find for it. This request was denied. It should have been granted, and its denial is assigned as error.

Considering the evidence given in support of plaintiff in the light most favorable to him, it presented substantially this situation: Plaintiff, who was 72 years of age, was night clerk in the Hotel Albany, a rooming house at 187 Third street, San Francisco. He was on duty as such the night of April 26, 1913. The office was on the second floor of the building, across a little hall at the head of the stairway leading from the ground floor, which was occupied by stores. The stairway is broken about the middle by a landing, where it turns. Two men came to the office and asked for a room. One of these was apparently intoxicated and "nasty" and "boisterous." Plaintiff showed them to a room. He subsequently told the manager, who had a talk with this man, and finally the man gave up the key to the room and voluntarily left the house. A short time thereafter he came back and asked plaintiff to let him go to the room, and plaintiff said, "No, I can't let you in the room; you heard the manager; you have given up the key; I have no right to do that; I can't change that." The man then went away, but a short time thereafter returned again, with the same request, which was again denied, and he again left. Shortly thereafter the manager came to the office and plaintiff told him that this man had been annoying him by coming back and requesting to be given accommodations. The manager said, "He has given up the key; don't let him in." The manager then left and plaintiff remained alone in the office. Some time later the man again returned. Plaintiff was in the office, the window of which looked out upon the stairway. The man came to the window with the same request, which was again denied, and he was asked to go away and not annoy plaintiff longer. He did go down the stairs to the landing or the step above the landing, and plaintiff came out of the office and to the head of the stairway, and endeavored to persuade him to leave the building. Suddenly the man, who had not before shown any inclination to the use of force, in some way reached up and took hold of plaintiff, with the result that plaintiff was dragged or fell to the landing, receiving the injuries on account of which this action was brought.

It will be observed that there is nothing in all this to indicate that plaintiff had been given any order or instruction to remove the man from the premises, or any instruction involving the use of force by him. Substantially, he had been instructed simply not to furnish the man with accommodations, or, in the language of the complaint, "not to permit" him "to become a guest therein." The instruction meant no more than that plaintiff should not receive the man as a guest, entailing the performance of a duty necessarily devolving on clerks in hotels and rooming houses constantly, that of refusing accommodations to applicants. It is impossible to find in the instruction or conduct of the manager any basis for an inference of negligence on his part in the matter, any basis for an inference of the omission of any information which he was reasonably called upon to give the employé, or of the omission of any precaution he was reasonably called upon to make for his safety.

The testimony given for the defense added nothing of benefit to plaintiff. The manager testified that he and the Mottets were away from the hotel all the evening, returning about 1 o'clock, and this man was just being given a room; that the man was intoxicated, and some dispute ensued, resulting in the man threatening to leave, and he told him that was "up to him," and the man left; that he followed him to the head of the stairs and saw him go out, and that he then said to plaintiff that he did not want that man in the house, and "if he returns or refuses to leave the house, either call me or get an officer"; that after taking some coffee he then went to bed, and shortly thereafter heard shouts for help and rushed down the stairs and found plaintiff lying on the landing floor.

It may be conceded solely for the purposes of the decision that if plaintiff had been ordered to personally eject this man from the premises, and in attempting to do so was injured, it might be held under the circumstances that there was some basis for a finding of negligence. But there was nothing of that sort in the case, no setting of the employé to a dangerous task, no order to assume new and perilous duties. In the language of Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153, a case cited by plaintiff, "there cannot be neglect without the existence of a corresponding duty," and we look in vain at the evidence in this case to discover anything indicating the existence of any duty devolving on defendant to give any information to plaintiff or to take any additional precaution for the personal safety of plaintiff in this matter.

We are entirely at a loss to account for the verdict in this case upon any other theory than the one it is claimed by defendant was adopted in the trial court, viz. that if the injuries were received by plaintiff in the course of his employment, and arose out of his employment, the defendant was liable without regard to whether or not there was any negligence or fault on its part. Of course, this could not be in view of the law applicable to the case. That it was the theory adopted in the trial court appears to be borne out by an instruction given to the jury, as follows:

> "If you gentlemen of the jury believe from the evidence that the relation of master and servant existed between plaintiff and defendant at the time of the accident, and if you believe that in the careful discharge of his duty and in obedience to the instruction received by plaintiff from defendant or its agent or manager in charge of the Albany Hotel the plaintiff received the injuries he complains of, I charge you that the defendant is responsible and in damages liable for the results of that accident. I charge you that injuries received in the line of a servant's duty, or within the scope of his employment, make the master liable."

This manifestly was erroneous and probably accounts for the verdict.

Looking at the case in the light most favorable to plaintiff, it simply presents the case of an employé who was unfortunately injured in the course of his employment, without any fault or negligence on the part of the employer, at a time when we had no compulsory compensation law rendering an employer liable for injuries to his employés suffered in the course of and arising out of the employment, without regard to whether there was any fault or negligence on the employé's part. In such a case there can be, of course, no liability on the part of the employer on account of the injuries.

The judgment is reversed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.

(175 Cal. 216)

ARTHUR v. CITY OF PETALUMA et al.

(S. F. 8174.)

(Supreme Court of California. May 31, 1917.)

1. MUNICIPAL CORPORATIONS 🔑864(1)—INDEBTEDNESS—AMOUNT.

Where a city's current revenues were sufficient to pay a printing claim when it accrued, but not thereafter, when payment was demanded, claim reduced to judgment, and money to pay it raised by special tax levy pursuant to St. 1901, p. 794, payment thereof was prohibited by Const. art. 11, § 18, prohibiting cities from incurring indebtedness exceeding in any year the income and revenue provided for such year, unless otherwise authorized by special election.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1828.]

2. MUNICIPAL CORPORATIONS 🔑868(1)—INDEBTEDNESS—AMOUNT.

Where an indebtedness against a city was valid when incurred, a subsequent exhaustion of funds from which it could be paid only affects the remedy to obtain payment, and does not prevent a judgment being secured for the amount due.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1842.]

3. MUNICIPAL CORPORATIONS 🔑864(1)—INDEBTEDNESS—AMOUNT.

A printing bill incurred under Const. art. 11, § 8, authorizing certain cities to adopt a charter and providing for its publication, is a municipal indebtedness or liability within Const. art. 11, § 18, prohibiting cities from incurring any indebtedness or liability exceeding the current year's income, unless authorized to do so by a special election.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1828.]

In Bank. Application for writ of mandate against the City of Petaluma and others. Transfer made from the District Court of Appeals of the Third Appellate District because of the inability of the judges of that court to agree upon a judgment. Alternative writ discharged and proceeding dismissed.

Lippitt & Lippitt, of Petaluma, R. L. Thompson, of Santa Rosa, and Newton A. Johnson, of Petaluma, for petitioner. G. P. Hall, of Petaluma, and W. F. Cowan, of Santa Rosa (E. J. Dole, of Petaluma, of counsel), for respondents.

ANGELLOTTI, C. J. This is a proceeding in mandate to compel the allowance and payment of a claim of petitioner against the city of Petaluma. The proceeding was commenced in the District Court of Appeal of the Third Appellate District, and was ordered transferred to this court because of the inability of the judges of that court to agree upon a judgment.

Petitioner's claim was for printing done by him for the city during the fiscal year 1910–11, in his newspaper, the Petaluma Daily Courier, the contract for city printing for that year having been awarded to him as the lowest bidder for the work. The particular printing was the publication in said paper of a proposed freeholders' charter, which the trustees of the city had ordered published "in the manner provided by law." When the printing was done there was sufficient money in the city treasury of the revenue of that fiscal year to pay petitioner's claim. His demand in due form for the amount alleged to be due was filed with the city clerk on March 28, 1911, but at that time the revenues provided for the fiscal year had been entirely exhausted. The claim was disallowed. Petitioner brought his action against the city thereon, and in September, 1912, obtained a judgment for the full amount of his claim. That judgment was subsequently affirmed on appeal. Arthur v. City of Petaluma, 27 Cal. App. 782, 151 Pac. 183. It was substantially found therein that the claim was in all respects valid, and that at the time the claim was presented for payment the funds of the fiscal year had been exhausted by the payment of other claims incurred or attempted to be incurred subsequent to the claims of plaintiff. The judgment was an ordinary judgment against the city for the amount claimed. The county clerk of Sonoma county having certified this judgment to the auditor and municipal governing body of the city, in accord with the provisions of an act of the state Legislature providing for the payment of judgments against counties, cities, etc., approved March 23, 1901 (Stats. 1901, p. 794), the city council, as provided by the act, included in the tax levy for the fiscal year 1916–17 a sum expressly devoted to the payment of the judgment and sufficient to pay the same. This tax was collected, and is now in the treasury of the city expressly set aside for the payment of the judgment. Nevertheless the city now refuses to pay the claim or any part thereof. Hence this proceeding.

[1, 2] The claim of the city substantially is that section 18 of article 11 of the state Constitution precludes payment of this claim incurred in the fiscal year 1910–11 from any of the revenue resulting from the tax levy by the city council for the fiscal year 1916–17. Whatever might be our view in the absence of previous decisions of this court, we are satisfied that the construction given to this section of our Constitution by a long line of decisions is such as to compel us to sustain this claim of the city.

Section 18, art. 11, of the Constitution, so far as here applicable, reads to-day as it did when first adopted, in the year 1879. The language is:

> "No * * * city * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. * * * Any indebtedness or liability incurred contrary to this provision, * * * shall be void."

Certain amendments to this section made in the year 1900, permitting the city and county of San Francisco to pay unpaid claims of previous fiscal years out of the income and revenue of succeeding fiscal years, and the city of Vallejo to pay an existing indebtedness "whenever two-thirds of the electors thereof, voting at an election held for that purpose, shall so decide," if they have any bearing upon the question, would seem to be entirely in line with the previous construction given by the court to the section, and to support the proposition that the limitation of the constitutional provision can only be overcome by a two-thirds vote of the electors or by a constitutional amendment to meet the particular case.

The constitutional provision was first considered by this court in San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, and was given a broad and liberal construction in view of the object it was desired thereby to attain. Under a strict construction it might possibly have been held that its only effect was to make void any indebtedness or liability incurred in excess of the income and revenue provided for the year, without the assent of two-thirds of the electors expressed at an election, leaving such indebtedness or liability as was not in excess of such income and revenue at the time of its creation unaffected by the provision, and a valid claim payable out of the revenue of succeeding years. But the court, through Mr. Justice Ross, said that it meant, not only that an indebtedness incurred contrary to its express provisions was absolutely void, but that "each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." It was also said:

> "The system previously prevailing in some of the municipalities of the state, by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. The change was eminently wise. A somewhat similar provision in the old Constitution with respect to state indebtedness saved the people of the state a vast amount of money. People v. Johnson, 6 Cal. 503; Nougues v. Douglass, 7 Cal. 65. We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the preexisting condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that the limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss."

In Shaw v. Statler, 74 Cal. 258, 15 Pac. 833, it was held that the statement that "no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year" was a correct statement as to the meaning of the section "at least so far as the revenue of any particular year is required for the expenses of that year," it not being necessary to go further in that case. But in Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449, where it was attempted to pay a claim absolutely valid in all respects, incurred in the fiscal year 1883–84, out of revenues for the fiscal year 1884–5, the statement in San Francisco, etc., Co. v. Brickwedel, 62 Cal. 641, was deemed to settle the proper construction of the section and forbid such payment. It has apparently never since been questioned that it is the construction that must be given the section, except for statements in one or two dissenting opinions. It was accepted as correct and followed in McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167; Weaver v. San Francisco, 111 Cal. 319, 43 Pac. 972; McBean v. Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; Bradford v. San Francisco, 112 Cal. 545, 44 Pac. 912; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Montague v. English, 119 Cal. 225, 51 Pac. 327; Higgins v. San Diego, 131 Cal. 294, 63 Pac. 470; Fresno, etc., Co. v. McKenzie, 135 Cal. 497, 67 Pac. 900; and County of Tehama v. Sisson, 152 Cal. 167, 172, 92 Pac. 64. Under these decisions, lack of available money of the revenue of the fiscal year against which the claim constitutes a charge, from whatever cause, and entirely regardless of the absolute validity of the claim, is a complete answer to any attempt to enforce *payment* from what are styled, in some of the later of the cases cited, "the ordinary revenues" of the city for succeeding years. To this term we shall refer later. This is perhaps shown most emphatically and clearly by what is said in Weaver v. San Francisco, supra. The views there expressed have never been modified, except as to the proper form of judgment to be given the holder of a valid claim. Having a valid claim, one valid when the indebtedness was incurred, the subsequent exhaustion of funds from which the same could be paid before the claimant was able to obtain formal allowance and payment, does not make his claim bad, but only affects his remedy to obtain *payment*, and he is entitled to have his claim established by a judgment for the amount due. Weaver v. San Francisco, supra; Montague v. English, supra. In the Weaver Case it was declared and ordered that the judgment in terms should limit satisfaction of the judgment to the income and revenues provided for the fiscal year in which the liability was incurred. In the later case of Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670, it was finally held that such a limitation should not be inserted, but that the claimant should be given a general judgment. The court said in regard to this:

> "We have no desire to disturb the principle that no indebtedness or liability incurred in any one year should be paid out of the ordinary income or revenue of any future year, which principle has been declared by a long line of decisions, running from the case of San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, to McBean v. Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. Future provision might be made for the payment of a debt, although there might be no revenues of the fiscal year in which the debt was incurred out of which it could be satisfied—as, for instance, by the adoption by the people of a proposal to pay it, or by other methods that might possibly be suggested; and a direction in a judgment that it should be paid only out of the revenues of a certain year might be held to preclude its payment in any other way. Merely putting a demand in the form of a general judgment would not in any way take it out of the general rule that the ordinary revenues of a future year cannot be applied to the payment of a liability in a previous year, as held in Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167. We think, therefore, that in a case like the one at bar there should be a general judgment in the usual form, without any direction as to the method of its payment."

This is now the settled rule. It is clear that the whole effect of this is simply that the judgment should not be drawn in such a way as to preclude enforcement in the possible event that legal provision is subsequently made for the payment thereof. What that legal provision outside of the necessary two-thirds vote by the people might be, if any, the court did not consider or intimate. But we think it must be apparent that in using the words "the *ordinary* income or revenue of any future year" it was not intended to suggest that, consistently with the constitutional provision, the city authorities could include in their tax levy for a future year a special levy for the express purpose of paying such a claim and that the same might be paid from the tax collected thereon. The very case approvingly cited by the court in the portion quoted above (Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167) decided this very point. The court there said:

> "The collection in the subsequent fiscal year of a tax levied by the board of supervisors for the express purpose of paying this judgment did not give to the plaintiff any additional right to the payment of his claim, or any right to the money thus collected. The provision of the Constitution limiting the power of the municipality in incurring a liability to the income and revenue 'provided for it for such year' means that only the income and revenue that had been provided for the expenditures of the year prior to incurring the liability can be appropriated for the payment of such expenditures. To hold that any deficiency in the revenues of one year can be met from taxes collected in a subsequent year, under the guise that they had been collected for the express purpose of meeting such deficiency, would sweep away the entire restriction which the Constitution intended to place upon municipal extravagance."

Clearly the term "ordinary revenue," as used in the Higgins Case, was understood as including all revenue resulting from taxes levied by the city authorities. There is nothing in any of the decisions to suggest that any such claim can be paid from any fund other than the income and revenue of the particular fiscal year in which the indebtedness or liability was incurred, except by authorization of a two-thirds vote of the electors or constitutional amendment, and we are satisfied that the constitutional provision, as construed by the decisions we have referred to, precludes any other method. See Bradford v. San Francisco, 112 Cal. 545, 44 Pac. 912.

The fact that petitioner has obtained a judgment against the city for the amount of his claim in an action brought for that purpose does not avoid the application of this constitutional provision. The judgment, of course, conclusively determines the question of the validity of his claim, but it still remains that, by reason of that provision, it cannot be paid out of the revenues of a fiscal year other than the one in which the liability or indebtedness was created. In Smith v. Broderick, supra, the claim had been reduced to a judgment, and it was squarely held, after an exhaustive discussion, that the existence of the judgment did not preclude an investigation for the purpose of ascertaining what the nature of the original cause of action was. In Goldsmith v. San Francisco, 115 Cal. 36, 46 Pac. 816, a similar situation existed, and the rule applicable was concisely and correctly stated by Mr. Justice Henshaw for the court as follows:

> "The reduction of the original claim to a judgment does not increase its dignity so as to authorize plaintiff to demand payment of it from any fund not subject to the primary demand."

See, also, Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

If there be anything in Johnson v. Supervisors, 65 Cal. 481, 4 Pac. 463, in conflict with this view, it must be deemed overruled by the later cases that we have just cited. If at the time the liability to petitioner was incurred such liability was not in excess of the revenue and income for the fiscal year, he was entitled to his judgment, as held in numerous cases to which we have referred, notwithstanding that at the time of presentation of his claim, commencement of action, and judgment the funds for the year had been exhausted, and the interposition of these matters as a defense would have been unavailing.

The legislative act of March 23, 1901, has been referred to. It purports to require the payment by the treasurer of any county, city, etc., of any final judgment "now existing or that may be obtained hereafter against any county, * * * city," etc. By it the county clerk is required to file with the auditor of the city a list of judgments of record in his office against the city at least 15 days before the day on which the tax levy is to be made, the auditor is required to examine and audit the same and certify the list to the treasurer, and the governing body of the city is required "to include in the tax levy for the next fiscal year a rate sufficient to pay all final judgments existing against" such city. The proceeding in regard to this claim was apparently in accord with the provisions of this act. But it is obvious that this act cannot be held available to petitioner for the enforcement of his demand against the revenue and income of a fiscal year subsequent to that in which the liability on which his demand is based was incurred. To hold otherwise would be to effect a violation of the constitutional provision. The Constitution is as binding upon the Legislature as it is upon a city, and the Legislature cannot require or authorize a city to proceed in defiance of its terms.

The conclusions we have stated as to the various points discussed are the necessary result of the settled construction of section 18, art. 11, of the Constitution. This construction has now been accepted as settled beyond question for many years. We do not feel at liberty to depart from it. The fact that great hardships result in individual cases from an observance of the rule has been recognized in several of our decisions, but, as has been well said, "this fact cannot afford reason for subverting the law or frittering it away."

[3] It was held in Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128, that the constitutional provision refers only "to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred—that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality"; and that consequently it has no application to the stated salary of a public officer fixed by state statute, that being a matter over which the municipality has no control and with respect to which it has no discretion. It appears here that the printing upon which petitioner's claim is based was the publication in his paper of a proposed freeholders' charter, proceedings for the adoption of which by the city of Petaluma were then pending in accord with the provisions of section 8 of article 11 of the Constitution. This section authorized such a city at its option to adopt such a charter and prescribed the procedure to be followed in order to accomplish such adoption. One of the conditions was that before the election at which the proposed charter is submitted to the people for ratification, it must be published for 20 days in a daily newspaper of the city. Petitioner, having been a bidder for the contract for city printing for the fiscal year, had been awarded the contract therefor, and a contract had been entered into between him and the city for such printing at specified rates. It was under this contract that petitioner made the publication of the proposed charter in his newspaper. It is claimed that under these facts the case is within the rule declared in Lewis v. Widber, supra, and that the constitutional provision has no application. We think it clear that there is no force in this contention. The indebtedness here is one incurred by the municipality, and it is the immediate result of a contract by the municipality. It would seem to be unnecessary in this connection to do more than to refer to the cases of Pacific Undertakers v. Widber, 113 Cal. 201, 45 Pac. 273, and Goldsmith v. San Francisco, 115 Cal. 36, 46 Pac. 816. It was there held that claims of a character not distinguishable in any material aspect from that here involved are within the constitutional provision. It was aptly said through Mr. Justice McFarland in the first of these cases:

> "If they are without that provision, then it is difficult to see how indebtedness incurred for any services or commodities necessary for the public welfare could be held to be within it, or how the constitutional limitation could be kept from being frittered entirely away."

There is no other point made that requires notice.

The alternative writ of mandate heretofore issued is discharged and the proceeding dismissed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 229)

SAN JOAQUIN LIGHT & POWER CORP. v. CITY OF MADERA et al. (Sac. 2651.)

(Supreme Court of California. June 1, 1917.)

In Bank. Appeal from Superior Court, Madera County; Chas. O. Busick, Judge.

Mandamus proceedings by the San Joaquin Light & Power Corporation against the City of Madera and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Short & Sutherland, of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant. F. A. Fee, of Madera, for respondents.

ANGELLOTTI, C. J. Mandamus to compel auditing and payment of a claim of plaintiff against the city of Madera. The superior court gave judgment for defendants, and on appeal by plaintiff to the District Court of Appeal of the Third Appellate District the justices of that court were unable to agree upon a judgment. The appeal was therefore transferred to this court for determination.

In all material aspects the case here presented is the same as that of Arthur v. City of Petaluma (No. 8174) 165 Pac. 698, decided May 31, 1917. It is sought to enforce payment against revenues of the fiscal year 1915–16 resulting from tax levies made by the board of trustees of the city, without any authorization by the electors, of a claim of $2,108.75 for electrical power and energy, lights and lighting, material and labor furnished the city during previous fiscal years. The claim has been reduced to judgment, and the proceedings were in accord with the act of March 23, 1901, referred to in the opinion in that case.

The decision in Arthur v. Petaluma, supra, controls here, and therefore the judgment of the superior court in favor of defendants must be held to be correct.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge, pro tem.

(175 Cal. 253)

CROSS et al. v. BOUCK et al. (L. A. 3685.)

(Supreme Court of California. June 1, 1917. Rehearing Denied June 28, 1917.)

1. Landlord and Tenant 🔑79(1) — "Assignment" or "Sublease."

Where a tenant made a lease to another person upon different terms and conditions from the tenant's lease, it was a "sublease," and not an "assignment" of the original lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 235, 244–248.

For other definitions, see Words and Phrases, First and Second Series, Assignment; Second Series, Sublease.]

2. Landlord and Tenant 🔑76(2)—Subtenant's Right to Sublet.

Where a lease prohibited an assignment thereof, but not subletting of premises, a sublessee could assign sublease to a third party without violating provisions of original lease, where sublease did not prohibit assignment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 228.]

3. Fraud 🔑11(1) — Misrepresentation — Fact or Opinion.

Representations regarding present condition and past earnings of an apartment house relate to matters of fact, and not of opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12.]

4. Fraud 🔑41 — Action for Deceit — Sufficiency of Complaint.

Complaint alleging misrepresentations as to present condition and past earnings of an apartment house, knowingly made with intent to induce plaintiffs to trade real estate for lease, and that plaintiffs were deceived thereby, and, relying on such representations, transferred property worth $5,000 in consideration of the promised assignment of the lease which was not assigned to them, or, if assigned, had no value, *held* sufficient to state cause of action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37.]

5. Fraud 🔑59(3)—Exchange of Property—Measure of Damages.

The measure of damages suffered by one who is fraudulently induced to exchange property is the difference between the actual value of that which he parts with and of that which he receives under the contract.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 62.]

6. Fraud 🔑58(1) — Evidence to Sustain Findings.

In action for deceit, a finding that plaintiffs received nothing of value from defendant *held* supported by evidence that lease which defendants proposed to assign had no value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 55.]

7. Appeal and Error 🔑882(17)—Preservation of Objections—Pleading—Variance —Failure to Object.

Although complaint in action for deceit did not allege that lease which defendants proposed to assign was valueless, as stated in findings, where defendants treated the question as an issue in the case, and evidence bearing on the question was introduced on both sides without objection, on appeal defendants cannot urge that finding was outside of the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3607.]

8. Appeal and Error 🔑1011(1)—Review—Conclusiveness of Findings — Conflicting Evidence.

Findings based upon conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

9. Fraud 🔑50—Issues, Proof, and Variance.

In an action for deceit plaintiffs were not bound to establish the making and falsity of every misrepresentation alleged by them.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47.]

10. Fraud 🔑9—Action for Deceit—Sufficiency of Evidence.

A single material misrepresentation knowingly made with intent to induce another to enter into a contract and relied on by the other party, to his damage will support an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Cora D. Cross and others against Cora D. Bouck and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jos. W. Mowell, of Los Angeles, for appellants. John S. Cooper, W. R. Law, and Davis & Rush, all of Los Angeles, for respondents.

SLOSS, J. This action was brought to recover damages for deceit. The amended complaint alleges that on or about the 28th day of September, 1912, the plaintiffs were the owners of certain real property in the county of Los Angeles of the value of $5,000. On that day the defendants represented to the plaintiffs that they (defendants) were the owners of an unexpired lease for seven years of an apartment house known as the Navarro Apartment Hotel, in the city of Los Angeles, together with a lease for the same period of the furniture and equipment in said house. On said day, for the purpose of inducing plaintiffs to transfer and trade their real property described in the amended complaint to the defendants, in consideration for said leases, the defendants knowingly made certain false and fraudulent representations to plaintiffs, with intent to deceive and defraud plaintiffs, and to procure their property above described. The pleading then goes on to describe the alleged fraudulent representations. Two of these related to the ownership by the defendants of the lease of the apartment house and the furniture therein and their ability to assign such lease. The others, briefly stated, were that the apartment house was then paying in rentals more than the expenses of operation; that no apartment in the house was rented for less than $45 per month; that but seven apartments were then vacant; that the house, at all times theretofore paid expenses for the entire year, with the exception of one summer month; that when all the apartments were rented the apartment house would produce a profit of $700 per month; and that in each preceding year it had produced a net profit of over $2,000 per year. All of these representations are alleged to have been false, and known by the defendants to be so. Plaintiffs, relying upon the truth of said statements, were induced thereby to enter into an agreement for the transfer by them to defendants of all of the real property described in the complaint, in consideration of the transfer by defendants to them of the unexpired lease on the apartment house and the furniture and equipment therein. Plaintiffs did, pursuant to such agreement, transfer and assign to the defendants their said real property. Plaintiffs entered into "tentative possession" of the apartment house, and, upon discovering the falsity of the representations, relinquished the possession. It is further alleged that the defendants failed and refused to give the plaintiffs a good and valid lease to said apartment house and furniture. Damages were asked in the sum of $10,000, consisting of $5,000, the value of the property transferred to the defendants, and other items. Except with respect to the value of the property transferred to the defendants by plaintiffs, the court made findings in substantial accord with the averments of the complaint. The value of the property was found to be $2,800. Among the findings was one to the effect that the plaintiffs received nothing of value in consideration of their transfer of such property. The court entered judgment in favor of the plaintiffs for $2,800, and the defendants appeal from such judgment.

[1, 2] Much of the discussion in the briefs turns on the question whether the defendants made any misrepresentations regarding their ability to assign the lease of the apartment house and the furniture therein to the plaintiffs, and whether they did, in fact, make such assignment. An assignment was actually executed, but the theory of the plaintiffs seems to be that such assignment was invalid for want of the lessor's assent thereto. This theory is not sustained by the evidence. It appears that the owner of the apartment house had originally made a lease which contained a covenant against assigning, but none against subletting. The lease which was the subject of negotiation between the parties to this action was a new lease from the original tenant, upon different terms and conditions. On its face it was designated, and rightly designated, as a "sublease." Its execution was not a violation of the provision of the original lease against assignment. 24 Cyc. 974. The sublease itself contained no restriction upon the right of assignment. The defendants therefore had a right to assign their sublease without the consent of any one, and the findings based upon this phase of the case are without support.

[3-5] But the complaint alleged, and the court found, other grounds ample to make out a cause of action for damages for deceit. The representations regarding the present condition and the past earnings of the apartment house related to matters of fact, not of opinion. It is charged that these representations were false, and that they were knowingly made, with intent to induce the plaintiffs to enter into the contract; that plaintiffs were deceived thereby, and did in reliance upon these representations enter into the contract and transfer their real property. Here we have every allegation necessary to a complete cause of action for deceit. In Rockefeller v. Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633, it is said:

> "The true measure of the damages suffered by one who is fraudulently induced to make a contract of * * * exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract."

This rule is approved in Barbour v. Flick, 126 Cal. 628, 633, 59 Pac. 122. The complaint alleges, in effect, that the plaintiffs, relying upon the fraudulent representations, transferred property worth $5,000, in consideration of the promised assignment of a lease, and that the lease was not assigned to them. The complaint therefore stated a cause of action, and there is no merit in the claim that the demurrer of the defendants should have been sustained.

[6] It is true, as above stated, that the finding that the lease was not assigned to plaintiffs is not supported by the evidence, but we have the further finding that the plaintiffs received nothing of value from the defendants. This finding would be supported by evidence that the lease which the defendants proposed to assign had no value, and we find that the record contains substantial evidence to this effect.

[7] While it is true that the complaint did not allege that the lease was valueless, it appears that evidence bearing upon its value or want of value was introduced on both sides without objection. The appellants having treated this question as an issue in the case, they will not, on appeal, be heard to say that the finding must be disregarded as outside of the pleadings.

[8-10] The appellants attack the sufficiency of the evidence to support the findings relative to the misrepresentations alleged in the complaint. Undoubtedly there was a sharp conflict regarding these matters, but the trial court believed the testimony offered by the plaintiffs, and this determination is, under our well-settled rules, conclusive here. The plaintiffs were not bound to establish

the making and the falsity of every representation alleged by them.

> "A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations." Davis v. Butler, 154 Cal. 623, 626, 98 Pac. 1047, 1048.

A single material misrepresentation will likewise suffice to support an action for damages.

While a different conclusion might have been reached by the trial court, we are satisfied that the evidence was sufficient to warrant the finding that the plaintiffs believed the representations made by the defendants, and were induced by their belief and reliance upon such representations to enter into the contract. Here, again, we have simply the situation of a conflict in the evidence, in the face of which the finding of the trial court is binding.

We think no other point made is of sufficient importance to require special discussion, or to affect the conclusion already indicated.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(34 Cal. App. 258)

BRION v. CAHILL et al. (Civ. 1957.)

(District Court of Appeal, First District, California. July 6, 1917. Rehearing Denied by Supreme Court Sept. 4, 1917.)

1. BROKERS 🔑64(2) — COMPENSATION — DEFAULT OF PARTY PRODUCED BY BROKER.

Where in contract of exchange one of parties agrees to pay broker who is not party thereto commission, he may, if the deal is not consummated because the other cannot convey good title, rescind contract, and he is thereby relieved of liability to pay commission, since no acceptance of other party as able to consummate the exchange can be predicated on fact of entering into agreement conditional on his ability to convey good title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97.]

2. EXCHANGE OF PROPERTY 🔑4—CONTRACT—CONSTRUCTION—PARTIES.

A broker is not a party to contract of exchange whereby one of parties agrees to pay him commission, where he is not named as party therein, and it was not executed by or delivered to him, but his name appears thereon only as witness to its execution.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4.]

Appeal from Superior Court of Alameda County; E. N. Rector, Judge.

Action by P. A. Brion against Patrick Cahill and another. From judgment for plaintiff against defendant named, latter appeals. Reversed.

Wilder Wight, of Oakland, for appellant. Robinson, Gillis & Sizer, of Oakland, for respondent.

KERRIGAN, J. This is an action to recover the sum of $1,000 alleged to be due to plaintiff under a contract between one Sam Krummes and the defendant Patrick Cahill, embodying the terms of a proposed exchange of real estate. One of the provisions of this contract was that the defendant Patrick Cahill would pay to the plaintiff said amount for "services rendered"; the services referred to being evidently those rendered by the plaintiff in bringing about the proposed agreement of exchange. Judgment went in favor of plaintiff against Patrick Cahill and in favor of defendant Sumner Cahill against the plaintiff. Patrick Cahill appeals from that part of the judgment affecting him.

The facts material to a consideration of the appeal are briefly as follows:

One Sam Krummes listed with the plaintiff a ranch situated near Lodi for sale or exchange. The latter brought this property to the attention of Patrick Cahill, who owned property in Oakland that he also was desirous of selling or exchanging. They together visited the Lodi property. Cahill expressed his willingness to exchange his Oakland property for it; whereupon Krummes and the plaintiff visited Oakland and inspected appellant's property. At this point the appellant left the completion of the details and the entry into a contract of exchange to his son, the codefendant. The latter went to the property at Lodi, and there, on behalf of the appellant and as his attorney in fact, entered into the following contract, the plaintiff assisting in its preparation:

> "This agreement witnesseth that the undersigned, Sam Krummes, of Lodi, Cal., owner of the following described first piece of property: [Here follows description of property of Krummes]—which [I] desire to exchange for the following second piece of property: [Here follows description of appellant's property.] * * *
>
> "For one dollar in hand paid and other adequate and valuable considerations I hereby authorize P. A. Brion to act as my agent in negotiating an exchange, and I agree that if he shall secure an acceptance of the proposition to exchange the above-described property on the terms, that I will within ten days furnish a certificate of title or an abstract from a reliable abstract company, and a grant, bargain, and sale deed conveying title to the property first above described, and will allow five days for the furnishing of a certificate of title or abstract and a deed conveying title to the second above described piece of property.
>
> "And it is further agreed with the agent P. A. Brion that when he has secured an acceptance of the above proposition that I will then pay to said agent the sum of no dollars for services rendered, or a commission of 5 per cent. on the gross price at which my property is put in in the exchange for such services.
>
> "Dated at this 6th day of March, 1913.
>
> "[Signed] Sam Krummes.
>
> "Witness:
> "P. A. Brion.
> "Geo. Thumann.
>
> "This agreement witnesseth that the undersigned Patrick Cahill, owner of the second piece of property described within hereby accept the proposition of exchange therein and upon the

terms therein stated, and agree to furnish a certificate of title or abstract from a reliable abstract company within 5 days, showing said property vested in him, and then to furnish a deed conveying title to said property to Sam Krummes, or his assigns or representatives. And I further agree to pay to P. A. Brion as agent, the sum of $1,000 for services rendered, for such services.

"Dated at this 6th day of March, 1913.

"Sumner Cahill, Power of Attorney.

"Witness:

"P. A. Brion.

"Geo. Thumann."

The exchange was not consummated owing to the fact—which sufficiently appears from the record, although, on the objection of the respondent, most of the testimony offered in proof thereof was excluded—that Krummes had no title to the property he agreed to convey. The appellant attempted to prove a mutual rescission of the agreement of exchange, but this evidence also was excluded by the court, which adopted the theory of the respondent that, irrespective of the consummation of the exchange or the ability of either of the parties thereto to carry out the terms of the agreement, the plaintiff was entitled to receive from the appellant the amount of compensation provided therein to be paid to him.

In support of the judgment the respondent relies upon a line of authorities holding that a real estate broker employed to sell real property has earned his compensation when he has produced a purchaser able and willing to take the property on the terms proposed, or who has been accepted by his principal as such purchaser by entering into a contract with him. In the latter event those authorities hold that the ability of the purchaser to carry out his contract is immaterial to the right of the broker to receive compensation from his principal.

[1] It will be observed, however, that the principle there laid down is based entirely upon the fact that there exists a contract of employment between the principal and the broker; and the ratio decidendi of those cases evidently is that the broker, having performed what he was employed to do, is entitled to be paid without regard to the ultimate fate of the negotiations or contract between his principal and the purchaser produced by him. But it is equally apparent, we think, that the reasoning of those cases can have no application to a situation where there is no previous contract of employment, and where the claim of the broker is based upon a provision of a contract of exchange between his principal and the person produced by him to which he himself is not a party. In such a case his rights are those only which are conferred by such contract.

Nor can the fact that an agreement of exchange has been entered into by the owners of the respective properties, where the exchange is conditional upon the ability of the respective parties to convey good title, be given the same effect as is given in the authorities above referred to to an agreement of sale. In the latter case the principal is held, by thus entering into a contract with the proposed purchaser, to have accepted him as able to consummate the purchase; but no such acceptance, with the consequential right in the broker to his compensation, can be logically predicated upon the fact of entering into an agreement of exchange in which conveyance of good title by the person produced by the broker is expressly stipulated.

So far as the appellant here is concerned, those authorities can have no application. His contract was with Krummes. Its main purpose was to effect an exchange of his property for that of Krummes. His obligations under the contract were concurrent with those assumed by Krummes; and if he, tendering performance to Krummes, meets with a refusal on the part of the latter to perform, it is elementary that he immediately has the right of rescission, and upon rescinding is relieved of his obligations under the contract, one of which was his promise to Krummes to pay to the plaintiff a commission for his services in bringing about the abortive exchange. As was said by this court in the case of Jennings v. Jordan, 31 Cal. App. 335, 160 Pac. 576, a case almost identical in its facts to this one:

> "The plaintiff's right to recover, then, must depend entirely upon the terms of the contract entered into between Fletcher and Jordan, to which Eppinger was not a party. Up to that point, so far as the evidence discloses, there was no obligation upon them to pay him anything. The object of the contract actually entered into was to provide for an exchange of the properties of the parties thereto, each agreeing to convey title free of incumbrances, and the provision therein for the payment of a commission to Eppinger must be construed in its relation to the whole contract. Quite apart from the evidence of Jordan, one of the parties to it, that as to him it was not his intention that any commission should be paid unless the exchange of lands was actually effected, such would be the natural and logical construction of the instrument. Unless and until the exchange was consummated the parties would receive no benefit from Eppinger's efforts; and, as we have seen, there was no obligation existing to pay Eppinger anything except that arising from the written agreement under consideration. The provision relating to such payment is not separable from the remainder of the contract; and certainly as to Jordan, when the other party to it found himself unable to comply with its terms and consented to its cancellation (Jordan already having a right to rescind it) the whole contract fell, the provision relating to Eppinger's compensation with the rest. If the broker should suffer any hardship from such construction, it is one inherent in the form of the contract entered into, and which was the only means he chose for his protection."

[2] The respondent seeks to differentiate his case from that of Jennings v. Jordan, supra, and says in his brief:

> "We are suing upon a contract between Brion and Patrick Cahill, or more particularly what might be termed a nonnegotiable promissory

note by Patrick Cahill to pay to P. A. Brion for services rendered the sum of one thousand dollars."

It is, however, quite apparent that the contract sued upon is one to which the plaintiff was not a party; he was not named therein as a party; it was not executed by him nor was it ever delivered to him, and his name appears thereon as a witness to its execution.

From what we have said we think it clear that whatever rights the plaintiff may have had under the foregoing contract with regard to Krummes, under the facts proved—and especially under those sought to be proven by the appellant, but which evidence was erroneously excluded—he established no right of action against the appellant.

That part of the judgment, therefore, from which the appeal is taken must be reversed; and it is so ordered.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

(175 Cal. 250)

OLSON v. SUPERIOR COURT OF MERCED COUNTY et al. (Sac. 2586.)

(Supreme Court of California. June 1, 1917.)

1. Mandamus 🔑51—Compelling Entry of Final Divorce Decree.

Mandate is an appropriate remedy to compel the entry of a final divorce decree, where the court's duty is plain, and unmixed with the exercise of discretionary powers.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 98–100.]

2. Divorce 🔑170—Final Decree—"May."

In Civ. Code, § 132, providing that, "when one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce," the word "may" means "must" only whenever facts are shown entitling the movant to such final decree; but facts arising subsequently to the interlocutory decree should have their influence in determining the right to a final decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553.

For other definitions, see Words and Phrases, First and Second Series, May.]

3. Divorce 🔑170—Interlocutory Decree.

The interlocutory decree merely fixes, at the time it is given, the right of the blameless spouse to a final decree after the expiration of one year, but does not itself sever the marital bonds; the delay of one year before absolute severance of the marriage ties furthering an important purpose of the law to give the spouses a chance to effect a reconciliation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553.]

4. Divorce 🔑170—Right to Final Decree.

A divorced husband, securing, before entry of final decree, a reconciliation with and the return of his wife, and living with her thereafter continuously for five years, could not then cause final decree to be entered.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553.]

In Bank. Application for writ of mandate by Albert Olson against the Superior Court of the County of Merced and E. N. Rector, as judge thereof. Writ discharged.

Stephen P. Galvin, of Los Banos, Croop & Croop, of Merced, Adolf Michel, of Oakland, and John J. McDonough, for petitioner. Andrew R. Schottky, of Merced, for respondents.

HENSHAW, J. This hearing is under an original alternative writ of mandate issued by this court on the petition of Albert Olson, who seeks to compel the superior court of Merced county to enter a final decree of divorce; more than one year having elapsed since the interlocutory decree was made and given in favor of his wife, who was the plaintiff in the divorce suit. Chronologically, the following facts have a bearing on the consideration:

Josie L. Olson, wife of petitioner herein, sued and obtained an interlocutory decree of divorce against her husband, which decree was entered on May 13, 1910. Thereafter, and in February, 1911, before the expiration of the year after which the final decree could be entered, the wife at the solicitation of the husband became reconciled to him, returned to his house, and resumed marital relations with him. Together they thus lived as husband and wife for five continuous years. Then, on the 21st day of February, 1916, the husband secretly and without the knowledge of the wife caused a final decree of divorce to be entered in the action. This becoming known to the wife, upon her application and within the six months period of time limited by section 473, Code of Civil Procedure, the court vacated and annulled this final decree and declared in its order so doing that the defendant (the husband) "is not entitled to a final decree of divorce in the said action; the status of married persons having been restored between the parties by reason of their reconciliation, and the resumption of marital relations." No appeal was taken from this last-mentioned order. Thereafter the husband again petitioned for a final decree of divorce, and upon the court's refusal to enter it sued out this writ of mandate.

[1, 2] That mandate is an appropriate remedy to compel the entry of such a final decree, where the court's duty is plain and unmixed with the exercise of discretionary powers, does not admit of debate, and has, in fact, been decided. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897. Petitioner's contention is that under the facts above narrated the trial court has no discretionary power by virtue of the mandatory provision of section 132 of the Civil Code. That section declares that:

> "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce."

That the word "may," as thus employed in the statute, means "must," whenever the facts are shown entitling the movant to such final decree, requires no discussion. Petitioner's argument is based upon the proposition that, when one year has in fact elapsed, the right is absolutely final, and the trial court is without the slightest discretion in the matter of withholding the relief sought.

[3] The question is one of first impression in this state, but in our view is one exceedingly easy of solution. Under our divorce laws the interlocutory decree fixes the right of the blameless spouse to a decree of divorce as and of the time when the interlocutory decree itself is given. Barring the familiar equitable considerations of fraud or mistake in the procurement of this decree, all matters therein litigated have passed beyond the possibility of future litigation; but it is never to be forgotten that the interlocutory decree does not sever the marital bonds. It is merely a declaration that one of the spouses has at that time established a right to a final decree which will be entered at and after the expiration of one year. Estate of Dargie, 162 Cal. 51, 121 Pac. 320.

What ends has the law in view in enforcing the delay of one year before an absolute severance of the marriage ties? This question, too, has been answered by our decisions, and it is truly declared to be one of the important purposes of the law to give the spouses a chance to effect a reconciliation which the law always favors. Barron v. Barron, 7 Cal. Unrep. Cas. 347, 96 Pac. 273.

[4] The facts presented show that one of the great purposes of our law had been fulfilled. Before the time when the final decree could have been entered the wife condoned her husband's offense and they became reconciled. They lived together as husband and wife continuously for five years thereafter, at the end of which time the condonee, not the condoner, demands of the court the entry of the final decree severing the bonds of matrimony between himself and his wife with whom he had thus been living. From its very nature the interlocutory decree can only operate upon facts existing down to the time it is given. It is within the contemplation of the law that facts subsequently arising should have their influence in determining the right to a final decree. While in every proper case a trial court will, and if necessary by mandate will be compelled to, enter such a final decree, it would be a grave reproach to our jurisprudence to hold that our law ever contemplated that such a decree could be forced upon a blameless and nonconsenting wife after such a reconciliation. Our law demands no such thing. It never designed to make itself an instrument of such frauds. The similar law in the state of New York entitles either spouse to a final judgment after three months "unless for sufficient cause the court in the meantime shall have otherwise ordered," and under that statute the court refused a final decree where a reconciliation was effected such as is here shown. Cary v. Cary, 144 App. Div. 846, 129 N. Y. Supp. 444. But, in the absence from our statute of this express language found in that of New York, the power of our courts is no different. The New York statute but expressed the power which our courts in equity inherently possess. They have under our present statute and without express authorization the power to recognize condonations and reconciliations such as are here shown, and to do justice to the litigants as may be demanded by such events in their lives as have arisen subsequent to the entry of the interlocutory decree and before the expiration of the fixed period of one year.

It would in our view be superfluous to elaborate upon a proposition so plainly consonant with the principles of equity and the due administration of justice. Wherefore the writ is discharged.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.

(175 Cal. 238)

In re EMART'S ESTATE. (S. F. 7521.)

(Supreme Court of California. June 1, 1917.)

WILLS ⟹123(5)—ATTESTATION—PRESENCE OF WITNESSES.

Civ. Code, § 1276, providing that every will must be executed and attested, and that the subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them to have been made by him or by his authority, requires the subscription or the acknowledgment to be before the two witnesses present at the same time, and hence a will was not sufficiently attested where one witness attested the will in the forenoon of the day upon which it was executed, and the other in the afternoon; the two witnesses not signing in the presence of each other.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 326–331.]

Angellotti, C. J., and Sloss, J., dissenting.

In Bank. Appeal from Superior Court, Monterey County; J. A. Bardin and Geo. W. Buck, Judges.

In the matter of the estate of Nancy Jane Emart. Appeal from refusal of order to revoke the probate of the will. Reversed.

Arthur L. Levinsky, of Stockton, for appellants. Hudson, Martin & Jorgensen, of Monterey, for respondents.

HENSHAW, J. Contest after probate was instituted against the will of Nancy J. Emart, deceased. The court refused to revoke the probate of the will, and this appeal followed. The facts stipulated were:

"That one of the attesting witnesses to said will attested said will in the forenoon of the day upon which the same was executed, and that the other attesting witness to said will attested the same upon the afternoon of said day, and that the said attesting witnesses did not sign their names or attest the said will in the presence of each other."

Further:

> That "the two attesting witnesses signed their names as witnesses at the end of the will at testatrix's request and in her presence."

Testatrix subscribed her will in the presence of one of the witnesses, and acknowledged the subscription to the other attesting witness, declaring that the instrument was her will.

The single question presented is whether, under this evidence, there was a legal compliance with our law touching the acknowledgment and publication by the testatrix of her will. That law is found in section 1276 of the Civil Code, and is as follows:

> "Every will * * * must be executed and attested as follows: * * * 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority."

The case is one of first impression, and the question by no means free from doubt. Properly to resolve it requires a brief consideration of this branch of the great statute of frauds. The fifth section of the statute of frauds (29 Car. II, c. 3) required that all devises and bequests of lands or tenements should be in writing and signed by the party so devising the same, and should be attested and subscribed in the presence of the devisor and of three or four credible witnesses. The construction put upon this statute was that it did not in terms require that the attestation and subscription should be made at the same time and in the presence of the assembled witnesses, and such continued to be the rule of English decision until the statute itself was changed. This construction, thus given at a very early day, was adhered to with great uniformity, though the judges frequently voiced their protests against the construction, as being unsound and as opening the door to the very frauds which the statute designed to prevent; it being said that in the requirement of acknowledgment before three or four witnesses it was manifestly designed that the acknowledgment should be of a quasi public character, and that there was less likelihood that fraud could be perpetrated under such solemn circumstances, and more likelihood of an accurate memory, than under the rule which permitted each witness to state that the testator at varying times and under varying circumstances had acknowledged to him and to him alone that the instrument was his will. In addition to this is the consideration that the execution of such a will is not fully complete until it is witnessed or attested. If the will is acknowledged to the one witness on one day and to the second witness months or even years thereafter, both witnesses will not be witnessing or attesting under the same state of facts that is to say, neither witness could declare that at the time the other witnessed it the testator was apparently free from duress, menace, or undue influence and was of sound and disposing mind.

Thus in New York, where by virtue of its language the judges held their statute to be an enactment of the English law, with the interpretation which had been put upon it, the learned Chancellor Walworth says in Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 424:

> "It was also settled in England, at a very early date, that a will of real estate, attested by three witnesses, who, at several times, subscribed their names, in the presence of testator and at his request, was valid, although all the witnesses were never present at the same time. * * * It is at least doubtful whether the decisions upon either of these questions were in conformity with the intention of the framers of the provisions in the statute of Charles relative to the execution of wills of real estate. But they are in conformity with the letter of the statute, which only required that the will should be signed by the testator, but not that such signing should take place in the presence of the attesting witnesses. Nor did the statute, in terms, require the witnesses to attest the will at the same time, and in the presence of each other, but only that the will should be attested by three witnesses who should subscribe the same in the presence of the testator."

By force of these considerations the time came when the English Parliament believed this statute to require remodeling, and it was remodeled in the Wills Act. 1 Victoria, c. 26. That act prescribed:

> "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

This became the law of England in 1837, and, with certain modifications not necessary here to consider, has continued to be the expression of the English law. In 1860, in Hoysradt v. Kingman, 22 N. Y. 372, the Court of Appeals of New York was called upon to determine whether or not a will had been duly executed under the provisions of the statutes of New York under the circumstances here presented; that is to say, the subscription and the publication or acknowledgment had been made before the witnesses at different times. Great pressure of argument was brought to bear upon the court, seeking to have it adopt a construction in consonance with the Wills Act, supra. The Court of Appeals said:

> "Our statute, passed a few years earlier, does not contain the language which so plainly settles the question in the English act. It declares that every will shall be executed and attested in the following manner: '1. It shall be subscribed by the testator at the end of the will; 2. Such subscription shall be made by the testator in the presence of *each* of the attesting witnesses, or shall be acknowledged by him to have been so made to *each* of the attesting witnesses; 3. The testator, at the time of making such subscription, or at the time of acknowledg-

ing the same, shall declare the instrument so subscribed to be his last will and testament; 4. There shall be at least two attesting witnesses, *each* of whom shall sign his name as a witness, at the end of the will, at the request of the testator.' 2 R. S. 63, sec. 40." (Some of these words have been placed in italics for convenient comparison with the language of our own statute.)

The court held that the language of the New York statute was in manifest harmony with the decisions governing the same matter under the earlier statute of Charles. It is perhaps unnecessary to add that in most of the older states the statute of frauds of Charles II was enacted as the state's own statute of frauds, either in precise terms or in all material substance. Therefore the decisions of those states, sound in themselves, will throw but little light upon this consideration, where the conclusion must be reached by an interpretation of the peculiar language of our own statute. But, to illustrate, the presence of the subscribing witnesses at the same time in the presence of the testator is not required in Tennessee under a law which simply declares that "the instrument must be subscribed by two witnesses, neither of whom are interested" (Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875); nor in Connecticut, where the law requires that "the will shall be in writing, subscribed by testator and attested by three witnesses, all of them subscribing in his presence" (Gaylor's Appeal, 43 Conn. 82); nor in Indiana, where the law requires that "the will shall be 'attested and subscribed in the presence of testator and two or more competent witnesses'" (Johnson v. Johnson, 106 Ind. 475, 7 N. E. 201, 55 Am. Rep. 762); nor in Wisconsin, where the statute law is identical with that of Indiana (Will of Smith, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756); nor in Illinois, where the law requires that the will be "subscribed in his (testator's) presence and at his request by at least two witnesses" (Flinn v. Owen, 58 Ill. 111); nor in Georgia, where the requirement is that the will be "attested and subscribed in the presence of the testator by three or more competent witnesses" (Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675). We need not multiply these instances. Enough have been given to show, as has been said, that they can afford us little of value in the present difficulty, and illustrate merely that the Legislatures of these states and their courts, in following the statutes, have in substance adopted the language of the statute of frauds of Charles II, and the interpretation which the English courts put upon that statute. In this connection perhaps it is proper to refer to one additional case, that of Green et al. v. Crain et al., decided in Virginia in 1855 (12 Grat. 252). The language of the Virginia statute taken from the Victorian Wills Act required a signing by the testator and that "the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time." The facts were that the testator signed and acknowledged the instrument in the presence of one of the attesting witnesses, and subsequently acknowledged the instrument in the presence of the other attesting witness, the first attesting witness being also present. The case in its facts differs from the present case in that there both the witnesses were present at the time the acknowledgment was made to the second witness; while here the two witnesses were never at the same time in the presence of the testator for the purpose of receiving his acknowledgment. The court of Virginia reasoned that the requirement "that the relation of 'presence' shall exist between the testator and the witnesses does not require that the relation of 'presence' should exist between the witnesses themselves," and the court repudiates the decisions of the English courts holding the contrary construction of the Wills Act of Victoria. Of this case it need only be said that its reasoning is far from convincing. In conclusion upon this general discussion it will suffice to point out that the Legislatures of some, even of the older, states, have in their wisdom adopted the requirements of the Victorian Wills Act (Ludlow v. Ludlow, 36 N. J. Eq. 597; Roberts v. Welch, 46 Vt. 164; In re Claflin's Will, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261); while in Connecticut its Legislature enacted in 1875, a statute of wills in all essentials like the Victorian Act, and subsequently, in 1885, modified its law to read as above quoted (Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94).

With this brief review we may come to the history of our own wills law. It first appears upon the books in the statutes of 1850, p. 177. It is there declared (section 3) that:

> "No will * * * shall be valid, unless it be in writing, and signed by the testator * * * and attested by two or more competent witnesses subscribing their names to the will, in the presence of the testator."

Manifestly this language from the statute of 1850 is susceptible of and would be given the construction placed upon the statute of frauds of Charles II. In 1870 commissioners were appointed by authority of law to draft a complete system of Codes for this state. The work of the original commission, before the Codes were adopted, was subjected to revision and review by two other Code commissions, and as a result of their labors this significant fact appears: The first Code commissioners submitted as their statute of frauds touching the execution of wills a section which they numbered Civil Code, § 1276, and which section was in the identical language of the New York provision above quoted. More than that, the learned commissioners themselves recognized and expressed their indebtedness to the proposed New York Code, upon which they made heavy drafts. These codifiers announced that section 1276 had been taken from section 550 of the proposed New York Civil Code. But our Civil Code first prepared by Commissioners Charles Lindley, John C. Burch, and Creed Haymond was not adopted, as has been said, until it had been repeatedly revised by other men learned in the law, and amongst these men two who sat upon this bench, Hon. Stephen J. Field and Hon. Jackson Temple. Section 1276 of the Civil Code, as enacted in its present form, is the result of their review and their modification of the proposed section 1276. The proposed section 1276 was substantially a re-enactment of the statute of frauds of Charles II. If the Code revisionists had desired that the statute of frauds of Charles II should be declared to be our law, no doubt can be entertained but that they would have accepted section 1276 as originally proposed by the first commissioners. At this time (1871 to 1874) the Wills Act of Victoria was and for years had been in existence. These learned jurists well knew it, and it is not easy to avoid the conclusion that when they refused to accept section 1276 in its proposed form, and modified it to its present form, they did so in the belief that the Victorian Act was the wiser statute, and therefore the one which this state should adopt. The Legislature, concurring in their views, enacted the law in its present form. We have much internal evidence in the language of the statute itself that this view is correct. To illustrate: The phraseology of subsection 1 of section 1276, to the effect that the will "must be subscribed at the end thereof by the testator himself," is language taken bodily from the Victorian Act, and not found in the statute of Charles II.

From the language of our statute and this review of its history, we regard the conclusion as unescapable that our law requires the subscription or the acknowledgment to be before the two witnesses present at the same time. And while, as has been said, there is no direct adjudication in this state upon the question, every utterance of this court is in confirmation of this view. Thus in Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83, objection was made to the will that it was not duly executed under the provisions of section 1276 of the Civil Code, upon the ground, amongst others, that the subscription was not made in the presence of the attesting witnesses. This court, reviewing the evidence, declared:

> "Here we have the fact that the testatrix made her mark to the instrument, the declaration that it was her will and testament, made in the presence and hearing of the witnesses, and the fact that the witnesses subscribed the same at her request in her presence, and in the presence of each other. * * * We think this was sufficient."

In Estate of Cartery, 56 Cal. 470, amongst the interrogatories submitted to the jury was one:

> "Whether the subscribing witnesses signed the proposed will in the presence of the deceased and of each other and at his request."

The jury's answer being in the affirmative, the trial court upheld the execution of the will as in accordance with law, and this court declared that this and like interrogatories covered all the issues raised by the contestant. In Montana, whose statute is identical with ours, it is declared, quoting from the syllabus of In re Noyes' Estate, 40 Mont. 178, 105 Pac. 1013:

> "The statutory formalities of execution, such as the place of the testator's signature, or the fact that he signed or made acknowledgment in the presence of witnesses, or made publication, or that the witnesses properly signed in his presence, and in the presence of each other and at his request stand as of equal importance, and must be observed."

The answer to respondent's argument that courts should give a liberal construction to the statutory requirements for the due execution of a will is found in Estate of Walker, 110 Cal. 390, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104, and in Re Seaman's Estate, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, and it is sufficient to rest the response upon the discussion of the matter found in those cases.

For the foregoing reasons, the judgment refusing to revoke probate of the will is reversed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.

SLOSS, J. I dissent. When the Legislature of this state enacted section 1276 of the Civil Code, it was not entering upon a new field of legislation. Statutes governing the making and attestation of wills had long existed in England and America, and these statutes had frequently been before the courts for interpretation. The enactments of the American states are based upon one or the other or both of the English acts referred to in the majority opinion, with such modifications as were deemed proper in the respective jurisdictions. As is stated in that opinion, it was the settled construction, under the statute of frauds (29 Car. II, c. 3, § 5), that the witnesses were not required to be present together at the signing or acknowledgment by the testator, or to attest in the presence of each other. Jauncey v. Thorne, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; Sullivan v. Sullivan, 3 L. R. Ir. 299; Westbeech v. Kennedy, 1 Ves. & B. 362; Ellis v. Smith, 1 Ves. Jun. 11. With the law thus established, there was enacted in 1837 the Wills Act (1 Vict. c. 26), which provides:

> "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;

and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The words "present at the same time" left no room for doubt that the witnesses must be jointly present when the testator makes or acknowledges his signature. One of the obvious purposes of the later statute was to change the old law, which, as I have just said, permitted the testator to acknowledge his signature to the different witnesses at different times. But the concluding clause, relating to the attestation by the witnesses, does not contain the words "at the same time." It merely prescribes that the witnesses shall attest and subscribe in the presence of the testator. Accordingly, even under the Wills Act, the requirement of joint presence of the witnesses was not carried beyond the time of the testator's signing or acknowledging. The prevailing opinion of English courts and text-writers has been that it is not necessary that the witnesses should attest and sign at the same time, or that both should be present during the attestation. The will having been signed or acknowledged in the presence of both, each might attest and sign during the absence of the other. The contrary view, expressed obiter by Lord Brougham in Casement v. Fulton, 5 Moo. P. C. C. 130, has not been followed. There have been several decisions that the witnesses need not sign in the presence of each other (Faulds v. Jackson, 6 Notes of Cas. Sup. 1; Webb's Case, 1 Deane, 1; Cooper v. Bockett, 3 Curt. 648; Sullivan v. Sullivan, supra), and the same construction of the statute has been approved by eminent law writers (1 Wms. Exrs. 93; 6 Sug. Real Prop. St. 342; 1 Jar. Wills, *85). The Virginia court, in giving the same effect to a statute like the Wills Act (Green v. Crain, 12 Grat. [Va.] 252), did not, as the majority opinion says, "repudiate the decisions of the English courts holding the contrary construction." To the contrary, it was in accord with the English courts.

It appears, therefore, that under both English statutes the provision that an act shall be done by two or more witnesses in the presence of the testator does not require that the witnesses do the act at the same time, or in the presence of each other. It is enough if each does the act and if the testator be present on each occasion. The same construction should, on like grounds, apply to a provision, like that of section 1276 of the Civil Code, that the testator perform some act, or make some declaration, "in the presence of" or "to" a given number of witnesses. The necessity for the joint presence of the witnesses during any part of the testamentary act exists only when the statute contains direct and explicit language to that effect, as the Wills Act does when it declares that the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.

The American statutes governing the making of wills have uniformly been interpreted in accordance with these views. The legislation in the several states has varied greatly, some of the statutes being modeled on the statute of frauds, others following the Wills Act, while some (like our own) embody certain features of each of the English acts, or make additional provisions, like that of declaration that the paper is a will. Where the statute simply provides that a will must be in writing and attested by two or more witnesses subscribing their names thereto in the presence of the testator, or that the will shall be signed or acknowledged in the presence of two witnesses, who shall subscribe the will in the presence of the testator, it has everywhere been held that the witnesses need not be together during the act of signing or acknowledgment on the part of the testator, or during their own attestation. Moore v. Spier, 80 Ala. 129; Gaylor's Appeal, 43 Conn. 82; In re Porter, 20 D. C. (9 Mackey) 493; Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; Flinn v. Owen, 58 Ill. 111; Hull v. Hull, 117 Iowa, 738, 89 N. W. 979; Grubbs v. Marshall (Ky.) 13 S. W. 447; Chase v. Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687; Cravens v. Faulconer, 28 Mo. 19; Welch v. Adams, 63 N. H. 344, 1 Atl. 1, 56 Am. Rep. 521; In re Clark's Will (N. J. Prerog.), 52 Atl. 222; Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875; Barker v. Hinton, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1150; In re Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756. Two states have or had statutes substantially identical with our own, so far as the question under consideration is concerned, with the single exception that subdivision 2 provides for signature or acknowledgment in the presence of or to "each of" the attesting witnesses. In both of these states it has been held that the witnesses are not required to be present at the same time. Rogers v. Diamond, 13 Ark. 474; Hoysradt v. Kingman, 22 N. Y. 372, 379. The prevailing opinion takes the position that our Code section is to be given a meaning different from that of the New York statute, for the reason that the provision in force in California does not embody the word "each." I think this argument gives entirely too much weight to what the New York Court of Appeals itself, in Hoysradt v. Kingman, terms a "verbal criticism." That court based its conclusion upon the fact that the Legislature, with the former statutes and the judgments of the courts upon them before it, drew an act which omitted the significant words of the Wills Act "present at the same time," thereby plainly indicating that it did not intend to adopt that requirement of the Wills Act. Our own statute also omits these words, and contains nothing of equivalent import. Nevertheless, the majority of this court reaches what seems to me the strange conclusion that our Legislature, with the earlier legislation on the subject before it, designed to adopt the rule of the Wills Act. If that was the purpose, it is difficult to see why the clear and unambiguous language of the Wills Act, requiring presence "at the same time," was not copied into our law.

No case is cited, and I have found none, holding that the witnesses must be present together, except where the statute explicitly calls for such unity, as in Connecticut, where it was provided that the will must be attested by three witnesses, "all of them subscribing in his presence and in the presence of each other" (Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94), or in Vermont, where the statute demanded attestation and subscription by "three or more credible witnesses in the presence of the testator, and of each other" (Adams v. Field, 21 Vt. 256), or in Virginia, under a statute containing the words "two competent witnesses present at the same time" (Green v. Crain, supra).

When the Legislature of this state enacted section 1276 of the Civil Code, it had before it the history of the earlier English and American legislation and the decisions interpreting that legislation. It adopted some of the provisions of the Wills Act not found in the statute of frauds. For example, it provided for the signing by the testator at the end of the will, and for a signing or acknowledgment in the presence of witnesses. But it omitted the clear and definite words of the Wills Act "present at the same time," which alone import into that statute the requirement for a joint presence of the attesting witnesses. As was said by the Court of Appeals of New York, the inference is irresistible that, if it had been intended to change the settled rule that the witnesses need not be present together at any part of the testamentary act, the change would have been made by incorporating the words which were used to accomplish such change in the legislation of England, or other words of like import. Hoysradt v. Kingman, 22 N. Y. 372, 379. The omission of any express requirement to this effect is convincing evidence that on this point the Legislature intended to adopt the rule of the statute of frauds, rather than that of the Wills Act.

Subdivision 2 of section 1276 provides that the subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him, or by his authority. It was so acknowledged in this case. The testatrix acknowledged to the two witnesses that the subscription to the will had been made by her. Subdivision 3 declares that the testator must at the time of subscription or acknowledgment declare to the attesting witnesses that the instrument is his will. Mrs. Emart did so declare to both of the subscribing witnesses. There is no more reason for reading into the provisions (subdivisions 2 and 3) referring to the subscription or acknowledgment, and to the declaration to the witnesses, a requirement that both witnesses must be present at the same time, than there was for reading such requirement into the provision of the Wills Act that the witnesses must sign in the presence of the testator.

The question before us is not one of policy; it is one of interpretation merely. There is no inherent or natural right to pass property by will. The privilege is conferred by statute, and the extent and the mode of its exercise are determined by the legislative provision. The courts have not the right to overlook the failure to comply with a single requirement of the statute, whatever their view of its wisdom or necessity. In re Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. But neither are they justified in reading into the law a demand for the performance of any act or formality not included within its terms. I think just that has been done in this case.

I concur: ANGELLOTTI, C. J.

(33 Cal. App. 462)

LUFT v. ARAKELIAN et al. (Civ. 2036.)

(District Court of Appeal, First District, California. April 19, 1917. Rehearing Denied by Supreme Court June 18, 1917.)

1. SPECIFIC PERFORMANCE ⟹121(4)—EVIDENCE—SUFFICIENCY.

In a purchaser's suit to compel specific performance of a contract for the purchase and sale of real estate made by plaintiff with a third party, evidence *held* to show that the third person, when executing the contract, was acting for himself, and not as the agent of the defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391-393.]

2. PRINCIPAL AND AGENT ⟹145(3)—OSTENSIBLE AGENT.

Where a purchaser had no actual notice that his vendor was not the actual owner of the property and did not at any time during his dealings with the vendor believe, or have cause to believe, that the latter was acting or purporting to act as agent for the real owner, he could not charge the owner with the obligations arising under the contract on the theory of ostensible agency of the vendor for owner.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 515-517.]

3. PRINCIPAL AND AGENT ⟹171(7)—CONTRACT—RATIFICATION.

The fact that the owner of property, while repudiating the acts and conduct of a person who contracted to sell it, offered in one or two instances to assume some of the small obligations incurred by such person under similar contracts, did not constitute a ratification of the contract in question.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 651.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Suit for specific performance by H. Luft against Krikor H. Arakelian and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Drew & Drew, of Fresno, for appellant. E. A. Williams, of Fresno, for respondents.

LENNON, P. J. In this action the plaintiff sought to compel the defendants to specifically perform a certain contract for the purchase and sale of real estate which had been entered into by the plaintiff with a third party named Klein, who, it appears, was doing business under the name of the "New York Real Estate & Building Company."

[1] The plaintiff's cause of action proceeded upon the theory that Klein was not the owner of the property purchased, but was the agent of the defendants in the transaction in suit. The trial court, however, found that Klein, when executing the contract in suit, was acting for himself and not as the agent of the defendants. This finding supports the judgment entered in favor of the defendants, which in turn finds ample support in the evidence adduced upon the whole case, which in substance is as follows: The defendants are husband and wife. The wife apparently had no relation to the contract in controversy, and was in no way interested in the property save as the wife of the defendant Krikor H. Arakelian. Therefore in this opinion we shall deal only with the husband, and shall refer to him as the defendant.

The real property which was the subject of the contract in suit stood of record in the name of the defendant. On January 6, 1914, the plaintiff entered into an oral agreement with Klein for the purchase of four residence lots at the price of $300 per lot, which lots were part of a tract of land situated in Fresno county, and known and designated upon an unrecorded map as "German Park." The record title to this tract at the time of the execution of the contract in suit stood in the name of the defendant. Incidentally, the New York Real Estate & Building Company contracted, at the time of the execution of this contract, with the plaintiff to erect a dwelling house on one of the purchased lots. By the terms of the sale, 10 per cent. of the purchase price was to be paid down and the balance in specified installments. The plaintiff, in accordance with the terms of the sale, paid to Klein the sum of $980, which left a balance of $100 due to Klein on the original agreement, but which it was stipulated was not to be paid to Klein until the dwelling house had been erected. When the sum of $980 had been paid to Klein, he absconded without completing his contract, and the plaintiff thereupon tendered the balance of $100 due to the wife of the defendant. At the time the contract was entered into, Klein, under the name of the "New York Real Estate & Building Company," was advertising the German Park property for sale, and the plaintiff never knew of the defendant's connection with the property and never had any dealings with him. The defendant, however, had knowledge of the fact that Klein was advertising the property for sale, and that he was doing so by reference to the unrecorded German Park map. But prior to the making of the contract of purchase and sale with the plaintiff Klein had entered into a conditional contract of purchase and sale with the defendant of the entire tract of land comprising the so-called German Park at the agreed price of $2,000 per acre, or $37,500, payable under certain conditions and in specified installments. This conditional contract of sale provided, among other things, that if, while complying with the conditions of the contract concerning the payment of the purchase price, Klein sold any lots in the tract, the defendant would execute to him a deed to said lots. This contract was not recorded at the time the plaintiff entered into his contract with Klein. When Klein absconded, the defendant procured other lands belonging to him and adjoining the tract conditionally sold to Klein, to be platted and added to the map known as German Park, and at the same time caused the name of the map to be changed to that of "Ara Park."

[2] Counsel for plaintiff concedes that the evidence as above outlined would not have supported a finding that the relation of principal and agent actually existed between Klein and the defendant, but earnestly contends that it would have supported and should have compelled a finding of ostensible agency in Klein. This contention we think is disposed of by the fact that the evidence shows affirmatively that the plaintiff had no actual notice of the defendant's relation to the property, and does not show nor tend to show that the plaintiff at any time during his dealings with Klein believed or had cause to believe that the latter was acting or purporting to act as the agent for the defendant; and it is well settled that he who seeks to charge a supposed principal with the obligations resulting from the acts and conduct of an alleged ostensible agent must show that he himself was cognizant of the facts which gave color to the alleged ostensible agency, and caused him to believe that the person he dealt with was acting in the capacity of an agent rather than as a principal. Civ. Code, § 2300; Harris v. San Diego Flume Co., 87 Cal. 526, 25 Pac. 758; Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; Gosliner v. Grangers' Bank of California, 124 Cal. 225, 56 Pac. 1029.

[3] The fact that the defendant, while repudiating the acts and conduct of Klein, offered in one or two instances to assume some of the smaller and comparatively inconsequential obligations incurred by Klein under

similar contracts, did not constitute a ratification of the plaintiff's contract with Klein.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(33 Cal. App. 473)

WORTHLEY v. WORTHLEY. (Civ. 1651.)

(District Court of Appeal, Second District, California. April 19, 1917.)

1. QUIETING TITLE 🔑47(2)—FINDINGS—CONSISTENCY—"EXECUTED."

In suit to quiet title, findings that plaintiff "executed her deed," etc., and that it was understood said deed should not be delivered until her last illness, are inconsistent, since the term "executed" includes delivery under the direct provisions of Code Civ. Proc. § 1933.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 97.

For other definitions, see Words and Phrases, First and Second Series, Execute.]

2. DEEDS 🔑211(3)—VALIDITY—FRAUD.

Plaintiff's testimony that she delivered a deed to her son because she was ill and afraid of him, her admission that he was to have the property after her death, and evidence that defendant son had contributed toward the property's purchase price, do not sustain a finding that the deed was procured by the son's false representations that plaintiff should have a life estate, and not lose her interest in the property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 644, 645.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Suit to quiet title by Charlotte Worthley against H. E. Worthley. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

E. Hardesty, of San Francisco, for appellant. George S. Richardson, of Los Angeles, for respondent.

JAMES, J. Appeal by the defendant from a judgment in favor of the plaintiff, and from an order denying a motion for new trial. This is an action by plaintiff against the defendant, who is her son, by which a decree was sought quieting a fee title in the plaintiff as to a certain lot of land located in the city of Los Angeles. It was alleged that plaintiff, in March, 1911, made a deed whereby it was proposed to pass title to her son, but that it was understood that the deed was not to be delivered until the plaintiff's last sickness. It was further alleged that in October, 1912, the defendant demanded of the plaintiff that she deliver the deed to him, and that in order to induce her to make delivery he "offered and represented that she would have a life estate in said property, and that she would not lose her interest in said property." The further allegation appears to the effect that the representations made were false and fraudulent and made with the intent and for the purpose of defrauding the plaintiff; and that in June, 1913, contrary to the representations so made, the defendant ejected the plaintiff from the dwelling house on the premises and compelled her "to live in a shed on the rear of said premises"; "that said defendant now threatens to sell and transfer said property to another, and thereby deprive plaintiff of her right in said property." The court made findings in accordance with the allegations of the complaint as to the circumstances under which the delivery of the deed was made, and further determined that the plaintiff held a life estate in the property.

[1] The finding, which follows one of the allegations of the complaint, that in the month of March, 1911, the plaintiff "executed her deed in the above-described property to the defendant H. E. Worthley," is inconsistent with the further finding, which also agrees with the allegation in that portion of the complaint referred to, "that it was understood and agreed between said parties that the said deed should not be delivered until plaintiff's last sickness." The term "executed" includes delivery. Section 1933, Code Civ. Proc.

[2] There was no testimony given by the plaintiff which is sufficient to support the finding that the deed was obtained by reason of the alleged false representations and promises. The plaintiff testified that, at the time she delivered the deed (which had been prepared some time prior thereto), the defendant, her son, demanded the deed of her, said that he would have it, that she was ill at the time and afraid of him, and that when she delivered it she was "afraid" that she would not have her home left to her. The trial judge, as shown by the reporter's transcript, appreciated this condition of the evidence, when he said, addressing plaintiff's counsel:

> "* * * She says she was afraid of him. If she had confidence in him, she would never be afraid of him."

Under the evidence, it was quite clear that a considerable part of the purchase price of the lot had been contributed by the defendant, although the title to same had been taken in the name of his mother. The mother admitted that the intention was that her son should have the property at her demise, but that she was to have "a home" while she lived. The circumstances of the case were hardly such as would indicate that the mother was making a gift of the entire estate to her son, and we think the circumstances were not such as to impress upon the transaction the presumption of fraud. Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910. The chief obstacle which we find in the way of affirming the judgment is that the evidence, as addressed to the main charge of fraud relied upon, does not support the allegations in the complaint nor the findings made by the court.

We have not had the aid of any briefs from either party, but from an examination of the record we are convinced that a new trial should be had.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

(33 Cal. App. 493)

PEOPLE v. NOLAN. (Cr. 378.)

(District Court of Appeal, Third District, California. April 21, 1917.)

STIPULATIONS ⟹14(4)—CONSTRUCTION.

In prosecution for selling alcoholic liquor, a stipulation that the territory involved "is no-license territory" refers to the date charged in the information, in view of conversation between court and counsel, although the trial court mentioned another date as that covered by the stipulation.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 27.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

M. D. Nolan was convicted of selling liquor in no-license territory, and he appeals. Affirmed.

J. C. Hurley, of Albion, and Lilburn I. Gibson, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of selling alcoholic liquor in no-license territory, upon indictment found by the grand jury of Mendocino county. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The charging part of the indictment is that defendant, "within the boundaries of the Fourth supervisor district of the said county of Mendocino, and outside the corporate limits of any city or town," at the hour of 8 o'clock p. m. on April 17, 1916, "did then and there willfully and unlawfully sell, furnish and distribute alcoholic liquor to one Emil Baroni, said supervisor district being then and there no-license territory under the law of the state of California, contrary," etc.

The prosecution introduced several witnesses whose testimony tended to establish the truth of the charge and, when about to close for the people, the following appears in the record:

> "Mr. McCowen (after consulting with attorneys for defendant): It is stipulated that Mendocino City is in the Fourth supervisor district, that it is not an incorporated town, and that the Fourth supervisor district is no-license territory. Mr. Gibson (attorney for defendant): Yes."

The only point now made on the appeal is that there is no evidence showing that the said district was no-license territory on April 17, 1916, the date of the alleged sale of liquor as charged in the indictment. The indictment was found on May 6, 1916, and the trial took place October 10, 1916, at which time the above stipulation was made.

Defendant cites People v. Cavallini, 29 Cal. App. 526, 156 Pac. 73. In that case the point was raised on demurrer to the information that it failed to allege the existence of the ordinance at the time the selling of the liquor was alleged to have occurred.

In his opening statement to the jury the district attorney, addressing himself to defendant's attorney, said:

> "I suppose, Mr. Schino, you will admit that the Fourth supervisor district on the date alleged in the information was 'dry territory'? Mr. Schino: No, sir; if your honor please, we desire to make a formal objection in that respect."

After a colloquy between the district attorney, defendant's attorney, and the judge, the following appears:

> "The Court: Then, gentlemen of the jury, it is stipulated by and between respective counsel representing the people and the defendant that the Fourth supervisor district of Madera county is 'no-license' territory. That will be taken by you as a fact in the case. Mr. Schino: That is, on the 30th day of September, 1914. The Court: Yes, I have no reference to anything else except as to the date of this information, that is, on the 30th of September, 1914, the Fourth supervisor district of the county of Madera was in 'no-license territory.'"

It was in view of this state of the record that the following was said by the court in reviewing the case:

> "The stipulation went no further than an admission that, on September 30, 1914, the district was 'no-license territory,' and this admission was subject to defendant's objection that evidence showing a violation of the local option law was not admissible, for the reason that the information failed to state a public offense."

It was held, correctly, we still think, that it was necessary to allege in the information that at the time the offense was committed the district was "no-license" territory. The averment in the present indictment meets that requirement.

The only question, then, is: Can we say that the stipulation was intended to refer to the averment in the indictment that at the time the offense was committed the district mentioned was "no-license territory"?

We must assume that the district attorney knew that it was necessary to establish the truth of the material averments of the indictment and that one of such averments was the existence of the no-license ordinance at the time of the alleged offense. He made his proofs as to the alleged violation of the ordinance by defendant, and then turned to defendant's attorney to counsel with him as to proving the remaining facts and was met by the stipulation.

> "The rules applicable to the construction of contracts generally govern the courts in their interpretation of stipulations, and thus stipulations will receive a reasonable construction with a view to effecting the intent of the parties." 36 Cyc. p. 1291.

"A construction will be placed upon the stipulation which will render it reasonable and just to both parties rather than unreasonable and unjust; and a construction will be avoided, if possible, which will make the stipulation frivolous or ineffectual." 20 Am. & Eng. Ency. Plead. p. 658.

The stipulation, as interpreted by defendant, might not make it frivolous, but would make it wholly ineffectual for any purpose.

"Where the language of one party may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the other party." Id., p. 660.

And this is the rule stated in section 1649 of the Civil Code. It is also stated, among other rules, that the stipulation is to be interpreted with reference to its subject-matter, in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues. 20 Am. & Eng. Ency. of Plead. p. 659. There were but two principal issues presented: First, did defendant sell intoxicating liquor in the Fourth supervisor district of said county as charged? Second, was the district at that time no-license territory? Proof was made of the first issue, and we think it reasonable to assume that the parties understood the stipulation to cover the second issue. It can hardly be doubted that the district attorney had reason to suppose it was so understood by defendant's attorney.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(33 Cal. App. 482)

FRANCIS v. INDEPENDENT ELECTRICAL SUPPLY CO. (Civ. 1914.)

(District Court of Appeal, Second District, California. April 20, 1917.)

1. APPEAL AND ERROR 🔑918(2)—RECORD—PRESUMPTION—DISCRETION—AMENDMENT OF PLEADING.

Application at close of plaintiff's case for leave to amend answer, to allege payment, without showing of fact excusing absence of the allegation, not being accompanied by affidavits or other matter of record from which reasonable probability of sustaining the defense can be inferred, it will be presumed that the court in denying it properly exercised its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3711.]

2. CORPORATIONS 🔑432(12)—AUTHORITY OF AGENT—ASSIGNMENT OF NOTE—EVIDENCE.

Testimony of the person who assigned to plaintiff defendant's note to a corporation that he was its sales agent, and as such had control and possession of its books of account and evidences of indebtedness and all other matters in connection with its business in the southern end of the state, supports the inference that he was authorized to make the assignment, though it appears another was president and general manager.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1737, 1743, 1762.]

3. CORPORATIONS 🔑398(1)—AUTHORITY OF AGENTS—GENERAL MANAGER AND DEPARTMENT MANAGER.

A corporation, though having a general manager, can vest in another agent the powers of a general manager representing it in the conduct of some department of its business; he standing in the same relation to the matters of his department as does the general manager to its general affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602, 1605.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Ira J. Francis against the Independent Electrical Supply Company. From an adverse judgment and order, defendant appeals. Affirmed.

Hyman Schwartz, of Los Angeles (Isaac Pacht, of Los Angeles, of counsel), for appellant. Oscar C. Mueller and Alfred Wright, both of Los Angeles (Wm. W. Lovett, Jr., of Los Angeles, of counsel), for respondent.

CONREY, P. J. Appeal by the defendant from the judgment and from an order denying its motion for a new trial.

[1] The action is upon a promissory note made by the defendant to a corporation; the complaint alleging that before the commencement of the action the note was assigned by the payee to the plaintiff. The answer to the complaint did not deny that the note was unpaid. After all of the plaintiff's evidence had been introduced, the defendant for the first time applied for permission to allege payment. This request was denied. It is now claimed that the court's refusal to allow the proposed amendment was an abuse of discretion by reason whereof the defendant is entitled to a new trial. No facts were shown excusing the defendant's failure to put an allegation of payment into its original answer. The application for leave to amend was not accompanied by affidavits nor by any other matter of record from which one can infer a reasonable probability that the defense could have been sustained. Therefore we will presume that the court properly exercised its discretion in that matter.

[2, 3] The only other ground of appeal urged on behalf of appellant is that the evidence is insufficient to support the finding that the note had been assigned and transferred to the plaintiff. The point made is that the evidence failed to show that the assignment was made by a person who had been given the authority or had been in the habit of signing contracts on behalf of his company or indorsing and assigning its negotiable paper. The testimony of the agent who made the assignment on behalf of the corporation was as follows:

"I am sales agent of John A. Roeblings' Sons Company of California, and as sales agent have control of and possession of all books of account and the evidences of indebtedness and all other matters in connection with the business of that corporation in the southern end of California."

It further appeared that another person was president and general manager of the corporation. We think that this evidence was sufficient to support the inference that the agent was authorized to make the assignment. The fact that a corporation has a general manager, whose supervision extends to all of its business, does not exclude its right to vest in another agent the powers of a general manager representing the corporation in the conduct of some department of its business. The superintendent or manager of such department stands in the same relation to the matters pertaining to his department as does the general superintendent or general manager to the general affairs of the company. For authorities to this effect, see note in 38 L. R. A. (N. S.) 1135.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(33 Cal. App. 467)

PEOPLE v. STOCKTON. (Cr. 537.)

(District Court of Appeal, Second District, California. April 19. 1917. Rehearing Denied by Supreme Court June 18, 1917.)

1. HOMICIDE 🔑234(1) — EVIDENCE — SUFFICIENCY.

In a homicide case, evidence *held* to warrant a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 482.]

2. CRIMINAL LAW 🔑1169(12)—APPEAL—HARMLESS ERROR.

In a homicide case, error in the admission over defendant's objection of a purported confession made by the defendant to the district attorney was cured, when the defendant voluntarily became a witness in his own behalf, and as such witness testified that he had heard his confession read to the court, and that the facts were therein truly stated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138.]

3. HOMICIDE 🔑234(8) — EVIDENCE—WEIGHT.

In a homicide case, the fact that when defendant was arrested, soon after the shooting took place, he had on his person a revolver in which two of the cartridges had been discharged, although corroborative evidence of defendant's testimony that he fired only two shots, is not necessarily conclusive of the question.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 489.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

R. L. Stockton was convicted of murder in the first degree, and from the judgment and order denying his motion for a new trial, he appeals. Affirmed.

W. C. Dorris, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of murder in the first degree and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

The defendant, having had a quarrel with one Brown, purchased a revolver and went out to look for Brown, whom he found in a saloon in the city of Bakersfield. One Leland Mull was standing at the bar next to Brown. The defendant fired in their direction, intending to hit Brown, but instead thereof hit and killed Mull.

[1] It is urged by defendant's counsel in support of the appeal that the evidence in this case was not sufficient to warrant a conviction, because (1) the defendant shot twice, while there is evidence that at least four shots were fired; (2) when he was shot, the deceased fell in the direction opposite to that in which he would have fallen, had the defendant fired the fatal shot. There is evidence from which the jury might have believed that at the time of the killing four shots were fired; but there is no testimony that at that time and place any shooting was done by any person other than the defendant. The evidence clearly and convincingly tends to show that Mull was killed by the first shot. The evidence does not conclusively show that the deceased fell in a direction opposite to that in which he would have fallen had the defendant fired the fatal shot. A reading of the entire testimony convinces us that the evidence is amply sufficient to warrant the conviction.

[2] The next point urged is that the court erred in admitting over defendant's objection a purported confession made by the defendant; also that the purported confession contained statements of facts not in the nature of a confession of guilt, and that the defendant was compelled to be a witness against himself. The so-called confession consisted of questions propounded by the district attorney and answers made by the defendant. James Price, a court reporter, was present and took down the statements in shorthand and afterwards transcribed his notes. At the trial he testified to these facts and identified the document, stating that it was a correct transcript of the statement as made by the defendant, but did not directly testify to the contents thereof. It was then read to the jury by the district attorney. It is unnecessary to discuss the legal propositions presented by counsel, or the authorities in support thereof, under which he claims that this evidence was wrongfully received. The defendant voluntarily became a witness in his own behalf, and as such witness testified that he had heard his confession read to the court, and that the facts were therein truly stated. Assuming, without deciding, that there was error in the court's original ruling upon the objections, it is, as to any claim of prejudicial error, fully cured by this testimony of the defendant. We fail to find any-

thing in the record to support the claim that defendant was compelled to testify against himself.

[3] Finally, it is claimed that the court erred in refusing to allow testimony to prove that shots were fired, other than two which were fired by the defendant. This point relates to questions asked of certain witnesses for the purpose of showing that a shot fired by the defendant after he stepped out of the saloon did not go through the door, but struck against a baseboard next to the bootblack stand on the outside of the building. There was no witness who saw the shooting that was done outside of the building, other than the defendant himself. He testified that he fired one shot while in the saloon, and that after he backed out of the door of the saloon he shot again, but not towards the saloon. "Q. Where did you shoot when you were outside, Mr. Stockton? A. Well, sir; I shot on the sidewalk, or near the bootblack stand." No testimony was introduced directly contradicting the statement that defendant fired a shot toward the bootblack stand. In accordance with a request made by the defendant, the jury was permitted to view the entire premises, both inside and outside of the saloon. They examined the bullet hole in the door, which according to the prosecution's theory was caused by a shot fired by the defendant after he backed out of the saloon, and which according to the defendant's theory was caused by a shot fired by some other person. They also examined the place where the defendant claimed that the second shot fired by him struck the bootblack stand. When the defendant was arrested, soon after the shooting took place, he had on his person a revolver in which two of the cartridges had been discharged. While this fact may be taken as corroboration of the defendant's testimony that he fired only two shots, it is not necessarily conclusive of the question. Neither is this matter of prime importance in determining the case against the defendant, in view of the fact, to which we have referred, that the direct testimony points most strongly to the fact that Mull was killed by the first of the shots that were fired.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(23 Cal. App. 506)

HILLYER et al. v. HYNES. (Civ. 2037.)

(District Court of Appeal, First District, California. April 24, 1917.)

1. Trusts 🔑96 — Constructive Trust — What Constitutes.

A husband's promise, upon receiving a deed from his dying wife, that he would in turn execute a similar deed to her niece to be delivered upon his death, impresses the property with a constructive trust in favor of the niece.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148.]

2. Limitation of Actions 🔑102(8)—Computation—When Statute Runs.

Code Civ. Proc. § 343, providing a four-year limitation period for actions not otherwise provided for, and applying to constructive trusts, does not run until the beneficiary received notice of the trust's creation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 502.]

3. Limitation of Actions 🔑19(1)—Recovery of Real Property.

An action to enforce a husband's promise, made upon receiving a deed from his dying wife, to execute a similar deed to her niece to be delivered upon his death, is one to recover real property governed by the five-year limitation period prescribed by Code Civ. Proc. § 318.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73, 80, 84, 85.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Annie Hillyer and others against W. J. Hynes, as administrator of Henry Romoser, deceased. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Reversed.

Stafford & Stafford, of San Francisco, and W. M. Stafford, for appellants. Cullinan & Hickey, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by the plaintiffs from a judgment in favor of the defendant and from an order denying their motion for a new trial.

The complaint alleges that on the 27th day of September, 1909, Anna Flanigan Romoser was the owner of the real property here in controversy; that shortly before that date, being severely ill and not expecting to live, she entered into an arrangement with her husband, Henry Romoser, whereby she was to execute and deliver to him a deed of gift of said real property, and he in turn was to execute a like deed conveying the property to Catherine Meyers, a niece of Mrs. Romoser's former husband, and place the same in escrow, to be delivered upon his death; that accordingly Mrs. Romoser executed her deed to Henry Romoser, and that he continued to own the property to the time of his death; that, while he made and signed the promised deed of gift to said niece, he never actually delivered it to her nor in escrow for her, without, however, ever repudiating his agreement so to do. This failure of Romoser to keep his agreement is charged in the complaint as fraudulent; and it then proceeds to allege that he died intestate on January 24, 1914, and that the defendant is the administrator of his estate; that Catherine Meyers died intestate on December 28, 1910, leaving as her only heirs the plaintiffs. The prayer of the complaint in part is that the defendant be declared to hold the property in trust for plantiffs, and that he be required to convey the property to them, and that their title be quieted as against said defendant, administrator of the estate of Henry Romoser.

All the material allegations of the complaint are denied in the answer; and in addition the defendant alleges that the plaintiffs' cause of action is barred by subdivision 4 of section 338 of the Code of Civil Procedure, by subdivision 1 of section 339, and by section 343 of said Code.

In addition to finding generally for the defendant, the trial court also found that plaintiffs' cause of action was barred by the provisions of subdivision 4 of section 338, Code of Civil Procedure, as pleaded.

From the evidence it appears without dispute that Mrs. Romoser died in March, 1910; that on September 27, 1909, being very ill, she sent for her attorney, and informed him that she desired to make a conveyance of the property in controversy; that, as she had acquired it from her first husband, Lawrence Flanigan, she thought it only fair to give the same to Mrs. Catherine Meyers, a niece and only living relative of said Lawrence Flanigan; but that she also believed it was her duty to her present husband, who was old and without income, to reserve for him a life estate in the property. She directed her attorney to draw a deed which would carry into effect these desires. It was accordingly drawn, and when presented to her for execution it transpired that since giving the above instructions she had been advised by one Father Casey that it would be better for her to make a deed of gift of the property to Henry Romoser, and have him make a like deed to Mrs. Meyers, placing the latter in escrow with Father Casey, to be delivered to the grantee upon Henry Romoser's death. Her attorney expressed his disapproval of this method of carrying out her desires; nevertheless when she learned that it was legally unobjectionable she instructed him to pursue it. Accordingly a deed of gift conveying the property from Mrs. Romoser to her husband was made and delivered to him with the distinct understanding and promise by Henry Romoser that he would make a deed to the property in favor of Mrs. Meyers. At the same time the attorney requested Romoser to call at his office for the purpose of executing this deed. This he did about a month later, but no delivery of it was made either to the grantee or in escrow for her, and the record does not disclose what became of it.

Henry Romoser died on January 2, 1914, predeceased by Mrs. Meyers, without having delivered, either to her or in escrow for her, the promised deed.

[1] Being husband and wife, Henry Romoser and Anna Flanigan Romoser occupied a confidential relation towards each other; and, whatever may have been his intention at the time Mrs. Romoser made said conveyance of property to him, he received it upon his express oral promise that he would in turn execute a deed to Mrs. Meyers and place the same in escrow. His failure to do so was a betrayal of her confidence; it was a violation of trust, and, under the authorities in this state, impressed the property with a constructive trust in favor of Catherine Meyers or her heirs which a court of equity will enforce. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Dimond v. Sanderson, 103 Cal. 97, 102, 37 Pac. 189.

In the former case the court decided two propositions: (a) If a party, by means of a parol promise made without any intention of performing it, obtains an absolute deed without consideration, it is a case of actual fraud; (b) if a party by means of such parol promise to reconvey obtains an absolute deed to real property without consideration from one who stands in a confidential relation, the violation of the promise is constructive fraud, even if at the time it was made there was an intention to perform it.

In the case of Jones v. Jones, 140 Cal. 587, 590, 74 Pac. 143, 144, the court said:

> "Where a grantee and grantor of land stand in fiduciary relations to each other—as husband and wife, for example—and the deed is executed without consideration other than the promise, express or implied, of the grantee to hold the land for the purpose of carrying out an express trust in favor of the grantor, which is not put in writing, and is therefore invalid as an express trust in land, the confidence which induced the transaction having * * * presumably arisen from the fiduciary relations, the violation by the trustee of the terms of the parol agreement as to the express trust constitutes a constructive fraud, makes the grantee an involuntary trustee of the land for the use of the grantor, and gives the grantor the right to have the deed declared void and to a decree that the land is the property of the grantor, notwithstanding the execution of the deed."

In the case of Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506, it is said:

> "It has been established by a number of decisions in this state that, where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other, upon a parol promise by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises."

The evidence in the case at bar is not only uncontradicted, but it is clear and convincing that Henry Romoser accepted the conveyance of the property from his wife with the distinct oral agreement that he would in turn make a conveyance of the same to Catherine Meyers and place the deed in escrow, to be delivered to her upon his death, and the finding to the contrary therefore cannot be sustained.

The only other point in the case worthy of more than passing notice is the one as to the statute of limitations. As before stated, this action was commenced within five years, but after the expiration of four years, after the deed was made and delivered by Mrs. Romoser to her husband, at which time the latter ought to have taken steps to carry out his part of the agreement by which he acquired an interest in the property. The plaintiffs neither in the complaint nor in the evidence introduced by them attempted to bring their case within the provisions of subdivision 4 of section 338, Code of Civil Procedure, which provides that an action grounded in fraud or mistake must be brought within three years after the discovery by the aggrieved party of the facts constituting the fraud or mistake.

[2] And, assuming that this is an action to declare and enforce a constructive trust (Jones v. Jones, 140 Cal. 590, 74 Pac. 143), and that it is consequently, as to the period within which it may be brought, governed by section 343 of said Code (Norton v. Bassett, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162), to the effect that an action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued, still we think that the statute has not operated in this case, for the reason that the time could not be held to have commenced to run until Catherine Meyers had notice of the transaction, and it appears from the record that she had no such notice until about March 4, 1910, just after the death of Mrs. Romoser, at which time the surviving husband in effect recognized the trust, and stated that upon his death the property was to go to her.

[3] We think, however, that while the main ground of the action is constructive fraud, and that one of its purposes is to enforce a trust, in its final purpose it is an action to recover the title and possession of real property, and is therefore subject to the provisions of section 318, Code of Civil Procedure. Accordingly the five-year period prescribed by that section is the only limitation which can be applied in bar of plaintiffs' cause of action. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Bradley Bros. v. Bradley, 20 Cal. App. 1, 6, 127 Pac. 1044; 25 Cyc. 1026. That section provides that no action for the recovery of real property or for the recovery of the possession thereof can be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action; and while it appears that neither the plaintiffs nor any grantor or ancestor of theirs was ever seised or possessed of the property, we think that under the circumstances of this case Henry Romoser may well be considered as the predecessor of the plaintiffs within the meaning of the section, since, if he had carried out the terms of the understanding by virtue of which he acquired an estate in the property, he would have conveyed it to the plaintiffs or their intestate, and thus have been literally their predecessor in interest. It is the estate which in equity passed to the plaintiffs upon the death of Henry Romoser which they seek by this action to recover.

There is nothing in the point that the heirs of Henry Romoser should have been joined as parties defendant to the action; for it appears that he had no heirs.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

(33 Cal. App. 454)

PEOPLE v. WAKAO et al. (Cr. 300.)

(District Court of Appeal, Third District, California. April 18, 1917.)

1. LIBEL AND SLANDER 🔑152(1)—CRIMINAL PROSECUTION — INFORMATION—JURISDICTION —CONSTITUTIONAL PROVISION—"VENUE."

Under Const. art. 1, § 9, providing that in all criminal prosecutions for libels, indictments found or information laid, shall be tried in the county where such newspapers have their publication office or in the county where the party alleged to be libeled resided at the time of the alleged publication, etc., in a prosecution for libel, an information laid in Sacramento county charging libel of the prosecuting witness in a newspaper printed and published in Fresno county which failed to allege that the prosecuting witness resided in Sacramento county was insufficient to give the court jurisdiction of the action, since, as "venue" means place of trial, and "place of trial" means the jurisdiction of the court, which in the instant case is limited by the Constitution to one of the two counties mentioned, it is essential that the particular facts upon which it depends should be alleged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417, 420, 423.

For other definitions, see Words and Phrases, First and Second Series, Venue.]

2. LIBEL AND SLANDER 🔑151—EVIDENCE—PRESUMPTIONS.

In a prosecution for criminal libel, the district attorney is presumed to know the residence of the complaining witness, and the defendant is not charged with such knowledge.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 415.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

E. K. Wakao and M. Ishihashi were convicted of criminal libel, and from the judgment and from an order denying their motion for a new trial, they appeal. Reversed.

R. P. Henshall, of San Francisco, and R. B. McMillan, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. This is an action in which defendants were accused, by information laid in Sacramento county, of the crime of libel, as follows:

"That the said E. K. Wakao and M. Ishihashi on the —— day of December, 1915, in the county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, and maliciously and with intent thereby to injury (injure?) and defame one Risaburo Hattori and to impeach his honesty and integrity and virtue and reputation and to expose him, the said Risaburo Hattori, to public hatred and contempt and ridicule, did compose, print, and publish in a certain newspaper called the Central California

Times, printed and published in the county of Fresno, state of California, and circulated therein and which said newspaper was then and there circulated and published in the county of Sacramento, state of California, certain false, scandalous, malicious, defamatory, and libelous words of and concerning the said Risaburo Hattori, in the Japanese language, as follows, to-wit: [Then follows a photographic copy of the newspaper article and its alleged translation.] Contrary to the form, force, and effect of the statute," etc.

The jury returned a verdict of guilty as charged. Defendants moved for a new trial on statutory grounds, and also moved in arrest of judgment on the ground that the court "has not and never had any jurisdiction of the offense charged in the information." The motions were denied, whereupon defendants were sentenced to imprisonment for the period of one year each in the county jail. They appeal from the judgment and order denying their motion for a new trial.

[1] The principal point now urged for a reversal of the judgment is that the court was without jurisdiction, and the contention is based upon the failure of the information to allege that Hattori, the person alleged to have been libeled, resided in Sacramento county at the time said newspaper was circulated therein.

Section 9, art. 1, of the Constitution of the state, provides:

> That in all criminal prosecutions for libels, "indictments found, or information laid, for publications in newspapers, shall be tried in the county where such newspapers have their publication office or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause."

The interpretation put upon this provision of the Constitution by the Attorney General is that "it was intended to give defendant a defense in the event the offense was prosecuted in any other county than Fresno or Sacramento"; that it "does not prescribe a rule of pleading, but merely shows a rule of defense," and hence it was not necessary to allege in the information that Hattori, the person libeled, was at the time the libel was circulated in Sacramento county a resident therein. If this be true, it would be equally true that, had the information been laid in Fresno county, it would not have been necessary to allege that the newspaper mentioned had its "publication office" in that county. That is to say, the information, charging the publication of the offensive article to have been made in a newspaper in the county where the information is laid, need not state that the newspaper had its publication office in that county; nor, if the information is laid in another county, need it state that the complainant resided in such county. We cannot assent that an information constructed on such interpretation of the Constitution would be sufficient.

Under the Constitution of 1849 such prosecutions could be made in any county in the state where the newspaper was circulated. It was said in Older v. Superior Court, 157 Cal. 770, 109 Pac. 478:

> "The prior evil especially intended to be remedied was the danger of prosecution in any county where the libel was circulated, with power to select any judge in the state. This evil was remedied by limiting the venue to two counties only, that of the place of publication and that of the residence of the complainant."

Venue means place of trial, and place of trial means the jurisdiction of the court, which in the present case is limited by the Constitution to one of the two counties mentioned therein. The libelous article may be circulated in every other county in the state, but the superior court has no jurisdiction to bring the offender to trial in any of these counties, for the reason that the Constitution has declared that jurisdiction resides only in the two counties specified. It seems to us that to confer this jurisdiction it is essential that the particular facts upon which it depends should be alleged.

It is a well-settled principle of law that the information or indictment must allege that the offense was committed within the jurisdiction of the court (People v. Wang, 92 Cal. 277, 281, 28 Pac. 270); and this is the Code rule (Pen. Code, § 959). That is, the information must allege facts from which jurisdiction will be made to appear. In the present case the jurisdiction depended upon the fact that the party libeled resided in Sacramento county, and this fact should have been alleged in the information.

In Henderson v. Palmer Oil Co., 29 Cal. App. 451, 159 Pac. 65, it was held that jurisdiction to appoint a receiver, under section 565 of the Code of Civil Procedure, upon the dissolution of a corporation, resides alone in the county where the corporation carries on its business, or has its principal place of business, and that where an application based upon a verified complaint which failed to show that the county in which the action was brought was the county in which the corporation had its principal place of business or carried on its business, the court was without jurisdiction to make the appointment.

The rule of pleading in criminal law should not be less exacting. It was held in People v. Cohen, 118 Cal. 74, 50 Pac. 20, that in an indictment for perjury it must be shown therein that the violated oath was administered by competent authority. In that case it was alleged that the oath was taken before a judge of the superior court sitting as a magistrate, and was administered by the acting deputy county clerk. The judgment of conviction was reversed on the ground that the indictment failed to show competent authority to administer the oath for the reason that the judge sitting as a magistrate alone had such authority. The court said:

> "But, assuming that the magistrate may competently employ a clerk or other officer to perform this function, it is obvious that it should, to show authority in such officer, be alleged that the act was done at the direction of the magistrate. There is no such averment here except

it be by mere inference or legal conclusion, and that is not sufficient. The fact being material, it must be directly averred to satisfy the rules of pleading, even in a civil action, and a fortiori in a criminal pleading."

In People v. Terrill, 127 Cal. 99, 100, 59 Pac. 836, 837, the court said:

> "It is an elementary principal of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute, or its equivalent, or by stating facts which show that such crime has been committed. In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged."

The rule was much discussed in People v. Schmitz, 7 Cal. App. 330, 365, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717, and see opinion of supreme court on petition for hearing in that court. Not only is it essential that a crime be charged, but it must also appear that the court has jurisdiction to hear and determine the case.

There are three cases reported in which the prosecution was at the residence of the complainant (In re Kowalsky, 73 Cal. 124, 14 Pac. 399; People v. Miller, 122 Cal. 84, 54 Pac. 523; Older v. Superior Court, 157 Cal. 770, 109 Pac. 478); and in each case the residence of the party libeled was directly alleged to be in the county where the information was laid. The question at bar therefore was not involved. The Kowalsky and Older Cases are cited by the Attorney General, but we find nothing in them to support his contention.

According to the theory of the prosecution, the information would be sufficient if silent as to the residence of the prosecuting witness, or the place where the newspaper has its publication office. Suppose an information thus framed were laid in a county where the publication office was not situated and where the complainant did not reside. Upon habeas corpus the defendant could not find relief against the warrant of arrest, since, on the Attorney General's theory, the information would be sufficient on its face. Defendant would be compelled to appear and answer or demur. His demurrer would not avail him for the same reason that his discharge on habeas corpus must be denied. To do the only thing open to him he must plead not guilty. Obviously, to make out a case where the information is laid in a county other than that in which the newspaper has its publication office, the prosecution must prove that the complainant resided in such county at the time the alleged newspaper article was circulated therein. It is not for the defendant to make negative proof otherwise than to controvert such fact. The fact is to be established by the prosecution as an essential element of the power of the court to try the case. Otherwise the newspaper publisher is thrown back into the midst of the evil from the consequences of which the Constitution was intended to protect him. True, he could not, in the case supposed, be legally convicted, but he could be put to the expense and annoyance of submitting to compulsory appearance in a county remote from the place of publication or remote from the residence of the complainant, whereas, if defendants' position be sound, as we think it is, he can have present and speedy relief by habeas corpus, and the prosecution would be forced to seek the forum which the Constitution has provided.

[2] The district attorney is presumed to know the residence of the complaining witness. The defendant is not charged with such knowledge. The fact, as we have said, is essential to jurisdiction. Upon every principle of pleading this jurisdictional fact should be stated in the information.

Other questions are presented by the record, but, as they may not arise, should there be a new trial, we refrain from noticing them.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

(33 Cal. App. 530)

PEOPLE v. LOPEZ. (Cr. 540.)

(District Court of Appeal, Second District, California. April 26, 1917.)

1. CRIMINAL LAW ⟹1153(2)—WITNESSES ⟹40(2)—DETERMINATION AS TO COMPETENCY—REVIEW.

In determining competency of child witnesses, the trial court has a wide discretion which will rarely be interfered with on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3062; Witnesses, Cent. Dig. § 98.]

2. WITNESSES ⟹40(2)—DETERMINATION AS TO COMPETENCY—REVIEW.

Evidence *held* not to show abuse of discretion of trial judge in excluding testimony of a child witness on the ground of incapacity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 98.]

3. RAPE ⟹48(1)—EVIDENCE—ADMISSIBILITY—COMPLAINT.

Witness could testify that prosecutrix complained of the rape to him, though not what she said, though she was under the age of consent, and want of consent was immaterial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 67.]

4. RAPE ⟹51(5) — INFANT PROSECUTRIX—OUTCRY.

One accused of rape of a girl under the age of consent may be convicted without evidence that prosecutrix made an outcry.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 75.]

5. CRIMINAL LAW ⟹807(1)—INSTRUCTIONS—ARGUMENT.

Accused is not entitled to instructions argumentative in character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960.]

6. CRIMINAL LAW 🔑829(1)—INSTRUCTIONS—DUPLICATION.

Refusal of requested instructions covered so far as pertinent by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

7. CRIMINAL LAW 🔑829(16)—INSTRUCTIONS.

In prosecution for rape, where the court fully charged on reasonable doubt, refusal of instruction on facility of charging rape to satisfy malice was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Rehino Lopez was convicted of rape, and he appeals. Affirmed

Albert D. Trujillo and Ralph E. Swing, both of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape. The crime charged was alleged in the information to have been committed with a daughter of the defendant aged 17 years. By the judgment of the court defendant is required to serve a term of 25 years' imprisonment. The appeal is from the judgment.

Counsel for appellant very correctly say that there was very little evidence, aside from that given by the prosecutrix herself, to be looked to in support of the conviction. However that may be, the only function this court is permitted to exercise is to determine whether there is any substantial evidence in support of the verdict, and whether errors appear by which the defendant was prejudiced in his right to a fair trial. It appears that in about June, 1916, defendant went to reside at Chino, in the county of San Bernardino, with his five children, three girls and two boys, the prosecutrix being the oldest of the girls. Defendant and his wife prior to that time had separated, and the former had the care and custody of the children, whom it appears he in a general way was educating and reasonably providing for. Lizzie Lopez, the complainant, testified that the house in which they lived at Chino contained four rooms, that her father and her sister Jennie slept in one bed in one of the rooms, and that she and her young sister Ida, aged 9, occupied a couch in another room. She testified that her father commenced to pay visits to her bed shortly after the family moved to Chino, and that this continued, once or twice a month, up to September of the same year, at about which time defendant was arrested and charged with the crime of rape. Lizzie testified that she would be asleep when her father came, and that she did not cry out, but attempted at different times to awaken her sister Ida by "pinching" the latter; that Ida was never awakened so as to observe the father in his unlawful act. She also testified that finally she had gone to the witness Dillon and complained to him of her father's conduct. On cross-examination she was asked as to whether she complained to anybody else, and she replied that she had told other people, among them a young man named Cisneros; that she had written him a letter and told him about it. Referring to the times when the defendant would visit her, she said that on those occasions she would be asleep. The following questions were asked, and these answers given in that connection:

> "Q. And did you know what was going on? A. I knew afterwards. Q. You didn't know at the time though? A. Yes, sir; I knew, but after it had all happened. Q. You didn't say anything when it was happening, did you? A. Yes, sir. Q. Who did you say it to? A. To him. Q. Well, did you say anything to your sister? A. I tried to wake her up, but I never succeeded. Q. Never succeeded at any of these times? A. No, sir. Q. Would you try each time to wake her? A. Yes, sir. Q. What would you do, get hold of her and shake her? A. I pinched her. Q. You never woke her up at any time? A. No, sir."

The theory of the defense, as developed by the testimony, was that the young man Cisneros had been in the habit of calling upon the complainant during her father's absence, and that the father objected to this, and both remonstrated with the daughter and administered corporal punishment because of the visits of the young man. One of the sons, a brother of complainant, testified that upon returning home he had frequently found his sister closeted with Cisneros; that at times the doors leading to the apartment where they were, were fastened; that he had peered through a window and observed the two lying together upon a couch in a position which, according to the descriptive terms used by the witness, was a compromising one. In substance the same testimony was given by the defendant, who denied ever having had intercourse with his daughter. The mother of Lizzie Lopez, being called as a witness, gave testimony indicating that in her opinion the girl was not of truthful mind. On the other hand, several witnesses, apparently reputable people who had resided in the same community with the defendant prior to his moving to Chino, testified that they knew appellant's general reputation for honesty and integrity, and that such reputation was bad. There was some testimony from which the jury might have inferred that children of the defendant who gave testimony favorable to him had been coached by an aunt and instructed what to say, although this was denied both by these witnesses and the aunt referred to. The girl Ida was the young daughter who, according to complainant's testimony, at all times occupied her bed with her. This young girl was called to the witness stand by the defendant, but the court indicated that he did not consider that she was competent to testify. We quote in full the examination of this witness and the remarks of the court:

"The Court: What is your name? A. Ida Lopez. Q. How old are you, Ida? A. Nine. Q. Do you go to school? A. Yes, sir. Q. What grade are you in? A. Third. Q. Where do you live? A. In Juvenile. Q. Do you know what it is to testify in court? Do you know what it is to hold up your hand? A. Yes, sir. Q. What do they do that for? A. To tell the truth. Q. If you do that, and don't tell the truth, what do they do to you? A. Put you in jail. Q. Anything else? Have you ever been a witness in court before? A. No, sir. The Court: I think this witness is too young to understand the nature of an oath that she takes or the testimony that she gives. Mr. Swing (counsel for defendant): Very well then."

[1] Counsel for appellant insist that the court committed prejudicial error in refusing to allow the young girl to testify in the case. If we were permitted to judge of the competency of this witness from the printed record before us, we would perhaps find it difficult to say that she was not possessed of sufficient mentality and understanding to entitle her to testify. However, in matters of this kind the court has the duty in the exercise of sound discretion to determine that question, and it would be a rare case, indeed, where such determination would be interfered with upon appeal. People v. Craig, 111 Cal. 460, 44 Pac. 186.

[2] In this case we cannot say that the court, from his observation of the young girl as she appeared upon the witness stand and the manner in which she gave her answers, did not properly determine that the child was too young to testify understandingly and with full appreciation of the obligation of a witness' oath. It may be further observed that counsel for appellant appear to have acquiesced, without objection, in the court's suggestion, and made no request to be allowed to further examine the witness to test her competency.

[3] It is next complained that the court erred in permitting the witness Dillon to relate the substance of a conversation that he had with the complaining witness prior to the arrest of the defendant. This testimony was to show the fact that the complainant did complain about the conduct of the defendant, under the rule which permits such complaints to be offered in corroboration of the charge of the prosecutrix and to show want of consent. People v. Wilmot, 139 Cal. 103, 72 Pac. 838. The question of the consent of the prosecutrix on account of her youth becomes immaterial in this case, but it is said in the case of People v. Wilmot, supra, the fact of "complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this court has in this respect made no distinction between cases where there was actual resistance and those where resistance and nonconsent were conclusively inferred by the law." We fail to find in the testimony given by Dillon any such recitation of forbidden details as would make it appear that the admission of that testimony constituted prejudicial error. The court cautioned the witness that he could only tell what the "complaint" was, and not the detail of it, and the witness replied that she came to his office in the middle of September crying, and said, "I don't want to live with my father." The court then struck out this statement, and instructed the jury to disregard it, and the witness was asked again as to what complaint was made, and replied "that she had had sexual intercourse with her father." Undoubtedly it was competent for the witness to tell what complainant complained about—that is, what the subject of her complaint was—and whether he phrased it as that she complained of a rape, or that she said, as he stated, that she had had sexual intercourse with the defendant, is not material. The one would mean no more than the other. The defendant on cross-examination was not content with the statement of the complainant of the fact of the complaint made to Dillon, but asked her directly, as we have before mentioned, as to other persons she had complained to. It was proper for the district attorney to follow this examination and bring out more fully the matter of other complaints, if any were indicated to have been made. No prejudicial misconduct can be charged to the prosecuting officer.

[4] Complaint is made because the court refused to give certain instructions offered by the defendant. Instruction No. 9 was to advise the jury that:

> If "the defendant [prosecutrix is evidently intended] made no outcry at the time of the alleged offense and did not immediately complain to others and that when she did complain she had some motive other than the prosecution of the defendant for the alleged offense, it is your duty to take all of these things into consideration in arriving at a verdict, and unless and in spite of these facts you are convinced to a moral certainty and beyond a reasonable doubt that the defendant did commit the alleged offense, you should return a verdict of not guilty."

This instruction cannot be said to be clearly phrased, and there was no error in refusing it. The prosecuting witness was under age, and the matter of her consent or nonconsent was not material, and the defendant might well have been convicted without any evidence at all being offered as to any complaint or outcry being made by her.

[5] Instruction No. 11 offered and refused was merely argumentative, and the defendant as a matter of right was not entitled to have it read to the jury. As to instruction No. 12, the same observation may be made; and the same may be said of instruction No. 15.

[6] Instruction No. 17 which was to advise the jury that, if they believed the testimony of the prosecuting witness was inherently improbable or "possibly untrue," it was their duty to find a verdict of not guilty, in so far as it contained suggestion of pertinent instruction, was completely covered in the instruction on reasonable doubt and other instructions given by the court.

[7] Instruction No. 18, offered and refused, was an instruction warning the jury as to the

danger of prosecutions for rape being used to satisfy malice or private vengeance, and proceeded to declare that in such case "the accused is almost defenseless, in view of the facility with which charges of this character may be invented and maintained." We do not consider that the refusal to give this instruction amounted to prejudicial error. It may be observed that the court very fully and carefully instructed the jury as to the necessity that it should find in fact the truth of the charge to be beyond a reasonable doubt, and that the testimony of the prosecutrix should be carefully scanned, that neither the gravity of the charge nor the fact that the defendant was the father of the prosecuting witness was to bias the judgment of the jurors in any manner, and that he was presumed to be innocent until his guilt had been established beyond a reasonable doubt. The defendant was allowed to show very fully the alleged conduct of the prosecutrix with the young man Cisneros, in the furtherance of his contention that the prosecution arose through the ill will of the complainant because of his interference with and objections to the visits of Cisneros. As we have before stated by way of preface to this opinion, to our minds the corroborating evidence did not make out, as the record shows it, a strong case. There was no testimony by physicians or other competent persons showing that as a result of any physical examination it had been ascertained that the young girl had been tampered with. It is true that by way of rebuttal the district attorney did offer as a witness a physician and started to examine him as to some examination made of the young girl, when he was stopped by an objection that the testimony was not rebuttal, which objection was very properly sustained by the trial judge. However, the responsibility rested with the jury to determine the truth of the facts charged. It determined them in favor of the guilt of the defendant, and he must endure the penalty visited upon him.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 470)

HAMILTON v. MALLARD, City Assessor, et al. (Civ. 2323.)

(District Court of Appeal, Second District, California. April 19, 1917. Rehearing Denied by Supreme Court June 18, 1917.)

1. MANDAMUS ⇨66—WHO ENTITLED TO RELIEF—TAXPAYER.

A city taxpayer cannot maintain mandamus to have an alleged de jure city assessor perform his duties, where a de facto officer is performing the duties of such office, since the taxpayer's rights are as well protected by the de facto as by the de jure officer, and the question should be directly litigated between the interested parties.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 131.]

2. OFFICERS ⇨41—DE FACTO OFFICER—CITY ASSESSOR.

A county assessor, performing all duties of the city assessor, claiming to do so under color of right and with the consent of the city council, and the alleged city assessor de jure, is a de facto officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 63.]

3. MANDAMUS ⇨7—NATURE OF WRIT.

Mandamus does not issue as a matter of absolute right.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 5.]

Petition for writ of mandate by William R. Hamilton against Walter Mallard, City Assessor of the city of Los Angeles, and others. Writ denied.

J. R. Scott and James, Smith & McCarthy, all of Los Angeles, for petitioner. Albert Lee Stephens, City Atty., and C. B. Penn, Deputy City Atty., both of Los Angeles, for respondents.

SHAW, J. This is an original proceeding, instituted by petitioner as the owner of property in the city of Los Angeles, for a writ of mandate to be directed to Walter Mallard, as city assessor of the city of Los Angeles, and to the other respondents, as members of the council of said city, requiring the latter to furnish Mallard, as such assessor, certain stationery and supplies mentioned in the petition, alleged to be necessary for his use in the performance of his duties as such assessor, and for which he had made requisition, and commanding respondent Walter Mallard, as such assessor, to perform the duties of assessor of said city.

The proceeding grows out of the fact that, under and by virtue of an amendment to the charter of the city of Los Angeles purporting to authorize such action, the city council adopted an ordinance whereby it was provided that, beginning on the 5th day of March, 1917, the functions of the city of Los Angeles relating to the assessment of property for taxation should be transferred to, assumed, and discharged by the officer of Los Angeles county performing similar functions in such county, except as therein provided, and that the office of city assessor be vacated and abolished; the effect of which was to transfer the functions of city assessor to the county assessor of Los Angeles county for performance. Thereafter the board of supervisors of Los Angeles county adopted a resolution approving such transfer and assuming for and on behalf of said county the discharge and performance of such functions by the proper officer of the county, which officer, since the contrary is not made to appear, we must assume, by virtue of such transfer and the assumption of such duties, has entered upon, and is now engaged in the discharge thereof.

The theory upon which petitioner bases his claim to the issuance of the writ is the invalidity of the proceedings whereby the functions of the office of city assessor were transferred to the county assessor for performance, and the office abolished. In view of our conclusion that upon the facts stated in the petition, to which a general demurrer was interposed, the writ of mandate prayed for should not issue, it will be unnecessary to discusss the several grounds upon which petitioner's attack is made upon the validity of the amendment to the charter pursuant to which the proceedings of the council in effecting the transfer were had and taken. If the office was abolished, then clearly, since Mallard could not be the incumbent of an office that had no existence, the writ would not lie. On the other hand, assuming the existence of the office as claimed by petitioner, and that Mallard is the de jure city assessor, who, as alleged, refuses to perform the functions of the office, which are in fact being exercised by another under color of right so to do, is petitioner entitled to the writ? The answer to the question depends upon whether such performance of duties by the county assessor constitutes him the de facto incumbent of the office. If such fact be made to appear, then petitioner, since the law, "for grave reasons of public policy, holds valid the acts of such an officer" (Morton v. Broderick, 118 Cal. 480, 50 Pac. 644), is not concerned with the question as to the right of such county assessor to assess city property. "The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office, and in full possession of it." Town of Susanville v. Long, 144 Cal. 362, 77 Pac. 987.

[1-3] While the writ will issue to compel the performance of official duty, it cannot, where there is a valid performance of such duty, be invoked to determine the disputed question as to which of two persons is entitled as of right to perform the duty. Fowler v. Brooks et al., 188 Mass. 64, 74 N. E. 291, 3 Ann. Cas. 173. That it will lie in a proper case at the suit of a taxpayer to compel the assessor to assess lands admits of no doubt. People v. Shearer, 30 Cal. 645; Hyatt v. Allen, 54 Cal. 353. But where, as here, it appears that the duty of assessing property is being performed by one whose acts, if he be such de facto officer, are of the same validity as though exercised by the assessor de jure, how can a taxpayer be an aggrieved party, or said to have any beneficial interest in the subject which can be affected? The sole inquiry, then, is not whether the proceedings which purport to abolish the office of city assessor and transfer its functions to the county assessor are valid, but, conceding them invalid, are the facts such as to constitute the person filling the office of county assessor the de facto city assessor? That he is such de facto officer, we think, necessarily follows from his possession of the indicia of office and the fact that he is actually engaged in performing all the functions thereof, claiming so to do under color of right, with the acquiescence of the city council and the city assessor de jure. True, he does not hold himself out as being city assessor; but this, to our minds, is immaterial. It is the exercise of the functions of the office, not of right, but under claim and color of right, that gives the position of the county assessor its de facto character, rather than the name by which the office is designated.

Conceding petitioner's right as a taxpayer to have a valid assessment made of all city property, nevertheless, since it appears such valid assessment is being made, he is in no position to insist upon the issuance of a writ of mandate to determine the legality of the proceedings under which the county assessor is engaged in the performance of the functions of the office. He is not concerned with the question of which of two persons purporting to act officially performs an act which, in either case, is equally free from objection. To issue the writ under such circumstances would be tantamount to permitting its use for the purpose of determining as between two adverse parties, the right and title to the office, for which purpose another proceeding is provided by statute. True, where the party is entitled to the relief sought, the writ will not be withheld in a proper case because of the fact that title to the office is incidentally involved. Morton v. Broderick, supra; McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146. No facts are here disclosed, however, which bring the case within the exception to the general rule announced in those cases. Moreover, the writ of mandate does not issue as a matter of absolute right (People v. Lieb, 85 Ill. 484), and in the case at bar consideration should be given to the probable demoralization and disaster in the administration of the fiscal affairs of the city which might follow the granting of the application. If the proceedings for the transfer of the functions of the office are, as claimed, invalid, such question should be litigated in a direct proceeding, final as to parties directly interested, and not in a suit at the instance of a third party, who, as it appears to us, has no beneficial interest in the matter.

The writ is denied.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 479)

CANER v. OWNERS' REALTY CO.

(Civ. 2042.)

(District Court of Appeal, First District, California. April 20, 1917.)

1. Contracts 🔑277(1)—Performance—Necessity of Demand.

Where no time is specified for the performance of a contract other than for the payment of money, a demand for performance is necessary in order to put the promisor in default.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1217–1227.]

2. Contracts 🔑336—Action for Breach—Complaint—Sufficiency.

In an action for breach of contract to grade streets, in which time was of the essence, but no time for performance fixed, a complaint failing to allege a demand upon the defendant for performance is fatally defective.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1677–1681.]

3. Limitation of Actions 🔑66(6)—Computation of Period of Limitation—Breach of Contract—Demand for Performance.

Where demand for performance was essential to the creation of a cause of action for breach of contract, it was necessary to toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 359.]

4. Contracts 🔑212(2)—Indefinite Time.

Where, under a contract, the time within which an act is to be performed is either indefinite or not specified, it must be performed within a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 947–951.]

5. Limitation of Actions 🔑46(3)—Accrual of Contract—Demand for Performance.

Where, in a contract, the time within which an act is to be performed is either indefinite or not specified, the statute of limitations commences to run against an action for a failure to perform such an obligation at the expiration of a reasonable time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 242.]

6. Limitation of Actions 🔑66(15) — Demand for Performance — Time for Making.

Where demand for performance of a contract is essential to the creation of a cause of action, it must be made within a reasonable time, which is the period of time prescribed by the statute of limitations for the outlawry of such action; so that, where contracts for the grading of streets did not specify a time for performance, and no demand for performance was made within the period of four years prescribed by Code Civ. Proc. § 337, within which an action upon a contract in writing must be brought, an action for damages for breach of such contracts was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 373, 374.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by Petronella Caner against the Owners' Realty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Olson, of San Francisco, for appellant. Jordan & Brann, of San Francisco, for respondent.

LENNON, P. J. Upon this appeal from a judgment entered in favor of the defendant following an order of the trial court sustaining a demurrer to the plaintiff's first amended complaint, it appears from said complaint that the plaintiff individually and as the assignee of 22 other persons sought in 23 separately stated causes of action to recover damages from the defendant for the alleged breach of covenant of a contract to grade streets in a certain tract of land in San Mateo county known as the "Ocean Shore tract," in which plaintiff and her assignors had purchased lots. The complaint also purported to plead 23 causes of action upon the same covenant for specific performance. To all of these causes of action the defendant demurred upon the ground that none of them stated facts sufficient to constitute a cause of action, and that each of them was barred by the provisions of sections 337 and 343 of the Code of Civil Procedure. Upon the oral argument it was conceded by counsel for plaintiff that the demurrer was well taken in so far as it was directed against the several causes of action attempted to be pleaded for specific perfomance.

The covenant of the contract pleaded and relied upon to support the plaintiff's claim of damages for its breach is as follows:

> "The sellers [defendant] guarantee to grade all the streets in the Ocean Shore tract at their expense. Time is acknowledged to be of the essence of this contract. These covenants shall be binding on the parties to this contract, their heirs, successors, and assigns."

It affirmatively appears upon the face of the complaint that the several contracts in suit were not made within four years prior to the institution of the action; it is alleged that each and all of them were made at different times, varying from five to seven years, before the complaint was filed. It will be noted that the covenant in question does not specify, and the plaintiff's complaint does not allege, nor attempt to allege, the time within which the defendant was to grade the streets in the tract wherein plaintiff and her assignors had purchased lots. Furthermore, the complaint is devoid of an allegation that the plaintiff or her assignors ever demanded that the defendant perform the said covenant.

[1-3] Where no time is specified for the doing of an act, other than the payment of money, it is the rule of law that a demand for performance is necessary in order to put the promisor in default. 9 Am. & Eng. Ency. of Law, 200, 201. The reason for the rule in this behalf is to give the promisor an opportunity to perform before being subjected to the inconvenience and expense of litigation. 1 Corp. Jur. 979. No time having been fixed by the covenant under consideration for the performance of the obligation thereof, and the complaint failing to allege a demand upon the defendant for performance, it is

clear that the complaint, in so far as the several causes of action for damages are concerned, is fatally defective—when measured by the foregoing rule. Moreover, such a demand, in addition to being essential to the creation of a cause of action, was necessary to toll the statute of limitations.

[4-6] In this behalf it is the rule, well settled we think, that where in a contract the time within which an act is to be performed is either indefinite or not specified, it may and must be performed within a reasonable time; and ordinarily the statute of limitations commences to run against an action for a failure to perform such an obligation at the expiration of a reasonable time. Williams v. Bergin, 116 Cal. 56, 47 Pac. 877. And again, where, as in the present case, a demand for performance is essential to the creation of a cause of action it must be made within a reasonable time, which, it has been held, is the period of time prescribed by the statute of limitations for the outlawry of the action. Meherin v. San Francisco Produce Exchange, 117 Cal. 215, 48 Pac. 1074.

An action upon any written contract founded upon an instrument in writing executed within the state is barred within four years (Code Civ. Proc. § 337); and, as no demand was made within four years after the contracts in suit were executed, all of the causes of action arising therefrom and pleaded in the plaintiff's complaint were under the rule last above stated barred by the statute of limitations.

It follows, from what we have said, that the demurrer to the plaintiff's complaint was well taken and rightly sustained. The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(33 Cal. App. 476)

DOOLITTLE v. SAVAGE TIRE CO.

(Civ. 1899.)

(District Court of Appeal, Second District, California. April 19, 1917.)

1. CONTRACTS 🔑247—TERMINATION—SUFFICIENCY OF EVIDENCE.

In action against an employer to recover for use of an automobile plaintiff employé's testimony that a new arrangement was made concerning the machine's use on a certain date does not establish that the previously existing agreement regarding compensation was thereby terminated.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1139, 1787.]

2. CORPORATIONS 🔑432(9)—EVIDENCE OF AUTHORITY—BY-LAWS.

In employé's action against his employer for use of an automobile defendant's by-law requiring compensation of its employés to be fixed by its directors or executive committee is inadmissible, at least where the plaintiff was not a stockholder when he made his contract with defendant's general manager and had no notice of such by-law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1734, 1743, 1762.]

Appeal from Superior Court, Los Angeles County; J. W. Curtis, Judge.

Action by M. G. Doolittle against the Savage Tire Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, and Titus & Davin, of San Diego (Jas. A. Gibson, Jr., of Los Angeles, of counsel), for appellant. Earl Curtis Peck, of Los Angeles, for respondent.

CONREY, P. J. The judgment awarded to the plaintiff the sum of $1,000 as compensation for the use of an automobile pursuant to an alleged agreement between plaintiff and defendant. The defendant appeals from the judgment.

The principal grounds upon which appellant claims a reversal are that the evidence is insufficient to sustain the following findings: (1) That the plaintiff used his automobile in the business of the defendant pursuant to the agreement sued on, from on or about the 1st day of July, 1913, to and including the 31st day of August, 1914; (2) that the reasonable value of the use of the automobile was the sum of $1,000.

The plaintiff was a salesman employed in selling tires for the defendant, and was the owner of an automobile. At a date not exactly established, but which was between the 1st and middle of August, 1913, the sales manager of the defendant made an oral agreement in its behalf with the plaintiff which in substance was that the plaintiff should use his automobile in connection with his work as a salesman, and that the defendant would pay the reasonable value of such use. The plaintiff did use his automobile exclusively in the business of the defendant from that time until about the end of August, 1914. There is evidence tending to establish the fact that this arrangement between the sales manager and the plaintiff was made known to and was approved by the president and general manager of the defendant. The evidence further shows that the reasonable value of the use of the automobile, if plaintiff paid for the gasoline used by him, was $100 per month; if the defendant paid for the gasoline, it was at least $75 per month. The plaintiff did pay for his own gasoline until March 1, 1914. Thereafter the gasoline expense was paid by the defendant.

Fairly construed, the brief for appellant concedes that the plaintiff is entitled to compensation under the contract sued on for the time from the middle of August, 1913, until March 1, 1914. This would justify the judgment at least to the extent of $650. Appellant contends, however, that the contract was terminated on March 1, 1914, and therefore that the recovery cannot include compensation for the use of the automobile after that date.

[1] Evidence was received concerning an

agreement said to have been made about March 1, 1914, between plaintiff and defendant whereby the defendant purchased the plaintiff's automobile, and that thereafter it was used as the defendant's machine. But all of this evidence was afterwards stricken from the record by consent of the parties. Notwithstanding such stipulation, appellant relies upon a general statement made by the plaintiff in his testimony that on March 1st a new arrangement was made concerning the use of this automobile, and argues therefrom that the contract made in August was thereby terminated. In our opinion, such conclusion does not follow. As the record stands, we do not know what were the terms of the supposed new arrangement, and we cannot say that they were sufficient to put an end to the existing contract. The fact that the plaintiff continued in the employ of the defendant as salesman and continued to use his automobile in that business as he had used it before, with the single exception that from that time the defendant paid for the gasoline used, tends to support plaintiff's claim that he was continuing to use the automobile in that business under the agreement that he should be paid the reasonable value of such use. At the rate of $75 per month this would have amounted to $450. It follows that the evidence is sufficient to support the court's finding that the reasonable value of the use of the machine for the entire period included in the findings amounted to $1,000.

[2] Appellant further complains that the court erred in excluding from the evidence a by-law of the defendant which limited the manner in which the compensation of employés should be fixed. This by-law stated that:

> "The compensation for all employés may be fixed by the executive committee or by the general manager, but no employment for a longer period than one month shall be valid unless agreed upon in writing and approved by the directors or the executive committee."

We think that the by-law was properly excluded. The compensation of the plaintiff as an employé was his salary, about which there appears to have been no dispute. At least it is not involved in this case. The contract for the use of plaintiff's automobile stands on the same foundation as if it had been made with any automobile owner to obtain the use of such machine in the company's business. Appellant claims that the by-law was admissible for the additional reason that the plaintiff was a stockholder of the defendant corporation, and therefore bound to take notice of its by-laws. In fact, the evidence shows that the plaintiff was a stockholder of the defendant corporation at the time when this action was tried in the superior court, but not that he was such stockholder when the contract was made. Since the contract related to a matter connected with the ordinary course of business of the corporation and was made by or with the consent of the general manager, and the corporation received the benefit of the contract thus made, it should not be permitted to take advantage of a limitation (if such there was) of the general manager's authority, without evidence that the plaintiff knew or had notice thereof.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(33 Cal. App. 511)

PEOPLE v. WILBUR. (Cr. 385.)

(District Court of Appeal, Third District, California. April 24, 1917.)

1. CRIMINAL LAW 🔑966—MOTION IN ARREST—NATURE.

A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense and is neither more nor less than a demurrer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423–2468.]

2. BANKS AND BANKING 🔑21—INFORMATION—SUFFICIENCY—CHECKING AGAINST INSUFFICIENT FUNDS.

Under Pen. Code, § 476a, as to checking against insufficient funds, where defendant wrote a check payable to himself and gave it to a third party without indorsing it, the offense was complete; the gist thereof being the intent to defraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25.]

3. BANKS AND BANKING 🔑21—"CHECKING AGAINST INSUFFICIENT FUNDS"—ELEMENTS OF OFFENSE.

To establish the offense under Pen. Code, § 476a, of "checking against insufficient funds," it is necessary that, with intent to defraud, a party has made and drawn a check or draft upon some bank for the payment of money and delivered the same to another knowing at the time that he has not at the time sufficient funds or credit with the bank to meet the check in full.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25.]

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

A. H. Wilbur was convicted of an offense, and he appeals. Affirmed.

Henry L. Ford, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. By an information duly filed, the district attorney of Humboldt county charged the defendant with the crime of drawing a bank check without funds in bank, as follows:

> That the said defendant did, on the 31st day of October, 1916, at and in the county of Humboldt, "willfully, unlawfully, feloniously, fraudulently, knowingly and with intent to defraud H. A. King, make, draw, utter and deliver to H. A. King a certain check and draft upon a certain bank, banker and depositary, to wit, The First National Bank of Eureka, a banking corporation duly organized for the purpose of

doing a banking business under and by virtue of the laws of the United States of America and doing business in the said county of Humboldt. That said check and draft was then and there for the payment of money and was then and there in the words and figures following, to wit: 'Eureka, Cal., October 31, 1916. The First National Bank of Eureka (90–147). Pay to A. H. Wilbur, or order thirty-five dollars ($35.00). [Signed] A. H. Wilbur.' That he the said defendant had not then and there sufficient funds in or credit with the said The First National Bank of Eureka, a banking corporation as aforesaid, to meet said check and draft in full upon its presentation, as he the said defendant then and there well knew, contrary to the form, force and effect of the statute," etc.

The defendant, upon his arraignment upon said information on the 10th day of November, 1916, entered a plea of guilty thereto, and "waived the statutory time for the pronouncing of judgment herein," whereupon the court postponed the pronouncing of judgment to the following day, November 11, 1916, at 9:30 a. m. On the last-named date, the cause having been called for the pronouncing of judgment, the attorney for the accused filed and pressed a motion in arrest of judgment. The motion was based upon a number of grounds, among which were the following: (1) That the facts stated do not constitute a public offense; (2) that the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code; (3) that the said information contains matters which, if true, would constitute a legal justification or excuse of the offense charged. Pen. Code, §§ 1004, 1185. The motion was disallowed and judgment of imprisonment thereupon pronounced. This appeal is by the defendant from said judgment.

The point upon which the defendant relies for a reversal of the judgment is that the check, as delivered to King, having been drawn by the defendant and made payable to himself or order, and not having been indorsed on the back thereof by the latter, was worthless in the hands of King; that is to say, since the check, as drawn, did not bear upon its back the indorsement of the defendant, King could not have succeeded in passing or cashing the check or securing payment thereof. It is argued that the check, never having been legally transferred to King, amounted to nothing more than a piece of waste paper, that it was worthless for any purpose, and of the mere act of delivering the paper to King no charge of crime could be predicated and sustained.

[1] We cannot agree to that contention. A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense. The office of such a motion is neither more nor less than that of a demurrer. It is practically a demurrer interposed to an accusatory pleading after conviction. Necessarily, then, the question the solution of which is here submitted to us is whether the facts stated in the information constitute a public offense.

[2] The charge laid in the information is founded on section 476a of the Penal Code, which provides:

> "Every person who, willfully, with intent to defraud, makes or draws, or utters, or delivers to another person, any check or draft on a bank, banker or depositary for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he has not sufficient funds in, or credit with, such bank, banker or depositary, to meet such check or draft in full upon its presentation, is punishable by imprisonment in the county jail for not more than one year or in the state prison for not more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depositary for the payment of such check or draft."

The elaborate discussion in the briefs, pro and con, upon the question whether there may be a legal transfer of a check by delivery under a parol or verbal agreement, or, in other words, without a written agreement or indorsement, is of no consequence in the decision of the point made by the defendant. The element of intent which enters into the commission of the acts constituting, with such intent, the crime charged—that is, the expression, "intent to defraud"—can hardly be said to mean an intent to defraud the bank, but refers (as the information here alleges) to an intent to defraud the person to whom the check is delivered, for, quite obviously, there could be but little, if any, chance or opportunity for defrauding the bank in such case, since, if the drawer had no assets therein or credit therewith sufficient to satisfy the draft, the bank could and would promptly repudiate and dishonor the check. And the fact that the check may be "a worthless piece of paper" in the hands of the person to whom it was delivered, because it has not been properly indorsed, does not enter as an element into the crime defined by the section upon which the information is based. The check in this case, even if indorsed by the defendant, could be no less a "worthless piece of paper," if, at the time of its presentation for payment, the drawer had no money in or credit with the bank sufficient to satisfy it. We can therefore conceive of no reason for saying that it is material or necessary to the statement or consummation of the offense to show or prove that the check or draft so drawn and delivered is in such form as would make it legally binding upon the bank to pay it upon presentation, if the drawer then had adequate funds in, or credit with, the bank to satisfy it.

[3] To ascertain what are the essentials or elements constituting a crime, we must look to the statute itself defining the crime, and, thus guided in this case, we find that the gist of the offense charged in the information is in the fraudulent intent with which the check or draft is drawn and delivered and knowledge by the drawer and deliverer, at the time of such drawing and delivery, that he was then without assets of any kind or character in the bank upon which it was drawn to satisfy or meet it. Hence, all that

need be pleaded or proved to show or establish the fact of the commission of the offense denounced in said section is that, with intent to defraud, a party has made and drawn a check or draft upon some bank for the payment of money and delivered the same to another, knowing at the time such check was made, drawn and delivered that he has not sufficient funds in, or credit with such bank to meet such check or draft in full upon its presentation.

The information in this case, as will be observed from an examination of it, follows, substantially, the language of the section under which it was drawn, and, among other things, directly charges that the defendant delivered the check to one H. A. King with intent to defraud him. Thus the offense defined by said section is clearly and concisely stated, and this is all that is required to render the information impregnable against successful attack, in whatever form the attack may or might be made, upon the ground that it does not state a public offense. And, we may add, the information is equally unobjectionable as against any other ground of demurrer or of a motion in arrest of judgment.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(33 Cal. App. 434)

BROOKE v. QUIGLEY. (Civ. 1635.)

(District Court of Appeal, Third District, California. April 21, 1917.)

1. PRINCIPAL AND AGENT 🔑48—DUTIES OF AGENT.

The constant and undivided fidelity of the agent to the interest of the principal is demanded.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 78.]

2. APPEAL AND ERROR 🔑1039(2)—HARMLESS ERROR—PLEADINGS—INCONSISTENCY.

Complaint showing agreement for agent's commission and performance of the agent's contract and alleging that "thereafter, in accordance with said negotiations carried on on the part of plaintiff in accordance with said agreement, a deed of grant was executed" not in the terms agreed upon, was not prejudicially inconsistent owing to the presence of the words "in accordance with said agreement."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4075.]

3. SPECIFIC PERFORMANCE 🔑114(2) — RIGHT TO REMEDY.

In an agent's action attempting to establish a trust and seeking to have an interest in himself declared in the property involved in the trade, though the complaint contained no allegation that the consideration was equitable and adequate, where such issue was tendered by the answer, and was found in plaintiff's favor, it was immaterial whether the action be regarded as one for specific performance or to enforce a trust.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357-361.]

4. SPECIFIC PERFORMANCE 🔑126(1)—DECREE.

When an agent consummated a trade under an agreement that he should have a one-sixth interest in the tract conveyed, he was not entitled to a decree in his suit for specific performance or to have a trust declared for the whole interest in the one-sixth of the land or any portion thereof, but could only have decreed for a one-sixth undivided interest of the whole.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 55, 401-405.]

5. PRINCIPAL AND AGENT 🔑78(1)—INTEREST OF—EVIDENCE—SUFFICIENCY.

Evidence *held* to require an accounting between an agent and his principal arising out of a real estate trade wherein the agent was to receive an undivided one-sixth interest in the land involved.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162-165, 176.]

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Morris Brooke against T. L. Quigley. Judgment for plaintiff, and defendant appeals. Reversed.

Butler & Swisler, of Sacramento, and M. E. Sanborn, of Yuba City, for appellant. W. H. Carlin, of Marysville, for respondent.

BURNETT, J. The suit was for the recovery of a certain interest in real property which was alleged to be held in trust by the defendant for the plaintiff. The cause of action is based upon a contract between the parties whereby respondent acted as the agent for appellant in the purchase of a tract of land from one Edward A. Noyes under an agreement that he should receive as his commission a one-sixth interest in said real property. The contract is set out in the complaint, and it is further alleged that in accordance therewith respondent secured the sale, and the deed was made to appellant as the sole grantee, that subsequently appellant sold a portion of said real estate, and that said portion was of the value of one-half of the whole tract. The prayer was for judgment decreeing respondent to be the owner of an undivided one-third interest in the part remaining unsold, and that appellant held it in trust for respondent, and that he be required to perform specifically his contract and execute a deed to respondent of the one-third interest. The answer set up a failure on plaintiff's part to perform his contract, concealment of knowledge, and information from defendant by plaintiff, and also misrepresentations by the agent to the principal, constituting a violation of his duties and obligations as such agent. It was also alleged that the contract was not sufficiently specific, comprehensive, or definite to admit of specific performance, and that the alleged services did not constitute a fair, just, and adequate consideration or any consideration whatever for plaintiff's demand. By counterclaim and cross-complaint defendant also sought to recover the sum of $2,167.60 which he had paid to plaintiff before he had discovered the said violation of his duties as agent and the failure to render the services contracted for. It may be stated that this payment was made by reason of a certain reduction in the cash payment required of appellant at the time of the execution of the deed to him. The court's conclusion harmonized with the view of plaintiff, and its judgment determined and decreed:

> "That plaintiff is the owner in fee and entitled to the possession of an undivided $^{25333}/_{114795}$ interest in and to those certain tracts or parcels of land situate and being in the county of Sutter [describing them], subject, however, to the payment by plaintiff of the sum of $21,166.66 on or before the 1st day of January, 1921, with interest thereon from the date of the entry of this decree at 6 per cent. per annum, the same being a portion of the last payment required to be made in and by that certain promissory note executed by defendant T. L. Quigley to E. A. Noyes and secured by a mortgage of record."

Then follows a copy of said note, and the judgment continues:

> "It is further here ordered, adjudged, and decreed that within ten days from the date of the rendition and entry of this decree the defendant, T. L. Quigley, execute his said trust by the execution and delivery to plaintiff of a good and sufficient deed of grant, granting and transferring to him said $^{25333}/_{114795}$ interest in and to said lands and premises hereinbefore described subject to the payment of said sum of $21,166.66 on or before the 1st day of January, 1921, with interest from the date of the rendition and entry of this decree at 6 per cent. per annum as hereinbefore set forth, and that in the event of the failure or refusal of said defendant, T. L. Quigley, to execute said deed within the time and in the form and substance as herein directed, the sheriff of the county of Sutter, state of California, is hereby appointed for such purpose and directed to make, acknowledge, execute, and deliver said deed in the place and stead of said defendant, T. L. Quigley."

We now proceed to the consideration of the principal contentions of appellant for a reversal of the judgment.

While appellant presents various points for our determination, he declares in his brief that the primary reason why appellant resists the demands of respondent is because of the knowledge obtained by appellant that respondent, while pretending otherwise, in fact failed to render the services as broker which in law and good conscience he was bound to render before he could rightfully claim compensation. In fact, appellant testified to the agreement substantially as did respondent, and declared that he intended to execute it until he learned "that he had not delivered or given me the service I expected, that I was paying for." The particular remissness of the agent is designated as "fraudulent concealment," "nonperformance and delay," "positive acts of fraud," and "misrepresentations." Under the first are specified:

> "(a) He did not inform appellant that he had knowledge of the Phipps-Beere option; (b) he did not inform appellant of the terms of that option or the price thereunder at which the land could be purchased, viz. $28 per acre; (c) he did not inform appellant during the time he was pretending to act as the confidential agent of appellant, that he at the same time was acting as the agent for Noyes and endeavoring to obtain for the land the highest possible price," and that he advised Noyes to insist upon a cash payment of $25,000 instead of $12,500 which Noyes had consented to accept until a flaw in the title was removed.

In the second category are enumerated his omission to avail himself of the opportunity to purchase the land at the price of $28 per acre, through said Phipps-Beere option, and his failure to submit to Noyes the various offers for the land made by appellant. The "positive acts of fraud" are covered by the foregoing, and the "misrepresentations" relate to a letter and telegram sent by respondent to appellant on December 29, 1912, to the effect that the net price for the land was $30 per acre, and that it had never been offered for less.

[1] The constant and undivided fidelity of the agent to the interest of the principal is, of course, demanded by the provisions of the statute, the decisions of the courts, and the recognized principles of honorable dealing, and if we had to accept the recital of appellant as embodying the established facts of the case, we should not hesitate to say that respondent was recreant to his trust and was not entitled to any consideration in a court of justice. But the foundation of appellant's claim is found in the testimony offered in his own behalf. It may be admitted that from the record his showing appears to be not destitute of persuasive force, but the apparently inculpatory circumstances are negatived by the denials and explanations of the plaintiff himself. As far as it was inconsistent with the evidence of appellant, the court undoubtedly accepted and acted upon the testimony of respondent, and we can do no less under the familiar rule. In view of the insistent assertions of appellant as to these important circumstances, we have been at pains to read carefully the entire transcript, and we find therein legal justification for the conclusion of the trial court that respondent acted in good faith in his dealings with appellant. We need not quote from the record, but we deem it sufficient to say that respondent testified that he knew of said option and told Quigley about it, but was informed that it called for $30 per acre; that he was told by Noyes that the land had never been offered for less; that he did not advise Noyes to insist upon a payment of $25,000 instead of $12,500; that he did submit to Noyes the various offers made by appellant; and that he did not know at any time while acting as the agent of appellant that the land could be bought for less than what it was purchased for. As to any effort made to sell the property to another party, he gave an explanation capable of reconciliation with an honest attitude toward appellant. He declared that Mr. Quigley said to him:

> "I may do business down here, but if you have any other prospect of selling that property and doing business with Mr. Noyes go ahead and do business."

Respondent testified that he had an arrangement with Mr. Quigley to that effect, and he did the best he could for him, but he had the privilege of disposing of the property elsewhere if the opportunity was offered. It seems that by agreement with Noyes the price for any other purchaser was $175,000, but the owner and respondent were anxious to favor appellant, and if a sale were made to him it would be for about $25,000 less. Respondent gives his reasons for believing that this scheme was in the interest of Quigley, and we cannot say that his conduct was inconsistent with good faith. He was, no doubt, anxious to obtain a commission, but in that respect he was probably like the average individual, and it cannot be said that he was not justified in what he did. Mr. Quigley was himself a real estate agent, and had, no doubt, a fellow feeling for the craft, and he was willing to give Mr. Brooks as much leeway as possible. Indeed, appellant seemed to rely entirely upon his own judgment as to the value of the land, he determined what he would pay for it, and his engagement was with Brooks that the latter would endeavor to secure it for him at that price, but with the privilege of selling it for more to another purchaser.

[2] It is contended with much learning that the theory of a trust upon which respondent relies is utterly untenable. The criticism begins with the complaint itself. After setting out the agreement between the parties, as we have hereinbefore stated, and the negotiations culminating in a sale, carried on by plaintiff with Mr. Noyes, the complaint proceeds:

> "And thereafter in accordance with said negotiations carried on on the part of plaintiff in accordance with said agreement a deed of grant, bargain, and sale was on or about the 5th day of December, 1913, executed by said Edward A. Noyes to said defendant, T. L. Quigley, granting and transferring to said Quigley the above-described lands and premises. Shortly before the execution and delivery of said deed, plaintiff learned that the deed was to be executed by said Noyes, and he requested and demanded of said defendant, Quigley, that in the execution of said deed plaintiff should be named as a grantee therein to the extent of an undivided one-sixth interest, and said defendant, Quigley, as grantee therein to the extent of the remaining five-sixths interest therein in accordance with said agreement as aforesaid; that, however, defendant, Quigley, refused to permit plaintiff to be named in said deed," etc.

It is declared that the complaint is thus inconsistent and self-destructive. The particular point is that in one breath plaintiff claims that the conveyance to Quigley was in accordance with the agreement between the parties, and in the next that it was in violation of said agreement. In other words, assuming that a trust existed, it is alleged both that it was and that it was not executed. We think, however, that this criticism involves rather a matter of uncertainty than of vital infirmity. Respondent admits that the complaint was hurriedly and somewhat carelessly drawn, and it is contended that what was meant is that the sale was secured through the efforts of plaintiff in accordance with the agreement of plaintiff and defendant, but that the deed was executed contrary to said agreement in the respect indicated. There was no special demurrer, and the case was tried upon the theory that the cause of action was properly set forth, and defendant certainly suffered no prejudice by reason of said defective phraseology.

Appellant, however, with more confidence, apparently, urges the objection that the evidence fails to disclose any trust at all that can be legally enforced. There is an interesting discussion in the brief of the various kinds of trusts that are recognized by the authorities, and special attention is devoted to the consideration of a resulting trust, of which respondent contends this is an example. Therein are recited the different conditions upon and according to which such a trust may arise, and it is claimed that only one of these conditions could possibly apply here, and that is "when a purchaser of an estate pays the purchase money or some portion thereof and takes the title in the name of a third person." But it is insisted that such is not the case here, for the reason that no part of the consideration of the conveyance passed from respondent to Noyes, the owner of the property. In support of the position certain authorities are cited, including Pomeroy's Equity Jurisprudence, § 1037; Woodside v. Hewel, 109 Cal. 485, 42 Pac. 451; and Los Angeles, etc., Co. v. Occidental Oil Co., 144 Cal. 534, 78 Pac. 25. In the first it is said:

> "The fundamental idea of such a trust is that equity considers that the beneficial interest follows the consideration and attaches to the party from whom the consideration comes. But in order that this effect may be produced it is absolutely indispensable that the payment should be actually made by the beneficiary B. or that an absolute obligation to pay should be incurred by him as a part of the original transaction of purchase, at or before the time of the conveyance."

In the Woodside Case, supra, the doctrine is therein stated:

> "The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the cestui que trust, and the deed not taken in his name. The trust results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of money, and on no other ground."

And in the Los Angeles Case, supra, it was declared:

> "Efforts as the promoter or agent of the parties, and the traveling and other expense he incurred in bringing about this transfer, cannot be held to perform even a part of the consideration for the * * * transfer."

It is therefore urged, in opposition to the claim that respondent's share of the consideration was his efforts in bringing about the conveyance, that, since no part of this passed to the grantor or furnished any part of the consideration for the conveyance, it cannot be regarded as sufficient to create a resulting trust. However, we are not greatly concerned with the definition of words or in what category the alleged trust falls, but the vital inquiry, of course, is whether there was evidence of the creation of a legal obligation on the part of appellant to convey said one-sixth interest to respondent.

The written correspondence between the parties would seem to answer this inquiry. We can see no reason why it may not be held that thereby what is known as an express trust was created within the purview of sections 852 and 857 of the Civil Code. Estate of Hinckley, 58 Cal. 457; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659, and other decisions. In the Hinckley Case it was said:

> "The Code does not in terms declare the distinction between express and implied or resulting trusts. But section 857 declares that 'express trusts' in relation to real property may be created for certain purposes. Express trusts are put in opposition to those which are implied or resulting—the latter being such as exist 'by operation of law,' and the former such as are created or declared by instrument in writing."

It is true that, if the said letter of December 23d were the only writing in relation to the matter, it could hardly be held sufficiently definite and comprehensive to be enforced, but its deficiency was supplied in the other correspondence between the parties. There can be no mistake as to what was intended. Indeed, as we have seen, appellant on the witness stand admitted the agreement as claimed by respondent, but sought to justify his refusal to convey by reason of said misconduct.

[3] But, apart from the foregoing, the action may be upheld as one for specific performance. As to this appellant complains that there is no allegation in the complaint that the consideration was equitable and adequate. The issue, however, was tendered by the answer, evidence was received in relation to it, and it was found by the court in favor of plaintiff. It is immaterial, therefore, whether we regard the action as one for specific performance or to enforce a trust. In either event there is sufficient foundation for a judgment in favor of plaintiff.

[4] But, regarded in either aspect, the particular judgment rendered, in our opinion, was not warranted by the facts. If a trust existed, it reached the whole tract, and fastened itself upon every portion of it. It was a trust to convey an undivided one-sixth interest in and to said land. It could not be executed by the conveyance of a larger proportion of a part of the land, at least without the consent of the defendant. The same would be true as to specific performance. Plaintiff must rely upon his contract for the conveyance of one-sixth of the entire estate. As to the part disposed of by appellant, respondent must rely upon a judgment for damages. This would not require, of course, a separate action, but can be included in the same complaint. The matter is treated at length in Lathrop v. Bampton, 31 Cal. 22, 89 Am. Dec. 141, wherein is quoted with approval the following from Mr. Justice Lewis in Thompson's Appeal, 22 Pa. 17:

> "Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the cestui que trust. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. * * * But the right of pursuing it fails when the means of ascertainment fail."

In that case all the trust property was disposed of, but the principle is the same where only a part of it remains. Here 1,100 acres of the specific property covered by the trust is gone, "and nothing is left to the cestui que trust except a naked claim for damages generally, on account of the breach," as far as that particular tract is concerned.

In section 843 of Perry on Trusts it is said:

> "If the cestui que trust is unable to trace the trust fund into the hands of other persons or into the hands of third persons other than bona fide holders for value, or into other property in the hands of the trustee, or, if he elects not to do so, he may proceed against the trustee personally."

It may be said also, as before suggested, that if we regard the case as one for specific performance, to allow plaintiff to recover one-fourth of the residue of the property instead of one-sixth of the whole tract would be to make for the parties a contract that was never in their minds. Grey v. Tubbs, 43 Cal. 359; Magee v. McManus, 70 Cal. 553, 12 Pac. 451.

[5] Another consideration is worth mentioning. Under plaintiff's theory he was entitled to a deed of one-sixth of the real property subject to his proportion of the indebtedness. As we have seen, there was a cash payment and a note and mortgage given for the balance. The note called for the payment of $98,465.55, with interest at the rate of 6 per cent. per annum. As to the principal, it was provided that $10,465.55 should be paid on or before 90 days from the date of the note, $10,000 on or before January 20, 1916, and the balance, to wit, the sum of $78,000, on or before January 1, 1921. According to the decree, plaintiff was awarded the fee and the use and possession of nearly one-fourth of the residue of the property without being required to make any payment until the first of January, 1921. He could thus enjoy the use of the property for nearly six years, and then abandon it without the payment of anything. That he was favored in this manner arises from the circumstance that appellant had sold a portion of it and been in the exclusive possession of the residue ever since the purchase. The judgment may not have been inequitable, but we are left to conjecture as to the extent of the damage done to plaintiff by his exclusion from the enjoyment of this portion of the property. We think

there should be an accounting between the parties that it may be determined how much is due plaintiff for the said sale and how much for the use of the property, and a decree entered for the residue in accordance with the terms of the contract, if the court is still of the opinion that plaintiff should recover.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(33 Cal. App. 515)

KEENEY v. BANK OF ITALY. (Civ. 2020.)

(District Court of Appeal, First District, California. April 25, 1917.)

1. Trusts 🔑1—Constructive Trusts—Separation of Interests.

A trust is created in judicial intendment whenever the legal and equitable interests in the property are separated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1.]

2. Trusts 🔑356(1) — Rights of Owner—Following Funds.

The equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529–538.]

3. Trusts 🔑372(2) — Identification of Funds—Presumptions.

Where a trustee mingles trust funds with his own money, drawing upon the aggregate from time to time, it will be conclusively presumed against him and his creditors and persons claiming under him that the residue is attributable to the trust so far as necessary to keep the trust moneys intact.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 601.]

4. Banks and Banking 🔑134(7) — Diversion of Funds—Application to Debts to Bank.

If a bank has notice of the equitable rights of a third person in funds of its depositor, it cannot apply such funds in satisfaction of the individual indebtedness of the depositor to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 362.]

5. Banks and Banking 🔑130(1) — Trust Funds—Duties of Bank.

There is no duty cast upon a bank in paying out checks upon a trust fund to look to the disposition of the fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

6. Banks and Banking 🔑130(1)—Deposits—Trust Funds—Constructive Notice.

Where a check deposited bore the indorsement "Pay to H. P. Platt, Agent, or order," it was sufficient to put the bank upon inquiry as to the rights of third parties in the money.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

7. Banks and Banking 🔑130(1)—Deposits—Trust Funds—Constructive Notice.

Where a bank carried an account for "H. P. Platt, Trustee," it was under the duty of inquiring as to the rights of third persons in the fund composing the account before it could appropriate them in payment of a debt due it from such trustee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

8. Banks and Banking 🔑130(1)—Deposits—Trust Funds—Constructive Notice.

The fact that such account was the only one kept by the depositor, and that he paid into it his individual funds, and used it as a personal account, does not overcome the constructive notice conveyed by its title.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

9. Estoppel 🔑72 — Equitable Estoppel—Innocent Party.

A bank having constructive notice that an account was impressed with a trust was not an innocent party, and could not invoke the doctrine that where one of two innocent parties must suffer he should suffer whose act contributed to the wrong.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188.]

10. Banks and Banking 🔑130(1)—Diversion of Funds—Debts Due Bank.

Conceding that deposit of a check made payable to a depositor as agent and credited to a fund in his name as trustee constituted a sale of the check to the bank, that view of the transaction would not avoid the effect of constructive notice conveyed by the title of the account and the indorsement of the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

11. Banks and Banking 🔑130(1)—Diversion of Funds—Debts Due Bank.

A bank which applied moneys deposited in a trust fund in payment of the individual indebtedness of the depositor to itself cannot avoid liability on the ground that the depositor acted for himself and not as agent, arguing therefrom that no trust was created in the fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by Marie Adele Keeney against the Bank of Italy. Judgment for plaintiff, and defendant appeals. Affirmed.

James A. Bacigalupi and Harry G. McKannay, both of San Francisco, for appellant. Orville C. Pratt, Jr., of San Francisco, for respondent.

LENNON, P. J. Action to recover the amount of two checks aggregating $979.98. and interest, drawn upon the defendant, a banking corporation, by a depositor therein. Plaintiff recovered judgment, and defendant appeals.

The facts were agreed upon by the parties, and from their agreed statement we extract those following, which we think will sufficiently present the questions in dispute between the parties. H. P. Platt carried with the defendant an account under the designation "H. P. Platt, Trustee," which he used generally, depositing therein his own funds and any others he might receive as agent or trustee of other persons, and this practice was known to the defendant. On June 2, 1913, Platt deposited in said account a check for $4,680, being the proceeds of a sale of real estate in which the plaintiff and her assignor were interested and which Platt as their agent had sold. It was a cashier's check drawn upon the First National Bank of Berkeley to the order of A. C. Wyckoff, and was transferred by him to Platt with the following indorsement: "Pay to H. P. Platt, Agent, or order." Platt appended his own indorsement in corresponding terms, and the defendant duly collected the check and credited it to Platt's account. On the same day Platt drew the two checks upon which the action is based, and delivered them to the respective payees on June 5th and 6th in payment of their interests in the real property referred to, and on June 7th both were presented for payment, and payment refused upon the ground of "No funds"; the defendant having some time between June 2d and 7th appropriated, by virtue of its banker's lien, Platt's credit balance, then amounting to $1,968.66, in satisfaction or part payment of an indebtedness due from Platt to itself.

The main question in the case is whether under the facts as narrated the trial court's conclusion is correct, that the defendant bank was charged with notice of the equitable interest of plaintiff and her assignor in the funds derived from the check of $4,680 so deposited in said account of H. P. Platt, trustee.

[1-3] There can be no doubt that a trust is created in judicial intendment whenever the legal and equitable interests in property are separated. 2 Story's Eq. Jur. § 964; Mandeville v. Solomon, 33 Cal. at page 44. Under this principle it will not be controverted that the proceeds of the sale of the real estate in the hands of Platt as agent equitably belonged to his principals. It is equally well settled that the equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust (Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; 3 Pomeroy's Eq. Jur. § 1048); and that where a trustee has mingled trust funds with his individual moneys, drawing upon the aggregate from time to time, it will be conclusively presumed both against him and his creditors and persons claiming under him that the residue thereof is attributable to the trust so far as may be necessary to keep the trust moneys intact. Hallett's Case, L. R. 13 Ch. Div. 696; Elizalde v. Elizalde, 137 Cal. at page 641, 66 Pac. 369, 70 Pac. 861.

[4] This brings us to the question of whether, both by the form of Platt's account (he being designated therein as trustee) and the form of the indorsement of the check to him as agent, the defendant is charged with constructive notice (it is admitted that it had no actual notice) of the equitable rights of the plaintiff and her assignor in the money derived from such check. If it had such notice it was not at liberty to apply it in satisfaction of the individual indebtedness of Platt. Miami Bank v. State (Ind. App.) 112 N. E. at page 43; Clemmer v. Bank, 157 Ill. 206, 41 N. E. 728; Globe Sav. Bank v. Nat. Bank of Commerce, 64 Neb. 413, 89 N. W. 1030; Nehawka Bank v. Ingersoll, 2 Neb. (Unof.) 617, 89 N. W. 618.

[5] It is not contended by respondent, nor could it well be in the light of the later decisions, that if the defendant had paid out to third parties the funds here in question upon checks regularly drawn upon the account, it could be held accountable for them, for under such a state of facts no duty is cast upon the bank to inquire into the purpose for which the funds are being used (U. S. Fid. & G. Co. v. First Nat. Bank of Monrovia, 18 Cal. App. 437, 123 Pac. 352; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; Silsbee State Bank v. French Market Co., 103 Tex. 629, 132 S. W. 465, 34 L. R. A. [N. S.] 1207); but the cases draw a clear distinction between such payments and an appropriation by the depositary of the fund in payment of its own claim against the trustee or agent.

[6] As to the form of the indorsement, i. e., "Pay to H. P. Platt, Agent, or order," we are of the opinion that by the weight of authority it was sufficient to put the defendant upon inquiry as to the rights of third parties in the money represented by the check. In Third Nat. Bank v. Lange, 51 Md. 138, 144, 34 Am. Rep. 304, a note in favor of "W., Trustee," was held to give notice of a possible trust to parties dealing with it. In Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, a check signed "———, Agent, Glass Bldgs.," was held sufficient to put the payee thereof on inquiry as to the equitable ownership of the fund drawn upon. In American Trust Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167, the proceeds of a check payable to "C. as administrator," and so indorsed by him, were deposited to his individual credit with the defendant bank and used to pay his individual debt to it. It was held that the bank had notice of the trust, and was liable to the beneficiaries thereof for the misappropriation of the trust funds through the joint act of itself and C. In Davis v. Henderson, 25 Miss. 549, 59 Am. Dec. 229, the drawer and indorser of a bill of exchange had signed it "H., Agent." The court there said:

> "These facts appearing upon the bill itself, if not conclusive evidence that the defendant was acting in a representative capacity, were at least sufficient to put a prudent man, taking the bill from the drawee, upon inquiry. * * * As ordinary diligence would have placed them in possession of the terms of the contract, it is but right that they should be charged with notice of the facts as proved."

In Bank of Hickory v. McPherson, 102 Miss. 852, 59 South. 934, it was held that a check payable to "H., Commissioner," on its face does not belong to H. individually. The court there said:

> "We rest this decision upon the naked language of the check itself. * * * It appears that the check was payable to H. as commissioner, which denoted to an ordinarily prudent person that H. was acting in some sort of fiduciary capacity,

> * * * which information, if followed up, would have disclosed to the" defendant bank "the actual status of H. with reference to the money. * * * It was also perfectly manifest that, on the face of the paper, the money represented by the check did not belong to H."

See, also, U. S. Fid. & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653; Bischoff v. Yorkville Bank, 170 App. Div. 679, 156 N. Y. Supp. 563; Id., 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059; U. S. Fid. & Guaranty Co. v. Union Bank & T. Co., 228 Fed. 448, 143 C. C. A. 30.

[7] We think also that the form in which the account was carried, "H. P. Platt, Trustee," placed upon the defendant the duty of inquiring as to the rights of third persons in the funds composing the account before it could appropriate them in payment of a debt due to it from Platt. In Bundy v. Monticello, 84 Ind. 119, a bank deposit in the name of "W., Trustee," was considered, and the court held that the bank had constructive notice of the character of the funds in such deposit saying:

> "The word 'trustee' meant something. It was not merely descriptio personæ, but was a description of the fund deposited. It imported the existence of a trust, and was notice of the character of the fund."

In Central National Bank v. Connecticut Ins. Co., 104 U. S. 54, 26 L. Ed. 693, there was a bank account, standing in the name of "D., General Agent," and the court, while not placing its decision solely on the constructive notice to the bank afforded by those words, held that the designation of the account put the bank on inquiry as to the rights in the funds to the credit thereof of those for whom D. was agent. In Union Stockyards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724, it was held that a bank cannot take from a factor in payment of his own debt money which it either knows or should know belongs in equity to the factor's principal. To the same effect are Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544; Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; Silisbee State Bank v. French Market, 103 Tex. 629, 132 S. W. 465, 34 L. R. A. (N. S.) 1207.

[8] The fact that this account designated "H. P. Platt, Trustee," was the only one kept by Platt with the bank, and that he paid into it his own personal funds and used it as a personal account would not, we think, overcome the constructive notice which its title conveyed to the bank of the rights therein of third persons. Such notice places upon the bank the duty to inquire whether there existed any such rights; and such inquiry, if made, would probably have resulted in defendant gaining actual notice of the rights of respondent and her assignor, for there is nothing in the evidence to warrant the presumption that Platt would have concealed the true state of affairs.

[9] Nor is this a case, as argued by the appellant, where there are two innocent parties, one or the other of whom must suffer through the wrongful act of a third. Platt did nothing wrongful when he deposited the trust funds in the way and to the credit of the account which he did; and in the next place the bank is not an innocent party if it had constructive notice of the rights of third persons in the fund. We are of the opinion also that the addition of the word "trustee" to the name of the account is not to be regarded in the same light as the addition of that word to the name of a person in a certificate of mining stock. The cases cited by the appellant, viz. Brewster v. Sime, 42 Cal. 139, and Thompson v. Toland, 48 Cal. 99, holding that the addition of the word "trustee" to the holder's name in such a certificate gives no notice of the rights of third parties therein, we believe to be inapplicable to a case like the present, for the reason that in those cases the court took judicial notice without pleading or proof that the word "trustee" on a certificate of mining stock was meaningless as a result of universal custom. We know of no reason for holding that the use of the word "trustee" in connection with the name of a bank account has become for a similar reason devoid of meaning.

[10] It is strenuously urged by the appellant that the check under consideration being a negotiable instrument, its transfer to the defendant, and the crediting by the latter of its amount to Platt's account, constituted in effect a sale of the check to the defendant for a valuable consideration. Without assenting to this proposition in view of the well-known custom of the banks of San Francisco (the place of business of the defendant) of receiving customers' checks "for collection only," even this view of the transaction would not avoid the effect of the constructive notice to the bank given by the form of the check; for its proceeds when placed to the credit of Platt's account equitably belonged to his principals, of which the defendant had the same notice as of their rights in the check itself. If the defendant had paid Platt the amount of the check in money over the counter instead of placing it to his credit, and Platt had deposited the cash instead of the check, it might be difficult, perhaps impossible, to follow the fund; but, as we have seen, this is not the form that the transaction took, and we think the analogy attempted to be set up by appellant does not hold.

[11] It is also argued very earnestly by appellant that there was no relation of trust even between the plaintiff and Platt himself, the contention being made that Platt was merely the debtor of his principals in the transaction relating to the sale of real estate made by him for their account. In support of this the language of the late Chief Justice Beatty, in dissenting from an order denying

a petition for transfer in the case of People v. Cal., etc., Trust Co., 23 Cal. App. 210, 137 Pac. 1111, 1115, is quoted to the effect that:

> "When an agent is accounting to his principal and paying over the balance due his principal he is not acting in the character of agent, but in that of a debtor paying his creditor."

The correctness of this statement by Chief Justice Beatty is obvious, for when an agent, by reason of transactions entered into on behalf of a principal—as, for instance, receiving money for his account—becomes indebted to him, and proceeds to make a settlement, any action taken in making such settlement is taken by the agent in his own behalf. It could hardly be said that it was in behalf of the principal, for if so we would have the principal through his agent paying money to himself. But this view of the matter does not help the appellant, for so long as Platt, the agent of the plaintiff, retained the proceeds of the sale it was the money of his principals and not his own.

This disposes of the points requiring detailed discussion; and for the reasons given we are of the opinion that the trial court was correct in holding that the defendant was charged with notice of the plaintiff's rights in the money applied by the defendant in reduction of Platt's individual indebtedness and in rendering judgment in her favor.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(33 Cal. App. 496)

HOUGHTON v. KERN VALLEY BANK et al. (NG HON KIM, Intervener). (Civ. 1665.)

(District Court of Appeal, Third District, California. April 21, 1917.)

TAXATION 🔑421(3)—ASSESSMENT—DESCRIPTION OF PROPERTY.

An assessment, on which tax title is claimed, of property as lots 1, 2, and 3, in block 132, town of B., though made in 1896, and though there was but one block 132 in the town, is insufficient to identify the lots; two maps dividing the block into north and south lots having been filed in 1875 and 1888, and one dividing it into east and west lots having been filed in 1889, and there being no testimony of which was the official map, or which was in use at the time the assessment was made.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 722, 723.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by R. E. Houghton against the Kern Valley Bank and others; Ng Hon Kim intervening. From adverse judgment and order, plaintiff and defendants appeal. Reversed.

Nancy Ella Houghton, in pro. per. Octave G. Du Py, of San Francisco, Rowen Irwin, of Bakersfield, C. Brower, J. W. P. Laird, of Bakersfield, Olney & Olney, of San Francisco, W. S. Allen, of Los Angeles, Fred E. Borton, of Bakersfield, and Emmet H. Wilson and G. C. De Garmo, both of Los Angeles, for other appellants. Charles N. Sears, of Bakersfield, for respondent Ng Hon Kim.

CHIPMAN, P. J. The action originally was in partition and involved numerous different lots of land owned by many different persons. Respondent, Ng Hon Kim, filed a complaint in intervention in the nature of an action to quiet title, alleging ownership in fee of certain three of the lots situated in the city of Bakersfield, Kern county. Intervener had judgment in his favor from which plaintiff and defendants appealed to the Supreme Court.

The judgment and order denying motion for a new trial in favor of intervener were reversed. 157 Cal. 289, 107 Pac. 113. The complaint described the property as lots 1, 2, and 3, block 132, in the Baker homestead tract, according to the map of said tract filed in the office of the county recorder of Kern county, state of California, on the 3d day of April, 1889. Intervener claimed title under delinquent tax sales. The complaint in intervention described the property as "lots 1, 2, and 3 in block 132, situate in the city of Bakersfield, county of Kern, state of California," but made no reference to any map. We quote from the opinion:

> "No map showing the location of any lots or blocks was introduced in evidence. Under the decisions of this court there seems to be no escape from the conclusion that the assessment is prima facie invalid."

The assessment book was offered in evidence and, under the heading "Description of Property," showed entries as follows: "In the town of Bakersfield, lots 1, 2, 3," and under the heading "Block" the figures "132" appeared. The theory upon which the decision proceeded was:

> "That a description of this kind is of such a nature as to indicate that the property can ordinarily be located only by reference to some map or plat, and no such map or plat being referred to as being in existence, the description is prima facie insufficient. There is no presumption, in the absence of such a reference, that there is such a map in existence."

In remanding the case the court said:

> "Upon a new trial it will, of course, be competent for the intervener to offer evidence for the purpose of showing that the description was sufficient. To this end he may show, if it be the fact, that there was of record at the time of the assessment a map by the aid of which the description of the lots in question would serve to fully and completely identify and locate them."

At the second trial the evidence submitted at the former trial was introduced by stipulation, and is in the transcript on page 31 down to the middle of page 66, at which point the transcript shows as follows:

> "Thereupon the trial proceeded and the intervener offered in evidence a map entitled Map of the 'Baker Homestead Tract,' which was indorsed: 'Filed in the office of the County Recorder of Kern County, Cal., this 3d day of

April, 1889, N. R. Packard, County Recorder,' and the same was admitted in evidence."

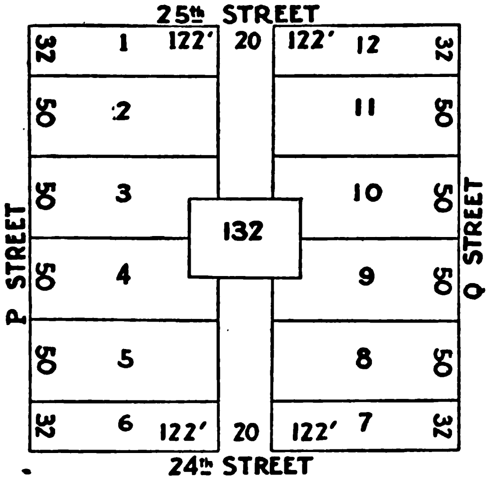
The plaintiff and defendants thereupon, "with a view of showing that there were two maps of block 132 in Bakersfield, and that the lots in the blocks were not described in the same manner, nor did they cover the same land, and with a view of showing that there existed an uncertainty in the description of the land that was carried into the assessment, offered in evidence two maps of Bakersfield." The transcript is as follows:

"Thereupon the plaintiff and defendants offered in evidence a map entitled 'Map of Bakersfield, Kern County, Cal.,' and indorsed, 'Filed in the office of the Recorder of Kern County, Cal., August 17th, 1875, F. W. Craig, Recorder,' and the same was admitted in evidence.

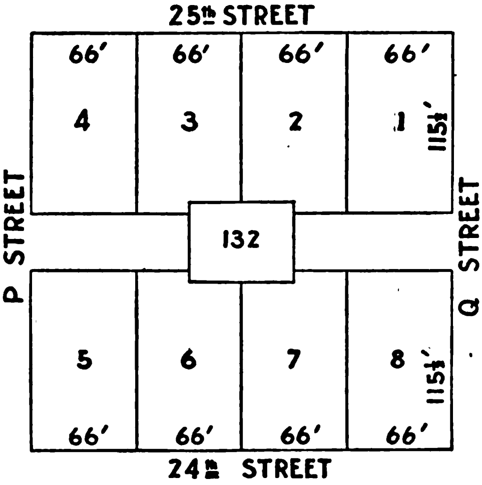
"The plaintiff and defendants also offered in evidence a map entitled 'Map of Bakersfield and Sumner, Kern County, California,' and indorsed, 'Filed in the office of the County Recorder of Kern County, June 5th, A. D. 1888, N. R. Packard, County Recorder,' and the same was admitted in evidence."

These maps were by stipulation omitted from the transcript with an understanding that either party might, if necessary, produce them for inspection by the reviewing court. Appellants have presented in their opening brief, at page 13, a diagram which shows without controversy the situation of the lots in question on the three different maps, as follows:

Block 132, Bakersfield, showing division into lots as delineated on map offered in evidence by the intervener, respondent herein, entitled "Map of Baker Homestead Tract, Bakersfield," filed in the office of the county recorder, Kern county, Cal., this 3d day of April, 1889. N. R. Packard, County Recorder.



Block 132, Bakersfield, showing division into lots as delineated on the two maps offered in evidence by the plaintiff and defendants, appellants herein, entitled Map of Bakersfield, Kern county, Cal.—the first being indorsed, "Filed in the office of county recorder of Kern county, Cal., August 17, 1875. F. W. Craig, Recorder;" the second map being indorsed, "Filed in the office of Kern County Recorder, June 5, 1888. N. R. Packard, County Recorder."



An inspection of these maps will show that block 132 is the same size in all three of them—264 feet square; that, on the map of Baker homestead tract block 132 is divided in 12 lots fronting east and west on P and Q streets with an alley between of 20 feet in width; that lots 1, 2, and 3 front on P street with a depth of 122 feet and, with half of the alley, would make one-fourth of the block in the northwest corner. The other maps show that the block is surrounded by the same streets, but that the lots front north and south on Twenty-Fourth and Twenty-Fifth streets and the block is divided into eight lots. Lots 1, 2, and 3 on those maps have a uniform width frontage of 66 feet and a depth of 115½ feet, which would be three-eighths of the block, less half of an alley, and are in the northeast corner of the block and have a frontage of 198 feet on Twenty-Fifth and 115½ on Q street. On the face of the maps it would seem impossible to identify the lots in question.

There was but little oral testimony, which we give in its entirety, as follows:

"Mr. Sears: What is your name? A. J. M. Jameson. Q. What office, if any, do you hold in this county? A. County assessor. Q. How long have you been assessor of this county? A. Since 1899. Q. You have the supervision over the assessment of property in this county? A. Yes, sir. Q. I will ask you if you know anything as to this map, August 17, 1875? A. Well, I have seen it before. Q. Will you observe lot 132 upon this map? A. Yes, sir. Q. Now I will show you another map here sought to be offered in evidence by the plaintiff which shows to have been filed in the recorder's office on the 5th day of June, 1888. Have you ever seen that map? A. I think so. Q. Known as Bakersfield and Sumner. A. I think I have. Q. Will you observe as to block 132 upon that map of Bakersfield. Now, in making your assessments, do you know as to whether or not these maps are in use, or whether or not they have been abandoned in making the assessment of property in this city, and in this county? A. Well, it would take a comparison of a map I think to tell that. In making my assessment, I have always gone by the official map at the time the assessment was made and I could not say as to that. Q. In making your assessments in this case, and involving the property involved in this case, being lots 1, 2, and 3, block 132, the assessment shows that the same was assessed at that time, at the time of the assessment as shown in this case, to the city of Bakersfield. I will ask you as to whether or not at the time of the date of those maps there, there was any city of Bakersfield? A. How is that? Q. Whether there was any city of Bakersfield, known as the city of Bakersfield. A. It was not incorporated—that is, I don't know—there was an old incorporation a good many years ago; I don't know anything about that, but my memory is that there was an old incorporation a good many years ago, which fell through with; but the later incorporation came later.

"Mr. Houghton: Of which the record is the best evidence of when the city was incorporated, disincorporated and reincorporated.

"The Court: That is true.

"Mr. Sears: The maps themselves merely show 'Bakersfield' and 'Bakersfield and Sumner,' while the assessment says 'lots 1, 2, and 3 in block 132, in the city of Bakersfield.' Q. Now, what has been your custom and procedure in making assessments in this city as to the descriptions as in this case, for instance, in property in the city of Bakersfield?

"Mr. Houghton: We object to it as incompetent what the custom has been, the question is what has been done in this case.

"Mr. Sears: I think I said 'in this case.'

"Mr. Houghton: The record speaks for itself as to what has been done in regard to the assessments.

"The Court: He can tell how he made this assessment if you want him to. A man might have a custom and it might be wrong, and they would not be bound by it.

"Mr. Sears: The language in this case is 'evidence showing the system of assessment.'

"The Court: You can show that.

"Mr. Sears: What has been the system of assessments of property in this city? A. What do you mean, in descriptions, in describing? Q. Yes, as in this case, the property is situated in the city of Bakersfield? A. I describe it by lots and blocks. Q. Have you found that that has been generally sufficient so that parties may identify the property?

"Mr. Houghton: Object to it as irrelevant, incompetent, and immaterial.

"The Court: The objection is sustained.

"Mr. Sears: Note an exception. Q. Now, in making the assessments in this case, as 'lots 1, 2, and 3, in block 132,' if there were another map covering the same, what do you do? A. Another map covering the same property? Q. The same block for instance. A. You mean if there was a duplicate block 132 in the city of Bakersfield? Q. Yes, sir. A. If there was a duplicate block in the city of Bakersfield, it would be necessary to designate it, in my opinion, as of a certain tract. Q. Now, in assessing the property here described as 'lots 1, 2, and 3, in block 132,' and it appeared that that was part of the Baker homestead tract, has it been the general system of assessing property then, as lots 1, 2, and 3, in block 132 of the Baker homestead tract? A. No, because there is only one 132 in the city of Bakersfield. I think a few instances where people took the pains to write in 'Baker homestead tract' in giving the statement in that that description would probably be carried into the roll from the statement, but in an instance where a person gave in lots 3 and 4 or any other lots in block 132, the description of 'block 132' I considered sufficient for the description of the property, because there is only one block 132 in the city of Bakersfield. Q. There is at this time only one block 132 in the city of Bakersfield, and that is in the Baker homestead tract? A. Yes, sir.

"Mr. Sears: Take the witness.

"Mr. Houghton: That is all."

The assessment book of the property showed as follows:

"Unknown Owners—In Town of Bakersfield—Lots one, two, three, block 132, value $115.00. Total tax, $1.90. School tax, 29 cents."

In all the instruments relating to the assessment and in all subsequent conveyances this description is followed and in none of them is there any reference to a map. It thus appears that there were, at the time these lots were assessed, three maps of record of the town of Bakersfield—one entitled "Baker Homestead Tract," one entitled "Map of Bakersfield," and one entitled "Bakersfield and Sumner," both of the latter having been filed before the first one above mentioned. The most than can be said of the testimony of the assessor is that in the assessment he described the property by "lots and blocks"; that it has not been the general system of assessing these lots as of the Baker homestead tract, "because," as the assessor stated, "there is only one 132 in the city of Bakersfield." He testified, "I think in a few instances where people took the pains to write in 'Baker homestead tract' in giving the statement" that description would probably be carried into the roll, but where a person gave in "lots in block 132 the description of 'block 132' I considered sufficient for the description of the property, because there is only one block 132 in the city of Bakersfield. Q. There is at this time only one block 132 in the city of Bakersfield, and that is the Baker homestead tract? A. Yes, sir." It is not disputed that these three maps relate to the same lots and block and the assessor expressed the opinion that "if there was a duplicate block in the city of Bakersfield, it would be necessary to designate it as of a certain tract." The witness testified, "In making my assessment, I have always gone by the official map at the time the assessment was made," but he could not say whether the maps of 1875 and 1888 were in use when he made his assessment and he did not state which map was the official map. When the case was remanded it went back with the statement that intervener "may show, if it be the fact, that there was of record at the time of the assessment (the assessment was made in 1896) a map by the aid of which the description of the lots in question would serve to fully and completely identify and locate them."

In the case of Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, a case cited with approval by the court when the present case was decided, the question of the sufficiency of the description was involved where a party was claiming under a tax title. In discussing the use of a map for identification of the property, the court said:

"It was, however, permissible to show, in aid of this description, that it was in fact sufficient to identify the land, and, in this behalf, to show the recorded map of such Pellissier tract, designating with certainty the property referred to in the assessment. If by such evidence it was made to appear that there was such a recorded map, and only one such map, or, if more than one, no difference therein so far as the assessed property was concerned, the evidence was sufficient to sustain a conclusion that the assessment sufficiently identified the property. The trial court had the right to assume, in the absence of a showing to the contrary by the person assailing the description, that there was but one Pellissier tract in the county of Los Angeles, and that this tract and the extent of its boundaries were well known by that name. People v. Leet, 23 Cal. 161."

The court then quoted from Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, as follows:

"Parol evidence will not be admitted to help out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms. * * * If reference is made to a map, the map thereby becomes a part of the description, and may be read in evidence to identify the land, by showing that it is delineated thereon according to the recital; and although it is not competent to show that any particular map was intended, if none is referred to, yet if it can be shown that there is only one map of a tract which includes the lot in controversy, upon which this lot is delineated or designated, and that that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify the land before the court."

See Furrey v. Lautz, 162 Cal. 397, 122 Pac. 1073; Campbell v. Shafer, 162 Cal. 207, 121 Pac. 737; McLauchlan v. Bonynge, 15 Cal. App. 240, 114 Pac. 798.

There was no evidence that these lots were assessed in accordance with any existing system of numbering lots and blocks as shown by but one map, nor is there evidence that the lots delineated on all the maps introduced are the same and embrace the same land. The maps, in our opinion, add to the uncertainty of the description in the assessment rather than "to fully and completely identify and locate them." Bearing in mind that there is but one block 132 in the city of Bakersfield and that all three of these maps refer to that and no other block, it is plain enough that lots 1, 2, and 3 as delineated on the 1889 map are in a different part of the block and do not embrace all the land referred to by lots 1, 2, and 3 in the other maps. "The purposes to be subserved by the description," said the court, in Best v. Wohlford, supra, "are to enable the owner to discharge his land from the lien of the assessment by paying the same; and also, in case the land shall be sold to satisfy the lien, that bidders may know what land is offered for sale, and that the purchaser may receive a sufficient conveyance. The assessment becomes a lien only upon the land which is described in the assessment book, and it is therefore essential that such description be sufficiently definite to inform the owner whether any of his land is burdened by the lien. The description must be such that the land claimed by virtue of the deed can be identified or located upon the ground by means thereof."

The judgment rested upon the finding of the trial court "that the said property was duly assessed by the county assessor of Kern county, in the year 1896, for the year 1896." This finding is challenged on the ground "that the description of the land in said assessment was not sufficient, and on account of the want of such description the assessment was void." We think that this finding is not sustained by the evidence.

The judgment and order are therefore reversed.

We concur: HART, J.; BURNETT, J.

(13 Okl. Cr. 734)

LEVY v. STATE. (No. A-2384.)

(Criminal Court of Appeals of Oklahoma. May 26, 1917.)

Appeal from County Court, Logan County; J. C. Strang, Judge.

Paul Levy was convicted of gaming and appeals. Affirmed.

E. I. Sadler, of Guthrie, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Paul Levy was convicted in the county court of Logan county on a charge of conducting a game of chance played with dice, and his punishment fixed at a fine of $100 and imprisonment in the county jail for a period of 30 days.

An examination of the record discloses no error sufficient to warrant a reversal of the judgment of the trial court. It is therefore affirmed.

(13 Okl. Cr. 457)

Ex parte MONROE. (No. A-3022.)

(Criminal Court of Appeals of Oklahoma. May 29, 1917.)

Habeas corpus by T. J. Monroe against W. B. Nichols, Chief of Police of Oklahoma City. Writ denied.

J. T. Michael, of Oklahoma City, for petitioner. Frank Watson, of Oklahoma City, for respondent.

PER CURIAM. On this day a petition for writ of habeas corpus on behalf of T. J. Monroe was filed in this court, averring in substance that petitioner is unlawfully restrained of his liberty and illegally imprisoned in the city jail of Oklahoma City by W. B. Nichols, chief of police of said city.

It appearing that said petitioner is held in custody under and by virtue of a commitment issued by the municipal judge of said city, in pursuance of the judgment and sentence of said court, wherein said petitioner was adjudged guilty upon a charge of vagrancy and was sentenced to pay a fine of $19 and $1 costs, the writ of habeas corpus will be denied.

(13 Okl. Cr. 735)

MORRIS v. STATE. (No. A-2459.)

(Criminal Court of Appeals of Oklahoma. May 26, 1917.)

Appeal from County Court, Beaver County; John A. Spohn, Judge.

Walter Morris was convicted of petty larceny, and appeals. Affirmed.

R. H. Loofbourrow, of Beaver, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Walter Morris, was convicted at the March, 1915, term of the county court of Beaver county on a charge of petty larceny and his punishment fixed at a fine of $10.

Upon a careful examination of the record, we find no error sufficient to warrant a reversal of the judgment. It is therefore affirmed.

(13 Okl. Cr. 735)

TRAMMELL v. STATE. (No. A-2481.)*

(Criminal Court of Appeals of Oklahoma. May 26, 1917.)

Appeal from County Court, Kiowa County; J. S. Carpenter, Judge.

Tom Trammell was convicted of violating the prohibitory law, and appeals. Affirmed.

O. J. Logan, of Hobart, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Tom Trammell, was convicted at the April, 1915, term of the county court of Kiowa county, charged with having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of $50 and imprisonment in the county jail for 30 days.

A careful examination of the briefs and record in this case discloses no error which would justify a reversal of the judgment. It is therefore affirmed.

(13 Okl. Cr. 522)

ALLEN et al. v. HUSTON, District Judge. (No. A-2580.)

(Criminal Court of Appeals of Oklahoma. June 14, 1917.)

(Syllabus by the Court.)

COURTS 🔑207(4)—MANDAMUS—JURISDICTION OF CRIMINAL COURT OF APPEALS—ACTS OF INFERIOR COURT.

The Criminal Court of Appeals has jurisdiction to issue the writ of mandamus directed to an inferior court, in the exercise or in aid of its appellate jurisdiction, when the same is a proper proceeding in a criminal case.

Mandamus by Minnie Allen against A. H. Huston, Judge of the Eleventh Judicial District, sitting as Judge of the District Court in and for the County of Payne and State of Oklahoma. Writ allowed.

J. M. Springer and Robert A. Lowry, both of Stillwater, for petitioner. R. McMillan, Asst. Atty. Gen., for respondent.

DOYLE, P. J. This was a petition for writ of mandamus to the Honorable A. H. Huston, judge of the Eleventh judicial district, sitting as judge of the district court of Payne county, to command him to correct the record in a certain case wherein the petitioner had been convicted of manslaughter in the first degree, and was sentenced to imprisonment in the penitentiary for the term of eight years.

The petition alleges that after the jury had retired to deliberate upon their verdict, the presiding judge left the county of Payne, and that he had refused to correct the record to show such absence. The material allegations of said petition are as follows:

> "That thereafter, and while said jury were yet in charge of said bailiff and were deliberating of their verdict and before said jury had agreed or returned a verdict into court and at 8:14 o'clock a. m. on the morning of October 16, 1915, the said Hon. A. H. Huston, judge of said district court, left the city of Stillwater, which said city is the county seat of Payne county, state of Oklahoma, and the place provided by law in and where the district court in and for said Payne county must be held and traveled, by passenger train upon the Atchison, Topeka & Santa Fé Railway from said city of Stillwater to the city of Guthrie, in the county of Logan and state of Oklahoma, and that said Hon. A. H. Huston so absented himself from said city of Stillwater.
>
> "That about 9:30 o'clock a. m. on the said 16th day of October, 1915, the jury in said cause finally agreed upon a verdict and in charge of the bailiff was brought into the district court room in the city of Stillwater, county of Payne, state of Oklahoma. That at said time the said judge of the district court had passed without the county of Payne and was at some point in the county of Logan and state of Oklahoma, on his said passage to the city of Guthrie.
>
> "That at the adjournment of court on the evening of the 15th day of October, 1915, it was agreed in open court between the attorneys for the plaintiff and the county attorney and in the presence of said district judge that in the event said jury should not agree before the departure of said district judge for Guthrie the next morning that one Robt. A. Lowry, an attorney of said Payne county bar, should act as special judge, and should receive said verdict, approve the same, and cause the clerk to read and enter the same of record.
>
> "That no affidavit of disqualification was filed and no certificate of disqualification was filed by said district judge, and that said agreement was the oral agreement made by said persons and said parties in said court. That by reason of the fact that no affidavit of disqualification had been filed or no certificate of disqualification had been filed by said district judge and for the reason that the said Robt. A. Lowry was of the opinion that he had no authority upon the record in said cause to act as such district judge, said Robt. A. Lowry refused to accept such appointment or to so act, and so notified the said

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*Rehearing denied September 25, 1917.

district judge before his departure from Stillwater on the morning of the 16th day of October, 1915.

"That it was thereupon proposed by said district judge that if the said county attorney and this plaintiff and her attorneys should agree and in the event said jury returned a verdict, the said Robt. A. Lowry should receive said verdict, approve the same and direct the clerk of said court to read and record said verdict and take such further proceedings as said district judge might have done, if personally present, and that the record in said cause should be made to state and recite the presence of said Hon. A. H. Huston, judge of the said district court, and that all proceedings so had and done by said Robt. A. Lowry were in fact had and done in open court before said Hon. A. H. Huston, as judge of said district court and by him and in his presence.

"That after said jury had agreed upon a verdict in said cause and had been produced at said courthouse by the bailiff having them in charge, the said Robt. A. Lowry stated to the said county attorney and to the attorneys for this plaintiff the proposition so made by said district judge, and thereupon the said county attorney and the attorneys for this plaintiff agreed that the said Robt. A. Lowry should proceed in accordance with such agreement, and that the record in said district court should be made in all respects as though said proceedings were had and done by the said district judge then present and presiding, but that said agreement was not made in open court, nor was said agreement made in the presence of said district judge, nor was said agreement made while said district judge was in the county of Payne, state of Oklahoma, and that such agreement was in fact an agreement only between the county attorney of said Payne county and the attorneys for the plaintiff herein, made out of court and conveyed no judicial authority or power whatever upon the said Robt. A. Lowry, and did not in law authorize the making and entering into the records of said district court of Payne county of the trial record falsely showing the presence of said district judge, and that proceedings were had and done by him.

"That thereafter and at a time after said district judge had passed beyond the boundaries of Payne county, the said Robt. A. Lowry, so acting upon the agreement hereinbefore set forth, caused the sheriff to make a proclamation that said district court was convened and inquired of said jury, if they had agreed upon a verdict and upon said jury answering that they had, he caused said verdict to be passed to him, and, having examined said verdict, passed said verdict to the clerk of said court and directed said clerk to read and record said verdict, and thereupon inquired of counsel for plaintiff herein if they desired said jury be polled, and thereupon at their request he polled said jury, and each of said jurymen having separately answered that he was satisfied with said verdict, informed said jury that by order of the said district judge they were excused until the reconvening of said district court at 9 o'clock a. m. on the 18th day of October, 1915, and thereupon said jury separated and returned to their homes at various points in said county of Payne, and have not since said time reconvened or appeared in said court as a jury body in said cause against this defendant.

"That said persons so appearing as a jury in said cause produced a paper writing, which was a pretended verdict against this plaintiff finding her guilty of the charge of manslaughter in the first degree, and fixing her punishment as imprisonment in the penitentiary for a period of eight years.

"That the records of said district court were on said 16th day of October, 1915, falsely made to show the presence of said district judge during all proceedings had and done in said cause on said date, and that said records wholly fail to show and now fail to show that said proceedings in fact were had and done by a substitute for said district judge, and that said district judge was absent from said court during said entire day.

"That thereafter, on the 18th day of October, 1915, because of the premises hereinbefore set forth and in order that the records of the district court in said cause might show the truth, and for the purpose of protecting the plaintiff in her rights to her day in court, and for the purpose of causing said record to show the facts and the truth in order that she might present her motion for a new trial in said cause and might thereafter appeal said cause to the appellate court, and in order that she might present the full facts and truth in said cause to the proper court upon a petition of habeas corpus, the plaintiff herein filed in said court and in said cause her motion for an order requiring the clerk to cause the record in said cause to show the truth and the facts as to all proceedings had and done in said cause or purporting to have been had and done in said cause on said 16th day of October, 1915, a true, correct, and certified copy of which motion, together with the affidavits made a part thereof and presented therewith is hereto attached, marked Exhibit C, and made hereof a part.

"That thereafter and on the 19th day of October, 1915, and on a regular judicial day of said court, her said motion came duly on to be heard, and the court, having heard and considered the same, overruled plaintiff's said motion, to which the plaintiff at the time duly excepted. That a true, correct, and certified copy of the record and the journal entry of the overruling of said motion is hereto attached, marked Exhibit D, and made hereof a part. That thereafter, and upon the same day, plaintiff being desirous of preserving in the record of said cause all of the matters and things hereinbefore set forth and complained of, and in order that she might either upon habeas corpus or upon an appeal to the Criminal Court of Appeals present from the record in said cause the actual facts and the truth as to all proceedings had and done, or pretended to have been had or done in said cause preceding her sentence to the penitentiary therein filed with the clerk of said court and presented to said court her application and motion for the settling and allowance by said court of her bill of exceptions in said cause, a true correct, and certified copy of which bill of exceptions is hereto attached, marked Exhibit E, and made hereof a part.

"That thereafter and upon the same day plaintiff's motion for the settling and allowance of her said bill of exceptions came on before said court for hearing, and the court, having heard and considered the same, overruled plaintiff's application and motion, and refused to either consider, correct, settle, or sign any bill of exceptions whatever for plaintiff in said cause. That proceedings were had and done by said court upon said motion as shown by a true, correct, and certified copy of the journal entry of record in said cause hereto attached, marked Exhibit E, and made hereof a part.

"That plaintiff herein has exhausted all of her remedies in said district court of Payne county, Okl., and that she has no speedy or adequate remedy or relief at law, and that plaintiff herein is entitled as a matter of right to have her said bill of exceptions considered, settled, allowed, and signed in order that she may preserve the error of the said district judge of Payne county, Okl., in the record, and may prepare an appeal to the Court of Criminal Appeals for the purpose of testing the illegality of her present custody and confinement.

"That plaintiff herein further states that she is now in the custody of the sheriff of Payne county, Okl., and being confined in the county jail at Pawnee, in Pawnee county, Okl., under a pretended sentence in said cause of State of Oklahoma v. Minnie Allen et al., rendered and entered in said district court of Payne county, Okl., on the 19th day of October, 1915. That she is unable to give a bond in the sum of $8,000 and unable to fully perfect her appeal in said cause or to present to this said court her petition in habeas corpus until said A. H. Huston, as judge of said district court, shall have acted upon her said bill of exceptions.

"That plaintiff herein further states that on the presentation of said bill of exceptions, under the requirements of the statute of the state of Oklahoma, it became and was the duty of said district judge to fully and fairly consider said bill of exceptions, together with all the evidence thereto attached and made a part thereof, and if he found said bill of exceptions to be true and correct to sign the same and cause the same to be made a part of the record in said cause, and if he found said bill of exceptions in any respect to be incorrect, to correct said bill of exceptions so that the same should show the truth of and concerning all matters therein alleged, and to so settle said bill of exceptions and sign the same and cause the same to be made a part of the record in said cause. That the plaintiff's motion hereinbefore set forth to cause said record to be corrected so as to show the facts is not a part of the record proper in a criminal procedure, and the error of said district judge in overruling the same cannot be presented to the Appellate Court upon a transcript, and that the plaintiff herein desires on her appeal to present her cause to said Appellate Court upon a transcript of the proceedings had and done therein without being compelled to go to the expense of making up a case-made therein.

"Wherefore the plaintiff herein, Minnie Allen, moves the court for a peremptory writ of mandamus requiring said Hon. A. H. Huston, as judge of the Eleventh judicial district, sitting as judge of the district court in and for the county of Payne, state of Oklahoma, in said district to consider the said bill of exceptions heretofore filed and presented by her in the case of State of Oklahoma v. Minnie Allen et al., pending in the district court of Payne county, state of Oklahoma, and if it appear to him therefrom that the allegations contained in said bill of exceptions are true and correct upon the affidavits and evidence, to sign said bill of exceptions as a true and correct bill of exceptions and cause the same to be made a part of her record in said cause, and, if he find said bill of exceptions untrue or incorrect in any matter or thing therein recited, to correct said bill of exceptions so that the same shall show the truth and the facts as to matters and things therein set forth and to so settle and sign said bill of exceptions and cause the same to be made a part of the record in said cause, or, if this honorable court shall hold that plaintiff is not entitled to a peremptory writ of mandamus, that an alternative writ of mandamus issue, and that the said defendant be cited to appear before this honorable court at the time to be by it fixed and show cause why such writ of mandamus should not be issued and enforced against him."

An alternative writ of mandamus issued, to which the following return was duly made:

"Comes now A. H. Huston, defendant above named, and makes return upon the alternative writ of mandamus issued by the Hon. Thos. H. Doyle, presiding judge of the said Criminal Court of Appeals in the above-entitled cause on the 17th day of November, A. D. 1915, and states: That he has complied with the order of said court and writ, and has on this date signed a bill of exceptions in accordance with the facts, a true and correct copy of which is hereto attached and made a part of this return:

"Be it remembered, that the trial of the above-entitled cause was commenced in the above-entitled court before the Hon. A. H. Huston, district judge of the Eleventh judicial district of the state of Oklahoma, in and for Payne county, on the 14th day of October, 1915. That thereafter on the 15th day of October, 1915, the evidence, instructions, and argument of counsel in said cause was duly completed and said cause submitted to the jury, and the jury retired in charge of a sworn bailiff to deliberate upon their verdict, and the court thereupon recessed pending the return by said jury of said verdict.

"Be it remembered, that at the time of the adjournment of said court on said 15th day of October, 1915, and during the night following and the next morning, the said honorable district judge was ill, infirm, and sick, and that by reason of such infirmity it became necessary for the said honorable district judge to return to his home at Guthrie, on the morning train on Saturday, the 16th day of October, 1915, which train left the depot at Stillwater on said date at 8:18 a. m.

"Be it further remembered that on the evening of Friday, the 15th day of October, A. D. 1915, and in view of such illness, it was agreed between A. W. Turner, county attorney, of Payne county, and the attorneys for the above-named defendant in said cause, that in the event it became necessary for the said honorable district judge to return to Guthrie on the morning train on October 16, 1915, and in event the jury in said cause at said time had not yet agreed and returned a verdict, that Robert A. Lowry, an attorney at the bar of Payne county, should act as special judge, in absence of said honorable district judge for the purpose of receiving the verdict of said jury when returned, and that said Robt. A. Lowry was consulted and agreed so to do.

"Be it remembered, that said jury remained in session and deliberated upon their verdict from the time said cause was submitted to them until 9:20 o'clock a. m. on said 16th day of October, 1915, at which time they notified the clerk of said court that they had agreed and were ready to return a verdict. That said Robt. A. Lowry was immediately notified and immediately went to the courthouse. That thereupon it was further agreed between said county attorney and J. M. Springer for defendant and for his co-counsel that the said Robt. A. Lowry should convene said court and receive said verdict and order the clerk of said court to read and record the same and take such further proceedings as the honorable district judge might have had and done had he been personally present, and that the record in said cause should be made on its face to show the presence of said district judge, and that all proceedings had and done in said matter were to be had and done by said district judge. That in accordance with said agreement, the said Robt. A. Lowry, by virtue of said agreement, convened said court, inquired of the jury if they had agreed upon their verdict, and that said jury answered that they had, and thereupon he caused said verdict to be passed to him, and, having examined the same and finding it in due form, delivered said verdict to the clerk of said court, and ordered that said verdict be read and the clerk place the same of record, and that said clerk make a record in accordance with said agreement, showing that all proceedings had and done by Robt. A. Lowry were in fact had and done by the honorable district judge, present in his own proper person.

"Be it further remembered, that said honorable district judge left the city of Stillwater, which is the county seat of Payne county, Okl., for a continuous trip from said city of Stillwater, at 8:18 a. m. of said 16th day of October, 1915, and traveled by continuous passage from said city of Stillwater to said city of Guthrie, in Logan county, Okl., a distance by railway of about 50 miles. That the jury in said cause came into the courtroom ready to return their verdict at 9:25 o'clock of said date, and that said verdict was actually received by said Robt.

A. Lowry from said jury, and so read by the clerk at 9:40 o'clock a. m. of said date.

"Be it further remembered, that no exceptions were taken or objections made by the above-named defendant to any of the proceedings so had and done as recited herein, and that the said Robt. A. Lowry so convening said court and before receiving said verdict made statement from the bench in the presence of said defendant and of said county attorney, and of said J. M. Springer, of the agreement which had theretofore been made between said parties, and that he was acting in pursuance to said agreement only, and that no dissent was made by said defendant or by said J. M. Springer, and no objections made to said procedure so had by the said Robt. A. Lowry, and no exceptions taken to such proceedings or to the direction of said Robt. A. Lowry to the clerk of said court to make the record of said proceedings, showing the presence of said honorable district judge as hereinbefore set forth. A. H. Huston, Judge."

(13 Okl. Cr. 533)

ALLEN v. STATE. (No. A-2702.)

(Criminal Court of Appeals of Oklahoma. June 14, 1917.)

(Syllabus by the Court.)

1. Criminal Law ⟹183, 872—Reception of Verdict — Delegation — Statute — Consent to Discharge of Jury.

Where, during the trial of a homicide case, the jury having retired to deliberate on their verdict, the judge was incapacitated from further proceeding with the trial on account of sickness, and by agreement of the parties he designated an attorney of the court to receive the verdict of the jury:

Held, that the reception of the verdict in a criminal case is a judicial act, which cannot be delegated, and a verdict so received is a nullity, and that no judgment of conviction could be lawfully pronounced upon such verdict.

Held, further, that the discharge of the jury under such circumstances must be deemed to have been with the consent of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 335, 2082, 2083.]

2. Criminal Law ⟹182—Illness of Judge Preventing Return of Verdict—Retrial.

Where a jury impaneled and sworn in a criminal case is prevented from returning a verdict by reason of illness of the presiding judge, incapacitating him from attending to the duties of the trial, the case may be again tried.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 330–332.]

3. Criminal Law ⟹168, 193—Former Jeopardy—Acquittal — Illegal Verdict — Retrial—Constitutional Provisions.

A judgment of conviction based on an illegal verdict will not operate as an acquittal, either before or after reversal on appeal, and a new trial in such a case after reversal of such judgment, on defendant's appeal, is no infringement of the clause of the Constitution which declares that, "Nor shall any person be twice put in jeopardy of life or liberty for the same offense." Const. art. 2, § 21.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290–303, 378.]

(Additional Syllabus by Editorial Staff.)

4. Criminal Law ⟹183—Former Jeopardy—Discharge of Jury—"Accident."

The word "accident," as used in Rev. Laws 1910, § 5916, providing that where a jury is discharged or prevented from giving a verdict by reason of an accident the cause may be retried, means an event happening unexpectedly and without fault; an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a casualty or mishap.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326–329.

For other definitions, see Words and Phrases, First and Second Series, Accident; Accidental.]

Appeal from District Court, Payne County; A. H. Huston, Judge.

Minnie Allen was convicted of manslaughter in the first degree, and she appeals. Reversed.

J. M. Springer and Robert A. Lowry, both of Stillwater, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Minnie Allen, was tried in the district court of Payne county upon an information jointly charging her and George W. Carpenter with the murder of one Tom Oglesby, alleged to have been committed in the said county on the 18th day of May, 1915. Upon her separate trial she was found guilty of manslaughter in the first degree, and her punishment fixed at eight years' imprisonment in the penitentiary. From the judgment rendered in pursuance of the verdict she appeals.

It appears from the record that on the 15th day of October, 1915, the cause was submitted to the jury, and they retired in charge of a bailiff to consider of their verdict, and the court thereupon recessed; that Judge Huston, presiding judge, became seriously ill that evening, and in view of such illness it was agreed between the county attorney of Payne county and the attorneys for plaintiff in error that in the event it became necessary for Judge Huston to return to his home in Guthrie before the jury had returned a verdict, that Robert A. Lowry, an attorney at the bar of Payne county, should act as special judge for the purpose of receiving the verdict of the jury; that Judge Huston left Stillwater on the morning of the 16th day of October before said jury had returned their verdict; that about an hour later the jury came into the courtroom in charge of their bailiff, and in accordance with the aforesaid agreement, Robert A. Lowry convened court and inquired of the jury if they had agreed upon a verdict. The jury answered they had. Robert A. Lowry received their verdict and delivered the same to the court clerk. After the verdict was read and the jury polled, Robert A. Lowry ordered the clerk to record the same and have the record show that all proceedings had and done by Robert A. Lowry in said case were in effect had and done by the district judge, present in his own proper person. On October 19th Judge Huston returned to Stillwater, opened court, and overruled plaintiff's motion to require the court clerk to correct the record in the case to show the facts. See Allen v. Huston, Judge, 165 Pac. 742. On the same day motions for new trial and in arrest of judgment were overruled, and in pursuance of said verdict the judgment appealed from was rendered.

It is contended by the plaintiff in error that upon the record the trial court lost jurisdiction during the trial by reason of the fact that the trial judge absented himself from the place where court was being held while the jury was deliberating upon their verdict, and that the plaintiff in error waived none of her rights by reason of said agreement, and that she was entitled to be discharged upon her motion in arrest of judgment. The Attorney General has filed a confession of error and motion to remand the cause that it may be again tried.

[1] Every person charged with crime is entitled to a fair trial in conformity to the laws of the state, and it is a duty resting upon the courts to see that this guaranty conferred by the laws upon every citizen is upheld and sustained. In many cases this court has held that it is the duty of the presiding judge at criminal trials to be present during each and every stage of the proceedings before him, and when the record affirmatively discloses that he lost control of the proceedings by reason of his absence from the bench during the progress of the trial, a judgment of conviction will be reversed. Stites v. State, 9 Okl. Cr. 596, 132 Pac. 822; Wright v. State, 7 Okl. Cr. 280, 123 Pac. 434; Cochran v. State, 4 Okl. Cr. 380, 111 Pac. 974. It is a fundamental principle of law that judicial power cannot be delegated, and a verdict of conviction to be of any validity must be delivered in open court.

Under the following provisions of our Procedure Criminal the presence of the presiding judge during the entire course of the trial is essential, and the receiving of the verdict is a judicial act which cannot be delegated.

"After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court." Section 5906, Rev. Laws.

"After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the county attorney and the defendant or his counsel, or after they have been called." Section 5913.

"If, after the retirement of the jury, one of them becomes so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept together for deliberation, the jury may be discharged." Section 5914.

"Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by the consent of both parties entered upon the minutes, or unless at the expiration of such time as the court deems proper, it satisfactorily appear that there is no reasonable probability that the jury can agree." Section 5915.

"In all cases where a jury are discharged or prevented from giving a verdict, by reason of an accident or other cause, except where the defendant is discharged from the indictment or information, during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term, as the court may direct." Section 5916.

"While the jury are absent the court may adjourn from time to time as to other business, but it is nevertheless deemed open for any purpose connected with the cause submitted to them until verdict is rendered or the jury discharged." Section 5917.

"When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered," and "if the jury render a verdict not in form, the court may, with proper instructions as to the law, direct them to reconsider it." Sections 5925 and 5926.

"When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation." Section 5928.

Under these provisions, after the retirement of the jury to deliberate and until a verdict is rendered, or the jury discharged in due course of the law, it is the duty of the presiding judge to be where he can respond to any call for the exercise of his judicial authority, and thus give protection and security to all parties interested or concerned in the result of the trial, and such judge cannot delegate these judicial functions to another, even with the consent of the parties. It is well settled that in prosecutions for felonies the continual presence of the judge during the entire course of the trial is indispensable, and that whether objection be or be not made, a conviction will be reversed in the case of his improper absence.

In Meredeth v. People, 84 Ill. 479 (2 American Crim. Rep. 448), which was an indictment for murder, it was held:

"The trial judge must occupy the bench throughout the entire trial, which includes the argument of counsel. Where it is made to appear that, for two days during the argument, the judge was not in the courtroom, but in another part of the building, engaged in other business, and that members of the bar presided in his place, the verdict will be set aside, although this was done by consent of the respondent's counsel, or even by his own consent. The accused cannot waive the presence of the judge during his trial."

In Ellerbe v. State, 75 Miss. 522, 22 South. 950, 41 L. R. A. 569, it was held:

"One prosecuted for crime is entitled to have a legally constituted court at every stage of his trial, and where the presiding judge calls

> a member of the bar to the bench, and, by consent of counsel, leaves the courthouse for some minutes during the concluding argument for the state, the judgment of conviction will be reversed on appeal of the accused, notwithstanding the waiver of objection by his counsel."

In Durden v. People, 192 Ill. 493, 61 N. E. 317, 55 L. R. A. 240, where it appeared that one circuit judge heard the evidence and a part of the argument of counsel, and then vacated the bench as presiding judge and left the county and thereafter took no part in the trial of the cause, nor in any of the other proceedings therein, until the hearing of the motion for a new trial, which he overruled, the judgment for this reason was reversed. The court used the following language:

> "In our view, it makes no difference that another circuit judge of equal power and jurisdiction was presiding in place of the absent judge, if he had no such knowledge of the testimony, already given upon the witness stand, and of the proceedings, already taken in the cause, as to be able to direct and control the arguments of counsel when they pass beyond proper limits, and to determine whether or not the instructions to be given to the jury are based upon the evidence already heard in the presence of the jury. * * * In the case at bar, there was no death, nor sickness, which justified the judge, who conducted the trial, in vacating the bench. It does not appear for what reason he abandoned the trial of the cause and turned it over to another judge. But, even if he went into another county in order to attend to other business upon his circuit, as is alleged by the attorney general, there was no official business, which more properly demanded his attention than the trial in hand, which involved the life of a human being. * * * Hence, when he was absent from the bench, the authorities, which hold that absence from the bench is error such as justifies a reversal, are strictly applicable to his conduct. His absence was not excused by the fact that another judge, not familiar with the evidence, instructed the jury and received the verdict. The injury, which may have inured to the interests of the plaintiff in error, was not counterbalanced by the presence of a new and outside presiding officer."

In People v. McPherson, 74 Hun, 336, 26 N. Y. Supp. 236, it was held that a criminal case cannot be partly tried before one magistrate and partly before another, and it was there said:

> "The proposition that a criminal case cannot be partly tried before one magistrate and partly before another seems to me too clear to need argument or citation of authority to sustain it. When the trial of a case has once commenced it must proceed to the end before the same court and jury."

See, also, O'Brien v. People, 17 Colo. 563, 31 Pac. 230; Hayes v. State, 58 Ga. 35; McClure v. State, 77 Ind. 287; State v. Carnagy, 106 Iowa, 487, 46 N. W. 805.

In Ex parte Patswald, 5 Okl. 789, 50 Pac. 139, speaking through Mr. Justice Taraney, the court said:

> "The one question to be determined is: Did the absence of the presiding judge discharge the jury from the consideration of the cause and, by operation of law, terminate the trial of the cause so as to render void the further proceedings had therein? By law, the terms of the district court of Oklahoma county are fixed to be held at Oklahoma City, and cannot be held at any other place. No person can be lawfully deprived of his liberty except 'by due process of law.' Due process of law would in this case imply, upon conviction by a court of competent jurisdiction. A court of competent jurisdiction for the trial of the crime of perjury consists of a presiding judge and a jury. It is not a court unless there be both judge and jury. It is the very existence and vitality of the court which authorizes the jury to deliberate. It is the existence and authority of the court which keeps them together, and that existence and authority must continue from the time they are impaneled until they are discharged. Barrett v. State, 1 Wis. 156 [175]. For all general purposes the court is considered as in session from the commencement to the close of its term. The jurors, officers and parties are all under its direction. The functions of the court cannot be suspended and the functions of the jury continue. To hold the contrary would be to throw off all those salutary restraints which have been found necessary to the due and solemn administration of justice. The jury are under the control and protection of the court. * * * The jury may, while deliberating, properly require of the court additional instructions as to the law of the case, or require of the court explanation of the meaning of the instructions given. They may, in the presence of the court and by permission of the court, have their memories refreshed as to the testimony in the case. All these privileges and safeguards are in great measure for the protection of the rights of the defendant, and nothing but the existence and presence of the court during every part of the proceedings of his trial can insure them to him. * * * The presence, actual or constructive, of a judge at every stage of the proceedings in a court is necessary, or the proceedings will be coram non judice; the law requires his presence during each and every step. * * * He may take a recess or adjourn as to all other business from day to day, or for rest or refreshment, but he cannot suspend the functions of the court as to the case of which the jury are deliberating. He need not remain actually on the bench or in the courtroom, but he must remain where he may exercise his functions as a court; that is, at the place where the court is by law required to be held. He cannot be at another place or engage in another business which precludes the exercise of such functions. * * * The court cannot be adjourned or its functions suspended as to the cause submitted to the jury. It is constructively open even though the judge be resting or refreshing himself; but to be constructively open the judge must be at the place where the law requires it to be kept open. If the judge should die after a cause was submitted to a jury, we do not think a verdict could be returned by the jury after a successor had been appointed and assumed the functions of the court. The death of the judge would render the jury, as to the cause, functus officio; and absence from the place where, by law, the court is required to be held, or other cause which dissolved the organization of the court, or suspended or prevented the exercise of its functions, would have the same effect as the death of the judge. The termination of the court by operation of law destroys the power of the jury to exist as a part of the court and discharges the jury. State v. Jeffors, 64 Mo. 376. With the termination of the court the jury is discharged by operation of law, and it can then neither make nor return a verdict."

It appears from the record that in the case at bar the jury were without any judicial supervision whatever from the time the presiding judge left the county until they returned their verdict, and then by consent of the parties Robert A. Lowry, a practicing attorney of the court, assumed to act as special judge for the purpose of receiving the verdict and discharging the jury. Applying the well-established rules of law enunciated in the cases quoted, we are of the opinion that the verdict of the jury was a nullity, and that no judgment of conviction could be lawfully pronounced on it by the court. It follows that the confession of error is well founded, and should be sustained.

[2, 3] It is now insisted that the plaintiff in error was, by the proceedings of that trial, once in jeopardy, and cannot lawfully be put upon trial the second time. It is a well-settled principle of common and constitutional law that a person cannot be put in jeopardy a second time upon the same charge. Article 2, § 21, Constitution of this state, declares:

> "Nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life and liberty for the same offense."

It is well established that after the jury has been impaneled and sworn in a criminal case any discharge thereof without sufficient cause operates as an acquittal, in that it effectually bars another trial for the same offense. But to have this operation and effect such discharge must have been made without the consent, expressed or implied, of the defendant. 1 Bish. New Crim. Law, § 998.

In Cooley's Const. Lim. (7th Ed.) p. 467, the author says:

> "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a nolle prosequi entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause. If, however, the court had no jurisdiction of the cause, or if the indictment was so far defective that no valid judgment could be rendered upon it, or if by any overruling necessity the jury are discharged without a verdict, which might happen from the sickness or death of the judge holding the court, or of a juror, or the inability of the jury to agree upon a verdict after reasonable time for deliberation and effort, or if the term of the court as fixed by law comes to an end before the trial is finished, or the jury are discharged with the consent of the defendant expressed or implied, or if, after verdict against the accused, it has been set aside on his motion for a new trial, or on writ of error, or the judgment thereon been arrested—in any of these cases the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection."

The discharge of the jury under the circumstances of this case must be deemed to have been done upon the agreement and with the consent of the plaintiff in error. Again, the statute prescribes (section 5916, supra) that in all cases where the jury are discharged, or prevented from giving a verdict by reason of an accident or other cause, after the cause is submitted to them, the cause may be again tried at the same or another term, as the court may direct. The record shows, and counsel for the plaintiff in error concede, that the sickness of the presiding judge was such that unfitted him for the further performance of his duties in the trial of the case.

[4] The word "accident," as used in this section, is variously defined as an event happening unexpectedly and without fault, or as an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a casualty or mishap. Under the foregoing principles and authorities, the discharge of the defendant on the claim of once in jeopardy should be denied in any aspect of the case contended for by her counsel.

For the reasons stated, the judgment of conviction is reversed, and the case remanded for a new trial. The warden of the penitentiary at McAlester will surrender the plaintiff in error to the sheriff of Payne county, who will hold her in custody until she shall be discharged, or as otherwise ordered according to law.

ARMSTRONG and MATSON, JJ., concur.

(13 Okl. Cr. 545)

Ex parte ALLEN. (No. A-2627.)

(Criminal Court of Appeals of Oklahoma. June 14, 1917.)

Habeas corpus by Minnie Allen. Writ denied.

Robert A. Lowry, of Stillwater, for petitioner. The Attorney General and R. McMillan, Asst. Atty. Gen., for respondent.

DOYLE, P. J. A petition is presented in this case for a writ of habeas corpus, directed to the warden of the state penitentiary at McAlester, for the discharge of Minnie Allen. The petitioner was convicted in the district court of Payne county of manslaughter in the first degree, and was sentenced, as the record shows, to imprisonment in the state penitentiary for the term of eight years. The case out of which this proceeding grows was before us by direct appeal. By the decision of this court the judgment of the district court of Payne county was reversed. For the reasons stated in the opinion in that case (Minnie Allen v. State, 165 Pac. 745), the petition for writ of habeas corpus will be denied, and it is so ordered.

ARMSTRONG and MATSON, JJ., concur.

(53 Mont. 573)

STATE, on Accusation of LANGOHR et al., v. STORY. (No. 3969.)

(Supreme Court of Montana. May 28, 1917.)

1. COUNTIES 🔑67—OFFICERS—REMOVAL—"ILLEGAL FEES."

Under Rev. Codes, § 9006, providing that public officers may be removed when guilty of charging and collecting illegal fees by virtue of their official position, a county commissioner who in good faith charged and collected from the county bills for services in attending to business of the county other than meetings with the board and for inspecting and overseeing roadwork, not rendered pursuant to any previous order of the board, could be removed from office; such charges, although not made against an individual, being "illegal fees" within the meaning of the statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 100–103.

For other definitions, see Words and Phrases, Second Series, Illegal Fee.]

2. STATUTES ⟹208—CONSTRUCTION—GENERAL TERMS.

General terms and expressions of a statute are to be given a general construction, unless some other provision of the statute or the context itself shows a contrary intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 285.]

3. COUNTIES ⟹74(1)—COUNTY COMMISSIONERS—COMPENSATION—ADDITIONAL FEES.

Rev. Codes, § 3194, provides that members of the board of county commissioners shall each receive $8 per day and 15 cents per mile in going to and returning to the county seat. Section 2952 provides that all claims by the members against the county for per diem and mileage, "or other service rendered by them," must be verified as other claims. Section 2893 provides that each member is entitled to $8 per day for each day's attendance on the sessions and 10 cents per mile for the distance necessarily traveled in going to and returning from the county seat. Laws 1915, c. 141, §§ 12, 13, authorizes a charge by a commissioner especially authorized by the board to inspect the condition of contract construction work on the highways and bridges. *Held*, that a county commissioner was not entitled to a fee for attending to business other than meeting with the board and for inspecting and overseeing roadwork, where he was not acting pursuant to any previous direction of the board, in view of Rev. Codes, §§ 3556, 3557, relating to construction of conflicting articles and chapters.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 104.]

Appeal from District Court, Gallatin County; R. Lee Word, Judge.

Proceedings by the State, on the accusation of M. Langohr and others, against Nelson Story, Jr. From an adverse judgment, defendant appeals. Affirmed.

See, also, State ex rel. Payne v. District Court of Fifth Judicial Dist. in and for Madison County, 165 Pac. 294.

W. S. Hartman and Justin M. Smith, both of Bozeman, for appellant. S. C. Ford, of Helena, and Frank Woody, of Butte, for respondent.

SANNER, J. In a proceeding had under the provisions of section 9006, Revised Codes, the appellant, Nelson Story, Jr., was found by the district court of Gallatin county to have charged and collected illegal fees for services rendered in his office as county commissioner of said county, and was adjudged to be deprived of and ousted from such office. The basis for the finding and adjudication is an agreed statement of facts from which it is made to appear, among other things: That the appellant charged and collected from the county certain bills for services as county commissioner, which bills included items of charge at the rate of $8 per day for "attending to business of the county" other than meetings of the board, and items of charge at the rate of $8 per day for "inspecting and overseeing roadwork"; that the service for which such charges were made was actually rendered and believed to be for the best interests of the county in connection with roadwork under the immediate supervision of the board, but was not rendered pursuant to any previous order of the board directing the appellant to inspect the condition of any contract construction work on any highway or bridge in the county, or in connection with any such inspection.

[1] I. The main contention of appellant is stated in the language of his counsel as follows:

> "We contend that the word 'fees,' as used in the section under consideration, refers only to the statutory charges for official services rendered by an official to the different members of the general public, and does not in any way include, refer to, or contemplate the compensation, whether by way of salary or per diem, paid by the state or the county direct to its officials for services rendered; that the statute was intended for the protection of the individual members of the general public who, dealing with the officer, as such, may have been compelled to pay an illegal fee for the services rendered; that it was never intended to protect the county, the state, or the municipality from charges by the officer against it for services rendered by the official which were either illegal or wrongful or which were covered by his compensation or salary fixed by the statute regulating the compensation which he should receive for his services; that the statute is both penal and criminal, and that it cannot be extended to charges made by officials (however irregular, wrongful, or illegal) for services performed or alleged to have been performed which were not within the purview of the statute when enacted; that in this state county commissioners do not, and never have, charged, collected, or received 'fees' within the meaning of the statute; that they could not do so from the nature of the services required of them by the statute, and rendered by them in practice; that, conceding that appellants charged and collected per diem for services which they had rendered to the county, which charges and collections were without authority of law, they did not thereby become guilty of charging and collecting illegal fees within the purview of the statute in question; and that therefore the judgment of ouster rendered against them in their respective cases by the trial court should be reversed."

This entire contention is in reality foreclosed by the decision of this court in State ex rel. Payne v. District Court, 165 Pac. 294, wherein we said:

> "The term 'fees,' used in the Codes, is somewhat elastic. Section 3172, Revised Codes, provides that 'the county surveyor is entitled to receive and collect for his own use the following fees: * * * Expense of chainman and markers,' etc. Section 3173: 'The coroner is entitled to receive and collect for his own use the following fees: * * * For each mile actually traveled in the performance of any duty, ten

cents.' We think the term 'fees,' used in section 9006, is sufficiently broad to comprehend both per diem and expenses. * * * If the items for which the accused charged these fees show on the face of them that they are not authorized by law, there is no necessity to characterize them or to attempt to show wherein they are illegal. They show for themselves. We think the accusation, in the first count, is sufficient to charge the collection of illegal fees. In effect, it alleges that the accused, acting in his official capacity as county commissioner of Madison county, spent one day seeing about a right of way for which he charged and collected from the county $8 and $5 additional for expenses, etc. This item particularly is not comprehended within any provisions of law authorizing fees or other compensation to a member of the board of county commissioners for services rendered in his office, and is therefore prima facie illegal."

Because, however, the conclusion thus announced has been challenged by a motion for rehearing, and because the appellant here invokes historical data to support his view, we determined to re-examine the subject. The result has been to confirm our view that the term "illegal fees" is used in section 9006 in its broadest sense, as meaning any moneys collected or attempted to be collected, by a public officer from any source whatever, whether in the guise of mileage, per diem, or specific charge for service rendered, or to be rendered, in his office without authority of law for such collection. We are impelled to this result by these considerations:

1. Neither in common parlance nor in legal usage has the word "fees" any such narrow limit as that assigned to it by appellant's counsel. It has many meanings, general and particular. Generally it signifies a reward or payment of money (Trench, Select Glossary); money paid or bestowed;. emolument (Century Dictionary); reward or compensation for services rendered or to be rendered (Webster's International Dictionary). In its particular sense it imports a recompense or reward fixed by law for the services of a public officer. Century Dictionary. Legally it means a reward or wages given to one for the execution of his office, differing from costs in that fees are a recompense to the officer for his services. Bouvier's Law Dictionary. Nowhere is it said to connote a particular source, as from individuals, and not from nation, state, or county. So that, considered in its ordinary significance, the term "fees," as used in section 9006, would cover the appellant's charges made upon and paid by the county, and the phrase "collecting illegal fees for service rendered" accurately describes his receipt of the money if there was no legal warrant for its payment.

2. Confining ourselves to the historical data submitted, we might possibly conclude that prior to 1895 the word "fees" was understood as counsel now defines it; but a wider survey convinces us that this would not be correct. In the Bannack Statutes (page 470 et seq.) it is specifically applied to the sheriff's per diem for attending court, payable by the county, to his compensation for dieting prisoners, to his mileage for serving papers and for transporting prisoners; also to the compensation of $10 for each inquest and to the mileage allowed coroners, payable by the county; also to the per diem of judges and clerks of election, payable by the county; also to the compensation, percentages, and mileage allowed the county treasurer, payable by the county; also to the per diem and mileage of election couriers, the per diem and mileage of witnesses, the per diem and mileage of jurors, and the per diem of prosecuting attorneys attending causes on change of venue. Substantially the same use of the word appears in the Codified Statutes of 1871-72 (page 420 et seq.), in the Revised Statutes of 1879 (5th div. §§ 585, 586, 587, 590, 593, 594, 596), and in the Compiled Statutes of 1887 (5th div. §§ 956, 1074, 1075, 1089, 1090, 1095). It is further interesting to note that in the "act concerning compensation of county, district, and township officers," approved March 6, 1891 (Session Laws 1891, p. 235 et seq.), the word "fees" is used to describe charges paid by the county as well as by individuals, and charges for per diem and mileage as well as those for specific service; moreover, section 9 of the act contains a provision that "any such officer who shall receive any fee or reward or salary not specifically provided by law shall be liable to the county, state, or persons paying the same," etc. While none of these references apply specifically to county commissioners, they establish, we think, that prior to 1895 the word "fees" meant more than specific charges to individuals for particular services, and that illegal fees could be collected from the county and could consist of unauthorized claims for per diem and mileage.

But, whatever may be the correct, or even just, inference from previous legislation, there cannot be the slightest doubt that, when the Codes of 1895 were enacted, including as section 1545 of the Penal Code the present section 9006 of the Revised Codes, the term "fees" was not confined in its significance to specific charges for particular services rendered to individuals, nor did it always exclude moneys had from the county or state, whether as compensation, per diem, or mileage. On the contrary, we find in the chapter on "Salaries and Fees of Officers" (chapter 4, pt. 4, tit. 2, Political Code), which with few changes reappears in the Revised Codes of 1907 as sections 3111-3197, that it is used in almost every possible sense. For example: In section 4592 (Rev. Codes, § 3113) it means a mode of compensation different from salary; in section 4604 (Rev. Codes, § 3137) it connotes mileage payable to the sheriff by the county in certain cases; in section 4605 (Rev. Codes, § 3138) it designates the recompense payable by the county to the sheriff for boarding prisoners; in sec tions 4606, 4607, 4611, 4612, 4614, 4615, 4616 (Rev. Codes, §§ 3139, 3140, 3144, 3145, 3147, 3148, 3149), and others it imports specific charges to be collected from private individuals for particular services; in section 4618 (Rev. Codes, § 3151) it refers to costs of publications; in section 4634 (Rev. Codes, § 3167) to the sheriff's mileage as well as his other charges; in section 4639 (Rev. Codes, § 3172) to the per diem of the county surveyor, to his charge for copies, etc., and to his expenses for chainmen and markers, whether chargeable to the county or to private individuals; in section 4640 (Rev. Codes, § 3173) to the per diem and other charges of the coroner which are payable by the county; in section 4642 (Rev. Codes, § 3176) to the charges of the justice of the peace, whether collectible from the county in criminal cases, or from individuals in other matters; in section 4643 (Rev. Codes, § 3177) to the charges of the constable, whether collectible from the county in criminal cases or from individuals in civil actions; in section 4643 (Rev. Codes, § 3177) to mileage as among the fees of the constable; in sections 4648 and 4650 (Rev. Codes, §§ 3182, 3184) to the per diem and mileage of witnesses. In no way can it be ascertained whether an officer has collected illegal fees within the meaning of section 9006 without a reference to the chapter on fees from which the above references are taken: with such reference, it would be a perversion to say that such collection occurred if the unauthorized moneys came from individuals, but not if they came from the county, or if they consisted of per diem or mileage instead of specific charges or particular services.

[2] 3. Besides the Payne Case, supra, this court had occasion in State ex rel. Rowe v. District Court, 44 Mont. 318, 119 Pac. 1103, Ann. Cas. 1913B, 396, to consider some of the aspects of appellant's present contention. There one Booher was sought to be removed from office under section 9006 for collecting illegal fees. The collection was from the county in good faith for services rendered, but it was held nevertheless that, since there was no legal warrant for it, the transaction constituted a collection of illegal fees for which removal, under section 9006, was possible. Elsewhere, too, the same result has been reached. Under the statute in North Dakota, Idaho, and Utah, as here, county commissioners received per diem and mileage payable by the county; and in State v. Richardson, 16 N. D. 1, 109 N. W. 1026, State v. Borstad, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014, Rankin v. Jauman, 4 Idaho, 53, 36 Pac. 502, Rankin v. Jauman, 4 Idaho, 394, 39 Pac. 1111, Ponting v. Isaman, 7 Idaho, 283, 62 Pac. 680, and Robinson v. Huffaker, 23 Idaho, 173, 129 Pac. 334, it was expressly determined that a county commissioner who receives from his county per diem and mileage to which he is not entitled, either because not earned or not authorized by law, is guilty of collecting illegal fees for service rendered in his office, and subject to removal under provisions similar to section 9006 of our Code. And the same conclusion was reached in Skeen v. Craig, 31 Utah, 20, 86 Pac. 487, respecting a city councilman. In this case the court, upon the first appeal reversing a judgment below for the defendant, said:

> "Counsel for defendant insist that the facts as disclosed by the record do not bring the case within the provisions of section 4580; their contention being that this section refers to officers only who are paid by fees for specific services, or, being salaried officers, are yet required to charge and collect fees for specific services, and that, as a city councilman is paid a stipulated and fixed salary, and in no way charged with the collection of fees of any kind whatsoever, he cannot be proceeded against under said section. It is conceded that the construction of the section of the statute under which this action is brought depends more upon the sense in which the term 'fees' is therein used than upon the technical definition of the word as contradistinguished from other terms denoting the compensation of public officers. The terms of this section of the statute wherein it refers to public officers and the 'charging and collecting illegal fees' are general, and are not confined to the fees charged and collected by any one class of public officers not liable to impeachment. Now, it is a well-recognized rule of statutory construction that general terms and expressions of a statute are to be given a general construction unless some other provision of the statute or the context itself shows that the Legislature intended them to be used and applied in a limited or restricted sense. Sutherland, Stat. Const. (2d Ed.) 392; Black on Interp. Laws, 136. We fail to find anything in the phraseology of the section itself, or when it is read and considered in connection with other provisions of the statute relating to the general subject-matter of the action, which restricts or limits the scope or operation thereof to only one class of officers. By its very terms the statute includes any officer (not liable to impeachment) who has been guilty of charging and collecting illegal fees. And its provisions are equally broad respecting 'illegal fees.' To bring the charging and collecting of illegal fees within the statute, it is not necessary that such fees be obtained from any specific source or sources, nor that they be charged or collected by an officer who is authorized by law to collect fees for specific services. The charging and collecting of illegal fees from the state, county, or municipality by a public officer for private gain, is as clearly within the statute as the charging and collecting of illegal fees from a private individual. It would seem that, if it were intended to limit proceedings of this kind to include only a certain or specified class of public officers who might become delinquent, the Legislature would have said so. The Legislature has not only failed to so state in so many words, but, as we have observed, there is nothing in any of the statutory provisions which relate to or have any bearing upon the subject-matter of this class of actions from which such an intent can be inferred."

We think that these authorities effectually dispose of appellant's contention.

It has been suggested, though it is not exploited in appellant's brief, that the only illegal fees for collecting which an officer can be removed under section 9006 are those received for services rendered in his office, and if the service for which collection be made is not required of the officer or authorized by law to be performed by him as such, it is not service rendered in his office; so that, whatever legal animadversion he may be subjected to for the collection, assuming the charge to be without legal warrant, there can be no removal under section 9006. In a certain sense this is obvious; but it is not illuminating. At the time involved here county commissioners had general supervision over highways (Laws 1915, c. 141, § 2), were charged with the establishment, maintenance, and control of the same (Laws 1915, c. 141, § 2; Rev. Codes, § 2894, subd. 4); it was their function to manage and care for highways as other interests committed to their charge (Rev. Codes, § 2894, subd. 22), and in that behalf they could do or cause to be done whatever might be necessary (Rev. Codes, § 2894, subd. 25; Laws 1915, c. 141, § 2). If these provisions mean anything at all, it is that county commissioners could in virtue of their office personally superintend and effectively direct the work of construction and repair upon highways and could depute one of their number to see and speak for them respecting the same; but, unless payment is authorized for such service none can be lawfully made, and to charge and collect for it is to charge and collect illegal fees for service "rendered in his office."

[3] II. In oral argument it was insisted that there are two statutory provisions, viz. sections 3194 and 2952, Revised Codes, under which it is permissible for commissioners to receive compensation for such service as was rendered in the present instance, and that therefore no illegal fees were collected. We cannot reconcile this with the theory of the briefs, nor does it at all conform to the postulates of the Payne Case referred to above. We consider it, however, in order that the matter may be set at rest. The sections referred to are as follows:

> "3194. Members of the board of county commissioners each receive eight dollars per day and fifteen cents per mile for the distance necessarily traveled in going to and returning from the county seat and his place of residence."
>
> "2952. All claims against the county presented by members of the board for per diem and mileage, or other service rendered by them, must be verified as other claims, and must state that the service has been actually rendered."

If these two sections were the only provisions reflecting on the subject, it might be possible to imply from the phrase "or other service rendered," in section 2952, and from the absence of any express restriction in section 3194, that the commissioners should have compensation for any service whatever rendered to the county—for those to which per diem properly applies at the rate of $8 per day, together with mileage, and for other services on some basis not stated, perhaps the reasonable value of the service. Section 2952, however, is in itself no authorization to take money from the public treasury for any purpose, and cannot be employed to bolster up a claim for which independent authority does not exist (Irwin v. County of Yuba, 119 Cal. 686, 52 Pac. 35); it is a mere prescription, touching the manner in which commissioners' claims for compensation, elsewhere authorized, shall be formulated and is designed in connection with section 2945 to enable the board to determine in the first instance whether it will even consider the claim (Christie v. Board of Supervisors, 60 Cal. 164). Moreover, these sections are not the only ones upon the subject. Section 2893 provides:

> "Each member of the board of county commissioners is entitled to eight dollars per day for each day's attendance on the sessions of the board, and ten cents per mile for the distance necessarily traveled in going to and returning from the county seat and his place of residence, and no other compensation must be allowed."

And sections 12 and 13 of article 3 in chapter 141, Laws of 1915, authorize commissioners especially ordered by the board to inspect the condition of contract construction work on highways and bridges to receive $8 per day and actual traveling expenses. It is not impossible to harmonize these provisions; construing them together, it may be said that, as respects per diem, a commissioner may receive $8 per day for each day's attendance upon sessions of the board and for each day given to inspection of contract roadwork under order of the board, but shall receive no other compensation. In every instance his claim must be verified as other claims. Conceding, however, that as to sections 2893, 2952, and 3194, there is such a difference in implication as to present an essential conflict, then, for reasons prescribed in the Code itself, section 2893 must prevail. All are original sections in the Code of 1895 (Pol. Code, §§ 4222, 4293, 4660), but section 2893 is an obvious carrying forward of a pre-existing provision (section 347, 5th div., Rev. Stat. 1879; section 755, 5th div., Comp. Stat. 1887), with changes as to mileage and the fund from which payment shall be made. Section 2893 is part of the article and chapter (article 1, c. 2, tit. 2) which defines the organization, term, and compensation of county commissioners, and is particularly germane to that subject. Section 2952 is part of the article and chapter (article 6, c. 2, tit. 2) which relates to "Other Powers and Restrictions" in county government; and section 3194 is found in the general chapter (chapter 4, tit. 2) on salaries and fees of public officers. The rule established by the Code is that, if the provisions of any article conflict with or contravene the provisions of another article in the same chapter, the provisions of each article must prevail as to all matters and questions arising out of the subject-matter of such article (Rev. Codes, § 3557), and if the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter (Rev. Codes, § 3556).

It is doubtless true that, in the case of a commissioner acting honestly and with a view to the efficient discharge of the duties of his office, the conclusion is a harsh one which results not only in the restoration of moneys actually earned, though illegally claimed, but also in his removal from office. This, however, cannot be helped. Section 9006 is general, makes no distinctions, leaves no room for judicial discretion. It was designed to serve a far-seeing public purpose, and to deny its application to this case, upon the grounds urged here, would be to destroy its value in other cases where its effect may be more certainly needed.

The judgment appealed from was commanded by the facts stated, and is therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(53 Mont. 584)

STATE, on Accusation of LANGOHR et al., v. CALLAGHAN. (No. 3970.)

(Supreme Court of Montana. May 28, 1917.)

Appeal from District Court, Gallatin County; R. Lee Word, Judge.

Proceedings by the State, on the accusation of M. Langohr and others, against Charles Callaghan. From an adverse judgment, defendant appeals. Affirmed.

W. S. Hartman and Justin M. Smith, both of Bozeman, for appellant. S. C. Ford, of Helena, and Frank Woody, of Butte, for respondent.

SANNER, J. The questions presented by this appeal are the same and arise in the same way as those presented in State ex rel. Langohr et al. v. Story, 165 Pac. 748, just decided. On the authority of that decision, and for the reasons stated therein, the judgment appealed from is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(53 Mont. 585)

STATE, on Accusation of LANGOHR et al., v. OVERSTREET. (No. 3971.)

(Supreme Court of Montana. May 28, 1917.)

Appeal from District Court, Gallatin County; R. Lee Word, Judge.

Proceedings by the State, on the accusation of M. Langohr and others, against C. W. Overstreet. From an adverse judgment, defendant appeals. Affirmed.

W. S. Hartman and Justin M. Smith, both of Bozeman, for appellant. S. C. Ford, of Helena, and Frank Woody, of Butte, for respondent.

SANNER, J. The questions presented by this appeal are the same and arise in the same way as those presented in State ex rel. Langohr et al. v. Story, 165 Pac. 748, just decided. On the authority of that decision, and for the reasons stated therein, the judgment appealed from is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(53 Mont. 604)

CANYON CREEK ELEVATOR & MILLING CO. v. ALLISON. (No. 3738.)

(Supreme Court of Montana. May 31, 1917.)

1. Corporations 🔑81—Stock Subscription—Construction of Condition.

A stock subscription agreement, providing that, if a committee appointed from "our number" reported unfavorably on a certain plant, the subscription might be declared void, contemplates that the committee was to be appointed by all the subscribers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266–284.]

2. Corporations 🔑83—Stock Subscription—Unconditional Subscription.

Ordinarily an unconditional stock subscription is a continuing offer until the proposed corporation is formed, and until that time may be withdrawn at the subscriber's option.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 328–336, 1407.]

3. Corporations 🔑81—Stock Subscription—Conditional Subscription.

Where a stock subscription agreement contains a condition precedent, the condition must be fulfilled, or the agreement is not binding, although the corporation is formed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266–284.]

4. Corporations 🔑81—Stock Subscription—Compliance with Condition.

Where a stock subscription agreement provided that if a committee, appointed from the subscribers, should report unfavorably on a certain plant, the subscriber might withdraw evidence that a self-constituted committee inspected and reported favorably on such plant, does not make the subscription contract binding.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266–284.]

5. Corporations 🔑81—Stock Subscription—Waiver of Conditions.

A stock subscription provision, that it might be declared void if a committee of subscribers should report unfavorably on a certain plant, is not waived by a subscriber, who knew that a self-constituted group of subscribers inspected and reported favorably, but did not attend their meetings or ratify their action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266–284.]

6. Corporations 🔑81—Conditional Stock Subscription—Notice of Withdrawal.

Where a stock subscription agreement provided that subscribers might withdraw if a committee, appointed from their number, reported unfavorably on a certain plant, but only a self-appointed group reported, a subscriber need not give notice of his withdrawal to avoid liability on his subscription contract, although the corporation was fully organized, and, in any event, an oral notice would be sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266–284.]

Holloway, J., dissenting.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by the Canyon Creek Elevator &

Milling Company against W. A. Allison. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

F. B. Reynolds, of Billings, for appellant. Johnston & Coleman, of Billings, for respondent.

BRANTLY, C. J. Action by plaintiff corporation to recover of the defendant $100, the par value of one share of its capital stock, upon a subscription contract therefor. The contract is as follows:

"September 18, 1913.

"Whereas, we, the undersigned, desire to secure and establish a flour mill at Yegen, Mont., for the purpose of doing custom and general mill work and the handling of all kinds of grain; and whereas, the Northwestern Mill Construction Company proposes to erect such a plant at Yegen, Mont.: Now, therefore, we, the undersigned, do hereby agree with each other and with the said Northwestern Mill Construction Company that we will purchase from a company, organized for the purpose of purchasing from the Northwestern Mill Construction Company such a plant, the number of shares set opposite our names. The shares to be $100 each. It being an express condition of this subscription that, if sufficient subscribers are not obtained within 60 days from the date hereof for the purchase of such a plant, or if a committee appointed from our number to inspect such a plant in operation shall report unfavorably, then these subscriptions may be, at our option, declared null and void; otherwise, to be in full force and effect."

The complaint alleges that, on or about the date of the contract, defendant subscribed for one share of the capital stock of the plaintiff upon the conditions named. It then alleges that all the conditions of the contract had been fulfilled, and that the stock of the plaintiff was issued to each of the subscribers in the amount subscribed by him; that one share was issued and tendered to the defendant, but that he refused to accept and pay for the same. Judgment is demanded for the amount of the subscription, with interest and costs.

The answer by counter averment denies that the committee mentioned in the contract was appointed or made any report. It admits all the other allegations of the complaint and alleges three separate affirmative defenses. At the trial the second one of these was abandoned. The others may be briefly epitomized as follows: (1) That the defendant signed the subscription contract at the solicitation of one Frank Sanderson; that, as an inducement to him to subscribe, Sanderson made certain representations to him as to the kind and character of the corporation to be formed, the location of the milling plant, and the profits such a plant would yield; and that defendant believed such representations and relied upon them as true, whereas they were false. (2) That it was a condition precedent that the committee provided for in the subscription contract should be appointed and should make report before the subscription should become effective; that no such committee was ever appointed; and that for this reason defendant, on December 6, 1913, notified the secretary of plaintiff that his subscription was null and void, and that he would not pay it. The reply joins issue upon these defenses.

At the opening of the trial the court held that, upon the issues as made, the burden was upon the defendant. Upon objection by counsel for plaintiff, it excluded all the evidence tendered by defendant in support of the first defense. After the evidence was submitted in support of the third defense, the court on motion directed a verdict for the plaintiff. The defendant has appealed from the judgment and an order denying him a new trial.

Counsel have devoted much space in their briefs to a discussion of the questions whether the complaint states a cause of action, whether the allegations in the first special defense disclose a case of fraud by Sanderson, the solicitor of the subscription, and whether the court properly ruled that the burden was upon the defendant. It is not necessary to consider and determine these questions, because under the evidence submitted in support of the third defense, which presents no substantial conflict, the defendant, we think, was clearly entitled to a verdict and judgment.

[1] The contract does not expressly provide that the two conditions therein named are precedent. The conclusion cannot be avoided, however, that each subscriber, when he signed it, understood that he had reserved to himself the option to withdraw his subscription: First, if the amounts subscribed within 60 days from September 18th were not sufficient to make the proposed purchase; and, second, if a committee appointed from the number of subscribers made an unfavorable report after conducting the proposed investigation. It is clear, also, that they understood that the power to appoint the committee resided in the subscribers, for it was to be appointed from "our number"—language which, from the fact that it included all subscribers, cannot be construed to mean anything other than that the inspection was to be made by authority of all, and for the benefit of all. It may be assumed that those who were engaged in promoting the enterprise were impliedly authorized to take the lead in calling the subscribers together and ascertaining their wishes; but the right to select those whose opinion was to have significance as a determinating factor in their subsequent conduct was vested in the common body. The purpose to be served in inserting this provision evidently was that those subscribers who had not practical experience in connection with such enterprises might have the benefit of the judgment of those of their number whom they deemed qualified to judge of the feasibility and prospective success of the one to be establish-

ed at Yegen, and therefore whether the proposed investment would probably prove profitable. It was clearly not contemplated that any number of the subscribers less than the whole should select a committee whose judgment should conclude all. In order to reach the desired result, therefore, while it was not necessary that all should take part in selecting the committee, it was necessary that whatever form the proceeding assumed, all were to have an opportunity to take part. Mr. Thompson, in his work on Corporations, speaking of these subscription contracts, says:

> "It is not necessary that a condition precedent be expressly stated as such; courts would scarcely require subscribers to say in express language that their subscriptions are made on condition that the corporation shall first perform some particular thing; on the contrary, mere recitals in the contract of subscription are frequently regarded as implied conditions." Section 599.

In 10 Cyc. at page 412, we find this statement of the rule:

> "A man cannot be forced into a contract which he does not choose to enter into. If, therefore, a man subscribes for shares in a corporation upon a condition which is lawful, and which consequently may be performed, unless that condition is performed, or its performance is waived by him, he cannot be held to make good his subscription."

Again, on page 418, this statement is found:

> "If the condition is expressed on the face of the subscription agreement, and is valid under rules and theories already discussed, the obligation of the subscriber does not become binding until the condition has been performed by the corporation or waived by the subscriber; until that time he cannot be held to the liabilities of a shareholder. It is scarcely necessary to suggest that the corporation cannot elect to treat as unconditional a subscription which has been made upon a valid and expressed condition."

[2, 3] The general rule is that an unconditional subscription is a continuing offer until the proposed corporation is formed. It becomes irrevocable only when it has been acted upon. This, however, is necessary in order to bind the subscriber, and until the corporation is formed he is at liberty at any time to withdraw. Deschamps v. Loiselle, 50 Mont. 565, 148 Pac. 335. When the subscription, as here, is made to take effect upon the fulfillment of a condition precedent, the condition must be fulfilled, or the offer is never binding, even though the corporation has been formed. On this subject Mr. Thompson says:

> "Many cases have held that a strict performance of the condition is necessary in order to entitle the corporation to recover. These holdings are governed largely by the particular wording of the contract of subscription. And where there is nothing to show a contrary intention, and the language of the subscription is plain, there is no reason why a strict compliance should not be required. This naturally follows as a minor proposition from the major premise, that a subscriber may attach any condition to his subscription which he sees fit, under the limitation that it is not contrary to law or against public policy, and is within the power of the corporation to perform. For a court to say that a subscriber might thus attach a whimsical condition to his subscription, and then to hold that there need not be a strict compliance on the part of the corporation, would be illogical and inconsistent." Section 604.

This rule is supported by the following cases: Martin v. Pensacola, etc., Ry. Co., 8 Fla. 370, 73 Am. Dec. 713; Midland City Hotel Co. v. Gibson, 11 Ga. App. 829, 76 S. E. 600; Chase v. Sycamore, etc., Ry. Co., 38 Ill. 215; Cravens v. Eagle Mills, 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; Belfers, etc., Ry. Co. v. Moore, 60 Me. 561; Morrow v. Nashville Iron, etc., Co., 87 Tenn. 260, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658.

[4] The evidence discloses that no committee was ever appointed by authority of the subscribers, or made report to them. At the time the subscriptions were solicited, it was understood by the subscribers that the committee to be appointed was to inspect a mill similar to that proposed, situated at Absarokee, in Stillwater county, and make report accordingly. The only attempt to fulfill this condition was the following: Mr. Frank Sanderson, who solicited the subscriptions from the defendant and others, C. W. Sanderson, John Epperson, Roy Stebbins, and J. M. Brannon, all being subscribers, agreed among themselves, at the instance of W. W. Clarke, himself a subscriber, and also interested in some official capacity in the Northwestern Mill Construction Company, to go to Absarokee and inspect the mill at that place. Mr. Clarke proposed to pay the expenses of all who would go. The first five took the lead in effecting the organization; Frank Sanderson becoming its president and C. M. Sanderson its secretary. They called up some of the subscribers by telephone, including the defendant. Some of them had no notice of any kind. The defendant testified:

> "The evening before the committee went, Mr. Sanderson called me up and asked me if I would like to go to Absarokee. He didn't say the committee. I said it was impossible for me to go. I asked him who was going. He said: 'I don't know any more than I think Mr. Roy Stebbins and Mr. Sansome.'"

He declined to go. Later a meeting of those who went to Absarokee and some of the other subscribers was held at a schoolhouse near Yegen, at which this self-constituted committee made a formal report. Frank Sanderson testified as to what took place at that time as follows:

> "After we made the trip, there was a meeting of the subscribers held. I don't know the date of the meeting. It was held at Canyon Creek schoolhouse at a called meeting. The meeting was called just among ourselves. Told everybody we saw, and called up some on the phone, etc., that there would be such a meeting there, and this committee would report at that meeting. The committee reported at that meeting. The report was favorable."

The defendant was informed of this meeting, but did not attend, and did not know what was done. Concerning it he testified:

> "Mr. Sanderson told me of a meeting to be held at the Canyon Creek schoolhouse, at which this committee that went to Absarokee was to report. That was to be on a Saturday evening."

Some of the subscribers did not become such until after these occurrences had taken place. On November 17th Mr. Stebbins, who was acting as "secretary," sent written notices to all the subscribers, addressing them as stockholders of the plaintiff, that their first meeting would be held at the store of C. M. Sanderson, at Yegen, on December 6th, for the purpose of "adopting by-laws for the said company." He asked for the proxies of those who did not care to attend the meeting in person. Defendant did not attend, nor did he send his proxy. The preliminary steps were taken to effect the organization of plaintiff, by the execution of the articles of incorporation and the selection of officers. On the same day defendant notified Stebbins by telephone that he canceled his subscription on the ground of misrepresentation. Later, in a conversation with Stebbins, he told him he had withdrawn his subscription. With reference to what occurred he testified:

> "I called up Roy Stebbins, and told him to cancel my subscription because of misrepresentations. I told him the change of location [of the mill] was one. That is not the only one I mentioned. I stated it was a misrepresentation all through, for I understood we were to be called together as subscribers to select the committee. The substance of my conversation with Stebbins at that time was something to that effect. In the course of our conversation Mr. Stebbins said he wasn't satisfied with the action they had taken. He said: 'I, for one, would have rather that they had called the subscribers together before doing anything.' And the next time I saw Mr. Stebbins, he said to me, 'Did I really mean I was pulling out?' and I said I did."

The organization was completed by the filing of the articles on December 17th.

[5] It may be conceded that, if the defendant had by word or act assented to or ratified the proceedings of the self-constituted committee, as by attending the meeting at the schoolhouse to hear its report, or by attending the subsequent meeting at Sanderson's store, and taking part, without objection, in the organization of the company, he would properly be held to have waived the right to insist that he had not been given an opportunity to exercise his option to annul his subscription. He was not bound, at his peril, however, to object to the proceedings of a committee of which he had not been informed, and in the selection of which he had taken no part. He had a right to understand that Frank Sanderson, Stebbins, and others, who had assumed the leadership in forwarding the enterprise, would give him notice, so that he might take part in the selection of the committee by whose favorable judgment he was to become bound. He was not consulted as to the propriety of the selection of the self-constituted committee. The information he received was that there was a committee, with an opportunity extended to him to join it, if he desired to do so. He was not bound by its action, unless he chose to be; and as he said no word nor performed any act from which it might reasonably be inferred that he intended to acquiesce in the action of the committee, the fulfillment of the condition of the contract was not waived by him. Therefore, under the rule of the authorities cited, he was at liberty to recall his subscription and thus avoid liability to pay it. Otherwise, he became bound, notwithstanding he never had an opportunity to exercise his option.

[6] The notice of withdrawal by defendant was given to Stebbins after the adjournment of the meeting of December 6th, at which C. M. Sanderson was named secretary of the plaintiff. Inasmuch as defendant never had an opportunity to exercise his option as contemplated in the contract, he was not under obligation to give notice to any one, even though the corporation was thereafter fully organized. In any event, his notice to Stebbins was sufficient to indicate his purpose.

The judgment and order are reversed, and the cause is remanded to the district court, with direction to enter judgment for the defendant.

Reversed and remanded.

SANNER, J., concurs.

HOLLOWAY, J. (dissenting). I am unable to subscribe to the conclusion reached by the majority. Under the third defense, defendant could avoid liability only in the event that the report of the committee was unfavorable. No such report was ever made. Though the committee which investigated the Absarokee plant was selected in the most informal manner, it nevertheless made an investigation and reported favorably. The defendant does not object to the personnel of the committee, does not contend that it was not fairly representative of the subscribers generally, and does not challenge the correctness of the report. If the report made truthfully stated the facts concerning the Absarokee plant, then defendant is not entitled to be heard to urge this defense, for, though an entirely different committee had been selected, and selected in the most solemn and formal manner imaginable, the report would necessarily have been the same.

Reduced to its ultimate analysis, then, defendant avoids responsibility solely on the ground that the committee was not selected in a formal manner. This he ought not to be permitted to do. Upon the theory of the case presented to the trial court, I think the correct conclusion was reached, and that the judgment should be affirmed.

(53 Mont. 595)

STATE ex rel. BOYLE v. HALL. (No. 4045.)

(Supreme Court of Montana. May 29, 1917.)

1. QUO WARRANTO 🔑34—RIGHT OF PRIVATE INDIVIDUAL—EXERCISE OF PUBLIC OFFICE.

Although under Rev. Codes, §§ 6943-6946, the authority of the state represented by the Attorney General to invoke the remedy by quo warranto is quite extensive, under section 6947, a private individual is limited in his right to the remedy to a case in which he claims to be entitled to a public office unlawfully held and exercised by another.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 41.]

2. QUO WARRANTO 🔑33—"PUBLIC OFFICE."

The board of railroad commissioners being a creature of statute whether the chairmanship of the board is a public office, with public duties and functions independent of the duties and functions which are attached to the office of commissioner, within Rev. Codes, § 6947, depends on the intention of the Legislature as manifested in the act, when considered in the light of the general rules as to the tests applied to determine whether a public office is involved.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 40.]

3. STATUTES 🔑212 — CONSTRUCTION — PRESUMPTION.

In construing a statute to determine whether a public office is involved, the lawmakers are presumed to have been guided to their ultimate determination by the same rules regarding the tests to be applied to determine whether a public office is involved.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289.]

4. QUO WARRANTO 🔑33—BOARD OF RAILROAD COMMISSIONERS—"PUBLIC OFFICE."

Rev. Codes, § 4367, provides that the board of railroad commissioners shall organize by electing one of its members as chairman. Section 4369, which contains the only reference to the public duties or functions attached to the chairman of the board, provides that the state shall furnish said board with suitable offices, and provide it with all necessary furniture, stationery, and printing, upon requisitions signed by the chairman of said board. Section 4365 provides that any member of the board may administer oaths, and also that the board shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations, etc. Section 4370 provides that any member of the board may verify the vouchers for the board's expenses, and throughout the original act and the supplemental acts the references are uniformly to the duties, powers, and privileges of the board, while the chairmanship is dismissed by the reference in section 4369. *Held*, that as the Legislature referred to the board as an entity in all matters of board regulation and control, the chairmanship of the board is not a "public office," within Rev. Codes, § 6947, since a public officer is a part of the personal force by which the state thinks, acts, determines, and administers, to the end that its Constitution may be effective and its laws operative, and while the elements of fixed term and compensation are not indispensable to a public officer, they are indices to the existence of such position, and their absence indicates to some extent the contrary conclusion.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 40.

For other definitions, see Words and Phrases, First and Second Series, Office.]

Quo warranto by the State, on the relation of Daniel Boyle, against J. H. Hall. Demurrer sustained, and complaint dismissed.

Galen & Mettler and E. G. Toomey, all of Helena, for relator. H. C. Hall, of Havre, for respondent.

HOLLOWAY, J. By chapter 37, Laws 1907, the "board of railroad commissioners of the state of Montana" was created, and by that act, and acts supplementary thereto, its powers and duties are defined. The board consists of three members, each elected for a term of six years, and the present members are J. H. Hall, J. E. McCormick, and Daniel Boyle. Hall was elected in 1912, McCormick in 1914, and Boyle in 1916. On January 1, 1917, Hall was duly elected chairman and continued in that capacity until April 16th, when, at a regular meeting of the board at which all three members were present, by the votes of McCormick and Boyle he was deposed and Boyle elected chairman in his stead. Hall refused to abide by the order, and has since claimed and assumed to act as chairman. This proceeding in the nature of quo warranto was instituted by Boyle to have determined the right or title to the chairmanship of the board. To the complaint, which sets forth the proceedings fully, the defendant demurred, and, electing to stand on his demurrer, the matter was submitted for final determination. Defendant presents three contentions:

[1] 1. That the chairmanship of the board is not a public office. If this be sustained, the other contentions need not be noticed; for though the authority of the state (represented by the Attorney General) to invoke the remedy by quo warranto is quite extensive (Rev. Codes, §§ 6943-6946), a private individual is limited in his right to the remedy to a single case, viz. a case in which he claims "to be entitled to a public office unlawfully held and exercised by another" (section 6947). The question before us in limine is: Is the chairmanship of the board of railroad commissioners a public office, with public functions to be performed by the occupant independently of his duties as a member of the railroad commission?

Courts and text-writers have undertaken to define the term "public office," and to prescribe certain criteria by which to determine whether, in a given instance, a public office is involved, but their efforts have been expended with rather indifferent success. The tests applied and found sufficient in one case have proved altogether inapplicable in another. The authorities are, however, quite generally agreed that the character of the functions to be performed is a primary consideration, if not a determining factor. 23 Ency. of Law (2d Ed.) 323. The duties attached to the position must concern the public directly, and must be imposed by public authority—not by contract. Mechem on Public Officers, 1–6; Throop on Public Officers, 3, 4; Wyman's Administrative Law, § 44. The duties must be public in the sense that they comprehend the exercise of some portion of the sovereign power and authority of the state, either in making, administering, or executing the laws. Eliason v. Coleman, 86 N. C. 235; Commonwealth v. Bush, 131 Ky. 384, 115 S. W. 249. They must be public, also, in the sense that they imply the element of personal responsibility, as distinguished from the merely clerical acts of an agent or servant. Attorney General v. Tillinghast, 203 Mass. 539, 89 N. E. 1058, 17 Ann. Cas. 449. In other words, a public officer is a part of the personal force by which the state thinks, acts, determines, and administers to the end that its Constitution may be effective and its laws operative. People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605. While the elements of fixed term and compensation cannot be said to be indispensable to a public office, they are indices the presence of which points to the existence of such a position, and the absence of which indicates to some extent the contrary conclusion.

[2, 3] The board of railroad commissioners is the creature of statute. It has such authority as is conferred expressly or necessarily implied from that which is expressed. It is subject at all times to legislative regulation and control. Its officers and employés—even the members of the commission—may be dismissed from the service of the state by a repeal of the law which created the board. Whether, then, the chairmanship of the board is a public office, with public duties and functions independently of the duties and functions which are attached to the office of commissioner, depends upon the intention of the Legislature as manifested in the act, when considered in the light of the general rules referred to above, and which are presumed to have guided the lawmakers to their ultimate determination.

[4] The only mention of the chairmanship is found in section 4367, wherein it is provided that the board shall "organize by electing one of its members as chairman." While this is not the creation of the position by specific legislative enactment, it might be deemed sufficient if other and indispensable elements of a public office were present. Counsel have not directed our attention to any public duties or functions attached to the chairmanship by the Legislature, and our research has disclosed but a single reference, viz.:

> "The state shall furnish said board with suitable offices in the state capitol building at Helena, Mont., and provide it with all necessary furniture, stationery and printing, upon requisitions signed by the chairman of said board." Section 4369.

Throughout the original act and the supplemental acts the references are uniformly to the duties, powers, and privileges of the board, while the chairmanship is dismissed by the brief references above. Any member of the board may administer oaths (section 4365), or verify the vouchers for the board's expenses (section 4370). Can it be said, then, with any degree of seriousness, that a position to which are attached no duties, powers, or prerogatives other than the authority to sign orders for paper, stamps, and pencils is a public office, the incumbent of which is required by law to perform a portion of the sovereign power of the state? To suggest the question is to answer it. A review of these statutes would seem to indicate beyond the possibility of a doubt that while the board is created with important public functions to perform, and clothed with authority to make effective the purpose of its creation, the Legislature, imposing trust and confidence in the intelligence and integrity of the members, referred to the board, as an entity, all matters of board regulation and control. Section 4365 provides:

> "The board shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations," etc.

In the absence of any specific declaration creating the office of chairman and in the absence of any independent public functions or powers attached to the position, this provision is peculiarly significant. The Legislature recognized the fact that in the orderly proceedings of the board there should be one member designated to preside over its deliberations, put all questions, and declare the will of the majority; in other words, to be the mouthpiece of the board, its agent and servant, but without authority or power independently of his authority as one member of the board and with such other power and authority only as the board might confer by appropriate rules and regulations or in the absence of any rule upon the subject, then with such authority as accords with the spirit of parliamentary procedure and meets the approval of a majority of the board. No mention is made of the term for which the chairman shall hold the position. The Legislature recognized further that the chairman would be selected by the members only because of their confidence in him; that the harmony and efficiency of the board would continue only so long as that confidence continued; and that whenever for any cause, or without cause, the chairman forfeits or otherwise loses that confidence upon the strength of which he was selected, the majority would have the authority to remove him and select a successor. That the Legislature thus treated the chairmanship as a merely honorary position, the occupant of which is subject to control by the majority, holds the position at the will of the majority, performs, without compensation, whatever duties are assigned to him by the majority, and is without public power or authority independently of his office as a member of the board, is fairly conclusive evidence that it was not the intention of the Legislature to create an independent public office.

Our conclusion is that the chairmanship of the board of railroad commissioners is not a public office, and therefore this proceeding cannot be maintained.

The demurrer is sustained, and the complaint is dismissed.

Dismissed.

BRANTLY, C. J., and SANNER, J., concur.

(40 Nev. 428)

O'DONNELL v. SIXTH JUDICIAL DISTRICT COURT OF STATE OF NEVADA, IN AND FOR HUMBOLDT COUNTY et al.

(No. 2275.)

(Supreme Court of Nevada. June 23, 1917.)

1. APPEAL AND ERROR 🔑1—RIGHT TO APPEAL—STATUTE.

It is not lightly to be assumed that from failure or omission of a special act to provide for an appeal the Legislature intended to deny such right to any person whose civil and legal rights are involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4.]

2. INSANE PERSONS 🔑33(2) — APPOINTMENT OF GUARDIAN—RIGHT TO APPEAL.

Const. art. 6, § 4, vests the Supreme Court with appellate jurisdiction in all cases in equity. Rev. Laws, § 4832, is to the same effect. Section 4833 empowers the Supreme Court to review on appeal a judgment in a proceeding commenced in a district court when the matter in dispute is embraced in the general jurisdiction of the Supreme Court. Section 5329 provides that an appeal may be taken from a final judgment or special proceeding commenced in the court in which the judgment is rendered. Section 6162 provides for petition for the appointment of a guardian for insane persons. *Held*, that such proceeding is equitable, and the judgment appointing the guardian for a mentally enfeebled person is final, so that an appeal lies.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 59.]

3. PROHIBITION 🔑10(2)—RIGHT TO REMEDY.

Where a stay of proceedings is had, and the court undertakes to exercise an unauthorized jurisdiction pending the stay, prohibition is the proper remedy.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 44-56.]

4. INSANE PERSONS 🔑33(2)—APPOINTMENT OF GUARDIAN—REVIEW—STAY OF PROCEEDINGS—UNDERTAKING ON APPEAL.

As procedure under Rev. Laws, § 6162, is not a case provided for in Civil Practice Act, §§ 404, 405, 408, and 409 (Rev. Laws, §§ 5346, 5347, 5350, 5351), the perfection of an appeal by giving the undertaking as prescribed by section 404 stays proceedings in the court below upon the judgment and order appealed from, under specific provision of Rev. Laws, § 5355.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 59.]

Original proceeding for prohibition by Ellen C. O'Donnell against the Sixth Judicial District Court of State of Nevada in and for Humboldt County and others. Writ issued.

Salter & Robins, of Winnemucca, for petitioner. Callahan & Brandon, of Winnemucca, for respondents.

SANDERS, J. Ellen C. O'Donnell was declared by a judgment of the district court for Humboldt county to be mentally incompetent, by reason of extreme old age, to manage her property, and by the judgment Chris Wolf, public administrator of said county, was appointed guardian for her estate, alleged to consist of 400 acres of land in said county and $8,500 in money, represented by two certificates of deposit in a local bank at Winnemucca, Nev. She gave notice of appeal to this court from the judgment and an order overruling her motion for a new trial, and filed an undertaking on appeal in the sum of $300. She now petitions this court for a writ of prohibition to restrain the judge of said court and the guardian so appointed from enforcing, or undertaking to enforce, said judgment pending her appeal.

We are satisfied from the return of respondents that, unless restrained, they will do the things complained of, and will endeavor to take possession of the property of petitioner in disregard of and in spite of her appeal. The only question presented, therefore, is: Should the writ issue?

It is urged by respondents that an appeal is a matter purely of statutory right (Esmeralda County v. Wildes, 36 Nev. 526, 137 Pac. 400), and as the statute under which the proceeding was commenced in the lower court (Statutes of Nevada 1899, p. 70) nor the general law governing appeals (chapter 46 Civil Practice Act) makes provision for an appeal in such cases, the judgment and order complained of is not appealable, and this court is therefore without jurisdiction to issue the writ. The jurisdiction of this court being thus challenged, it is incumbent upon us to consider the question as if made upon a motion to dismiss the appeal of petitioner. The several district courts of this state are vested by the Constitution and statutes with original jurisdiction in all cases relating to the estates of insane persons (Const. art. 6, § 6; section 4840, Revised Laws); not necessarily persons technically insane, but those who, for any cause, are mentally incompetent to manage their property (section 6162, Revised Laws; 14 R. C. L. p. 567); and such courts possess general power over the appointment and removal of guardians (section 4849, Revised Laws). The jurisdiction thus conferred is neither special nor limited, nor is it limited or qualified by the special act which regulates the procedure for the appointment of guardians and to prescribe their duties. Statutes of Nevada 1899, p. 70.

[1] It is not lightly to be assumed that from the failure or omission of a special act to provide for an appeal the Legislature intended to deny to the persons whose legal and civil rights are involved and affected by the act the right of appeal. The right to an appeal is a substantial right (Howard v. Rich-

ards, 2 Nev. 137, 90 Am. Dec. 520), and, while it is purely statutory (Esmeralda County v. Wildes, supra), a statute will not be construed as taking away the right of appeal unless the language used clearly shows such an intent (3 C. J. 319).

"If a statute is capable of being so construed as to maintain the right of appeal without violating the well-established rules for construing statutes, it will be so construed." Houghton's Appeal, 42 Cal. 35.

[2] The persons embraced by the statute in question are peculiarly "wards of chancery." Unless the statute, by express terms, necessary implication, or reasonable intendment, denies to such persons the right of appeal, it is our duty to uphold the right. But it is insisted that the general law governing appeals makes no provision for an appeal in this class of cases. In this view we do not concur. The Supreme Court is vested by the Constitution with appellate jurisdiction in all cases in equity. Const. art. 6, § 4; section 4832, Revised Laws. This court has jurisdiction to review upon appeal a judgment in an action or proceeding commenced in a district court when the matter in dispute is embraced in the general jurisdiction of the Supreme Court. Section 4833, Revised Laws. The proceeding authorized by the statute (section 6162, Revised Laws) is an equitable proceeding, and differs from ordinary actions only in procedure. It does not confer new rights, nor afford new remedies. In its essential characteristics it was an adversary proceeding in which the petitioner was the real defendant. An appeal may be taken from a final judgment or special proceeding commenced in the court in which the judgment is rendered. Section 5329, Revised Laws. For the purposes of this application, it is not necessary to determine whether the proceeding against petitioner was "an action" or "special proceeding." It was certainly one or the other. An appeal lies from a "final judgment" in either. The judgment was a "final judgment," which operates to divest petitioner of the right to the possession, control, and management of her property. The petitioner is entitled, therefore, to prosecute her appeal here so as to test the regularity of the proceeding by which it was sought to place her property under guardianship.

[3] It is well settled that, where a stay of proceedings is had, and the court undertakes to exercise an unauthorized jurisdiction pending such stay, prohibition is the proper remedy. 3 C. J. p. 1328.

[4] The undertaking on appeal filed by petitioner conforms to section 404 of the Civil Practice Act, and, as the procedure authorized by section 6162, Revised Laws, is not a case provided for in sections 404, 405, 408, and 409 of the Civil Practice Act, the perfecting of the appeal by giving the undertaking, as prescribed by section 404, stays proceedings in the court below upon the judgment and order appealed from. Section 5355, Revised Laws.

It is argued by respondents that it is against the interest of petitioner, and against public policy, to permit petitioner to manage her property pending the time of her appeal. And it might have been suggested, by way of argument, that an appeal in such cases defeats the purpose of the statute. This position has been ruled upon adversely to respondents by the Supreme Court of California in construing a similar statute. Coburn v. Hynes, 161 Cal. 685, 120 Pac. 26; In re Woods, 94 Cal. 566, 29 Pac. 1108; In re Moss, 120 Cal. 695, 53 Pac. 357.

We are powerless to remedy what may be a defect or omission in the Civil Practice Act.

Let the writ issue.

McCARRAN, C. J., and COLEMAN, J., concur.

KEELER v. BAKER et al. (No. 9185.)

(Supreme Court of Colorado. June 4, 1917.)

APPEAL AND ERROR ⟹1001(1) — REVIEW — WEIGHT OF EVIDENCE.

Where the probative force of the evidence and the facts established by the verdict were within the province of the jury to determine, such determination was binding upon the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3933.]

Error to County Court, City and County of Denver; V. H. Johnson, Judge.

Action by A. M. Baker and another, doing business as the Modern Mantel & Fixture Company, against Frank W. Keeler. From a judgment of the county court for plaintiff on appeal from a judgment of the justice court for plaintiffs, the defendant brings error. Affirmed.

Philip W. Mothersill and C. E. Wampler, both of Denver, for plaintiff in error. P. R. Anderson, of Denver, for defendants in error.

PER CURIAM. The defendants in error were the plaintiffs in the trial court, and sued Keeler before a justice of the peace for an alleged balance of $249.50 due on account of materials furnished and labor performed upon the residence of defendant. The defendant failed to appear in the justice court, and upon proof of plaintiffs' claim judgment was rendered accordingly. Defendant thereafter appealed the cause to the county court, where it was tried to a jury and a verdict returned in favor of plaintiffs in the sum of $175, upon which judgment was entered. The defense interposed was failure upon the part of plaintiffs to do and perform the work as agreed, and damages resulting therefrom to the house by reason of the negligence of plaintiffs in the performance of their work.

The sole question raised here and relied upon for reversal is the alleged insufficiency of the evidence to support the verdict. The claims of the parties were submitted to the jury under instructions to which no objections were interposed.

We have read the record, and find therein sufficient evidence to support the verdict. The probative force of the evidence and the facts established thereby were within the province of the jury to determine, and are binding upon us.

The application for a supersedeas is therefore denied, and the judgment affirmed.

GERMAN AMERICAN TRUST CO. v. WHITE. (No. 9186.)

(Supreme Court of Colorado. June 4, 1917.)

ASSIGNMENTS 🔑85—PRIORITIES.

Where the rights of a trust company as executor, in proceeds of a fire policy, rested solely on assignment which was expressly made subordinate to an assignment to one acting as its agent, it cannot complain, no fraud appearing, because full effect to its assignment was given, and the amount due the agent ordered first paid.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 149–151.]

Error to District Court, Jefferson County; Jesse C. Wiley, Judge.

Proceedings between the German American Trust Company, as executor of the estate of Burroughs R. Hall, deceased, and John F. White, to determine rights to the proceeds of an insurance policy, paid into court by the insurer. To review a judgment for White, the trust company brings error. Application for supersedeas denied, and judgment affirmed.

C. F. Miller, of Denver, for plaintiff in error.

WHITE, C. J. The question involved is which of the parties hereto is entitled to certain money paid into court by an insurance company upon an adjustment of a loss by fire of some personal property, belonging to one French, which it had insured. Each of the parties claims the money by virtue of an assignment by French. The assignment under which plaintiff in error claims is, by express terms, made subordinate to the assignment under which defendant in error claims. The facts resulting in the assignments are, briefly, as follows: One Burroughs R. Hall owned a building, and defendant in error White was his agent in renting and collecting the rents therefor. This building was occupied by one French as tenant, who conducted a small store therein, and who had fallen behind in the payment of her rent. She had also borrowed some money at a high rate of interest and secured the payment of the same by a chattel mortgage upon her trade fixtures in the store. Hall died, and thereupon the German American Trust Company became executor of his estate, and White became its agent in relation to the building. The defaults of French in the payment of rent continued, and White, in order to assist her, purchased the note secured by the chattel mortgage, and substantially reduced the rate of interest thereon. The note, becoming due, was renewed and a new chattel mortgage given all in the name of White's wife, though belonging to White. Some time elapsed, other rent accrued, and some payments were made thereon, and $2.75 paid as interest upon the note. When the fire occurred White was in California, and Mrs. French called upon the plaintiff in error, and stated to an assistant cashier of that institution, who was also the son of White, that she desired to have drawn and executed two assignments of her claim against the insurance company growing out of the fire; that she desired the first assignment to be in favor of White for the purpose of paying the mortgage indebtedness, and the second assignment to be in favor of plaintiff in error for the purpose of paying the delinquent rent. Thereupon the assignments were drawn in accordance with her wishes, and she executed the same. The amount of the note and delinquent rent exceeded the proceeds of the insurance policy.

The court found that the transaction was in good faith, and there was no fraud or deceit upon the part of plaintiff; and that from the insurance money the amount due on the note and the costs, including the expense of collecting the insurance policy, should first be paid and the balance, if any, turned over to plaintiff in error. The evidence warranted these findings. The rights of plaintiff in error were based solely upon the assignment, and it is not in a position to complain because the court gave full effect to that instrument.

The application for supersedeas is denied, and the judgment affirmed.

HILL and TELLER, JJ., concur.

HAMILTON v. PEOPLE. (No. 9042.)

(Supreme Court of Colorado. June 4, 1917.)

1. ABORTION 🔑11—EVIDENCE—SUFFICIENCY.

In a prosecution for having procured a criminal abortion, evidence *held* to support a verdict of guilty.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 22.]

2. CRIMINAL LAW 🔑1159(2) — APPEAL AND ERROR—REVIEW—VERDICT.

It is the province of the jury to determine the credibility of the witnesses, and the weight of their testimony, and to decide the facts, and where there is sufficient evidence to support their finding, the appellate court cannot interfere with their conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

Error to District Court, City and County of Denver; William D. Wright, Judge.

Noble O. Hamilton was convicted of having procured a criminal abortion, and he brings error. Affirmed.

C. A. Prentice, of Denver (J. G. Powell, of Denver, of counsel), for plaintiff in error. Fred Farrar, Former Atty. Gen., Leslie E. Hubbard, Atty. Gen., and Ralph E. C. Kerwin, Asst. Atty. Gen., for the People.

GARRIGUES, J. Defendant, plaintiff in error, was convicted under an information charging him with having procured a criminal abortion of Ada Williams, by means of thrusting an instrument into her private parts with intent to procure a miscarriage, from which her death resulted.

The principal assignment of error upon which defendant relies for a reversal is that the evidence is insufficient to support the verdict and judgment, and that no testimony was adduced upon which any reasonable, fair-minded jury could have concluded beyond a reasonable doubt that the defendant was guilty of the crime charged. This has necessitated a careful review of all the evidence introduced on the trial, which discloses the following:

Thomas and Ada Williams were husband and wife, residing in Denver. Mrs. Williams having become pregnant, was very much disturbed over her condition owing to the fact that her mother, a resident of Nebraska, who was nearly 50 years old, had written that she was about to be confined, and, fearing that she would not survive the ordeal, very urgently requested Mrs. Williams to come to her; that Mrs. Williams thought she could not go, in her delicate condition, and was desirous of having a miscarriage. Some time in the latter part of January, 1916, she called on defendant Hamilton, who was a practicing physician, and discussed her condition with him. On Sunday, February 13, 1916, she, in company with her husband, again visited the doctor at his office, where she introduced her husband and said that they had come to talk over what she had discussed with him on her previous visit. The defendant asked her if she still wanted to do what they had talked about, and she replied that she did. After discussing her condition and symptoms, she inquired of the doctor if he thought he could help her out, and he replied that he could, and told her to return on the following day, Monday. Mr. Williams asked how much the bill would be, and defendant told him he "charged $25 for confinement cases, and this would be the same."

Mrs. Williams returned to the doctor's office on Monday at about 9:40 o'clock in the morning. Of what occurred there on that occasion there is no direct evidence, excepting that of the defendant, who, while admitting that he inserted a speculum and made an examination of the woman's privates, and introduced a medicated tampon into her vagina, denied that he had done anything which would tend to bring about a miscarriage. On Tuesday morning Mrs. Williams was in bed when her husband went to work, although later she got up and went to the residence of a friend, and relative of Mr. Williams by marriage, where she seemed faint and ill. Williams that morning, on his way to work, stopped at the doctor's office and paid him $10 on account. On Wednesday Mrs. Williams remained in bed, was taken with labor pains, and about noon was delivered of a fetus in the stage of development at about three months. Dr. Hamilton was called, and the patient stated to him or in his presence that she had had hard work to keep the tampon in before the child was born. She also told him that along about 3 o'clock Tuesday morning she had sneezed real hard, and asked him "if that is the reason that it occurred sooner than he expected it would." The defendant placed the fetus in paper, put it in the stove, and after giving some directions as to the care of the patient left the house. On Thursday Mrs. Williams' condition grew worse, and symptoms of septicæmia developed. Dr. Hamilton was called, and then diagnosed her trouble as typhoid fever. On Friday the defendant called in Dr. Gundrum to examine Mrs. Williams, and to give his opinion as to whether or not she was suffering from typhoid, but refrained from telling him that she had had a miscarriage. The patient steadily grew worse, and Dr. Monson was called Friday evening, to whom Dr. Hamilton failed to mention that the patient had had an abortion, until after the physician had learned it from other sources. Mrs. Williams was removed to a hospital, where she died Sunday evening, February 20, 1916, from septicæmia or blood poisoning, the source of infection being the uterus.

[1, 2] This, in brief, was the evidence adduced upon which the people relied for a conviction, and upon which the verdict was based. It seems to us to fully warrant the conclusion reached by the jury. The rights of the defendant were fully protected in the instructions given by the court. Because the jury adopted and believed the evidence of the people instead of that of the defendant would not warrant us in reversing the case. It is the province of the jury to determine the credibility of the witnesses, the weight of their testimony, and to decide the facts, and where there is sufficient evidence to support their finding, as there unquestionably is in this case, we cannot interfere with their conclusion.

Other questions have been raised and argued by counsel for defendant, all of which we have carefully considered, and while there were some irregularities committed on the trial, we do not think they were of such seriousness as to constitute prejudicial error.

From the entire record we are convinced that the defendant had a fair and impartial trial; that no reversible error is disclosed thereby, and the judgment must therefore be affirmed.

Judgment affirmed.

WHITE, C. J., and SCOTT, J., concur.

FARMERS' LIFE INS. CO. v. WEHRLE et al. (No. 8771.)

(Supreme Court of Colorado. June 4, 1917.)

1. Libel and Slander 🔑33 — Words Libelous Per Se—Presumption of Damage.

When words published are libelous per se, the law presumes damages; the gist of the action being injury to plaintiff's reputation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 112, 277.]

2. Libel and Slander 🔑9(1)—Newspaper Article Charging Dishonesty.

A newspaper article charging an insurance company with fraud and dishonest conduct in sale of stock, necessarily injuring its reputation and business, was libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80, 90.]

3. Libel and Slander 🔑126 — Verdict Contrary to Evidence—Justification.

In absence of evidence to sustain a plea of justification in an action for libel, a verdict for defendants should have been set aside and a new trial granted.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 375, 376.]

4. Libel and Slander 🔑105(3)—Admission of Evidence — Meaning of Language — Reference to Plaintiff.

In an action for libel, it was erroneous to permit defendant to testify that the greater part of the publication did not refer to plaintiff, since the defendant cannot avoid the effect of the language used by testifying that it did not mean what would naturally be inferred to be its meaning.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 294.]

5. Libel and Slander 🔑123(2)—Question for Jury—Meaning of Language.

In an action for libel, the jury must determine from the language published what is the fair meaning of it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 357.]

6. Trial 🔑252(6)—Instructions—Applicability to Evidence.

In an action for libel, where no evidence was introduced upon the issue of truth, it was erroneous to instruct the jury upon that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 601.]

Error to District Court, Saguache County; Charles C. Holbrook, Judge.

Action by the Farmers' Life Insurance Company against John D. Wehrle and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

E. M. Sabin, of Denver (T. C. Ashley, of Denver, of counsel), for plaintiff in error. Palmer & True, of Saguache, and James P. Veerkamp, of Monte Vista, for defendants in error.

TELLER, J. The plaintiff in error brought suit against the defendants in error to recover damages from the publication of alleged libelous matter. The jury returned a verdict for the defendants, and judgment was entered accordingly. The matter alleged to be libelous was published in a newspaper owned and conducted by the defendants, and reads as follows:

"In another place we are printing the first installment of a severe arraignment of the Farmers' Life Insurance Company. The name is a misnomer, as no such company exists; but they are selling about $3,000,000 in stock and when it is sold, if ever, they expect to begin writing insurance. If these concerns were such money makers as the glib-tongued agent would have you believe, why do they not get the financiers of the money centers to buy it? The fact is they cannot be induced to buy because they know there is nothing in it, and it must be sold to people who do not know the real conditions. Give these grafters a wide berth. Learn to say no to them good and strong.

"One of these suave, oily, glib-tongued gentry who recently had some notion, for a few minutes at least, of bringing a $10,000 damage suit against the Post-Dispatch but learned differently when he consulted his bosses, purchased a tract of land in Saguache county for his company for about $12,000 and in the deal traded a few thousand dollars of worthless stock on the same. The place was only worth about $6,000 and to top it all off another party had an option on the land and stated that he expected to have it renewed for another twelve months. This company will now place this land among its estimated assets to fool some other unsuspecting victim whom they hypnotize into buying some stock."

The answer admitted the publication of and concerning the plaintiff of all of the first paragraph down to and including the word "conditions"; denied that the remainder of the publication referred to the plaintiff; and pleaded the truth of what was admitted to have been published of and concerning the plaintiff.

The plaintiff introduced evidence of the filing of its articles of incorporation with the secretary of state, and of the issue of a license or commission by the commissioner of insurance authorizing the parties named in the articles of incorporation to open books and receive subscriptions to the stock of the company. It also introduced evidence tending to show that the publication of the alleged defamatory matter had caused a loss of many hundreds of dollars by reason of subscribers for shares refusing to pay their subscriptions. It is urged that there was no evidence to support the plea of the truth of the matter admitted to have been published concerning the plaintiff; that the matter was libelous per se; and that the court erred, in several of the instructions, in submitting to the jury the question of the truth of these matters. It is also urged that there is error in the ruling by which one of the defendants was allowed to say that the reference to grafters, etc., did not apply to the plaintiff.

[1] The court allowed defendant Wehrle to testify at length as to his investigation of

the plaintiff's company, and of other newly formed companies, as well as to the letters which he wrote, and which he received in such investigation; but all of this was limited, by the court, to the question of punitive damages. On a careful review of the abstract, and the supplemental abstract filed by the defendants, we are unable to find any evidence tending to support the plea of the truth of the admitted publication of and concerning the plaintiff. The gist of such an action is the injury to plaintiff's reputation, and when words are libelous per se, the law presumes damages. Republican Publishing Co. v. Conroy, 5 Colo. App. 262, 38 Pac. 423.

[2] The article is clearly libelous since it charged plaintiff with fraudulent and dishonest conduct, such as would bring it into odium and disrepute, and necessarily injured the plaintiff's reputation and business. Republican Publishing Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; Burns v. Republican Publishing Co., 54 Colo. 100, 128 Pac. 1122; 2 Add. Torts, § 1089.

[3] In the absence of evidence to sustain the plea of justification, a verdict for the defendants should have been set aside, and a new trial granted.

[4, 5] The court erred also in permitting the defendant Wehrle, over plaintiff's objection, to tell the jury that the greater part of the publication did not refer to the plaintiff. In such cases, the jury must determine from the language published what is the fair meaning of it. The defendant cannot avoid the effect of the language used by testifying that it did not mean what would naturally be inferred to be its meaning.

[6] The court erred also in submitting to the jury by its instructions the issue of the truth of the admitted charge against plaintiff. We have already found that there was no evidence introduced upon that issue, and to instruct upon it was clearly to confuse the jury.

The judgment is reversed, and the cause remanded to the district court.

Reversed.

WHITE, C. J., and HILL, J., concur.

TRAUTMAN v. KRANZ et al. (No. 8870.)

(Supreme Court of Colorado. June 4, 1917.)

1. DEEDS 🔑95—CONSTRUCTION—INTENTION.

In arriving at the intention of the parties to a deed, the language of the entire deed should be construed together.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 238, 241-254.]

2. DEEDS 🔑133(2)—ESTATE GRANTED—LIFE ESTATE WITH CONTINGENT REMAINDER.

A son's deed to his mother read that in consideration of love and affection, etc., the son granted and sold to his mother a life estate in the land, reserving the remainder of the estate to the son if he should survive her, but that if she should survive him the remainder should belong absolutely to her, her heirs and assigns. *Held*, that the mother received a life estate with contingent remainder to become operative and vesting in her upon the death of her son, provided she survived him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 371.]

3. WILLS 🔑88(2) — DEED — TESTAMENTARY CHARACTER.

The disposition of other than a life estate to the mother by such deed was not testamentary in character, and so ineffective, since a deed may pass a present interest, and also contain provisions taking effect by way of contingent remainder on the grantor's death during the grantee's life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 209.]

En Banc. Error to District Court, El Paso County; J. W. Sheafor, Judge.

Suit by Frances E. Trautman, a minor, by Nellie A. Geach, her mother and next friend, against Annie Kranz and others. To review a judgment for defendants, plaintiff brings error. Affirmed.

P. M. Kistler, of Colorado Springs, for plaintiff in error. Harris & Price, of Colorado Springs, for defendants in error.

HILL, J. This action involves the meaning to be given a deed. The surrounding circumstances proper to consider disclose that in February, 1887, Elizabeth Trautman purchased the lot in controversy; that shortly thereafter she constructed a house thereon where she lived until her death; that in January, 1895, she conveyed the property to her son, Frederick C. Trautman, who was then unmarried; that immediately after the execution of this deed the mother (who was quite old) went away on a trip; that some time after her return and on November 1, 1897, the son, Frederick C. Trautman, executed the deed, the meaning of which is in dispute, to his mother; that on November 3, 1897, he married; that the plaintiff in error is the daughter of Frederick C. Trautman, and was born February 10, 1899; that her father died January 20, 1905; that on December 5, 1911, his mother, Elizabeth Trautman, conveyed this property by warranty deed to the defendant in error, her daughter Annie Kranz; that the mother died December 2, 1914. Both daughter and granddaughter claim the property. The daughter has had possession since the execution of her deed, and has mortgaged the property to the other defendants. This suit was brought by the granddaughter for possession. Judgment was for the defendants.

The deed is in the usual form containing the usual words of conveyance and habendum. That portion necessary to consider reads:

"* * * Between Frederick C. Trautman, party of the first part, and Elizabeth Trautman, his mother, party of the second part. * * * In consideration of love and affection and of the sum of one dollar, to him in hand paid by the said party of the second part, * * * party of the first part has granted, bargained and sold,

> and by these presents does grant, bargain, sell and convey unto the said party of the second part her heirs and assigns, the following described lands and premises in the city of Colorado Springs, * * * viz.: A life estate for and during the natural life of said Elizabeth Trautman in and to lot twenty (20), * * * saving and reserving the remainder of the estate in said described premises to said Frederick C. Trautman in case he shall survive his said mother, but in case she shall survive him said remainder shall belong absolutely to said Elizabeth Trautman, her heirs and assigns."

The grantor having died before the grantee, the question to determine is, What estate passed by the deed? The plaintiff in error contends that the instrument is testamentary in character other than the life estate; that the estate, other than this, never having passed from Frederick C. Trautman, the deed being ineffective as a will, the property descended to his heir at the termination of the life estate. The defendants in error contend that it conveys to Elizabeth Trautman a life estate, with a contingent remainder to become operative and vested in such grantee upon the death of Frederick C. Trautman, grantor, provided the grantee mother survived him.

[1, 2] Numerous rules of construction have been referred to as sustaining the position of both sides. We think it unnecessary to go into them in detail, but are of opinion, as was the trial court, that the intention of the parties is clearly disclosed by the instrument itself. In arriving at this intention, it is elementary that the language of the entire deed should be construed together. By the adoption of this rule, we find and the language reads, that the grantor sells and conveys to the grantee the land designated to have and to hold the same, etc., and all the estate, right, title, and interest of the said party of the first part, either in law or equity to the only proper use and benefit of the said party of the second part, her heirs and assigns, etc. 'Tis true, in the body of the deed are to be found two exceptions to the language last quoted: First, that the interest conveyed is limited to a life estate and the grantor reserves to himself the remainder in case he shall survive her, but it is further provided that in case she shall survive him, said remainder shall belong absolutely to her, her heirs and assigns. This language must be considered together and must likewise be considered in connection with the language used in the remainder of the deed. When thus considered, it leads to the irresistible conclusion that an interest in the estate passed at the date of the transaction, to wit, a life interest, with a further proviso that the remainder should pass to the mother upon the happening of the contingency, to wit, the death of the grantor prior to that of the grantee. It follows that in giving effect to the words "a life interest," it must be construed in connection with the other language used in the deed, which is to the effect that in case he dies before she does, it then becomes operative as a grant in fee.

[3] When the deed is considered as a whole, we cannot agree with the plaintiff in error that the attempted disposition of other than a life interest was testamentary in character and for that reason ineffective. In volume 2, Devlin on Real Estate (3d Ed.), at page 1581, it is said:

> "But the deed may pass a present interest in the land to the grantee for life, and may also contain provisions to take effect by way of contingent remainder, upon the grantor's death, during the life of the grantee. In such a case the question would arise whether the instrument is to be considered as a conveyance, or is to be deemed of a testamentary character only. The rule is that where the deed passes a present interest, such contingent provisions do not convert it into a will. The grantor cannot revoke such limitations, nor do they become void by his subsequent marriage."

The following cases in principle sustain the construction that we are giving to this deed: Mattocks v. Brown, 103 Pa. 16; Jones v. Caird, 153 Wis. 384, 141 N. W. 228, Ann. Cas. 1914A, 88; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Craven v. Winter, 38 Iowa, 471; Bassett v. Budlong, 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404; Wilson v. Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; Cates v. Cates, 135 Ind. 272, 34 N. E. 957; Hunt v. Hunt, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180, 7 Ann. Cas. 788; Durand v. Higgins, 67 Kan. 110, 72 Pac. 567; Abbott v. Holway, 72 Me. 298; Dismukes v. Parrott, 56 Ga. 513; Bevins v. Phillips, 6 Kan. App. 324, 51 Pac. 59; Wynn v. Wynn, 112 Ga. 214, 37 S. E. 378; Owen v. Williams, 114 Ind. 179, 15 N. E. 678; White v. Hopkins, 80 Ga. 154, 4 S. E. 863.

The judgment is affirmed.

Affirmed.

EBY v. PEOPLE. (No. 8733.)

(Supreme Court of Colorado. June 4, 1917.)

1. Criminal Law 🔑369(8) — Evidence of Other Acts—Admissibility.

In a prosecution for rape, where the time and place alleged were not in dispute, evidence of a similar act between defendant and prosecutrix was admissible in corroboration and explanation of the evidence, but not for the purpose of proving an offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823.]

2. Criminal Law 🔑810—Inconsistent Instructions.

In a prosecution for rape, where there was no dispute as to the time or place of the offense charged, where the girl involved testified to commission of a similar act about a week previous, but denied that there was any such crime at the time and place alleged, and where the evidence was circumstantial, giving instruction that it is sufficient to prove that the defendant committed the crime charged within three years was reversible error under the peculiar circumstances of the case, being misleading and creating a repugnancy between instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1968.]

Error to District Court, Teller County; J. W. Sheafor, Judge.

Charles Eby was convicted of a violation of the age of consent statute, and he brings error. Reversed.

W. M. Alter, of Victor, Barnett & Campbell, of Denver, and K. W. Farr, of Victor, for plaintiff in error. Fred Farrar, Atty. Gen., and Ralph E. C. Kerwin, Asst. Atty. Gen., for the People.

HILL, J. The plaintiff in error, hereafter called the "defendant," was convicted of the violation of our age of consent statute, and sentenced to a term in the penitentiary. The act was alleged to have been committed on March 27, 1915, with one ———, an unmarried female under the age of 18, to wit, of the age of 15. The time and place when and where the crime is sought to be fixed and alleged to have been committed are not in dispute. The testimony of the girl involved is that, at the time and place alleged, the defendant did not commit any such crime. There is testimony of other witnesses to sundry facts and a purported confession of the defendant which (if properly admitted) all tend to show that the crime was committed at the time and place charged. Over defendant's objection, the girl was allowed to testify that a crime similar to the one charged had been committed by the defendant with her at a certain rooming house in Victor about a week prior to the commission of the crime charged in the information.

[1] By instruction No. 7, the jury were told that evidence had been admitted of another similar act, etc., between the defendant and the girl about one week prior to the offense charged; that this evidence was not admitted for the purpose of proving an offense against the defendant upon which he might be convicted, but was received only in corroboration and explanation of the evidence of the act charged; that defendant could not be tried for, nor convicted of, an offense not charged in the information: and that the offense charged is the one alleged to have been committed at the Gould house, March 27, 1915. This instruction correctly states the law in this jurisdiction. See Mitchell v. People, 24 Colo. 532, 52 Pac. 671; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417. It is applicable to the crime for which the defendant was being tried and refers to the time and place when and where the girl testified that no such crime was committed. By instruction No. 8, the jury were told that in a prosecution of this character the people are not bound to prove the exact date as alleged in the information; that it is sufficient if it shall appear from the evidence, etc., that the defendant committed the crime charged in the information at any period of time within three years before the 7th day of April, 1915, the date of filing the information.

[2] By instruction No. 1, the jury were told that the crime charged, in substance, was that Eby, on March 27, 1915, at the county of Teller, etc., did then and there commit and accomplish an act, etc., with ——— an unmarried female under the age of 18, to wit, of the age of 15 years. While instruction No. 8 correctly states the law and should be given where applicable, yet, under the peculiar circumstances disclosed, we are of opinion that it should have been omitted in this case. The defendant's alleged confession, if properly admitted (which we shall not pass upon), is of doubtful import. The girl involved testified positively that he did not commit the crime for which he was convicted. The other testimony upon behalf of the people is circumstantial. It also discloses that, at the time and place of the alleged commission of the crime charged, the prosecuting witness and two other girls were alone with two married men at the home of one of these men between 3 and 4 o'clock in the morning; that they had gone there with these two and another man other than the defendant; that one of the men, who did not live there, was a doctor; and that the defendant, a young man, had been sent for, not knowing the girls were there, under the pretext that he was wanted to drive the doctor's car; also, that the girl involved had only known the defendant for 11 days prior to the night in question. The girl testified that the defendant did commit a similar crime to the one charged, with her about a week prior thereto, and that it was the only one with him within three years. Under instructions Nos. 1 and 8, the jury might have decided that they were justified in finding the defendant guilty of this crime concerning which there was positive testimony, for which reason, in a case lying so close to the border line for lack of testimony, and the fact that there was no necessity for the giving of this instruction, and the further fact that the people had placed before the jury testimony of the commission of a similar crime for which the defendant was not on trial, we are of opinion that the court erred in giving, as it did, without qualification, instruction No. 8. When applied to the facts of this case, it presents a repugnancy between instructions. We cannot say which the jury followed. This necessitates a reversal of the judgment. It is so ordered.

Reversed.

SCOTT, J., not participating.

TAYLOR v. WILDER et al. (No. 8792.)

(Supreme Court of Colorado. June 4, 1917.)

1. WILLS 🔑88(1) — WILL DISTINGUISHED FROM CONTRACT—TEST—INTENT OF MAKER.

Whether an instrument is a will or a contract depends upon whether the maker intended that the interest should pass before his death and vest in the other party upon execution of the paper or only upon maker's death, and this depends upon the provisions of the instrument aided by circumstances attending its execution, and it is immaterial what the maker calls the instrument or its form.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208, 214, 217.]

2. WILLS 🔑88(2) — WILLS DISTINGUISHED FROM CONTRACT—FORM.

An instrument reciting, "For the sum of one dollar and other valuable consideration, I hereby transfer to O. M. my library, of which she is to take immediate possession," *held* to have been intended to pass title immediately, and not upon the maker's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 209.]

3. WILLS 🔑88(2) — WILL DISTINGUISHED FROM DEED AND BILL OF SALE—TIME OF TAKING EFFECT.

A deed or bill of sale must take effect upon its execution or not at all, although it is unnecessary that it convey or pass an immediate interest in possession, while a will can only become effective in passing an interest after death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 209.]

4. WILLS 🔑88(1) — INSTRUMENT OPERATING AS WILL AND CONTRACT OF SALE.

An instrument may, as to one part, be a contract of sale, and, as to another part, a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208, 214, 217.]

5. WILLS 🔑88(2) — WILL DISTINGUISHED FROM CONTRACT—FORM.

An instrument reciting, "At my death she is to have * * * all other personal property I may have in my possession at the time of my death," *held* to be testamentary in character, but, not being properly executed, was noneffective.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 209.]

6. EXECUTORS AND ADMINISTRATORS 🔑210—CONTRACT TO DEVISE—PAYMENT FOR SERVICES—ENFORCEMENT.

An agreement whereby one undertakes to compensate another out of his estate for services rendered or to be rendered binds the estate, and the person rendering the service, failing to receive the promised amount, may claim a reasonable compensation from the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 737.]

Scott, J., dissenting.

En Banc. Error to District Court, City and County of Denver; William D. Wright, Judge.

In the matter of the estate of Dillie S. Aldrich, deceased. Claim presented by Ozetta Marshall Taylor for $2,829.68 to the county court, and opposed by Gertie B. Wilder and others, heirs and devisees. Upon trial de novo in district court after appeal from county court judgment was rendered for claimant for $100, and claimant brings error. Affirmed.

John Horne Chiles, of Denver, for plaintiff in error. Robert H. Kane, of Denver, for defendants in error.

WHITE, C. J. This case involves a claim of the plaintiff in error against the estate of Dillie S. Aldrich, deceased. The claim, as presented, was for $2,829.68, and was originally allowed in full by the county court. That judgment, however, was annulled by order of this court in Taylor v. Marshall, 56 Colo. 214, 138 Pac. 25. The cause was thereafter tried in the county court, appealed to the district court, and, upon trial de novo, judgment rendered therein in favor of claimant, the plaintiff in error, for $100. It is this judgment that is now before us.

The essential facts are as follows: Dillie S. Aldrich, residing at Solomon, Kan., executed a will on the 25th day of July, 1907. August 1st thereafter she executed and delivered the following written instrument, viz.:

"For the sum of one dollar and other valuable consideration, I hereby transfer to Ozetta Marshall my library, of which she is to take immediate possession.

"At my death she is to have my sewing machine, table silver, dishes, table linen, and any and all other personal property I may have in my possession at the time of my death.

"August first, 1907.

"Dillie S. Aldrich."

Within a month thereafter Dillie S. Aldrich died, and her estate was administered in this state as well as in Kansas, as stated in Taylor v. Marshall, supra.

The claim of plaintiff in error, who before her marriage was Ozetta Marshall, is based upon the aforesaid alleged bill of sale or instrument in writing, and was presented to the county court, together with a sworn statement of indebtedness in the total sum of $2,829.68, represented by personal property held by deceased at the time of her death, as follows: Household furniture, pictures, wearing apparel, dishes, silverware, etc., in Solomon, Kan., $100; two promissory notes, due and payable to deceased, in the aggregate sum of $800; cash in bank in the Citizens' State Bank of Solomon, Kan., $1,018; cash in the Colorado National Bank of Denver, Colo., $911.68. The judgment was for the value of the items first mentioned, consisting of household goods, etc.

Plaintiff in error contends: (1) That by the aforesaid instrument in writing she became and was the owner of all the personal property hereinbefore designated of which Dillie S. Aldrich died seised and possessed; (2) that, if the instrument in writing does not invest her with the ownership of such property, she is entitled to the value thereof as reasonable compensation for services rendered Dillie S. Aldrich.

[1] 1. Under this proposition it is essential to determine whether the writing in question is in reality a contract or only testamentary in character, or in part the one, and in part the other. It is elementary that the legal character of instruments of this kind depends upon whether the maker intended that ownership or interest should before his death pass from himself and vest in the other party upon the execution of the

paper, or whether such ownership or estate should pass only upon his death; and this in turn depends upon the provisions of the instrument, which may be aided by circumstances attending its execution. And the rule is that whatever may be the form of the instrument, or the circumstances attending its execution and delivery, if the intention of the maker was that it should become effective only after his death, it is a will, but, if presently effective, it is a contract. And it is immaterial what the maker calls the instrument for the law fixes its character and effect. The rule is well stated in Powers v. Scharling, 64 Kan. 339, 343, 67 Pac. 820, 821, as follows:

> "In determining whether an instrument be a deed or will, the question is, Did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, a will.
>
> "If, however, the testator (the maker of the instrument), intended that the grant should take effect upon the execution of the instrument as to certain of his property then in possession, and as to certain other of his estate not until his death, the instrument, having been properly executed, would be a contract, and irrevocable as to that part in possession and to which it was intended to vest the title, and testamentary as to the residue. * * *"

[2] Examining the instrument here involved, we are certain that the maker thereof intended that it should be effective immediately in passing ownership of the library, and, as to all other property therein mentioned, not until her death. The express words of the first clause of the instrument are immediately effective and pass a present interest. This is not true, however, as to the property covered by the second clause. On the contrary, it is clearly evident that no interest therein was intended to pass until the death of Mrs. Aldrich. She never parted with the right to deal with such property as she pleased. Had she attempted to dispose of it, or to use the money in the banks said to be a part thereof, Mrs. Taylor could not have interfered. This demonstrates that the instrument was not intended to become operative at once so as to vest ownership of such property in Mrs. Taylor.

In Sperber v. Balster, 66 Ga. 317, one Kohler executed a written instrument purporting to convey to Sperber 650 acres of land, in consideration of services rendered him by Sperber as a nurse. The instrument provided that it "shall have full effect" at his death. The court therein said:

> "It is wholly unnecessary to cite cases or invoke precedents in construing a paper like this with a view to get at his meaning in respect to the time when he intended title, right, property, to pass out of himself into the object of his bounty. It is enough to lay down the universal principle, embodied in our Code, § 2395, which is in these words: 'No particular form of words is necessary to constitute a will; and in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker, from the whole instrument, read in the light of the surrounding circumstances. If such intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if the intention be to convey an interest accruing and having effect only after his death, it is a will.' So reading this instrument, we construe it to be clearly a will: at all events, we all hold that such is the better legal view of it."

And in Kinnebrew v. Kinnebrew, 35 Ala. 628, we find the following:

> "An instrument under seal, in form a deed of gift, by which the grantor, in consideration of the natural love and affection for the grantee, who was his grandson, and the present payment of $5 by the grantee, conveys to the latter, by the words 'do by these presents give and grant,' a slave 'and fifteen hundred dollars in cash, to be paid to him out of my [grantor's] estate at my death, by my executor or administrator,' held a deed of gift as to the slave, but, as to the money, a purely voluntary executory trust, which a court of equity would not enforce as an instrument inter vivos, but which was valid and operative as a will."

[3-5] A deed or bill of sale must take effect upon its execution or not at all. It is unnecessary that it convey or pass an immediate interest in possession; but it must become effective in passing the interest or estate at its execution. A will is quite the reverse, and can only operate, that is, become effective in passing an interest, after death. And an instrument may, as to one part, be a contract of sale, and, as to another part, a will. Robinson v. Schly & Cooper, 6 Ga. 515. So we hold the second clause of this instrument testamentary in character; but the instrument, not being executed in the manner and form required in the execution of a will, is noneffective. Wilson v. Van Leer, 103 Pa. 600.

[6] 2. It is claimed that the evidence shows that plaintiff in error, while teaching school in Kansas, resided with Mrs. Aldrich, to whom she paid board, and rendered material assistance in the discharge of her household duties, Mrs. Aldrich at the time being in poor health, and that the writing in question constitutes an agreement for compensation for services rendered the decedent. It is true that an agreement by one whereby he undertakes to compensate another out of his estate for services rendered, or to be rendered, binds his estate, and the person rendering the service, failing to receive the promised legacy or bequest, may claim a reasonable recompense from the estate; yet there is nothing in the facts of this case to bring it within the rule. There is not the slightest evidence, written or oral, that deceased ever agreed, either expressly or impliedly, that she would compensate plaintiff in error out of her estate for services rendered or to be rendered. There is evidence that plaintiff in error did render slight service to Mrs. Aldrich, and that the latter spent some time in the home of the former. There is no evidence, however, as to the value of such service. But the alleged right to a judgment for the value

of the personal property, notes, and money mentioned herein is sought to be sustained by virtue of a stipulation entered into by the parties. The stipulation provided that the cause should be submitted for determination by the county court upon the sole issue as to whether the claim of plaintiff in error and the instrument executed by Mrs. Aldrich and delivered to plaintiff in error was valid in law, and upon the evidence used in the prior trial without the taking of further testimony, subject, however, to objections by either party as to incompetency, irrelevancy, and immateriality. It further provided that, if the finding and judgment of the county court should be for the claimant, that judgment should be for the full amount claimed. It will be observed that the stipulation referred to the trial of the cause in the county court and the judgment we are now considering was the result of the trial in the district court. Furthermore, the language of the stipulation clearly shows that it had reference only to the validity or invalidity of the second clause of the written instrument, and no question was in the minds of the parties as to the validity of the first clause. The claim of the plaintiff in error was based upon the instrument of writing and extended only to the personal property in the list filed with the claim. This did not include the library, which was the only property mentioned in the first clause.

But, apart from this, the county court was convinced that the stipulation was inadvertently entered into, and it was not contemplated by the parties that it should have the effect which that court ascribed to it, and therefore set it aside. Upon retrial in the district court plaintiff in error made a like contention as to the effect of the stipulation, and it was by that court set aside. We are of the opinion that the discretion of the court was not abused in the premises, and that the substantial rights of plaintiff in error were in no wise prejudiced. Upon the record the plaintiff in error was entitled to no judgment whatever, but defendants in error have not assigned cross-error.

The judgment will therefore be affirmed; and it is so ordered.

SCOTT, J., dissents.

FRANTZ et al. v. BARTELS et al. (No. 8886.)

(Supreme Court of Colorado. June 4, 1917.)

1. WATERS AND WATER COURSES 🔑156(2)—CONVEYANCE OF WATER RIGHTS—PRESUMPTIONS.

Where water rights purported to be conveyed by a contract for the sale of land together with "all water rights belonging to said property under" certain ditches named had been definitely fixed and described by a court in accordance with the vendor's claim, both parties must be presumed to have had in mind the specifically described right which was intended to be conveyed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 176, 179.]

2. EVIDENCE 🔑461(3)—PAROL TESTIMONY TO SHOW INTENT OF PARTIES.

Where a contract for the sale of land provided that land should be conveyed by warranty deed together "with all water rights belonging to said property under" certain ditches named, and the plaintiffs entered into possession, and thereafter title to all water rights was definitely fixed by a court, and the defendants conveyed the land, describing the water rights in the same terms, as the contract, and after the execution of the deed, the judgment fixing such rights was reversed, and it was determined that defendants were not the owners of the rights conveyed, in an action for damages for breach of the contract oral testimony was competent to show the intention of the parties regarding the water rights to be conveyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2131.]

3. WATERS AND WATER COURSES 🔑158½ (1)—ACTION FOR BREACH OF CONTRACT—COMPLAINT—SUFFICIENCY.

In an action for breach of contract to convey land and water rights, a complaint alleging a contract by which the defendants agreed to sell to the plaintiffs a certain tract of land, together with "all water rights belonging to said property" under certain ditches named, and that the plaintiffs entered into possession, and in an action against the plaintiffs, defendants and others, plaintiffs' and defendants' title to the water rights was quieted, and that later, after the warranty deed had been executed, such judgment was reversed, sufficiently declares that it was the intent of the parties that the warranty deed was to convey and warrant a specific and definite water right both in extent and amount.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189.]

Error to District Court, City and County of Denver; Chas. C. Butler, Judge.

Action by George S. Frantz and another against Louis F. Bartels and another. From a judgment sustaining a demurrer to the complaint, plaintiffs bring error. Reversed, with directions.

Melville & Melville, of Denver, for plaintiffs in error. H. L. Lubers and Arthur C. Bartels, both of Denver, for defendants in error.

SCOTT, J. The action is in damage for breach of warranty. To the amended complaint the defendants below and in error filed a general demurrer upon the ground that such complaint did not state facts sufficient in law to constitute a cause of action against the defendants. This demurrer was sustained by the court. The plaintiffs elected to stand on their complaint, and this ruling of the court is before us for review.

Briefly, the complaint alleges a contract by which the defendants agreed to sell to plaintiffs a certain tract of land and to convey the same by warranty deed together with "all water rights belonging to said property under the Epperson or Platte ditches, or the Green Valley ditch." That thereafter and immediately the plaintiffs entered into possession of said premises. That thereafter and on the 24th day of January, 1908, the Green Valley Ditch Company instituted an action in the district court of the city and county of Denver against these plaintiffs and others, to quiet its title to all water rights in said Green River ditch. That the defendants employed counsel to appear in said action with plaintiffs, to defend the plaintiffs' and defendants' rights therein. That thereafter the said district court rendered judgment in said action confirming the equitable ownership in plaintiff and their grantors to approximately one-sixth cubic foot of water per second of time, from the said Green Valley ditch, together with the proportionate interest in said ditch to carry said amount of water to said land. That subsequent to the rendition of said judgment and on the 3d day of September, 1909, the defendants executed and delivered to plaintiffs their warranty deed, and thereby conveyed to plaintiffs the said land and "all water rights belonging to said property under the Epperson or Platte ditches, or the Green Valley ditch." That at the time of the execution and delivery of said deed it was agreed and understood between plaintiffs and defendants that the latter owned and were by said deed conveying to plaintiffs one-sixth of a cubic foot of water per second of time from said ditch, together with a proportionate interest in said ditch to carry said water to the land involved. That thereafter and on the 6th day of January, 1913, the Green Valley Ditch Company sued out a writ of error from the Supreme Court in the cause above cited, and in such proceeding the judgment of the district court was reversed by the Supreme Court and title to all of said water awarded to said ditch company. That in said proceeding in the Supreme Court both plaintiffs and defendants employed counsel to defend their interests. That by said judgment it was finally determined that the defendants were not the owners of the water rights involved, and so sold and conveyed to plaintiffs, and that by reason of the premises the plaintiffs are damaged in the sum of $1,000, and in the further sum of $50 for attorneys' fees, and $522.25 expended in costs in such proceedings. We are of the opinion that a general demurrer will not properly lie as against the complaint, and that the court erred in so holding.

The defendants in error seek to invoke the well-settled rule that in the case of a contract for the sale of land which under the statute must be in writing, evidence is not admissible of any modification by parol. But in our view this rule can have no application in the case before us. There does not appear to be any such contention by plaintiffs, but rather to apply the rule which counsel themselves cite, as laid down in Paige on Contracts, as follows:

> "It is a recognized rule of construction that the court will place itself in the position of the parties who made the contract as nearly as can be done, in admitting evidence of surrounding facts and circumstances. * * * Even though the contract is in writing, extrinsic evidence of the surrounding facts and circumstances is admissible to aid the court in determining the intention of the parties." Paige on Contracts, § 1123.

The contract and deed were for the conveyance of all water rights belonging to said property under specified ditches. While the complaint does not specifically recite, yet it is broad enough to admit of testimony in explanation of the intent and understanding of the parties as to the descriptive expression used in the agreement and deed. This expression not only conveys the impression that there were water rights belonging to the estate so sold and conveyed, but that such water rights were from certain specifically named ditches. It may be the fact that water from these ditches was at the time, and had been for many years, applied to the land for irrigation purposes, and that this was well known to both plaintiffs and defendants. It may be that the defendants at the time of the execution of the contract for the sale of the land believed, and so represented to plaintiffs, that they were the owners of said water right, and that the same was then applied to the land.

[1] The complaint specifically alleges that a court of competent jurisdiction had confirmed to the defendants a specific water right fixing the amount, and to be taken from the ditch named in the warranty deed. In that action the defendants had employed counsel to defend their claim, and must be presumed to have been advised of said judgment. So that under the complaint at the time the defendants executed and delivered their warranty deed, the water rights which they purported to convey had been definitely fixed and described by the court in exact accord with their contention and claim. If this be true, both parties must be presumed to have had in mind, and to have well understood, the specifically described right which was intended to be conveyed.

[2] Oral testimony is competent to show this intention. The principle to be applied here is clearly stated in McPhee v. Young, 13 Colo. 80, 21 Pac. 1014, where it was said:

> "The purpose of the interpretation and construction * * * is to give effect to the intention of the parties. Their intention must first be sought in the instrument itself. The language used by the parties is the best evidence of their intention. This is elementary. * * * Thus far only the instrument itself has been considered. If, however, the intent and meaning of the parties is not clearly disclosed by the language of the contract, then competent evidence bearing upon the construction given to the instrument by the parties themselves, by their acts and conduct in its performance, may be considered."

In Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788, the court clearly distinguishes an action seeking to vary or change a written contract by parol, and one to determine the intention of the parties as here, where the water right in question is not fully described in the conveyance. It was there said:

> "At the time of this ruling, the opinion in the case of Arnett v. Linhart, 21 Colo. 188 [40 Pac. 355], though handed down, probably was not reported, at least, not called to the attention of the trial court. In this case, this court, basing its ruling upon the Strickler Case, supra [16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245], says: 'Although a water right may be appurtenant to the land, it is the subject of property and may be transferred either with or without the land.' Strickler v. City of Colorado Springs, 16 Colo. 61 [26 Pac. 313, 25 Am. St. Rep. 245]. Being therefore a distinct subject of grant, and transferable either with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed]; or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land."

The rule here announced is general as applied to deeds and other contracts, and its application has been common in conveyances in which water rights were concerned. It is said by Judge Kinney, in his work on Irrigation, Kinney on Irrigation, p. 1790, that:

> "It is self-evident from the nature of a water right, or the right to the use of water, that it cannot be described with the same degree of accuracy that the land conveyed by the same instrument can be described—by the legal subdivisions of the government survey, by lots and blocks, or by metes and bounds. And this is where the most of the trouble has arisen; and in deeds where there is no question as to the exact tract of land which was conveyed, the attempted descriptions of the water rights have been so vague and indefinite that the courts have oftentimes been called upon to determine as to just what was attempted to be conveyed in that respect. In construing deeds of this nature, the terms in the deed themselves must first be considered, and if they are vague or indefinite as to the exact water right or easement for a ditch, parol or extrinsic testimony may be introduced in order to explain away any ambiguity existing in the language used and to determine exactly what was intended to be conveyed."

[3] We think that the complaint sufficiently declares that it was the intent and purpose of the parties that the warranty deed was to convey and warrant a specific and definite water right both in extent and amount.

The judgment is reversed, with direction to overrule the demurrer, and to permit the parties to proceed as they may be advised.

Judgment reversed.

WHITE, C. J., and GARRIGUES, J., concur.

LAWSON v. PEOPLE. (No. 8730.)

(Supreme Court of Colorado. June 4, 1917.)

1. CRIMINAL LAW 🔑1186(6)—APPEAL—CONFESSION OF ERROR—REVIEW.

Although the present Attorney General has filed a confession of error, the better practice is to pass upon some of the assignments of error, where an able brief has been filed by the former Attorney General.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3218.]

2. JUDGES 🔑47(1) — DISQUALIFICATION — STATUTE—CONSTRUCTION.

Rev. St. 1908, § 6963, which disqualifies a judge who has been of counsel in the case, intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214–219, 223.]

3. CRIMINAL LAW 🔑178—NOLLE PROSEQUI—EFFECT.

A nolle prosequi puts an end to the case, but will not, as a rule, bar a new prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326–329.]

4. JUDGES 🔑51(1)—CHANGE OF JUDGE—BAR—NOLLE PROSEQUI.

Where a nolle prosequi was entered, the case was at an end, and a change of judge secured therein did not bar defendant's right to a change on filing of a new information.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224, 225.]

En Banc. Error to District Court, Las Animas County; Granby Hillyer, Judge.

John R. Lawson was found guilty of murder in the first degree and his punishment fixed at life imprisonment, and he brings error. Reversed.

O. H. Dasher, of Trinidad, Fred W. Clark, of Greeley, and E. P. Costigan, B. F. Reed, and Horace N. Hawkins, all of Denver, for plaintiff in error. Leslie E. Hubbard, Atty. Gen., Fred Farrar, Former Atty. Gen., and Norton Montgomery and Frank C. West, Asst Attys. Gen., for the People.

HILL, J. Upon February 15, 1915, the then Attorney General filed an information in the district court of Las Animas county in which the plaintiff in error, John R. Lawson (hereafter called the "defendant"), and several others were charged with the murder of one John Nimmo. The defendant was granted a separate trial, and on May 3, 1915, a jury found him guilty of murder in the first degree and fixed the punishment at imprisonment for life.

[1] There are 227 assignments of error, many of which are argued at length in the briefs. The present Attorney General has field a confession of error as to 2 of the defendant's assignments of error and a statement of reasons therefor. In such case, it appears to have been the uniform practice of this court to reverse the case upon his confession of error without giving it further consideration. We would do so here, were it not for the fact that the former Attorney General (who filed the information and prosecuted the case) filed herein, during his term of office, a very able and exhaustive brief upon behalf of the people, in support of the regularity of the conviction. In such circumstances, we think it the better practice to pass upon some of the assignments of error,

or one of them at least, upon which the present Attorney General has confessed error.

It is claimed that the trial court erred in denying the defendant's petition for a change of judges. This is one of the errors confessed by the present Attorney General. The record discloses that on March 4, 1915, an order was entered based on a stipulation that a petition for change of judges filed in another case be considered as filed in this case upon behalf of this defendant. Upon March 9th, following, an order was entered denying the petition for change of judges, and the defendant was forced to proceed to trial before the honorable judge who denied the motion. The substance of this petition for change of venue and the affidavits in support of it, so far as the disqualifications of the judge are concerned, are substantially identical with those in People ex rel. Burke et al. v. District Court et al., 60 Colo. 1, 152 Pac. 149, the reasoning in which, when adopted in this case, compels us to hold that it was the duty of the court to have called in another judge, and that it was prejudicial error to deny the defendant's petition for change of judges. This matter was thoroughly covered in the former opinion, which involved practically the same facts and the same judge; nothing would be accomplished by going over it again.

The former Attorney General contends that the right to a change of judges is purely statutory; that our statute provides but for one change of judges, citing Erbaugh v. People, 57 Colo. 48, 140 Pac. 188, as thus holding. He then states that the defendant had been granted such change prior to the consideration of the petition in question; that for this reason the trial court was justified in denying this petition. The defendant denies that he ever made previous application for or secured a change of judges in this action. We deem it unnecessary to pass upon the questions whether our statute limits the changes of judges to one when the one thus called is ascertained to be incompetent under section 6963, Rev. Stats. 1908, or to determine what was meant by the language used in Erbaugh v. People, supra, as this question was not involved in that case. Neither is it necessary to determine whether the common-law rule concerning the disqualification of judges is in force in this jurisdiction.

Counsel concedes that no previous petition for change of judges was ever filed or acted upon since the information was filed in this case, but claims that upon account of certain facts alleged to have taken place, as set forth in an affidavit by one of his assistants in resisting the motion for a new trial, the defendant should be held to have exhausted his right in this respect. The substance of this affidavit is that upon August 29, 1914, a grand jury returned an indictment against this defendant and a number of others, wherein they were charged with the murder of John Nimmo; that the offense charged in said indictment is the same offense of which defendant has been convicted in this case; that in the former case the defendants, including this defendant, filed a petition for change of judges on the ground of prejudice of Judge McHenry, the then only judge of said district; that the petition was granted and another judge called in, but who did not try the case; that thereafter the Attorney General appeared in said court before Judge McHenry and entered a nolle prosequi in said action, assigning as his reasons that direct informations had been or are about to be filed charging the same offense as the indictment did. The argument is that the information in this action is but a continuation of the case instituted by the indictment referred to in the affidavit, and that the defendant, having procured one change of judges in the indictment case by disqualifying Judge McHenry, is not entitled to another change in this case.

[2] We cannot agree with this line of reasoning. In State ex rel. v. Hocker, Judge, 34 Fla. 25, at page 29, 15 South. 581, 583 (25 L. R. A. 114) it is said:

> "The law which disqualifies a judge who has been of counsel in the case intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent. The great principle should not have a narrow or technical construction, but should be applied to all classes of cases where a judicial officer is called upon to decide controversies between the people."

In 10 Encyclopedia of Pleading and Practice, at page 558, it is said:

> "A nolle prosequi is not a final disposition of the case and will not bar another prosecution for the same offense. It is not an acquittal, but it is like a nonsuit or discontinuance in a civil suit, and leaves the matter in the same condition in which it was before the commencement of the prosecution."

[3] At page 561, the author says:

> "Some doubt and conflict of opinion have existed, as to the right to try the defendant in the same proceeding in which a nolle prosequi has been entered, though from the cases in which the point was directly involved, as well as from the tenor of the authorities generally upon the effect of a nolle prosequi as a bar, as hereinbefore set out, the general rule seems to be that a new prosecution may be instituted, but the nol. pros. puts an end to the one in which it is entered."

In Bishop's New Criminal Procedure, vol. 2 (2d Ed.) § 1395, in commenting upon the effect of nolle prosequi, it is said:

> "*Its Effect.*—We see, therefore, that a nolle prosequi during trial bars a subsequent prosecution for the same offense, whether on the same or another indictment. A fortiori it does when entered between the verdict and the sentence. Entered before trial, it, and the proceeding it discontinues, are no impediment to a subsequent prosecution for the same offense. It simply puts an end to the particular indictment, count, or part of a count to which it is applied, without prejudice to new proceedings; but the part or whole of the present proceeding which has been reached by it cannot be revived. In the language of an old case, 'the king cannot afterwards proceed in the same suit, but he may begin anew.'"

In State v. Billings, 140 Mo. 193, in commenting upon this subject and the statutes concerning it, at page 204, 41 S. W. 778, 780, the Supreme Court of Missouri says:

> "There is nothing in section 4163 which prevents a defendant from obtaining a change of venue on a second indictment. It is to all intents and purposes a new case for the purpose of allowing the defendant his right to plead and to take any other step necessary to his defense."

[4] We are in accord with the foregoing authorities, and are of opinion, for the purposes intended by our statute pertaining to the disqualifications of judges, that the filing of this information was the institution of a new suit. The indictment was by a grand jury. When the nolle prosequi was entered, that case was at an end. Any other conclusion might, in certain cases, defeat the object which the statute seeks to accomplish, if the defendant is entitled to but one change of judges. This was practically the effect here. To illustrate, the indictment came before one of the local judges, he was disqualified, and called another from the outside. This latter judge, however, did not try the case. Thereafter, it was dismissed, and still later on this information was filed by permission of the already disqualified judge in the former case. This case came on for trial before the other local judge, who the defendant showed was disqualified. To hold that he could try the case because the defendant had secured a change of judges in the other case would be to say that, where a defendant secures a change from one judge on account of disqualification and another is called in, the Attorney General or district attorney could defeat the defendant's statutory right by dismissing the former case and thereafter file an information before another disqualified judge. With this we cannot agree. For the purpose of this act, the distinction between the two cases is plain. As this ruling necessitates a reversal of the judgment, it is unnecessary to consider the other assignment of error confessed by the present Attorney General, or any of the others.

The judgment is reversed.

Reversed.

GARRIGUES, J., concurs in the reversal of the judgment on the sole ground that the Attorney General has confessed error.

ASIATIC TUNNEL MIN. & MILL. CO. v. STEPHENSON. (No. 8871.)

(Supreme Court of Colorado. June 4, 1917.)

1. BILLS AND NOTES 🔑537(1)—ACTION—NONSUIT.

Where the execution and delivery of the note in suit were admitted, and its assignment to plaintiff proved, the court properly refused to grant nonsuit; there being a conflict of evidence on the only ground of defense presented, an alleged agreement that the note should be paid only out of profits.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862, 1871–1875, 1891–1893.]

2. BILLS AND NOTES 🔑316—ASSIGNMENT—LACK OF CONSIDERATION AS DEFENSE TO MAKER.

Lack of consideration for an assignment of a note is no defense to the maker in the assignee's action on the instrument, since the maker is protected by judgment against him from further suit on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 752.]

3. APPEAL AND ERROR 🔑1033(1)—HARMLESS ERROR—NONNEGOTIABLE NOTE.

Where defendant was permitted to defend suit on its note on the same grounds as would have been allowed had the action been brought by the payee and assignor of the note, instead of the assignee, defendant cannot complain that the instrument was treated as negotiable under the law merchant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4052.]

4. ATTACHMENT 🔑40 — GROUND — FRAUD OF DEBTOR.

To justify attachment of a debtor's property, it is not necessary that there should be actual fraud on his part; it being sufficient if he conveys or assigns his property to hinder or delay his creditors.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 92–106.]

5. ATTACHMENT 🔑47(4) — GROUNDS — DEBTOR'S FRAUD—SUFFICIENCY OF EVIDENCE.

In an action on a note wherein plaintiff obtained writ of attachment, evidence *held* to support an inference of defendant's intent to prevent the immediate enforcement of plaintiff's claim, thus justifying the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 870–875.]

Error to District Court, Rio Grande County; Jesse C. Wiley, Judge.

Action by Omie Stephenson against the Asiatic Tunnel Mining & Milling Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William H. Dickson, of Denver, and James P. Veerkamp, of Monte Vista, for plaintiff in error. Jesse Stephenson, of Monte Vista, for defendant in error.

TELLER, J. The defendant in error recovered a judgment against the plaintiff in error on a promissory note made and delivered by it to one Sandford, who assigned it to the plaintiff before maturity. The plaintiff filed with her complaint an affidavit averring that the defendant was about fraudulently to transfer its property so as to hinder and delay its creditors, and particularly the plaintiff, and obtained writ of attachment, which was levied on the defendant's property some days before the note became due. The answer contained a statutory denial of the assignment of the note and of a consideration of an assignment, traversed the affidavit for attachment, and alleged that the note was executed and delivered to Sandford under an agreement that it should be paid only out of the net profits of the defendant in the operation of its mines, and that the plaintiff took said note with full knowledge of such agreement.

The plaintiff introduced the note in evidence and proved the assignment thereof to her. She also proved the making and recording of a deed of trust on the defendant's property to secure an issue of bonds to the amount of $200,000 a few days after the beginning of the suit; also, a notice to the defendant's stockholders of a meeting to authorize such incumbrance some days before the suit was begun. Plaintiff relied on the proposal to issue the bonds as evidence of a purpose on the part of defendant to hinder and delay its creditors.

On the question of the agreement that the note should be paid only out of profits, there was a conflict of evidence; a witness for defendant testifying that there was such an agreement, and three witnesses for the plaintiff testifying to the contrary. The testimony showed, also, several payments of interest on the note.

[1] The execution and delivery of the note being admitted and its assignment proved, the court did not err in refusing to grant a nonsuit; there being a conflict of evidence on the only ground of defense presented. Counsel for plaintiff in error urge that the court erred in sustaining objections to its question on the matter of consideration for the assignment of the note, as well as in instruction 11, in which the jury were told that the matter of consideration for the assignment was not a proper subject of inquiry.

[2] There was no error in respect to either of these matters. The rule is well settled in this state that the maker of a note is not concerned with the consideration of an assignment of it. He is protected by the judgment against him from further suit on the note. Walsh v. Allen, 6 Colo. App. 303, 40 Pac. 473; Lake County v. Schradsky, 31 Colo. 178, 71 Pac. 1104; Sykes v. Kruse, 49 Colo. 560, 113 Pac. 1013.

[3] The defendant was permitted to defend upon the same grounds as would have been allowed had the action been brought by the assignor of the note, and no complaint can be made that the instrument was treated as negotiable under the law merchant.

[4] It is also contended that the evidence is not sufficient to support the verdict on the attachment issue. We cannot agree with that contention. It was in evidence that some three weeks before the suit was begun notices of a stockholders' meeting were sent out, preparatory to the incumbering of the property. This note was the only debt owing by the company, and one witness testified that the treasurer, upon whom had devolved the management of the company's business, had said that the note would not be paid. It is not necessary, under the law, as construed by this court and the Court of Appeals, that there should be actual fraud on the part of a debtor to justify an attachment of his property. It is sufficient if he conveys or assigns his property for the purpose of hindering or delaying his creditors. Curran v. Rothschild, 14 Colo. App. 497, 60 Pac. 1111; Hafelfinger v. Perry, 52 Colo. 444, 121 Pac. 1021. In the latter case we said:

> When "it can be plainly seen that it was the design of a party to hinder or delay the collection of a just claim, although perhaps not actually to ultimately defeat it, still a ground of attachment is made out."

[5] The evidence in this case was such that the jury might reasonably infer from it an intent to prevent the immediate enforcement of this claim, and we cannot therefore disturb the verdict on that issue.

The discussion of the last-mentioned question is a sufficient answer to the allegation of error on the instructions which relate to that subject. Counsel contend that the court erred in several instances in overruling their objections to testimony; but, while in some cases the objections were well taken, we do not find that the testimony admitted was prejudicial so as to justify a reversal on that ground.

The cause was fairly tried, the instructions were fair to both sides, and the verdict is supported by the evidence.

The judgment is therefore affirmed.

Affirmed.

WHITE, C. J., and HILL, J., concur.

KELLER v. MILLER. (No. 8875.)

(Supreme Court of Colorado. June 4, 1917.)

1. EMINENT DOMAIN ⚷138 — DAMAGES TO RESIDUE—LAND TAKEN FOR DRAINAGE PURPOSES—DRAINS ON OTHER LANDS.

Under Rev. St. 1908, § 2420, providing that commissioners in eminent domain proceedings shall hear the proofs and allegations of the parties, and after viewing the premises shall ascertain and certify the compensation to be made for the lands, etc., to be taken or injuriously affected, as well as damages accruing to the owner or parties interested in consequence of the condemnation of the land taken or injuriously affected, in proceedings to condemn a right of way for a drain ditch upon the land of defendant, defendant was entitled only to damages to the remainder of her land which resulted from the taking of the land condemned, and such damages could not include those accruing from the operation of drains and ditches on the lands of others.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 370.]

2. APPEAL AND ERROR ⚷1046(5)—REVIEW—PREJUDICIAL ERROR.

In condemnation proceedings, where a question regarding the matter of benefits was asked by a juror and answered by the court with consent of counsel for defendant, and no objection was made to the answer at the time it was given, and the jury found benefits to the amount of $25, and there was no evidence in the record to show whether or not there was testimony as to the amount and value of the benefits, and instructions referring to the question of benefits were not complained of, and one of such instructions was given as requested by defendant, prejudicial error affecting the substantial rights of the defendant is not shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134.]

3. EMINENT DOMAIN 🔑265(1) — DAMAGES — STATUTE.

In eminent domain proceedings, where it appeared that plaintiff prior to the commencement of the proceedings lawfully tendered to defendant the sum of $300, which the defendant refused, and the jury awarded defendant $136.66⅔ as damages, an order that the defendant be awarded no costs in the proceedings and that none of defendant's costs be taxed to plaintiff was a compliance with Rev. St. 1908, § 2424, providing that in eminent domain proceedings, if the amount of compensation ascertained by a jury or by a board of commissioners shall not be in excess of any lawful tender of compensation found to have been made by petitioner to the party entitled to compensation shall be awarded, no costs provided to be taxed under the provision of the act shall be allowed to such party.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 690.]

4. CONSTITUTIONAL LAW 🔑281 — EMINENT DOMAIN 🔑265(1)—DUE PROCESS OF LAW—CONDEMNATION PROCEEDINGS—COSTS.

Rev. St. 1908, § 2424, in so far as it requires the landowner to be taxed with any costs not contumaciously or unreasonably incurred by him, is violative of Const. art. 2, § 15, providing that private property shall not be taken or damaged for public or private use without just compensation, such compensation to be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner or into court the property shall not be needlessly disturbed or the proprietary rights of the owner therein divested.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 880; Eminent Domain, Cent. Dig. § 690.]

En Banc. Error to District Court, Montrose County; Thomas J. Black, Judge.

Condemnation proceedings by F. H. Miller against Lina Keller, in which defendant filed a cross-petition. From the judgment, the defendant brings error. Reversed and remanded, with directions for proceedings consistent with the opinion.

Hugo Selig and Henry A. Cox, both of Montrose, for plaintiff in error. Catlin & Blake, of Montrose, for defendant in error.

ALLEN, J. F. H. Miller, plaintiff below, instituted proceedings under the eminent domain act to condemn a right of way for a drain ditch upon the land of Lina Keller, defendant below. The land on which this right of way is located will be hereinafter referred to as the Keller north 40.

The defendant filed a cross-petition alleging, in substance, that she is also the owner of the 40 acres lying immediately south of the Keller north 40; that a ditch which carries water through plaintiff's drainage system lies adjacent and contiguous to this south 40 for a distance of a quarter of a mile along the upper side, which is the east side of said south 40 acres; that water is seeping, percolating, and overflowing from said ditch along its entire length, and that plaintiff's ditch and drainage system have injured and will injure the said south 40-acre tract as well as the lands described in the petition, or the north 40.

On motion of plaintiff the trial court struck from the files the cross-complaint "in so far as the same relates to damages arising from the construction and operation of a ditch on other lands than the land of the respondent."

The facts of the case and the applicability of the law thereto may be more clearly understood if it is borne in mind how the several tracts of land mentioned in the record are situated with reference to each other. The land of the defendant, Keller, consists of 80 acres, the same being the north 40 described in plaintiff's petition and the south 40. The land of the plaintiff, Miller, lies southeast of the Keller land. North of the Miller land, and east of the Keller south 40, adjoining same, is the McCormick tract. East of the Keller north 40, adjoining same, is the Beckman tract. The drainage ditch of plaintiff commences on plaintiff's land; thence runs north close to the eastern boundary of the Keller south 40, but lying upon the McCormick land; thence continues north for a short distance along the eastern boundary of the Keller north 40, but upon the Beckman land; and thence runs westerly for a short distance into the Keller north 40. The land taken by the plaintiff by these condemnation proceedings is a strip lying in the Keller north 40, which is occupied by the ditch after it enters the Keller land.

The first and main ground and contention argued by plaintiff in error, defendant below, is that the trial court erred in excluding from the consideration of the jury the question of damages, if any, to the lands of defendant caused by the construction of a drain ditch by plaintiff on the lands of McCormick and Beckman adjoining defendant's land on the east, and not sought to be condemned by these proceedings.

This contention involves the correctness of the following instruction given by the court to the jury:

> "The court instructs the jury that you may take into consideration in assessing damages any interference with the irrigation of defendant's lands and seepage and percolating waters that you may believe from the evidence to follow from the construction and operation of the ditch of petitioner across the lands of respondent, and deprivation, if any, of any special use defendant has for said lands taken or those adjacent thereto."

The defendant, plaintiff in error, complains that this instruction was erroneous because:

It "limited respondent's damages to the construction and operation of the ditch on the lands of respondent, and withdrew from the consideration of the jury damages present and prospective from the operation of ditches and drains on the lands of others, and part of the petitioner's drainage system."

The cross-complaint, which was stricken by the court, presented the same question as that raised in the objections to the foregoing instruction, and if the instruction is correct the cross-complaint was properly stricken. The question to be determined is what damages are recoverable by the defendant in this condemnation proceeding as damages to the residue.

[1] The only statute which directs what damages shall be awarded to a landowner in eminent domain proceedings is section 2621 (1912 Ed.) Mills' Ann. St. (section 2420, R. S. 1908), providing what commissioners appointed in such proceedings shall do, and that such commissioners—

> "shall hear the proofs and allegations of the parties, and after viewing the premises, shall, without fear, favor or partiality, ascertain and certify the compensation proper to be made to said owner or parties interested, for the lands, real estate or claims to be taken or affected, as well as all damages accruing to the owners or parties interested in consequence of the condemnation of the same, taken or injuriously affected, as aforesaid."

The statute limits the recovery of damages affecting land not actually taken to such damages as accrue "in consequence of the condemnation." The language employed is not broad enough to include all damages arising from conducting the enterprise for the benefit and use of which the land is condemned when such enterprise necessitates the use of other land than that of the respondent. The statute does not contemplate the awarding of such damages as result by what is done outside of the land condemned.

> "Damages to the remainder by what is done elsewhere than on the part taken are not to be considered." Section 569, Lewis, Eminent Domain (2d Ed.), citing Atchison, etc., R. R. Co. v. Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637, reaffirmed 45 Neb. 453, 63 N. W. 787; Longworth v. Meriden & W. R. R. Co., 61 Conn. 451, 23 Atl. 827; Tinker v. Rockford, 137 Ill. 123, 28 N. E. 573; Egbert v. Lake Shore, etc., R. R. Co., 6 Ind. App. 350, 33 N. E. 659; Alabama Mid. R. R. Co. v. Williams, 92 Ala. 277, 9 South. 203.

The plaintiff in error cites Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; Farmers' Reservoir & Irr. Co. v. Cooper, 54 Colo. 403, 130 Pac. 1004; Home Supply Ditch Co. v. Hamlin, 6 Colo. App. 351, 40 Pac. 582. From these cases it will be seen that the owner of land sought to be condemned is entitled to damages to the residue caused by such taking and not to damages that may be caused by the whole canal system or drainage system. The balance of the drainage system in the case at bar is built on the plaintiff Miller's own land and rights of way owned and acquired by him on lands of McCormick and Beckman, and damages that may ensue to defendant's premises from that part of the drainage system on plaintiff's own land and the McCormick and Beckman lands are not to be considered by the jury in this proceeding to condemn a right of way for drain ditch across the Keller land.

The case of Garnet Co. v. Sampson, 48 Colo. 291, 110 Pac. 79, 1136, cited by plaintiff in error, is not in conflict with the theory, instructions, and rulings of the trial court. That case holds that in assessing damages for the lands taken for the construction of a canal or reservoir thereon injuries to the residue of such lands arising from seepage and damages for the same should be included in the original assessment. In none of the authorities cited is it held or intimated that the owner of land can recover in a condemnation proceeding for damages from an entire canal system or drainage system when same is located in great part on lands of others, but he is only entitled to recover damages to the remainder of his land caused or which may be caused from that part of the right of way sought to be condemned on his land.

> "It has been held that, when part of a parcel of land is taken for a use that is detrimental to the remaining land, such as a railroad, the owner is not entitled to the full diminution of the market value of the land arising from the construction and operation of the railroad, but only to so much of it as is due to the fact that part of his land was taken." 10 Ruling Case Law, p. 154, § 135, citing (note 9) Walker v. Old Colony, etc., R. Co., 103 Mass. 10, 4 Am. Rep. 509.

In the case cited above in R. C. L. the court says:

> "But, when land is taken, the owner is entitled to compensation for such injury to the value of his whole lot as is occasioned by the appropriation of a part of it to the uses for which it is taken."

Damages to the residue which are recoverable are those which result from the taking of the land condemned, and in the case at bar cannot include those accruing "from the operation of ditches and drains on lands of others," as contended by plaintiff in error. There was therefore no error in the giving of the instruction hereinbefore quoted or in striking the cross-complaint.

[2] An assignment of error is predicated upon the trial court's answering a question asked by a juror at the close of the trial. Plaintiff in error contends that the juror's question was not based on the evidence, that the court's answer was not responsive to the question, and was a comment upon the evidence, and that the court's answer prejudiced the respondent in the matter of benefits.

The record shows that the question was asked and answered with the consent of counsel for plaintiff in error, and that no objection was made to the answer at the time it was given. The jury in its verdict found the benefits to amount to $25. There is no evidence whatever in the record to show whether or not there was testimony as to the amount and value of the benefits, or, if any testimony was introduced, what it was. The instructions to the jury so far as such instructions referred to the question of benefits are not complained of, and one of such instructions was given as requested by plaintiff in error.

Under these circumstances, and the state of the record, it does not appear that there was any prejudicial error committed either in answering the juror's question or by the answer that was given.

Without deciding whether or not the form of the verdict, the verdict itself, or the form of the judgment in the trial of this cause was correct, we find that there was no defect in the proceedings in any of these respects which affected the substantial rights of the plaintiff in error, and further review of these matters is not necessary.

[3] Error is assigned upon the trial court's order:

"That defendant be awarded no costs in these proceedings, and that none of the defendant's costs herein be taxed to plaintiff."

This order was made upon a finding:

"That prior to the commencement of these proceedings the plaintiff herein did lawfully tender to said defendant the sum of $300, * * * and that the said defendant refused same."

This finding is conceded to be true. The jury awarded defendant $136.66⅔ as damages. The trial court's order as to costs appears to be a compliance with section 2625 (1912 Ed.) Mills' Ann. St. (section 2424, R. S. 1908), providing, among other things, that:

"If the amount of compensation ascertained by any jury, or by a board of commissioners as provided in this act, shall not be in excess of any lawful tender of compensation found by the court or judge to have been made by the petitioner to the party to whom such compensation shall be awarded, no costs provided to be taxed under the provisions of this act shall be allowed to such party."

[4] It is the contention of plaintiff in error that the above-quoted part of the statute is unconstitutional and void upon the ground that it is in violation of section 15, art. 2, of the Constitution of the state of Colorado, which provides:

"That private property shall not be taken or damaged for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested."

Of this constitutional provision it was said in Dolores No. 2 Land & Canal Co. v. Hartman, 17 Colo. 138, 29 Pac. 378:

"Section 15 of the Bill of Rights declares, inter alia, 'that private property shall not be taken or damaged for public or private use without just compensation'—a declaration which is repeated at the beginning of the eminent domain act. The undeniable intent of this provision is to secure the landowner whose property is taken against his will a fair compensation therefor. It cannot have been the purpose of the constitutional convention to require payment by the owner of costs reasonably incurred in the proceeding whereby his premises are taken. In some instances such costs will amount to nearly or quite as much as the compensation awarded. But if the owner must disburse for costs the money received for his land, the compensation cannot be regarded as 'just' within the meaning of the constitutional guaranty. However it might be as to attorney's fees and other like expenses, we do not hesitate to say that the spirit of the Constitution clearly covers the class of expenses usually taxed as costs."

This language, or the greater part thereof, was approvingly quoted in Brainerd v. State, 74 Misc. Rep. 100, 131 N. Y. Supp. 221, 233, Petersburg School Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756, 759, and in section 812, Lewis, Eminent Domain (3d Ed.). The case was followed in Denver Co. v. Howe, 49 Colo. 256, 268, 112 Pac. 779, which declined to award the petitioner, though successful on appeal, any of the costs of the appeal.

In the case of Land Co. v. Ditch Co., 18 Colo. 489, 33 Pac. 275, the statute in question appears to have been noticed, but the question raised was the validity of the judgment against respondent for petitioner's costs. The decision of that question did not involve the constitutionality of the statute, because the statute does not authorize the imposition of petitioner's costs upon the respondent in any event.

In the case of Dolores No. 2 Land & Canal Co. v. Hartman, supra, the respondent, landowner, was allowed his court costs expended in connection with the condemnation proceedings, which was complained of by the petitioner on appeal. The language quoted from that case was therefore pertinent to the decision, not obiter dictum, and, in view of its approval by other authorities, is entitled to be regarded as the law in the case at bar if and to the full extent that it is applicable.

The opinion in the Hartman Case, supra, is in full accord with the following from Lewis on Eminent Domain:

"By the Constitution the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before his property is taken or his possession disturbed. If the parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void." Section 559, Lewis, Eminent Domain (2d Ed.)

Numerous authorities have cited or quoted with approval the foregoing section of Lewis on Eminent Domain, and are collected in the third edition of that work in section 812. The above quotation is approvingly set out in the case of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 57. That case dealt with a statute which provided that in condemnation proceedings:

> "Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court."

The court held that this statute is limited by the constitutional provision. This case was followed by the case of City of Oakland v. Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468, where it was held that:

> "It is settled law in this state [California] that, in view of the provision of section 14 of article 1 of our Constitution that 'private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner,' the owner whose property is thus sought to be taken cannot be required to pay any portion of his reasonable costs necessarily incidental to the trial of the issues on his part, or any part of the costs of the plaintiff; for to require him to do this would reduce the just compensation awarded by the jury by a sum equal to that paid by him for such costs."

This last quotation is in accord with dictum found in Moffat v. Denver, 57 Colo. 473, at page 483, 143 Pac. 577, at page 581, where it is intimated that:

> The requirement of the payment of certain costs "would reduce the amount of compensation to which he [the landowner] is entitled before his property can be taken or damaged."

In Petersburg School Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756, it was said and held:

> "To hold that the owner must pay his own costs in resisting attempts to take his land against his consent, without first paying adequate and just compensation therefor, would nullify to a certain extent the constitutional guaranty, and result in giving him less than just compensation for his property. The constitutional provision means that he shall receive just compensation for his property, and not that the just compensation assessed by a jury shall be diminished to the extent of his costs. The provision was designed for the benefit of the landowner, and should be construed so as to give him its benefit to the full extent."

It will be observed that our constitutional provision guarantees the landowner not only that he shall receive "just compensation" for property taken or damaged, but also that such compensation shall be ascertained by a board of commissioners or by a jury.

In Adams County v. Dobschlag, 19 Wash. 356, 53 Pac. 339, a statute providing that the costs shall be taxed against the landowner in case he shall not recover a greater amount than that previously tendered him was held unconstitutional. It was said in that case that:

> "The landowner must not be put to the expense of litigation in order to preserve his constitutional right to have the amount of damages determined by a court in a proceeding to which he is a party."

In Epling v. Dickson, 170 Ill. 329, 48 N. E. 1001, it was said:

> "Where private property is taken or damaged for public use, just compensation cannot be made to the property owner if he is compelled to prosecute in the courts for his just rights at his own costs."

The plaintiff in error had the right, under the Constitution, to have the damages assessed by a jury, and therefore should not be prejudiced by having refused a tender made prior to the beginning of the proceedings. In view of the language in Land & Canal Co. v. Hartman, 17 Colo. 138, 29 Pac. 378, and the holdings in the cases cited, we hold that the trial court was in error in not taxing respondent's costs upon the petitioner, and that section 2424, R. S. 1908 (section 2625, Mills' Ann. St.), is unconstitutional in so far as it requires the landowner to be taxed with any costs not contumaciously or unreasonably incurred by him.

The judgment is reversed and remanded, and the trial court is directed to take such proceedings in this cause as are consistent with this opinion.

Reversed.

BRIDGE v. PEOPLE. (No. 9192.)

(Supreme Court of Colorado. June 4, 1917.)

1. FALSE PRETENSES 🔑26—OBTAINING MONEY BY CONFIDENCE GAME — STATUTE — "UNLAWFULLY"—"FELONIOUSLY."

Under Rev. St. 1908, § 1784, providing that it shall be sufficient to charge that accused did "unlawfully and feloniously obtain" money by means and by use of the confidence game, an information for the offense which omitted the word "unlawfully" before the word "feloniously" was sufficient, especially where the information charged that the acts were contrary to the form of the statute, since that which is done feloniously is necessarily unlawfully done (citing Words and Phrases, Feloniously; see, also, Words and Phrases, First and Second Series, Unlawfully).

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 52–67.]

2. FALSE PRETENSES 🔑26 — CONFIDENCE GAME—INDICTMENT—STATUTES.

In view of Rev. St. 1908, § 1785, providing that the act punishing the offense of obtaining money by the confidence game shall be liberally construed, section 1784, declaring that it shall be a sufficient description of the offense to charge that accused did unlawfully and feloniously obtain money by means of the confidence game, need not be strictly followed, and it is sufficient to allege facts presenting a clear case of obtaining or attempting to obtain from another money or property by means and by use of the confidence game.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 52–67.]

3. CRIMINAL LAW 🔑1186(4)—APPEAL—FAILURE TO OBJECT TO INFORMATION—STATUTE.

Where defendant did not question the sufficiency of the information until after he was found guilty, the Supreme Court is precluded, by Rev. St. 1908, § 1956, from considering on appeal a technical objection thereto.

Error to District Court, Jefferson County; Charles Cavender, Judge.

G. S. Bridge was convicted of obtaining money by means of the confidence game, and he brings error. Application for supersedeas denied, and judgment affirmed.

J. M. Wardlaw and Fred T. Peet, both of Denver (F. J. Knauss, of Denver, of counsel), for plaintiff in error. Leslie E. Hubbard, Atty. Gen., and Clara Ruth Mozzer, Asst. Atty. Gen., for the People.

WHITE, C. J. Plaintiff in error was convicted of obtaining a certain sum of money from another by means of the confidence game, and sentenced to the penitentiary. He brings the cause here for review upon the sole ground that the information fails to charge any offense under the law. The alleged insufficiency consists in the omission of the word "unlawfully" before the word "feloniously" in the information. Section 1783, R. S. 1908, creates and defines the offense, and section 1784 declares that it shall be a sufficient description of the offense to charge that the accused did, on, etc., "unlawfully and feloniously obtain" the money "by means and by use of the confidence game."

[1] Though the statute in declaring that a certain form of words shall be sufficient to charge the offense, uses the word "unlawfully" as well as "feloniously," we are unwilling to hold that the former word must appear in the indictment or information if the latter does. We hold that that which is done feloniously is necessarily unlawfully done. Williams v. People, 26 Colo. 272, 275, 57 Pac. 701; Kopke v. People, 43 Mich. 41, 43, 4 N. W. 551; Shinn v. State, 68 Ind. 423; Volume 3, Words and Phrases, p. 2735.

[2] Moreover, section 1785 commands that the act shall be liberally construed, and, we think, this necessarily implies that the words of section 1784, supra, need not be strictly followed. It is sufficient to allege facts presenting a clear case of obtaining, or attempting to obtain, from another money or property "by means and use of the confidence game." Property or money so obtained passes from the owner's hands contrary to law, and therefore unlawfully. Besides, it is charged in the information that the acts were "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Colorado." Here is an express charge that the acts were contrary to the statute, the law defining the crime, and is necessarily equivalent to the charge that they were "unlawfully" done. Nash v. State, 2 G. Greene (Iowa) 286, 293; People v. Stricker, 170 Ill. App. 485. Apart from this, there are other statutes, some of later date than section 1784, supra, dealing with the sufficiency of an indictment or information charging a criminal offense. Thus section 1950, R. S. 1908, declares every indictment or accusation sufficient which states the offense in the terms of the statute "or so plainly that the nature of the offense may be easily understood by the jury." Section 1959 declares that the offense "shall be stated in plain, concise language, without prolixity or unnecessary repetition." And section 1960 declares, in relation to the offense charged, that it shall be sufficient when set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case. It seems clear that within the legislative intent the information in question charges the defendant with the commission of the offense for which he was convicted and sentenced.

[3] There is, however, another reason why he is not entitled to relief. He in no wise questioned the sufficiency of the information until after he was found guilty, and we are, by section 1956, R. S. 1908, precluded from considering the technical objection at this late hour.

The application for a supersedeas is therefore denied, and the judgment affirmed.

BAILEY and ALLEN, JJ., concur.

BARROWS v. CASE. (No. 8713.)

(Supreme Court of Colorado. June 4, 1917.)

1. Trial 🔑191(5)—Instructions Assuming Facts—Fraud.

In an action for fraud, instructions assuming plaintiff's inexperience in business matters was erroneous; this being a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 428.]

2. Trial 🔑243 — Inconsistent Instructions.

In an action for fraud, an instruction that, where a person's acts necessarily operate to defraud others, he must be deemed to have intended a fraud, was inconsistent with instructions stating that fraud could not be presumed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565.]

3. Execution 🔑423 — Body Execution — Fraud—Guilty Knowledge.

Guilty knowledge upon the part of defendants, in an action for fraud, is essential to rendition of a verdict warranting a body execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1214–1221, 1223.]

4. Execution 🔑423 — Body Execution — Presumptive Fraud.

It is not competent for a jury to return a verdict warranting a body execution upon presumptive fraud merely.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1214–1221, 1223.]

5. Fraud 🔑65(2)—Instructions.

In an action for fraud, where defendants denied all allegations, instructions that, where a person's acts necessarily operate to defraud others, he must be deemed to have intended a fraud, was misleading, and shifted the burden of proof, in effect requiring defendants to affirmatively establish innocence of fraudulent intent.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72, 73.]

Error to District Court, Denver County; George W. Allen, Judge.

Suit by Lois Case against Stanley M. Barrows and others. Judgment for plaintiff, and defendant named brings error. Reversed and remanded for a new trial.

Davis & Whitney, of Denver, for plaintiff in error.

BAILEY, J. Lois Case, defendant in error, brought suit against Juanita M. Barrows, Stanley M. Barrows, Earl G. Medsker, and Charles L. Maloney, to recover damages and for body execution, for false representations in connection with a transaction in which she exchanged certain real property for the furniture and lease of a hotel in Denver. Prior to the commencement of the negotiations the hotel was the property of Ernest A. Barrows, a brother of Stanley M. Barrows, and the husband of Juanita M. Barrows. Ernest A. Barrows died before the negotiations began, and Juanita M. Barrows died before the trial. Earl G. Medsker and Charles L. Maloney were real estate brokers through whom the exchange of property was made.

In substance the complaint alleges that plaintiff was without business experience and was dependent upon the business judgment of the defendants, which fact was well known to them; that the defendants represented the hotel to be well and completely furnished, with forty-two rooms permanently rented; that the income was $1,200.00 a month in winter and $1,800.00 in summer, the profits averaging from $450.00 to $1,200.00 per month, and that the only reason for selling was the death of the husband of Juanita M. Barrows. That the hotel had a permanent, paying and established business. Plaintiff further alleged that she believed these statements and acted upon them, and had no way of ascertaining for herself whether they were true. She exchanged her property for the hotel, and shortly after taking possession discovered that the representations of the defendants were false in that there were but few permanent guests, and the income was far less than had been claimed. That these facts were well known to defendants, and that through her reliance upon these false statements she made the exchange; that because of it she had parted with her property for the hotel, which latter was subsequently lost through foreclosure of a chattel mortgage. She prayed for damages in the sum of $15,000.00, and for a body execution. Defendants denied all material allegations. The verdict was for plaintiff against Maloney and Stanley M. Barrows, with damages in the sum of $3,000.00. By special finding the jury declared these two defendants guilty of fraud and wilful deceit. Judgment was entered providing for their confinement, upon failure to satisfy the judgment, for a period of nine months in the county jail. Barrows brings the case here for review.

[1] Numerous errors are assigned but it is necessary to consider only those relating to certain of the instructions. Instruction 2 is in part as follows:

"If you believe, from a preponderance of the evidence, that defendants, with full knowledge, took advantage of plaintiff's inexperience in business matters, induced her to put confidence in them, and for the purpose of effecting a sale of the Toovey Hotel property to plaintiff, made material false representations, as set forth in the complaint, knowing such representations to be false, and as a result induced plaintiff to purchase said hotel property. * * *"

This instruction withdraws from the jury the question whether the plaintiff was in fact inexperienced in business, and instructs them in effect that she was without such experience. That was a material fact upon which the jury should have been permitted to draw their own conclusions from the testimony.

[2] Instruction 5 is in part as follows:

"* * * Every party must be deemed to have intended the natural and inevitable consequence of his or her acts, and where his acts are voluntary and necessarily operate to defraud others, he must be deemed to have intended a fraud."

Instruction 9 is in the following words:

"* * * You cannot find that the defendants falsely or fraudulently made representations to plaintiff from conjecture or mere inference. Fraud must be clearly proved and the burden of proof is on the plaintiff to establish the fact. Fraud is never presumed, but must be affirmatively proved by the plaintiff in this case. The law presumes that all men are fair and honest—that all their dealings are in good faith and without intention to cheat or defraud others; if the representations of defendant, if made, is capable of two constructions—one of which is fair and honest and one which is dishonest—then the law is that the fair and honest construction must prevail, and the acts of the defendants must be presumed to be fair and honest."

[3] Plainly instruction 5 is contradicted by 9. By instruction 15, wherein the jury is told that plaintiff must prove the fraud alleged by evidence sufficient to overcome the presumption of defendants' honesty and fair dealing, instruction 5 is again contradicted. Instruction 5 is especially prejudicial because the verdict which allowed a body execution might well have been wholly predicated upon it. In Geraghty v. Randall, 18 Colo. App. 195, 70 Pac. 767, an action based upon alleged false representations, the jury returned a general verdict for the plaintiff, and as here, in answer to a special interrogatory found the defendant guilty of fraud and wilful deceit. Defendant moved for a new trial, on the ground, among others, that the evidence was insufficient to sustain the verdict. This motion was denied as to the general verdict, but allowed as to the findings on the special interrogatory. The appellate court in affirming the judgment said:

"In our opinion, Section 2164 of Mills' Statutes, contemplates an aggravated case—one in which the wrong is premeditated and intentional. A person may obtain the money or property of another by means of statements which are untrue, but of the truth or falsity of which he is without knowledge. In such case he might be held responsible as for a legal fraud, although there was no active intention to commit a wrong. Converse v. Blumrich, 14 Mich. 109 [90 Am. Dec. 230]. But while such representations have been held to be false and fraudulent in law, they lack the peculiar feature of guilt implied in the words 'malice, fraud or willful deceit,' as used in

Section 2164. We think that from the connection of the word 'fraud' with the words 'malice' and 'willful deceit' it was intended to be understood in its odious sense. By denying the motion to set aside the general verdict the court held that there was evidence of fraud, and we cannot suppose that it intended to contradict itself; so that in setting aside the special verdict on the ground that it was not supported by the evidence, the court must have regarded the finding as having reference to actual and intentional fraud. The court was evidently of the opinion that the evidence did not warrant the extreme conclusion reached by the jury in their special finding, regarding it, however, as amply sufficient to sustain the general verdict. Counsel are therefore mistaken as to the import of the court's ruling. This was not that there was no evidence of fraud, but that there was not sufficient evidence upon which a verdict whose effect would be to deprive the defendant of his liberty, could be properly rendered."

[4] By instruction 5 the jury were advised in effect that guilty knowledge upon the part of the defendants was not essential to the rendition of a verdict carrying a body execution. Under the rule in the foregoing case, guilty knowledge is undoubtedly necessary to warrant such a verdict. Moreover, under this instruction, it was competent for the jury to have returned a verdict which would warrant a body execution, upon presumptive fraud merely, which is fundamentally wrong.

[5] Furthermore this instruction is inapplicable and misleading in a case like this. Besides, it shifts the burden of proof, and in effect required the defendants to affirmatively establish innocence of fraudulent intent. The contradictory, inconsistent and erroneous instructions given could not have failed to confuse the jury, and plainly constitute prejudicial error.

Judgment reversed, and cause remanded for a new trial.

WHITE, C. J., and TELLER, J., concur.

SAUNDERS v. PEOPLE. (No. 8527.)

(Supreme Court of Colorado. June 4, 1917.)

1. Criminal Law 🔑1144(8)—Appeal and Error—Presumption—Selection of Jury.

Where the court summoned jury upon open venire as allowed by Laws 1891, p. 249, § 5, in certain cases instead of in the usual manner provided by section 2, it will be presumed that contingency necessary under section 5 existed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2758–2760, 2901, 3023, 3024.]

2. Jury 🔑70(9)—Regularity of Proceedings—Open Venire.

A jury summoned on open venire under a contingency provided for by Laws 1891, p. 249, § 5, is no less a regular panel than one drawn from the box as provided by section 2.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 325, 330.]

3. Costs 🔑284—Criminal Prosecution—Right to Reimbursement from Defendant—Statute.

The right of the county to reimbursement for costs in criminal prosecutions depends upon the statute, Gen. St. 1883, § 964, providing that the court shall give judgment that the offender pay the costs of prosecution.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1195, 1196, 1198–1205, 1207–1235.]

4. Costs 🔑304—Criminal Prosecution—Jurors' Fees—Defendant's Liability.

Where a defendant is tried in district or county court with a jury drawn from the box, jury fees, mileage and per diem of the panel in attendance, and sheriff's mileage and fees in summoning them, cannot be taxed against defendant; no statutory provision existing for splitting up or apportioning fees among cases in which jurors on a regular panel have served.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1328.]

5. Costs 🔑311 — Criminal Prosecutions —Jurors' Fees—Construction of Statute.

Gen. St. 1883, § 504, providing for recovery of jury fees by the prevailing party who has advanced fees necessary to summon a jury, applies to civil and not criminal cases.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1374–1375½.]

6. Costs 🔑311—Criminal Prosecutions—Jury's Fees—Defendant's Liability.

Where defendant was tried before a jury summoned on open venire, she was not liable for jurors' fees and expenses, with the exception of the $5 fee provided by Rev. St. 1908, § 3702, since it was the duty of the county to furnish a jury.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1374–1375½.]

En Banc. Error to Chaffee County Court; Joseph Newitt, Judge.

Mrs. N. V. Saunders was convicted of cruel punishment of a child. Defendant's motion to retax costs overruled, and defendant brings error. Reversed and remanded, with directions to retax costs.

G. K. Hartenstein, of Buena Vista, for plaintiff in error. Leslie E. Hubbard, Atty. Gen., and Francis E. Bouck, Deputy Atty. Gen., and Gilbert A. Walker, of Denver, for the People.

GARRIGUES, J. Plaintiff in error, Mrs. N. V. Saunders, was convicted in the county court of Chaffee county on an information charging that:

She "did willfully, unnecessarily and unlawfully torture, torment and cruelly punish one Lenice Saunders, a female child 14 years of age, the said child being then and there under the custody and care of the said Mrs. N. V. Saunders, the said torture, torment and cruel punishment being inflicted by beating the said child with a stick in a brutal and unlawful manner and inflicting upon the said child great and serious bodily injury."

The court entered judgment on the verdict that she serve 60 days in the county jail, pay a fine of $100 and the costs, and stand committed until fine and costs, taxed at $433.50, were paid. The clerk taxed the following costs against her:

"Court and clerk fees, $41.90.

"Jury fees, mileage and per diem, $118.50.

"Sheriff's mileage and fee for serving open venire for jury, $24.50.

"Sheriff's fees other than serving venire, $29.50.

"District attorney fees, $15.00.

"Witness fees, including physician, $103.95."

Defendant filed a motion to retax costs as follows:

> "By taxing a jury fee of $5 instead of $118.50, by taxing sheriff's fees at $29.50 instead of $54.20, by taxing no fee for district attorney instead of $15: First, because the taxing of fees and mileage for jurors as costs against the defendant is illegal and not authorized by statute. Second, because taxing sheriff's fees for summoning jurors as costs against the defendant is illegal and unauthorized by statute. Third, because there is no authority to tax the fees of the district attorney as costs against the defendant."

The motion was overruled, and defendant brings the case here on error.

1. The record is meager, but we gather from it that no regular panel of jurors was in attendance, drawn from the box and summoned as required by section 2, p. 249, S. L. 1891, which provides:

> "In case a jury is required in the county court, to try either civil or criminal cases, the judge of the county court shall so notify the clerk of the district court in writing, stating in such notice the number of jurors desired, whereupon the clerk of the district court shall call to his assistance the sheriff, and shall draw from the box the requisite number of jurors, and shall certify their names to the clerk of the county court, who shall then issue a venire to the sheriff to summon the jurors so drawn, and make it returnable, as the said county court may order, which court shall, so far as possible, fix the trials of jury cases for some definite time, and shall try them successively by the same panel of jurors, so far as is practicable, and when the trials are over he shall discharge such jury from further attendance. Talesmen may be secured in the county court in the same way as they are in the district court. After said jurors are drawn and their names certified to the clerk of the county court, as provided in this section, [illegible] laws, proceedings and practice applicable to jurors in district courts, shall apply to jurors in county courts."

But this is not the only method of procuring a regular panel for "either the district or county court." Section 5 of the same act provides:

> "If the board of county commissioners shall fail to return a list of competent persons, or if jurors shall not be drawn and summoned as herein provided, and a jury is required in either the district or county court, the court shall, nevertheless, have power to cause a jury to be summoned by open venire as heretofore practiced."

The method provided by this act for summoning a panel of jurors is the same in both courts, and jurors in the county court stand upon the same footing as jurors in the district court. Giano v. People, 30 Colo. 20, 26, 69 Pac. 504; Pitkin County v. First Nat. Bank, 6 Colo. App. 425, 40 Pac. 894.

[1, 2] The record shows that the court ordered a venire facias juratores, or open venire for six men forthwith, from the body of the county to serve as jurors until discharged, and, when this panel was exhausted, the court issued a like venire for 12 more men to serve as jurors until discharged. As we said in Giano v. People, we must assume that the court summoned this panel upon open venire, instead of drawing from the box, because a jury was required and the contingency existed provided by the statute authorizing the court to summon a panel by open venire. It therefore follows that defendant was tried by a jury selected from a panel in attendance on the county court in the manner provided by law. A jury summoned on open venire under such an exigency is no less a regular panel than one drawn from the box.

[3] 2. Costs are a creature of statute unknown to the common law. At common law there were no costs. Our statute provides that the county must pay the costs of the people incurred by the prosecution. S. L. 1889, p. 100; Fremont County v. Wilson, 3 Colo. App. 492, 34 Pac. 265. The right of the county to reimbursement for such costs also depends upon the statute, and the only statute we have on the subject was passed in 1861, which provides:

> "In any case where any person or persons shall be convicted of any crime or misdemeanor, in this chapter specified, or of any at common law, the court shall give judgment that the offender or offenders so convicted shall pay the costs of prosecution." G. S. 1883, § 964.

See Parker v. People, 7 Colo. App. 56, 42 Pac. 172.

[4] If this case had been tried in the district court, or in the county court with a jury drawn from the box, the jury fees of the panel in attendance, mileage, and per diem, and the sheriff's mileage and fees for serving them, could not have been taxed against the defendant under the provisions of any statute to which our attention has been called. No provision exists for splitting up or apportioning the fees among cases in which jurors, on a regular panel, have served.

[5] 3. Our attention is called to Board of Commissioners of Pitkin County v. First Nat. Bank, 6 Colo. App. 423, 428, 40 Pac. 894, affirmed in 24 Colo. 124, 48 Pac. 1043, holding that section 504, G. S. 1883, is still in force notwithstanding the unconstitutionality of section 9 of the act of 1891. This section provides:

> "In any action pending before the county court, * * * either party may have a jury summoned, to try the same by advancing fees for the payment of such jurors, and when judgment shall be rendered in favor of the party demanding a trial by jury, such party shall recover the fees paid by him for such jurors, of the adverse party, and have the amount thereof taxed as a part of the costs in the case."

Contention is made that this was a special jury brought in under the provisions of this statute to try this particular case; that defendant made the costs, therefore the costs of summoning and empaneling the jury were taxable to her. The answer is: That statute applies to civil and not to criminal cases.

[6] In the next place, defendant did not ask for a jury; she did not want a jury; she did not want to be tried at all. There would have been no jury summoned and no trial if she had had her desire. The trial was forced upon her against her will by the prosecution, the Constitution gave her the right of trial by jury, and it was the duty of

the county to furnish a jury in the manner provided by the Constitution and laws of the state. The only provision for reimbursing the county in such a case by taxing a jury fee is found in section 3702, Rev. Stats. 1908, which provides:

> "A jury fee of five dollars shall be taxed as part of the costs of the suit in each cause tried by jury. The clerk shall pay such fee, when collected, into the county treasury."

4. We are of the opinion that the item of $118.50 for the jury fees, mileage, and per diem, and $24.50, sheriff's mileage and fees for serving the open venire, should not be taxed as costs against defendant; that a jury fee of $5 should be taxed against her; and that the item of $15 district attorney's fees was properly taxed.

The judgment is reversed, and the cause remanded, with directions to retax the costs in accordance with the views herein expressed.

Reversed and remanded.

GIBBONS et al. v. ELLIS. (No. 8575.)

(Supreme Court of Colorado. June 4, 1917.)

1. APPEAL AND ERROR 🔑907(4) — BILL OF EXCEPTIONS—PRESUMPTION.

Where there was no statement in the certificate to a bill of exceptions that all the evidence was contained therein, the appellate court is bound to assume, in the absence of such certificate, that there was sufficient evidence to justify the trial court in the conclusion reached, and every reasonable and necessary intendment will be resolved in favor of the propriety of such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2911.]

2. EXECUTION 🔑55 — PROPERTY SUBJECT TO EXECUTION—PROPERTY IN CUSTODIA LEGIS.

If, under a decree, corporate stock was in custodia legis at the time of a levy of execution thereon, it was not subject to execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 137-140.]

3. EXECUTION 🔑55—PROPERTY SUBJECT TO EXECUTION — PROPERTY "IN CUSTODIA LEGIS."

Where corporate stock was garnished, and the final decree required defendant to deposit the shares in court in order to obtain the redemption money, which the plaintiff had been required to pay into the registry of the court as a condition precedent to his right to have the benefit of the decree, the stock was in custodia legis, and not subject to execution until the matters involved had been finally disposed of, whether such execution issued out of the same or another court; the doctrine of "in custodia legis" being a rule of property right, for the benefit of litigants, as well as a rule of jurisdiction, for the purpose of avoiding conflicts between the courts.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 137-140.

For other definitions, see Words and Phrases, First and Second Series, Custody of the Law.]

En Banc. Error to Court of Appeals.

Motion to quash a levy under execution by Elizabeth M. Gibbons and another against Eva Prince Ellis. From a judgment of the Court of Appeals (26 Colo. App. 454, 145 Pac. 285) sustaining the levy, and reversing the decision of the trial court allowing the motion to quash, the plaintiffs bring error. Judgment of Court of Appeals reversed, and that of the trial court affirmed, and cause remanded to trial court.

T. J. O'Donnell, J. W. Graham, and Canton O'Donnell, all of Denver, for plaintiffs in error. J. Howard Dana, G. Dexter Blount, and Harry S. Silverstein, all of Denver, for defendant in error.

BAILEY, J. This is a review on error of a judgment of the Court of Appeals, sustaining a levy under execution in favor of Eva Prince upon 3,333 shares of stock of The Joseph Gibbons Consolidated Mining Company, as the property of Joseph Gibbons. These are in substance the facts: The judgment upon which execution issued was a deficiency foreclosure judgment in favor of Eva Prince, now Eva Prince Ellis, against Elizabeth Gibbons and Joseph Gibbons. Execution was begun by garnishment of the Joseph Gibbons Consolidated Mining Company; its return showed that 3,333 shares of the company stock, then standing on its books in the name of John F. O'Connor had been in litigation in the district court, and by judgment and decree there it had been determined that O'Connor was pledgee thereof, and that the company was required to re-issue the shares to Gibbons or his order upon compliance with the terms of redemption stipulated in the decree. The sheriff thereupon levied upon the shares in favor of Mrs. Ellis, and advertised them for sale. The Gibbonses, joined by Joseph Bordeleau, filed a motion to quash the levy on the ground, among others, that the shares of stock were not subject to be sold under levy and execution; under this subdivision counsel argued that the stock in question was in custodia legis and, therefore, exempt from levy and sale. Upon the hearing it appeared that the interest of Gibbons in the shares had been transferred in writing to Bordeleau. That instrument set out that the stock certificates were in the registry of the court at the time of the transfer, that they were to be delivered to Bordeleau, upon redemption in conformity with the terms of the decree in Gibbons v. O'Connor, under which they were held, and for which redemption Bordeleau had deposited in the registry of the court the necessary amount, some $5,800.00.

The motion to quash was allowed, and that decision was reversed by the Court of Appeals in Ellis v. Gibbons, 26 Colo. App. 454, 145 Pac. 285. Elizabeth M. Gibbons and Joseph Bordeleau appear here as plaintiffs in error from the Court of Appeals judgment, and Mrs. Ellis as defendant in error, and they will be so referred to herein.

In the opinion of the Court of Appeals it was stated that the record failed to show that the decree providing for the disposition of the shares was before the trial court when the motion to quash the levy was determined. Defendant in error, however, does not deny this. That decree was rendered, and the motion to quash allowed, in the same court and by the same judge. There can be no doubt that at the hearing of the motion the trial court had actual knowledge of all the provisions of the decree, and of the facts and circumstances connected with the entire transaction. It is not necessary to assume that the judge had to depend upon memory for these facts, as it is not possible to conceive that the court heard the motion without having before it, and taking judicial notice of, its records in a previous case involving the same property. The court would necessarily take notice of the fact that the stock levied upon was the same that had been involved in the former action, that the certificates had been deposited with the clerk of the court, and that Bordeleau had deposited the money to redeem them as assignee of Gibbons, in precise conformity with the terms of the original decree. These facts are not disputed; indeed, there is no controversy over them. As to whether they may be taken judicial notice of, being part of the court's records, Wigmore on Evidence, in Vol. 4, § 2579, says:

> "However, for reasons of convenience, where controversy is unlikely, and the expense of a copy would be disproportionate, courts are often found taking notice of the tenor or effect of some judicial proceeding, without requiring formal evidence. Since this dispensation is not obligatory on the part of the court, and since it must depend more or less on the practical notoriety and certainty of the fact under the circumstances of each case, little uniformity can be seen in the instances."

The proceedings of the trial court in the litigation respecting these shares was in the nature of a foreclosure, in which it determined the rights of O'Connor as pledgee and of Gibbons as the original owner of the shares, in these terms:

> "* * * That in case the said defendant, John F. O'Connor, shall abide by and perform this decree, and shall within thirty days from this date bring the said three thousand three hundred and thirty-three (3,333) shares of stock into the registry of this court duly assigned to the said Joseph Gibbons, to be delivered to the said Joseph Gibbons, upon the payment into the registry of this court for the use of him, the said O'Connor, of the amount found due to the said O'Connor as hereinaforesaid, and if the said Joseph Gibbons shall not perform the said decree and shall not pay the said sum as hereinaforesaid within the time herein fixed, then and in that event, the right of redemption shall cease and determine and be at an end, and this cause shall stand dismissed out of this court."

By the decree the mining company was required to re-issue the stock to Gibbons or his assignee upon compliance with the redemption provisions. While the decree was in process of enforcement, through redemption of the stock by Gibbons, or pending his failure to do so within the time limit, the attempted levy upon the shares was made by garnishment of the mining company.

[1] There is no statement in the certificate to the bill of exceptions that all the evidence is contained therein, and this court is bound to assume, in the absence of such certificate, that there was sufficient evidence to justify the court in the conclusion reached. This alone would be sufficient to warrant the affirmance of the judgment of the trial court. Every reasonable and necessary intendment will be resolved in favor of the propriety of such judgment. Martin v. Force, 3 Colo. 199; Webber v. Emmerson, 3 Colo. 248; Behymer et al. v. Nordloh, 12 Colo. 352, 21 Pac. 37; Colby v. Thomson, 16 Colo. App. 271, 64 Pac. 1053.

[2] If, however, under the decree the stock was in custodia legis at the time of the levy it was not subject to execution, and we will consider the matter from this standpoint.

[3] In National Bank v. Londonderry Company, 50 Colo. 85, 114 Pac. 313, certain funds which had been placed in the registry of the court were ordered deposited in a bank pending the issue of a controversy over them. In discussing the status of this fund so deposited the court said:

> "The funds borrowed were in the custody of the court, and the bank which came into court and borrowed this money with knowledge of the conditions under which it was acquired, made itself a quasi party to the action, and was subject to the orders and decrees of the court; and is estopped to deny that it had not become such a quasi party to the suit. In such case, it was not necessary that a separate suit should be brought; in fact, under repeated decisions of the federal courts, and in some states where the question has been passed upon, it is held that no separate or outside suit could have been brought to disturb these funds. Corbitt v. Farmers' Bank et al. [C. C.] 114 Fed. 602; Jones v. Merchants' Nat. Bank, 76 Fed. 683 [22 C. C. A. 483, 35 L. R. A. 698]; Allen v. Gerard, 21 R. I. 467 [44 Atl. 592, 49 L. R. A. 351. 79 Am. St. Rep. 816]; Tuck v. Manning, 150 Mass. 211 [22 N. E. 1001, 5 L. R. A. 666]; Curtis v. Ford et al., 78 Tex. 262 [14 S. W. 614, 10 L. R. A. 529]."

In Jones v. Merchants' Nat. Bank, supra, attempt was made to attack a similar deposit of money from the registry, and although these deposits were made under special statutes, the court declared the fund immune from seizure on common law principles:

> "Independently of all statutory provisions, the plain and well known principles of the general law, especially as administered in equity, furnish sufficient sanction and protection to each, and each is in all respects declared by the law to be as exempt from the process of the litigant, without the consent of the court first obtained, as though it had always remained in the personal custody of the court's immediate officials."

In Corbitt v. Farmers' Bank et al., supra, a similar attempt to attach funds deposited by court order was disposed of in the following language:

> "The question presented by the motion to abate the attachment in this cause is whether moneys paid into court pending litigation in regard thereto, and placed by order of the court in its registry or some other designated deposi-

tory, pursuant to law, are the subject of attachment emanating from another court. This question is one of importance, as it not only affects the orderly administration of justice in the several courts, but goes further, and tends, as in this case, to thwart and annul the carrying out of the court's judgment, in a case fully litigated, with the parties in interest all before it. Money paid into the registry of the court, pursuant to law, can only be withdrawn therefrom, by the very terms of the Act of Congress providing for the deposit, 'by the order of the judge, or the judges of said court, respectively, to be signed by such judge, or judges, and to be entered and certified of record by the clerk.' When a court causes funds to be so placed in its registry, they are to the credit of the court itself, there placed and held, to the end that its decrees and orders in respect thereto may be obeyed and carried out in accordance with its judgment rendered; and no court, other than one having a supervisory power over the acts of such court, can by any act of its own, or any decree, order, or process emanating from it, except with its leave, assert any claim to, or secure any right in or lien upon, such funds, so long as the same remains under its control. To entertain a contrary doctrine to this would not only work untold mischief and delay in legal proceedings, but would result in innumerable conflicts between the courts themselves; and the consequence would be that funds once paid into court, with a view of having the rights of parties litigant thereto adjusted and determined, instead of being disposed of by the termination of the particular controversy, would be involved in an endless chain of litigation. This subject has been before the courts, state and federal, too frequently to now admit of serious cavil or doubt."

The question of jurisdiction of the res, with reference to other judicial processes instituted regarding it, is passed upon in Farmers' Loan, etc., Co. v. Lake St. Rd. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. The court (177 U. S. at page 61, 20 Sup. Ct. 568, [44 L. Ed. 667]) says:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court; but it often applies as well where suits are brought to enforce liens against specific property, to marshall assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

It appears to be conceded by the Court of Appeals that if the stock in question could be regarded as having been in custodia legis at the time of the attempted levy the judgment of the court below should be affirmed. It is quite evident from its opinion that that court, for some reason not clearly apparent, failed to apply the doctrine here invoked, that property actually or constructively in the custody of the court cannot, until the matters therein involved have been finally disposed of, be interfered with by process in any other suit, whether issued out of the court which acquired such possession, or of some other court.

First National Bank of Oswego v. Dunn, 97 N. Y. 149, 49 Am. Rep. 517, contains a very thorough discussion of the subject of the law as applied to the facts, which are, that the bank had replevined certain property from Dunn, and no forthcoming bond having been given, the plaintiff in replevin was entitled to have the property delivered to it. While the sheriff was preparing to make such delivery, but before it had been actually accomplished, the Second National Bank of Oswego delivered to him an execution against Dunn and required him to levy upon the same property. We quote from pages 517-518 of the case in 49 Am. Rep.:

"He made the levy, and so found himself at one and the same instant required to deliver up the malt on one mandate and retain and sell it on another. He cannot do both. The two duties, each equally imperative, are utterly inconsistent, and the performance of either inevitably involves the non-performance of the other."

By the terms of the decree in Gibbons v. O'Connor, it was required of O'Connor that he deliver the shares, or deposit them in court, in order to get the redemption money. And Gibbons, as we have already noted, was required to pay some $5,800.00 into the registry of the court within ninety days from the date of the decree, as a condition precedent to his right to have the benefit of the decree. How could the terms of that decree be made effectual if meantime an outsider, in another and different suit, should be allowed to levy upon, seize and sell the shares or property in question? To permit interference of this kind with the enforcement of a judicial decree would be to cast parties, who had already litigated their differences in a court of justice, and whose rights had been solemnly adjudicated, upon a new sea of strife and uncertainty. Under such conditions to uphold the levy in question would not only hinder the enforcement of the decree, but would practically nullify it. Public policy, a due regard for the orderly administration of justice as embodied in the decrees of the courts, and the rights of parties litigant, successful and defeated, require that such practice be not approved.

The record in the Gibbons-O'Connor Case shows that upon the filing of the complaint an injunction was issued restraining O'Connor from voting the stock, and from "selling, disposing of, or incumbering in any manner any of the said shares of stock until the further order of this court." No amount of argument will make it plainer than the mere statement of the fact that "it clearly appeared from the complaint, as soon as it was filed," that it would become necessary to a complete determination of the issues tendered and to the enforcement of the decree sought, for the court to exercise its dominion over the specified stock described in the complaint. That it would be necessary to the enforcement of the court's judgment to seize, or to otherwise exercise dominion over, the stock. The commencement of the suit was the beginning of the jurisdiction and control over the property, and the deposit of the certificates was the culmination. From the beginning the stock was in the constructive possession of the law, and when the certificates were deposited in court they were actually and physically in custodia legis.

The Court of Appeals seems to think that the fact that the levy was attempted, under process issued from the same court as that which had drawn unto itself the custody of the property sought to be levied on in the suit of Gibbons v. Gibbons Consolidated Mining Company, is a reason why the cases cited do not apply. Those cases were cited merely to show the principle of law applicable to property situated as were the shares in question, after the institution of the suit of Gibbons v. Gibbons Consolidated Mining Company, up to the time that the injunctive and other orders referred to were disposed of by an enforcement of the decree therein. The principles, so clearly declared, apply to the property involved, and it is because of their application to the property, that the courts hold as they do. When property is in a situation which makes the principle applicable, it is just as much exempt from seizure by an officer of the court having it in custody (actual or constructive) upon process issued in another suit, in favor of one not a party to the action in which the custody was taken, as it is from levy under process issued by another court of the same or of an independent jurisdiction. That the doctrine of in custodia legis is a rule of property right, made for the benefit of litigants, as well as a rule of jurisdiction, made for the purpose of avoiding conflicts between courts, is abundantly demonstrated by the following cases: Berlin Mills Co. v. Lowe et al., 211 Mass. 28, 97 N. E. 57, Ann. Cas., 1914B, 937, 938; Tuck v. Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666. In the opinion of the Court of Appeals it is declared:

> "As we have heretofore said, all matters in issue as to the ownership of the stock were settled by the decree. That litigation was at an end. The duty of the court with respect thereto had been performed." 26 Colo. App. 454, 145 Pac. 290.

Herein lies the fundamental error of that court, in view of the fact that the decree was not yet enforced or carried out. Compare that language with this extract from the opinion in 114 Fed. 602, supra, cited and approved by this court in National Bank v. Londonderry, supra, before the Court of Appeals had spoken in this case:

> "The position taken by counsel for complainant, that the court, having entered its final order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to the defendant bank, is equally fallacious. A conclusion in favor of parties litigant in any controversy would be barren of good, if the court rendering the decision was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result, as to moneys in the court's open registry, would, indeed, leave it in a helpless and pitiable plight. In Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, Chief Justice Marshall said: 'The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.' In Osburn v. U. S., 91 U. S. 474, 23 L. Ed. 390, Mr. Justice Field, speaking for the Supreme Court, said: 'The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid.'"

Language more clearly in point could not well have been uttered, even if the learned authors of the opinion from which the above quotations are taken had been speaking concerning the facts in the case at bar.

There can be no reasonable doubt that the shares of stock attempted to be levied upon fall within the rule laid down in the cases herein referred to, were in custodia legis, and in a separate and independent suit, whether in the same or another court, between other parties, were beyond reach of legal process.

The former opinion is withdrawn, and this one substituted therefor, the judgment of the court of Appeals is reversed, that of the trial court affirmed and the cause remanded to the latter court.

ALLEN, J., not participating.

(50 Utah, 66)

FRED MILLER BREWING CO. v. GAUDIO et al. (No. 2994.)

(Supreme Court of Utah. May 8, 1917. Rehearing Denied June 21, 1917.)

1. PRINCIPAL AND SURETY ⟹159—EVIDENCE—BURDEN OF PROOF.

In an action against the surety of a buyer to recover an alleged balance due for merchandise sold, the burden was on the plaintiff to show that the purported statement of account between it and the buyer was correct, more especially where it is seeking to establish a liability on the part of the surety, who has properly controverted plaintiff's allegations of the buyer's indebtedness to it.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 428–435.]

2. PRINCIPAL AND SURETY ⟹161—EVIDENCE—SUFFICIENCY.

Evidence *held* to justify a finding that the plaintiff failed to prove any indebtedness owing to it by the buyer for which the surety was liable.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 439–441.]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by the Fred Miller Brewing Company against Joseph Gaudio and others. The action was prosecuted against defendant C. H. Denhalter alone, the other defendants not being served with process. Judgment for defendant, and plaintiff appeals. Affirmed.

Skeen & Skeen, of Salt Lake City, for appellant. Hancock & Barnes, of Salt Lake City, for respondent.

CORFMAN, J. This was an action brought in the district court of Salt Lake county to recover a balance alleged to be due for merchandise sold and delivered under a written agreement between the plaintiff and the defendant Gaudio, secured by a bond contemporaneously executed on the part of the other defendants as sureties guaranteeing performance and payment on the part of the defendant Gaudio. The complaint, in substance, alleges that on the 7th day of August, 1911, plaintiff and the defendant Gaudio entered into a written agreement whereby the plaintiff was to sell the defendant Gaudio merchandise on credit, not exceeding $1,000 in amount, in pursuance of which plaintiff had sold and delivered to the said defendant on credit merchandise of the value of $706.43, which sum is due and owing; that the defendants Whittaker and Denhalter are personally, jointly, and severally answerable therefor on a bond guaranteeing payment of said indebtedness; that payment of said amount was demanded of the defendant Gaudio; and that the same has not been paid by the defendants or either of them. The agreement and bond are attached to the complaint as exhibits and made a part thereof. Plaintiff prays judgment for $706.43, interest, and costs.

The separate answer, of the defendant C. H. Denhalter is, in effect, a specific denial upon the ground of want of information and belief, and an affirmative defense alleging that the plaintiff has not complied with Comp. Laws 1907, § 352, as amended by chapter 101, Laws 1915, relative to foreign corporations doing business within the state by reason of its failing to file certified copies of its articles of incorporation and by-laws with the secretary of state and with the county clerk of Salt Lake county; that the plaintiff had failed to use due diligence to collect from the defendant Gaudio; and that the bond had expired before the indebtedness sued upon was incurred. The defendants Gaudio and Whittaker were not served with process, and the action was prosecuted against the defendant Denhalter alone.

A trial to the court without a jury resulted in findings and judgment in favor of the defendant. Plaintiff appeals from the judgment.

Numerous errors are assigned, but for a proper determination of plaintiff's appeal it will not be necessary for us to discuss and pass upon all of them here, or other than the finding of the trial court:

"That the plaintiff has failed to prove that there is any balance due it from the said Joseph Gaudio, or that there was any balance due it from said Joseph Gaudio at the time of the filing of the complaint herein."

At the trial, pursuant to stipulation, the deposition of C. J. Smith, a witness on behalf of plaintiff, was read wherein he testified that the plaintiff was a corporation organized under the laws of the state of Wisconsin; that it had no branch office or representative located in the state of Utah; and that he was an employé traveling and soliciting trade for it. The plaintiff offered to introduce in evidence a purported statement of the account sued upon and complains of the trial court's refusal to receive it. The only evidence submitted to the trial court to prove the correctness of this statement was that of the witness C. J. Smith, concerning which he testified as follows:

"Mr. Barnes: I would like to interpose a question here. Did you make this statement out? A. No, sir. * * *

"Mr. Skeen: I will ask you whether or not you had any conversation with Mr. Joseph Gaudio with respect to the balance he owed to your company, the Fred Miller Brewing Company, along in October, 1912? A. Yes, sir. Q. State what that conversation was. A. In regard to his account—his indebtedness to the Fred Miller Brewing Company? Q. Yes. A. At that time I had with me a statement from the brewery for collection against Mr. Gaudio. I believe after that he failed and moved somewhere down in Illinois. Q. Well, how, did you discuss with him the amount that was due to your company, the Fred Miller Brewing Company, at that time? A. At that time I believe he owed us $1,200 or $1,300; I cannot just recollect the amount, but somewhere around $1,200 or $1,300. * * * Q. Have you any memorandum to which you could refer to refresh your recollection and state the amount due at that time? A. I haven't anything in my possession at the present time, except this statement. I do not carry the books along with me from the brewery. They are made up by the bookkeeper and submitted to the agents as being correct. * * * Q. And that was in May? A. In May, 1912. Q. Do you know as to what payments have been made since? A. Nothing, except by referring to the statement. * * * Q. Can you state the total amount of goods furnished by your company to Joseph Gaudio pursuant to the contract set out as Exhibit A here, and which Joseph Gaudio received at Salt Lake prior to the month of May, 1912? A. Well, I could not unless I referred back to this statement. * * *

"Mr. Barnes: And your knowledge as to the amount due is based on Exhibit B, by reference to Exhibit B? A. Yes, sir. Q. The various amounts you have given in this testimony? A. Yes, sir."

[1] Such was the character of the testimony upon which plaintiff relied, not only for the purpose of proving the correctness of the proffered statement of account rejected by the trial court, but for the purpose of proving its case and to establish a present liability against the defendant as well. The burden was on the plaintiff to show that the account in question was correct, more especially when, as here, it was seeking to establish a liability on the part of a surety having properly controverted the plaintiff's allegation of the defendant Gaudio's indebtedness to it.

[2] After carefully reviewing the record here, we think the trial court's finding that the plaintiff failed to prove any indebtedness owing to it from the defendant Joseph Gaudio is amply justified. In view of the conclusion that the plaintiff has failed to prove a case, the defense that it had failed to comply with the Utah statutes relating to foreign corporations becomes immaterial, and we here express no opinion upon that subject.

The judgment rendered in favor of the defendant C. H. Denhalter dismissing him from all liability to the plaintiff must be affirmed, with costs.

It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

(50 Utah, 58)

WARM SPRINGS CO. v. SALT LAKE CITY. (No. 3020.)

(Supreme Court of Utah. May 8, 1917. Rehearing Denied June 21, 1917.)

1. MUNICIPAL CORPORATIONS 🔑722 — RENT FOR PROPERTY LEASED BY CITY—EVICTION BY ORDINANCE.

Where premises belonging to a city were leased for the purpose of conducting a bathing resort, with the provision that a portion of the premises might be leased or sublet for saloon or bar purposes, and subsequently, pursuant to Laws 1911, c. 106, an ordinance was passed by the city by which the carrying on of the saloon business on such premises was prohibited, the mere fact that the saloon business was prohibited did not constitute an eviction, and the defendant was not thereby released from paying rent, and was not entitled to any abatement thereof, since if the lessee desired to protect itself against the payment of rent in case the right to maintain a bar on the premises should be prohibited it should have provided for that emergency in the lease.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1528.]

2. MUNICIPAL CORPORATIONS 🔑726 — RENT FOR PROPERTY LEASED BY CITY—EVICTION.

While the city in entering into the lease did so as proprietor of the property, and is governed by the same law and rules as other proprietors, in passing and enforcing the ordinance, pursuant to the provisions of Laws 1911, c. 106, it acted entirely in a governmental capacity, and as an arm of the state government, and had no more right to disregard the provisions of that chapter than a private citizen, and is not liable for the consequences of such governmental act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1545.]

3. MUNICIPAL CORPORATIONS 🔑722—LEASE BY CITY—STATUTE.

If a city should guarantee its lessee the right to continue the saloon business in violation of Laws 1911, c. 106, providing that licenses permitting the sale of intoxicating liquors should not be issued outside the limits of the business district of a city or town, and requiring cities to pass ordinances fixing such limits for the purposes of the act, the lease would be void, since municipal corporations have no power to make contracts which would embarrass or control their legislative powers and duties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1528.]

4. LANDLORD AND TENANT 🔑211(2)—RENT—PARTIAL EVICTION.

Generally a tenant may not hold possession of premises, and then sue for an abatement of rent on the theory of partial eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 841–843.]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by the Warm Springs Company against Salt Lake City. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

D. H. Wenger, of Salt Lake City, for appellant. H. J. Dininny, W. H. Folland, and M. Davis, all of Salt Lake City, for respondent.

FRICK, C. J. The plaintiff in this action seeks to recover certain moneys which it is alleged the defendant city wrongfully obtained from it for rental of certain premises leased to the plaintiff by the city. In view that the court's findings of fact are not assailed, and as they correctly reflect the issues and the evidence, and because the conclusions of law and judgment which are based upon the findings are vigorously assailed, we insert the court's findings, the material parts of which read as follows:

"That on the 21st day of February, 1905, pursuant to a resolution of the mayor and city council, the said Salt Lake City, defendant herein, entered into an agreement in writing with one Maxwell R. Brothers, his executors, administrators and assigns, whereby said defendant did lease and let unto Maxwell R. Brothers, for a period of ten years, the following described real estate and premises, to wit: All that property situate in Salt Lake City, county of Salt Lake, state of Utah, described as block 157, plat 'A,' Salt Lake City survey, known as the Warm Springs property, including the springs and land inclosed by fence, but not including the gravel beds on said tract; to have and to hold the said premises with their appurtenances unto the said Maxwell R. Brothers, his executors, administrators and assigns, from the 31st day of March, 1906, to and including the 31st day of March, 1916, for the purpose of conducting a bathing resort, with the privilege of subletting a portion of said premises for bar purposes; and in consideration of the said leasing and letting of said premises to him as aforesaid, the said Maxwell R. Brothers as aforesaid agreed to pay the defendant as rent for said premises the sum of $200 per month for each and every month of said term. Said lease as set forth in defendant's answer is hereby referred to and made a part of these findings of fact. That on or about the 19th day of January, 1906, the said Maxwell R. Brothers assigned said lease to the said Warm Springs Company, the plaintiff herein, and said plaintiff was, during the whole of said term of ten years, the successor in interest of the said Maxwell R. Brothers, with the knowledge, acquiescence and consent of said Salt Lake City, and the said plaintiff at all times during said term paid said sum of $200 per month rent as in said lease provided, and has complied with all other covenants and conditions of said lease, as the assignor of said Maxwell R. Brothers, and the said plaintiff was at all times entitled to sublet a part of said premises for bar purposes. That under said agreement and lease the plaintiff herein, upon the pay-

> ment of said sum of $200 per month, and as consideration therefor, was to have the privilege of conducting a bathing resort, leasing or subletting a portion of said premises for saloon or bar privileges. That the reasonable rental value of said premises as a bathing resort was $100 per month, and the rental value of said saloon for bar purposes was $100 per month, and that said plaintiff at all times during the term of said lease was able to let and lease said premises for bar purposes at the rate of $100 per month. That pursuant to said agreement the plaintiff did sublet a part of the said premises, known as the saloon building for bar purposes, beginning on the 21st day of March, 1906, and continuously until the 20th day of June, 1911, at the rate of $100 per month, and that after the 20th day of June, 1911, the said plaintiff was prevented from further leasing and subletting said premises or any part thereof for bar purposes for the reason that said real estate, as above described, and the surrounding premises were excluded by city ordinance of Salt Lake City from the district in which intoxicating liquors might be sold, and that thereafter until the end of said term of said lease said premises were excluded by reason of said ordinance passed pursuant to the authorization of the Legislature of the state of Utah, from the business district in which intoxicating liquors might be sold. That after said exclusion by said city ordinance the said defendant refused to pay to the plaintiff any rebate or bonus because of said exclusion. That on the 6th day of April, 1916, the plaintiff herein presented its claim against said city for the sum of $5.700, which said claim was refused by said defendant, and that after the 20th day of June, 1911, to the end of said rental term said rent was paid by plaintiff under protest."

The conclusions of law are as follows:

> "That said city in its governmental and legislative capacity did rightfully pass an ordinance under proper authority from the state of Utah, excluding said property above described from the district in which intoxicating liquors might be sold. That in its private and personal capacity said city did enter into a lease with said parties as aforesaid, and that defendant did collect rents from said plaintiff as set forth, by the provisions of said lease heretofore referred to. That said lease in question does not contain a restrictive clause, but does contain a permissive clause which permitted the said plaintiff to rent a part of said premises for bar purposes. That there was no guaranty or warrant by which said defendant was bound to continue the permissive privilege after said ordinance excluding said property from the restricted district was passed. That said defendant did lawfully and legally collect said rent from said plaintiff, and that therefore said plaintiff has no cause of action against the defendant in the premises."

Judgment was entered dismissing the complaint, from which plaintiff appeals.

The assignments of error are all directed against the conclusions of law and judgment. Plaintiff's principal contention arises upon the proviso in the lease which reads as follows: "Provided, however, the said party of the second part may sublet a portion of said premises for bar purposes." In 1911 the Legislature of this state passed chapter 106, Laws Utah 1911, p. 152, in which it was provided that licenses permitting the sale of intoxicating liquors shall not be issued or granted "outside of the limits of the business district of any city or town. The mayor and city council in their respective cities * * * shall from time to time determine and fix such limits for the purposes of this act." Pursuant to that chapter an ordinance was passed by the defendant city in which the district in which the bar was maintained by plaintiff was declared to be outside of the business district of the city and within which a license to sell intoxicating liquors would not thereafter be granted. The plaintiff, therefore, was unable to obtain a license to sell intoxicating liquors upon the leased premises, and hence it lost the right to sublet a part of the premises for bar purposes as provided in the clause of the lease we have quoted. The plaintiff did not surrender nor offer to surrender the demised premises, but paid that portion of the rent which it is contended the bar privilege was worth under protest, and by this action seeks to recover back the rent thus paid.

Plaintiff's counsel, as we understand him, contends that the district court erred in denying recovery upon the grounds: (1) Because the city, by adopting and enforcing the ordinance in question, by its own act, deprived plaintiff of subletting a part of the demised premises for bar purposes, and hence it "ex equo et bono" cannot retain that portion of the rent which represents the value of the bar privilege; and (2) that by the act of the defendant city the plaintiff was in legal effect evicted so far as the right of maintaining a bar is concerned, and for that reason the defendant city may not retain that portion of the rent demanded by the plaintiff. Counsel, in support of his contention, cites the following cases: Boston Molasses Co. v. Commonwealth, 193 Mass. 387, 79 N. E. 827; Tallman v. Murphy, 120 N. Y. 345, 24 N. E. 716; Lynch v. Baldwin, 69 Ill. 210; Grabenhorst v. Nicodemus, 42 Md. 236; Allsman v. Oklahoma City, 21 Okl. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184; Pearson v. City of Seattle, 14 Wash. 438, 44 Pac. 884. Counsel also refers us to 28 Cyc. 674. We cannot, nor is it necessary for us to, pause here to point out the distinction between those cases and the case at bar. It must suffice to say that the decisions of the foregoing cases do not authorize a recovery in a case like the one at bar. We have found one case, however, which is not cited by counsel, namely, Heart v. East Tenn Brewing Co., 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753, in which it was held that a lease on certain premises which were leased for saloon purposes terminated when the prohibitory law, which was passed after the lease had been entered into, went into effect. The decision is based upon the ground that when the prohibitory law went into effect the business of conducting a saloon was unlawful; that the premises were therefore leased for an unlawful purpose, and hence the lease terminated, and the tenant was released from paying rent. The great weight of authority as we shall see, is however, contrary to the case just referred to. In the following, among other, cases it is held that where premises are leased for saloon purposes, and, pending the lease, a law is passed by which the right to deal in intoxicating liquors is prohibited, and hence a saloon business may no longer be carried on, the tenant is not, for that reason, released from paying rent for the demised premises, and that in case the premises in connection with the saloon business are also used for other purposes, or that they thereafter can be used for such other purposes, to prevent the tenant from carrying on the saloon business does not amount to an eviction and that he is not entitled to an abatement of the rent. Lawrence v. White, 131 Ga. 840, 63 S. E. 631, 19 L. R. A. (N. S.) 966, 15 Ann. Cas. 1097; O'Byrne v. Henley, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496; San Antonio Brewing Ass'n v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368; Kerley v. Mayer, 10 Misc. Rep. 718, 31 N. Y. Supp. 818, affirmed in 155 N. Y. 638, 49 N. E. 1099. Quite a number of cases in which the same doctrine is held are cited by the annotator in the notes to the case in 19 L. R. A. (N. S.) 966. See, also, 1 Tiffany L. & T. § 182, p. 1160, and 2 Tiffany L. & T. § 185, p. 1289. In the case of Lawrence v. White, supra, Mr. Justice Lumpkin, in speaking for the court, says:

> "The question in the case is whether the lessee of a hotel, including a barroom was entitled to a reduction or proportional abatement of the agreed rental, because during the term of the lease the Legislature of the state enacted a law prohibiting the sale of alcoholic, spirituous, malt, or intoxicating liquors, and thus the bar could no longer be used for that purpose. The adjudicated cases with unusual uniformity answer this question in the negative, though they do not all give the same reasons for the ruling. It has been very generally held that the enforcement by public officers of restrictions or conditions in regard to the use of leased premises does not amount to an eviction of the tenant."

In the case of O'Byrne v. Henley, supra, the law in the headnote, which correctly reflects the opinion, is stated in the following language:

> "Where premises are leased for saloon purposes at a time when it was lawful to sell intoxicants and the premises are used by a lessee as a saloon for the sale of intoxicants, soft drinks, etc., the passing of a prohibition law prohibiting the sale of intoxicants does not have the effect to release the lessee from liability for future rent, as his business is not totally destroyed, since the use of the word 'saloon' in the lease, while including the sale of intoxicants, does not exclude the sale of other things, and the business is not totally destroyed."

[1] It is not necessary to quote further from the cases. In the case at bar the premises were leased for the principal purpose of conducting a bathing resort, and the business of carrying on the saloon was a mere incident to the principal business. When, therefore, the ordinance went into effect by which the carrying on of the saloon business on the demised premises was prohibited the tenant was still permitted and continued to conduct the principal business for which the premises were used, namely, the conducting of a bathing resort. Under all of the authorities, therefore, the mere fact that the saloon business was prohibited did not constitute an eviction, and the plaintiff was not thereby released from paying the rent, nor was it entitled to any abatement thereof. If the plaintiff desired to protect itself against the payment of rent in case the right to maintain a bar on the premises should be prohibited by law, it should have provided for that emergency in the lease. Not having done so, it cannot now complain.

[2] It is seriously contended, however, by plaintiff's counsel, that the defendant city, in passing and enforcing the ordinance in question, by its own act deprived the plaintiff of its right to sublet for bar purposes, and for that reason the city is required to abate the rent as claimed by plaintiff. We have already pointed out that the city, in passing and enforcing the ordinance in question, did so in obedience to the command contained in chapter 106, supra. While it is true, as plaintiff's counsel suggests, that the city, in entering into the lease, did so as a proprietor of property, and hence is governed with regard to that matter by the same law and rules as other proprietors would be. counsel, however, entirely overlooks the fact that the city, in passing and enforcing the ordinance, acted entirely in a governmental capacity and as an arm of the state government. The city was bound by the provisions of chapter 106, the same as all other persons, and it had no more right to disregard the provisions of that chapter than the plaintiff. If, therefore, the city had undertaken to contract or enter into an agreement with the plaintiff so as to relieve it from the effects of chapter 106, such an agreement would have been void and of no effect. The law respecting that subject is very clearly stated by the author in 3 McQuillin Mun. Corps. § 1169, in the following words:

> "The settled rule is that municipal corporations have no power to make contracts which will embarrass or control their legislative powers and duties. A city cannot by contract deprive itself of any of its legislative powers, and hence cannot agree that a sidewalk should only be graded to a certain depth. A common council 'cannot bargain away or divest itself of the right to make reasonable laws, and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety or welfare of the community.' So, power given to contract respecting a particular thing does not confer power, by implication, to contract even with reference to such thing so as to embarrass and interfere with its future control of the matter, as the public interests may require."

[3] If the city had entered into a lease in which it had guaranteed the plaintiff the right to continue the saloon business in the teeth of chapter 106, the lease to that effect would have been void. What could not be accomplished directly, therefore, cannot be accomplished indirectly by compelling the city to pay back part of the money it had received as rent for the demised premises.

If by some unlawful act the city in its capacity as proprietor had interfered, or if it had entered into an enforceable covenant not to do so, and had, nevertheless, interfered with plaintiff's enjoyment of the premises, the case would be quite different. The distinction between acting in a governmental capacity and as a mere proprietor of property is made quite clear in the case of Boston Molasses Co. v. Commonwealth, supra. In that case the commonwealth covenanted as a proprietor of property merely, and hence it was held that it was liable as a proprietor. In this case the act by the city which is complained of was a governmental act, and hence the city is not liable for the consequences of that act.

[4] The law also seems to be that, ordinarily at least, a tenant may not hold on to the premises and then sue for an abatement of the rent upon the theory of a partial eviction. 1 Tiffany L. & T. § 182, p. 1160 et seq., under the title of "Partial Eviction."

We desire to add in conclusion that the case of Lawrence v. White, supra, is a very carefully considered case. The other cases we have cited, and in which the doctrine laid down in the Georgia case is followed, are also all well considered, and, in our judgment, there logically is no escape from the conclusions reached in those cases.

The judgment is affirmed, with costs to the defendant.

McCARTY and CORFMAN, JJ., concur.

(50 Utah, 49)

JEREMY FUEL & GRAIN CO. v. MELLEN.
(No. 2955.)

(Supreme Court of Utah. April 28, 1917. Rehearing Denied June 21, 1917.)

1. JUDGMENT 🔑958(2) — RES ADJUDICATA — QUESTION FOR JURY.

It is proper for the court to determine the question of res adjudicata as a question of law where there is no dispute regarding the effect of matters or controversies in either the former or the instant action.

2. JUDGMENT 🔑743(3) — CONCLUSIVENESS — RES ADJUDICATA.

Plaintiff seeks to recover upon a negotiable note given in consideration of a crusher and motor. In a prior action in which this defendant was a party, plaintiff sought to foreclose a chattel mortgage lien on said crusher and motor, and in such action the court found that the plaintiff had no right, title, or interest to the crusher or motor, and quieted defendant's title thereto. *Held* that, as plaintiff was required to allege and prove consideration as an essential element of his cause of action, the former action is res adjudicata of the question of his ownership of the only consideration for the note, and is sufficient to dispose of his claim in this action; it not being necessary that the form of both actions be the same if the question directly involved in the first action is also directly involved in the second.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1277.]

3. JUDGMENT 🔑719—CONCLUSIVENESS—RES ADJUDICATA.

The fact that the finding in the former action quieting title to the crusher and motor in the defendant went beyond the allegations of defendant's answer in the instant case is immaterial, and in no way affects the question of res adjudicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1249, 1250.]

4. JUDGMENT 🔑622(2) — CONCLUSIVENESS — RES ADJUDICATA.

As defendant's counterclaim in the instant case for an amount paid on the note was necessarily connected with the same transaction on which the plaintiff based his first cause of action as well as the present, his right to recover on the counterclaim is now barred by his failure to raise it in the former action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136.]

5. JUDGMENT 🔑622(2)—COSTS ON APPEAL.

Under Comp. Laws 1907, § 2970, providing that, if a defendant omit to set up a counterclaim, neither he nor his assignee can maintain an action against the plaintiff therefor, plaintiff is now barred from recovering on his counterclaim by his failure to set it up in the former action entirely apart from the question of res adjudicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136.]

6. COSTS 🔑241—COSTS ON APPEAL.

Where on appeal a plaintiff succeeded in modifying a judgment against him on defendant's counterclaim, but practically plaintiff's whole record and brief are devoted to combating a ruling of the court against him which was affirmed, costs should be awarded to neither party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 927–935.]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by the Jeremy Fuel & Grain Company against J. W. Mellen, in which defendant filed a counterclaim. Judgment for defendant, and plaintiff appeals. Judgment reversed as to counterclaim and otherwise affirmed, and case remanded, with directions.

G. M. Sullivan, of Salt Lake City, for appellant. Stewart, Stewart & Alexander, of Salt Lake City, for respondent.

FRICK, C. J. The plaintiff, after alleging the necessary matters of inducement in its complaint, alleged as follows:

"That during the month of June, 1913, for a valuable consideration, the defendant executed and delivered to the plaintiff his certain paper writing, wherein and whereby he promised and agreed to pay to the plaintiff the sum of $600 during the month of July, 1913; that thereafter defendant paid upon said written obligation, the sum of $80, and no more, and there is a balance now due plaintiff from defendant upon said written promise the sum of $520, together with interest thereon from July 1, 1913."

The plaintiff prayed judgment accordingly.

The defendant answered the complaint, and in his answer he admitted "that on or about the 8th day of June, 1913, he signed a certain paper," a copy of which is set forth in the answer, and to which we shall refer later. The defendant also admitted that $80 was paid "upon said writing." The defendant then at great length sets forth that the plaintiff had commenced a former action in which it had sought to recover upon the same cause of action, that the defendant, with others, was a party to said action, and that the right of plaintiff to recover upon the present cause of action had been fully determined and adjudicated against the plaintiff in said former action. Defendant also set up a plea of want of consideration for said writing, and in a counterclaim demanded judgment for the $80 aforesaid. There was a reply, the averments of which it is not necessary to refer to.

The issues were tried to a jury, but when both parties had rested the defendant requested the court to direct the jury to return a verdict in favor of the defendant upon the plea of former adjudication, and also upon the plea of failure of consideration, and further asked that the court direct the jury to return a verdict in his favor for the $80 upon his counterclaim. The court granted defendant's motion upon the plea of former adjudication, and directed the jury to return a verdict as requested by the defendant, and also directed the jury to find in favor of the defendant upon the counterclaim. The jury returned a verdict as directed, upon which judgment was entered.

Plaintiff appeals from the judgment, and insists that the court erred both in directing a verdict on the plea of former adjudication and on the counterclaim for the $80. Plaintiff's counsel vigorously contends that the district court erred in sustaining the plea of former adjudication, while defendant's counsel as vigorously insist that, under the undisputed facts and the law applicable thereto, the district court could not do otherwise.

The facts upon which the plea of former adjudication rests, and upon which the court acted, briefly stated, are as follows: On June 8, 1913, defendant signed and delivered to the plaintiff the writing before referred to, which reads as follows:

> "Salt Lake City, Utah, June 8, 1913.
>
> "For value received, as expressed in a certain bill of sale dated to-day, I hereby agree to pay to the Jeremy Fuel & Grain Company the sum of $600.00 on or about July 1, 1913.
>
> "J. W. Mellen."

The bill of sale referred to in said writing reads as follows:

> "Sold to Jeremy Fuel & Grain Company for the sum of six hundred dollars ($600.00) 1 Climax No. 3 crusher, 1 thirty horse power motor.
>
> "Received payment. Bollwinkel Bros., by John Bollwinkel. Witness J. W. Goodfellow.
>
> "We hereby transfer the above-described bill of sale to J. W. Mellen in consideration of the sum of $600.00, payment of which is hereby acknowledged. Jeremy Fuel & Grain Co., per J. W. Goodfellow, Agt."

On July 7, 1913, the plaintiff in this action commenced an action against the Bollwinkel Bros. mentioned in said bill of sale to recover a certain sum of money claimed to be due from said Bollwinkel Bros. to the plaintiff and to foreclose said bill of sale. The plaintiff in said complaint, among other things, alleged:

> "That on or about the 15th day of February, 1913, the defendants made, executed, and delivered to the plaintiff their certain bill of sale for one Climax No. 3 crusher and one 30 horse power motor, that said instrument was given by the defendants, and was accepted by the plaintiff as security for the payment of defendant's account to the plaintiff, part of which amount was then due to the plaintiff, and that it was in reliance upon said security that the plaintiff made further sales upon credit to the defendants."

The plaintiff prayed judgment that "said bill of sale be foreclosed as a chattel mortgage and the property therein directed sold," and that the proceeds "be applied upon the plaintiff's claims." Among others who were made parties to said foreclosure action, or who intervened therein, was the National Bank of the Republic. The bank in its answer, in effect, averred that it had obtained a judgment against said Bollwinkel Bros. for a sum in excess of $1,100; that execution had been duly issued on said judgment and had been levied upon certain real estate belonging to said Bollwinkel Bros. which was duly advertised and sold by the sheriff; that the "Climax No. 3 crusher," and the "thirty horse power motor" mentioned in said bill of sale were affixed upon and constituted a part of the real estate levied on and sold under the execution aforesaid, and that the plaintiff in said action (who is the plaintiff in this action) had acquired no right, title, or interest whatever in or to said Climax No. 3 crusher or in said 30 horse power motor. Defendant in this action was substituted for the bank in the former action and adopted the bank's answer as his own. The court in the former action, in substance, found that said Climax No. 3 crusher and said 30 horse power motor were "annexed to and affixed upon," and constituted a part of the real property which was sold under the execution aforesaid, and which had been purchased by the bank, and by the bank transferred to the defendant. As a conclusion of law the court also found as follows:

> "That the plaintiff, Jeremy Fuel & Grain Company, a corporation, has no interest in the property described in plaintiff's complaint and in the findings of fact herein; that neither John Bollwinkel, nor J. P. Bollwinkel, nor the firm of Bollwinkel Bros., nor A. T. Moon, intervener herein, have any interest in the property described in the complaint, and in the findings herein; that as against all of the parties to this action the said Joseph W. Mellen is the owner of said property; that the said Joseph W. Mellen is entitled to judgment quieting his ownership in said personal property in these findings described; and for costs incurred."

Judgment was accordingly entered in favor of the defendant, Mellen, who, as before stated, had been substituted for the bank.

[1] On the trial of the case at bar it was made to appear without dispute that the consideration for the writing sued on in this action was the Climax No. 3 crusher and the

30 horse power motor, and nothing else; that the expression "for value received," as it is expressed in the writing, referred to the crusher and motor aforesaid, and to no other consideration. The district court, upon the undisputed evidence, thus determined, as a matter of law, that the right of the plaintiff to recover upon the writing in question had been adjudicated in the former action. There being no dispute regarding the effect of the matters in controversy in either the former or in the present action, it was proper for the court to determine the question of res adjudicata as a question of law. 2 Black on Judgments, § 631.

[2] The question, however, still remains: Is the plaintiff's cause of action in this action the same as in the former one? In other words, was the subject-matter litigated in the two actions, so far as the plaintiff and the defendant are concerned, the same? It certainly is clear enough that what the plaintiff sought to recover in the first action was a certain amount of money, the payment of which it asserted was secured by certain property consisting of one Climax No. 3 crusher and one 30 horse power motor. Plaintiff there claimed that it had a lien on said crusher and motor, and asked to have them sold and the proceeds thereof applied in payment of its claim. The court found against plaintiff's contention in that regard, and found that it had no right, title, or interest in or to said crusher, or said motor, or either of them. Now, while it is true that the action in this case is based on the writing aforesaid, it is equally true that the undisputed evidence shows that the only consideration for the writing in question was the crusher and motor aforesaid. Whether the plaintiff had ever acquired any interest in said crusher and motor was therefore one of the issues in the former action, which issue was found against the plaintiff. In this action it must not be overlooked that the writing in question is not a negotiable instrument, and hence does not import a consideration. The plaintiff was therefore required to allege and prove a consideration. In view that the evidence is without conflict, that the only consideration for the writing was the crusher and the motor, and that the evidence is also undisputed that it was adjudicated in a former action that the plaintiff at the time the writing was given did not have, and that it never had, any right, title, or interest in said crusher or motor, or in either of them, therefore the question of consideration for the writing in question, and which plaintiff was required to establish, was adjudicated in the former action. An essential element which the plaintiff was required to prove as part of his cause of action in the present action was therefore adjudicated against him in the former action, and hence, as between the parties to this action, that issue is res adjudicata. Suppose the plaintiff had prevailed in the former action, and the crusher and motor had been sold, and the proceeds thereof applied in satisfaction of its claim; could it successfully maintain another action on the writing in face of the former judgment in case that judgment was pleaded as is done in this case? We think no one would seriously so contend. If the plaintiff would be estopped from maintaining a second cause of action if it had succeeded in the first one, it is likewise estopped from successfully maintaining the second one in case it failed in the first one. This case comes squarely within the rule laid down by the author in 2 Black on Judgments, § 609, in the following words:

> "It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties, or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined therein."

In Goodenow v. Litchfield, 59 Iowa, at page 231, 9 N. W. 109, Mr. Justice Rothrock, in referring to the rule respecting former adjudication, says:

> "The rule, as appears to be well settled by all the authorities, is that, where a former judgment or decree is relied upon as a bar to an action, it must appear either by the record or by extrinsic evidence that the particular matter in controversy and sought to be concluded was necessarily tried and determined in the former action."

Neither is it necessary that the form of both actions be the same. The test is: Was the question directly involved in the first action and also directly involved in the second one? Bank v. Rude, 23 Kan. 143; Spear v. Tidball, 40 Neb. 107, 58 N. W. 708. The foregoing cases leave no room for doubt that the plea of res adjudicata in this case was established, and that the district court did not err in declaring it established, as a matter of law.

[3] We are not unmindful of plaintiff's contention that the findings of the district court in the former action, in effect, quieting title to the crusher and motor in the defendant, went beyond the allegations of defendant's answer. If it be conceded that counsel is right in his contention, yet that in no way affects the question we have just decided. The finding that the plaintiff did not have, and never had, any right, title, or interest in and to said crusher and motor, or in either of them, was in issue and is squarely found. That is quite sufficient to dispose of plaintiff's claim in this action.

[4, 5] Plaintiff's counsel, however, also insists that the court erred in directing a verdict on defendant's counterclaim in his favor. It seems to us that, under the undisputed facts, counsel's contention should prevail. The counterclaim arose out of and was necessarily connected with the same transaction on which plaintiff based his first cause of action, as well as the present one. If, therefore, the defendant intended to counterclaim against the plaintiff, he should have

done so in the first action. Suppose the defendant had sued the plaintiff in an independent action, and the plaintiff had set up the former adjudication. Could the defendant recover? It would seem not. But, entirely apart from the question of res adjudicata in the sense that question is usually considered, the defendant is now barred from recovering under our statute, Comp. Laws 1907, § 2970.

As just pointed out, this claim arose out of the transaction set forth in plaintiff's complaint and was also connected with the subject of the action in both the former and the present action, and hence he cannot, under section 2970, supra, maintain a separate action for the amount claimed by him. Nor can he maintain a counterclaim in another action for such amount. (Plaintiff's reply was sufficient to raise the question of the defendant's right to recover on the counterclaim.) The court therefore erred in directing a verdict for the defendant. Indeed, under the undisputed facts, the court should have directed a verdict for the plaintiff against the counterclaim.

[6] The only question left to determine is one of costs. While it is true that the plaintiff has succeeded in modifying the judgment, it is also true that practically plaintiff's whole record and brief are devoted to combating the court's ruling on the question of former adjudication. In view of that fact, we have concluded that costs should be awarded to neither party. The ruling and judgment of the district court on the question of res adjudicata are therefore affirmed, and the ruling and judgment on the counterclaim are reversed. In view, however, that this question is one of law merely, the cause is remanded to the district court of Salt Lake county, with directions to set aside the judgment upon the counterclaim in favor of the defendant and to enter a judgment in favor of the plaintiff and against the defendant upon the counterclaim.

McCARTY and CORFMAN, JJ., concur.

(96 Wash. 550)

STATE v. WARD. (No. 13785.)

(Supreme Court of Washington. June 4, 1917.)

1. Embezzlement 🔑5—Requisites.

The gist of larceny by embezzlement under Rem. Code, § 2601, penalizing persons who, with intent to defraud the owner, appropriate property, etc., is accused's intent.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 3.]

2. Criminal Law 🔑1170(1)—Admissibility of Evidence.

In larceny prosecution against an attorney for misappropriating a mortgage sent him for collection, where accused claimed he had traded such mortgage for one of his own, excluding defendant's evidence regarding circumstances under which he assigned the second mortgage for a personal debt, *held* reversible error, since such evidence was admissible upon question of his good faith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145, 3149-3152.]

3. Criminal Law 🔑417(13)—Admissibility of Evidence.

In larceny prosecution against an attorney for misappropriating a mortgage sent him for collection, where accused claimed he had traded another mortgage for it, testimony that owner of original mortgage stated he had made such a trade with defendant was admissible, because against such owner's interest and to show his consent to the appropriation.

4. Criminal Law 🔑417(13)—Admissibility of Evidence.

In larceny prosecution against an attorney for misappropriating a mortgage, where accused claimed he had traded it for another, a receipt by nonresident owner of first mortgage reciting payment of all claims against accused, especially of money due on second mortgage, for which first mortgage had been exchanged, is admissible.

5. Embezzlement 🔑48(2)—Instructions.

In larceny prosecution under Rem. Code, § 2601, penalizing persons who, with intent to deprive or defraud the owner, misappropriate property, etc., an instruction that intent to restore or replace the property unlawfully appropriated is not a defense, is erroneous.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 73.]

6. Criminal Law 🔑823(5)—Instructions.

Refusing a requested instruction that accused was not guilty of larceny if he converted a note believing that it was his own, etc., *held* reversible error, where the charge as given merely covered the matter by an abstract definition of larceny.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158.]

Department 2. Appeal from Superior Court, Klickitat County; R. H. Back, Judge.

Nathaniel L. Ward was convicted of grand larceny, and appeals. Reversed, and new trial ordered.

McMaster, Hall & Drowley, of Vancouver, and Brooks & Brooks and E. C. Ward, all of Goldendale, for appellant. John R. McEwen, of Goldendale, and Miller & Wilkinson, of Vancouver, for the State.

FULLERTON, J. The defendant Nathaniel L. Ward was convicted of the crime of grand larceny, and sentenced to a term in the penitentiary. The information charged that:

> While acting as attorney, agent, or trustee of Sarah C. Hughes and Peter Hughes, her husband, the defendant collected and came into possession of property of theirs by reason of such relation, "and did then and there, without the consent of the said Sarah C. Hughes and her husband, Peter Hughes, or either of them, willfully, unlawfully, and feloniously embezzle said property, consisting of more than twenty-five ($25) dollars, lawful money of the United States of America, to wit, eight hundred fifty ($850) dollars, lawful money of the United States of America of the value of eight hundred fifty ($850) dollars, said money then and there belonging to the said Sarah C. Hughes and her husband, Peter Hughes, by fraudulently and feloniously withholding and appropriating said money to his own use with intent to deprive and

defraud the owners, to wit, Sarah C. Hughes and her husband, Peter Hughes."

The defendant appeals, assigning that the court erred in excluding certain evidence tendered by him, in giving certain instructions, in refusing to give certain instructions, in overruling a motion for a new trial, and in refusing to sustain a challenge to the sufficiency of the evidence.

Peter Hughes was the holder of a note for $1,000, dated March 1, 1910, payable on or before three years after date, which was secured by mortgage upon land in Klickitat county, Wash. The maker, one Smithson, having defaulted in the interest, the note was sent by Hughes to appellant N. L. Ward, then a practicing attorney residing in Goldendale, for the purpose of enforcing payment. On December 4, 1912, appellant, for Hughes and wife, instituted a foreclosure suit which was afterwards abandoned. The property had depreciated in value so that it was doubtful whether it was worth the full amount of the mortgage. The parties to the mortgage entered into negotiations for a reconveyance of the property in payment of the mortgage indebtedness, but this arrangement was never consummated. The appellant in the course of his dealings with his client Hughes had offered to trade him for the obligation an $800 mortgage on land in Tillamook county, Or., due in the year 1913. Respecting this offer Hughes wrote him as follows:

> "Sallisaw, Oklahoma, November 25, 1913.
>
> "Mr. N. L. Ward, Attorney at Law: Am answering your letter that I may have to take my place back. I want to say it will be too big expense to come back to Washington and if you still have the $800 mortgage on the Tillamook land can make a trade as you say the mortgage is good.
>
> "Yours truly, Peter Hughes."

Appellant testified that he considered the trade as made, and dealt with the mortgage on the Klickitat land as his own, and held the note and mortgage on the Tillamook land for the benefit of Hughes without, however, assigning or indorsing them over to the latter. On December 1, 1913, the sum of $850 was paid to appellant in full settlement of the note and mortgage due Hughes, and a release, which had been executed by Hughes and wife on January 28, 1913, and turned over to appellant, was delivered to the mortgagor. This money received by appellant was deposited to his own credit and checked out by him as his own money. In February, 1914, the Tillamook mortgage, which appellant testified he regarded as the property of Hughes, was assigned to the Bickleton State Bank at Bickleton, Wash., on an indebtedness of the appellant to that bank. Hughes, having received no money on either the Klickitat or Tillamook mortgage, put his claim against appellant in the hands of the Gillett State Bank of White Salmon, Wash., for collection. In June, 1914, appellant wrote the bank that he would "fix the Hughes matter up satisfactory," and on July 16, he again wrote the bank:

> "I have just received a letter from Mr. Peter Hughes and will fix the matter up as he suggests next week."

On July 13, 1914, he had written Hughes:

> "Relative to the Smithson matter, I will fix the matter up as you suggest in your letter and will pay you 10 per cent. interest on the note, and will pay you anything you have been out. I will pay you the $500 within next few days."

On August 19, 1914, he again wrote Hughes:

> "I will pay a part of the Smithson money to the bank to-morrow or next day."

The appellant, however, made no payment to Hughes until after the filing of the information against him. On January 2, 1915, he paid Hughes in full the sum of $872.30. The fact of payment was admitted in evidence, but the court excluded other recitals in the receipt tending to exonerate the appellant.

The statute under which the respondent was prosecuted provides that:

> "Every person who, with intent to deprive or defraud the owner thereof— * * * (3) Having any property in his possession, custody or control, as * * * attorney, agent, employé, trustee, * * * shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto, * * * steals such property and shall be guilty of larceny." Rem. Code, § 2601.

[1] The gist of the offense of larceny by embezzlement is the intent of the party charged to deprive or defraud the owner by withholding or appropriating his property. Any fact tending to prove or disprove that intent is properly admissible in evidence. The rule is stated in 15 Cyc. 529, as follows:

> "Since from its nature intent is incapable of direct proof, great latitude is necessarily allowed in proving this element of the offense. Broadly speaking, any evidence is admissible which has a tendency, even the slightest, to establish fraudulent intent on the one hand, or on the other hand to show the bona fides of the accused."

[2] The defense in this case was that the appellant had traded his Tillamook mortgage for the Klickitat mortgage belonging to Hughes. The evidence showed that, after this alleged trade and after appellant had used the proceeds of the Klickitat mortgage as his own, he made an assignment of the Tillamook mortgage to the Bickleton State Bank. The defense sought to prove by the appellant under what circumstances this transfer was made and what arrangements he had made with the bank for raising money to send to Hughes. This testimony was excluded. It was already in evidence that appellant in his letters had been promising to get the money for Hughes, and was not denying liability. This testimony had a direct bearing upon the question of his good faith, and, while not conclusive in itself, was

admissible for the purpose of showing good faith. We think it was error on the part of the court to exclude it.

[3, 4] In substantiation of appellant's defense that he had a right to dispose of the proceeds of the Klickitat mortgage as his own money, he offered to prove by the witness S. A. Rossier, who had visited Hughes in Portland, Or., for the purpose of paying over the money due him from appellant, that Hughes stated in a conversation held on January 2, 1915, that he had made a trade with appellant of his mortgage on the Klickitat property for a mortgage on Tillamook property, and that the witness at that time took from Hughes a receipt as follows:

> "Jan. 2, 1915, received from N. L. Ward $872.30 in full settlement of all claims against him, and particularly for all money due me on the land in Tillamook county for which my Klickitat mortgage was exchange.
>
> "Peter Hughes."

The prosecution was based on the theory that appellant had embezzled the money derived from a note and mortgage originally placed in his hands for collection, while the defense was that appellant became the lawful owner of this note and mortgage through a trade made with his principal. The evidence was relevant and material upon that issue. The action of the court in excluding it seems to have been based upon the ground that it was hearsay evidence. It is said in 2 Jones, Commentaries on Evidence, § 323:

> "It has long been settled as one of the exceptions to the general rule, excluding hearsay, that the declarations of persons since deceased are admissible in evidence, provided the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it and if it was opposed to his pecuniary or proprietary interest. * * * In this country the law is more liberal, and it has been held that absence from the state, so far as it affects the admissibility of secondary evidence, has the same effect as the death of the witness."

See. also, Alter v. Berghaus, 8 Watts (Pa.) 77; Walnut Ridge, etc., Co. v. Cohn, 79 Ark. 338, 96 S. W. 413; 2 Wigmore, Evidence, § 1456.

The state seeks to avoid the effect of this rule on the theory that the declarations made by Hughes were not against his pecuniary interest, for the reason that he had been paid what was due him, and he had no further interest in the subject-matter. But it seems to us this is not the proper view to take of the situation. He was an essential factor in the prosecution; it was based on the alleged embezzlement of his money, and the proceedings had been set in motion by his wife acting as his agent in the capacity of prosecuting witness. He had a pecuniary interest in the money which the accused was charged with appropriating. If he made a statement to the effect that the accused owed him no money when all the evidence shows that the accused had been in his debt, that is surely a declaration against his pecuniary interest. But even if the recitals in the receipt made after the fact of payment should be in any sense inadmissible, the reasoning of the state would not apply to the offered testimony of witness Rossier, as to statements made by Hughes at the time of their meeting and before the money had actually passed. There was in evidence a letter from Hughes to appellant in which the former agreed to take the Tillamook mortgage in exchange, tending to show that the parties were dealing with one another on that understanding. It seems to us that these declarations of Hughes were against interest, and that their exclusion was prejudicial error. We further think such evidence was admissible for the purpose of showing consent on the part of the prosecuting witnesses to the appropriation for which it is sought to criminally charge appellant. Lockett v. State, 59 Tex. Cr. R. 531, 129 S. W. 627; Pye v. State, 74 Tex. Cr. R. 322, 171 S. W. 741; Wharton, Crim. Law (11th Ed.) §§ 381, 1226.

[5] The following instruction given by the court is assigned as error:

> "You are instructed that the intention to restore, repay or replace money or property wrongfully and unlawfully appropriated, does not take from the act its criminal character, and in this case, if you find from the evidence beyond a reasonable doubt that the defendant wrongfully and unlawfully appropriated the property belonging to the parties alleged, the fact, if you should find it to be a fact, that at the time he made the appropriation he intended to repay or replace at some future time, the money wrongfully and unlawfully appropriated, would not take from the act its criminal character, and the defendant would be liable."

We think the objection to this instruction is well taken. Under Rem. Code, § 2601, intent to deprive or defraud the owner is an essential element in the crime of larceny by embezzlement. The instruction complained of makes unlawful or wrongful appropriation of another's property without any intent to deprive him thereof a crime. Such an instruction is not in accord with the statutory definition of the crime, nor with the authorities.

> "The word 'unlawfully,' where used in the instruction, does not supply the [place of the] word 'felonious,' or the word 'fraudulently,' etc., for while defendant may have unlawfully converted the money to his own use, it does not necessarily follow that he did so with a felonious or fraudulent intent, and unless he did so with such intent he is not guilty of embezzlement, although the statute does not in express terms require that there should be a criminal intent." State v. Cunningham, 154 Mo. 161, 55 S. W. 282.
>
> "Where defendant, having borrowed a diamond ring pawned it with intent to redeem it, and without any fraudulent intent to permanently deprive the owner of the property, he was not guilty of theft as bailee; the fraudulent intent existing at the time of the conversion being an essential element of the offense." Taylor v. State, 50 Tex. Cr. R. 377, 97 S. W. 473 (syllabus).

"The rule of law, with some exceptions, which do not apply to our case, is this: That when an act is forbidden by law to be done, the intent to do the act is the criminal intent and the law presumes the intent from the commission of the act; but when an act becomes criminal only by reason of the intent, unless the intent is proved the offense is not proved, and this intent must be found by the jury as a fact from the evidence. It is for them to infer it, and not for the court. * * * This shows clearly that the mere act of converting the property to the defendant's own use is not sufficient to constitute the offense, and that it is incumbent upon the state to go a step farther and prove that it was done with a fraudulent purpose." State v. McDonald, 133 N. C. 680, 45 S. E. 582.

See, also, State v. Lentz, 184 Mo. 223, 83 S. W. 970; State v. Reilly, 4 Mo. App. 392; Tashima v. People, 58 Colo. 98, 144 Pac. 200.

[6] The following instruction requested by appellant was refused by the court:

"You are instructed that under the laws of the state of Washington if a person in converting property to his own use does so under a bona fide claim of title thereto, he is not guilty of the crime of larceny, although his claim of title was not good, and in this case you are instructed that if the defendant after negotiating with Peter Hughes for a trade believed that this note in question was his, and so believing used the proceeds as his own, you cannot find the defendant guilty."

This instruction was addressed to the facts in evidence, while the court in its charge merely covered the matter by an abstract statement in the language of the statute defining the offense of larceny by embezzlement. It is said in Brickwood's Sackett on Instructions to Juries, § 179:

"Instructions should be framed with reference to the circumstances of the case on trial, and not be expressed in abstract and general terms, when such terms may mislead instead of enlightening the jury."

See, also, Blashfield, Instructions to Juries, § 92; State v. McCann, 16 Wash. 249, 272, 47 Pac. 443, 49 Pac. 216; State v. Rolette, 161 Pac. 1042.

We think that the refusal of the foregoing instruction constituted prejudicial error. The other instructions requested and refused were sufficiently covered by those given by the court.

The challenge to the sufficiency of the evidence was properly denied. The contention is that the evidence on the part of the state did not tend to prove the crime alleged, that it tended to show the conversion of a check or credit while the charge is a conversion of money; but without further reviewing the evidence, we find no merit in the contention.

For the errors indicated above in the exclusion of evidence and the giving and refusal of instructions, the judgment of conviction is reversed, and a new trial awarded.

ELLIS, C. J., and MOUNT, and PARKER, JJ., concur. HOLCOMB, J., concurs in the result.

(22 N. M. 530)

STATE v. MONTES. (No. 1990.)

(Supreme Court of New Mexico. June 1, 1917.)

(Syllabus by the Court.)

1. HOMICIDE 🔑137 — INDICTMENT — DEATH FROM WOUND.

An indictment charging A. with having inflicted a mortal wound upon B., of which mortal wound the said B. thence continually languished until a certain day, the said B. languishing did die, sufficiently alleges that B. died of the mortal wound alleged to have been inflicted by A.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 228–230.]

2. CRIMINAL LAW 🔑1028—HOMICIDE 🔑137 —INDICTMENT—PLACE OF DEATH—APPEAL.

(a) Under section 5570, Code 1915, trial of one charged with homicide may take place either where the mortal wound was inflicted or where the person died. *Held* that, where homicide is prosecuted in county where mortal wound was inflicted, indictment which omits allegation of place of death of deceased is not fatally defective.

(b) Nonjurisdictional questions cannot be raised first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Homicide, Cent. Dig. §§ 228–230.]

Appeal from District Court, Grant County; Neblett, Judge.

Pedro Montes was convicted of murder in the first degree, and he appeals. Affirmed.

A. B. Renehan, of Santa Fé, for appellant. Harry S. Bowman, Asst. Atty. Gen., for the State.

HANNA, C. J. The appellant, Pedro Montes, was tried and convicted of murder in the first degree in the district court for Grant county and sentenced to be hanged.

[1] 1. The transcript filed by appellant contains only the record proper, and but two questions are presented for our consideration. The first question is that the trial court was without jurisdiction for the reason that the indictment is defective in not stating the cause of death of Rufina Villanueba. After alleging the assault, the indictment proceeds to charge the following:

"* * * did strike, penetrate and wound, giving to the said Rufina Villanueba, then and there with the leaden bullets aforesaid, * * * in and upon the head and body of her the said Rufina Villanueba, one mortal wound, of which said mortal wound the said Rufina Villanueba, thence continually languished until the eighth day of January, in the year aforesaid, she the said Rufina Villanueba languishing did die."

The contention of appellant is that Rufina Villanueba, though mortally wounded, might have languished of the hurt and died of poison, pneumonia, or of another assault, for all that the indictment discloses. Counsel for appellant criticizes the holding of this court in the case of Territory v. Benito Lobato, 17 N. M. 666, 134 Pac. 222, L. R. A. 1917a, 1226, saying that "the court evidently strained the law against the defendant, instead of in his favor." This statement and others contained in his brief are without any foundation whatever. The Lobato Case, cited supra, is controlling on this point of law. There the indictment alleged:

> "Of which said mortal wound, the said Juan Trujillo thence continually languished until, on the 30th day of December, A. D. 1909, * * * he there died."

The court held that the indictment sufficiently alleged that the deceased died of the mortal wound inflicted by the appellant in that case, saying:

> "We do not believe the language used in the indictment and quoted above, by any rule of construction, justifies the assertion that it does not charge that the deceased died of the mortal wounds inflicted by the defendant. Briefly stated, and stripped of legal verbiage, the indictment charged that Trujillo was given a mortal wound by the defendant, 'of which mortal wound' the said Trujillo 'there died.' It is true, the indictment alleges, after using the language 'of which said mortal wound,' that 'the said Juan Trujillo continually languished until, on the 30th day of December, A. D. 1909, between the hours of 2 and 3 o'clock in the morning of said day,' and that such language intervenes between the words 'of which said mortal wounds' and 'he there died,' still it is all a part of one sentence, and such language simply relates to what occurred between the infliction of the wounds and the death. The charge is that he died of the mortal wounds, so received, and the recital is made that, of the mortal wounds so received, he languished, followed by a statement of the time of his death. The charge is all part of one sentence, separated only by commas, and only by a strained construction can appellant's contention be sustained."

The position of appellant on this point, in the face of the foregoing decision, is wholly without merit.

[2] 2. (a) The second proposition urged by appellant is that the indictment is defective because it fails to allege the place of death of Rufina Villanueba. The indictment alleges that:

> "In the year aforesaid, in the state of New Mexico aforesaid, she the said Rufina Villanueba languishing did die."

Appellant contends that the indictment should have alleged definitely the county wherein death occurred, and that an allegation of the definite place of death is essential. Numerous cases are cited by appellant to the effect that at common law the indictment must allege that the deceased died in the county in which the indictment was found, such allegation being necessary in order to confer jurisdiction, and the case of State v. Coleman, 17 S. C. 473, is cited as authority that such an allegation is necessary even where a statute permits indictment and trial of an offense, either where the mortal wound was inflicted or where death ensued. That case does so hold, but it is one holding to the minority doctrine. There the statute made specific provisions for the place of trial, where the injury causing the death was inflicted within the limits of that state and death ensued beyond the limits; where the injury was inflicted by a person within the limits of the state upon a person without the limits of the state, or vice versa; where the injury causing death was inflicted by one person in one county and death ensued in another; and where the injury causing death was inflicted by a person who was in the bounds of one county upon a person who was in the bounds of another county. The court said that the statute did not purport to make any change in the rules of criminal pleading, and the indictment, not having alleged the place of death, was defective, both under the statute and under the common law. Apparently, the court lost sight of the purpose and necessity of the allegation, for its principal purpose, under common-law pleading was to exhibit the venue of the offense and thereby aver jurisdiction. But numerous other cases, where statutes of the same purport were in effect, reached a contrary conclusion. In State v. Baldwin, 15 Wash. 15, 45 Pac. 650, the indictment failed to allege the place of death, and appellant urged that it was therefore defective because it disclosed that the court had no jurisdiction of the offense and that it violated his constitutional right to be informed of the nature and cause of the accusation against him. The court referred to Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377, relied upon in the case at bar by appellant, and said that it was decided under common-law principles and was not applicable to the case then at bar because of the existence of a statute of Washington, which provided, among other things, that all criminal trials should be held in the county where the offense was committed. Speaking to the contention that the failure to allege the place of death deprived appellant of his constitutional right to be appraised of the nature and cause of the accusation against him, the court said that the proposition was not presented to the trial court, and "it was not error going to the jurisdiction of the court, and from the proofs it is apparent that no harm resulted to the defendants." In Roberson v. State, 42 Fla. 212, 216, 28 South. 427, 429, the identical question presented in this case was before the court. It is said that the true common-law rule probably was that the offense was committed where the mortal wound was inflicted. The court, under a statute similar to ours (section 5570, Code 1915), said:

> "So far as showing jurisdiction in the court is concerned, it is evident, under the statutes mentioned, that an allegation of a mortal wound in a county in this state, and the consequent death therefrom within a year and a day, would be sufficient to give jurisdiction in the county where the mortal blow was struck. If the mortal wound is inflicted in a county in this state, jurisdiction attaches there, whether the death resulted in another county of the state, or beyond its territorial limits. The question here, however, is not entirely one of jurisdiction, but one, also, of pleading, and a direct assault was made on the indictment by motion to quash on account of the failure to allege where the death occurred. The American decisions are in conflict on the point, an apparent majority in number sustaining an indictment without an allegation as to the place of death."

The justice writing the opinion in that case said that he believed that the place of death should be averred in an indictment for homicide, but the majority of the court reached the opposite conclusion, in view of the statute. In the concurring opinion, the court reasoned that at common law the place of death might be laid in the county where the mortal wound was inflicted, and that proof of death in a different county was not a fatal variance; hence it was apparent that the allegation was essential only for the purpose of showing venue or jurisdiction. Under the statute of that state, similar to ours as we have said, the indictment was held to be good. In Albright v. Territory, 11 Okl. 497, 69 Pac. 789, the court said that the allegation of the place of death was essential at common law, to confer jurisdiction, but that under the statute of that state, providing for trial of homicide, either where the mortal wound was inflicted or death occurred, the allegation was not essential. See, also, Loyd v. State, 6 Okl. Cr. 76, 116 Pac. 959, 961; State v. Jones, 38 La. Ann. 792; State v. Bowen, 16 Kan. 475; 13 R. C. L. "Homicide," § 185; and note to Commonwealth v. Snell, 3 L. R. A. (N. S.) 1019. In this note the author concludes that an allegation of the place of death is not necessary under statutes giving the courts of either the place where the mortal wound was inflicted, or where death occurred, jurisdiction over the homicide. The cases for and against this conclusion will be found collected in that note.

2. (b) We are satisfied that the contention of appellant on this point is without merit, but an additional reason exists for that conclusion. The record fails to disclose that the indictment was made the subject of attack on this point at any time. The court acquired jurisdiction by the allegation that the mortal wound was inflicted in the county of Grant, and the question presented, made on the theory that the indictment should have been more definite so that appellant might intelligently prepare his defense, is nonjurisdictional and cannot be considered here for the first time.

The only other contention made by appellant is that the indictment attempts to charge several offenses, the attack being on the ground of grammar and syntax, and that section 5570, Code 1915, has no bearing upon the second point discussed herein. The indictment is not defective for the reasons argued or assigned, and the conclusion reached in the discussion of the second point herein makes it unnecessary to restate the reasons why the second contention under this point is without merit.

The judgment of the trial court is therefore affirmed, and it is so ordered.

PARKER and ROBERTS, JJ., concur.

(101 Kan. 20)

RICE v. RICE et al. (No. 20534.) *

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. EVIDENCE 🔑423(1)—PAROL EVIDENCE—GROUND OF WRITTEN OBLIGATION.

Although the terms of a written obligation, assumed to be valid, cannot be varied by parol, it may be shown by parol what caused the party thus to obligate himself, and thereby test the question whether he is legally bound, as the writing imports, or whether he is by any cause wholly or partially freed from liability thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957, 1960.]

2. EVIDENCE 🔑432—PAROL EVIDENCE—FAILURE OF CONSIDERATION FOR NOTE.

In a foreclosure suit between the immediate parties to the note and mortgage parol evidence is always admissible to show a failure of consideration, or that the note and mortgage were given merely as accommodation to the payee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981–1989.]

3. GIFTS 🔑49(4)—MORTGAGES 🔑25(6)—VOLUNTARY GIFT OF REALTY—CONSIDERATION FOR MORTGAGE—EVIDENCE.

The evidence examined, and *held* sufficient to support findings to the effect that a warranty deed from plaintiff to his nephew, one of the defendants, conveying certain real estate was intended by the plaintiff as a volntary gift, and that a note and mortgage executed to him at the same time by the nephew for the amount stated as consideration for the deed were given without consideration and intended as an accommodation to the payee.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 95; Mortgages, Cent. Dig. §§ 42, 1364.]

Appeal from District Court, Graham County.

Suit to foreclose a realty mortgage by A. J. Rice against Louis H. Rice and another. Judgment for defendants, and plaintiff appeals. Affirmed.

W. L. Sayers, of Hill City, and Z. C. Millikin, of Salina, for appellant. F. D. Turck, of Hill City, and Burch, Litowich & Royce, of Salina, for appellees.

PORTER, J. The plaintiff is the uncle of defendant L. H. Rice, and brought this suit to foreclose a mortgage on residence property in Hill City occupied by L. H. Rice and wife.

The note for $6,500 and the mortgage were executed February 4, 1908, signed by L. H. Rice a day or two before his marriage. The answer alleges that on that date the property which was then owned by the plaintiff was conveyed by warranty deed to L. H. Rice as a voluntary gift, and at the same time and at the plaintiff's request the note and mortgage were executed, but without any consideration, and merely for the accommodation of the plaintiff, who stated that he was a heavy borrower of banks and others, and desired the note and mortgage so he could use them as collateral to loans he might make in the future, and that his nephew would never be called upon to pay

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 11, 1917.

the note, and that the mortgage should never be enforced against the property. L. H. Rice further alleges in his answer that he had full confidence in his uncle and executed the note and mortgage in reliance upon these representations. The court found for the defendants on the facts, and gave judgment against the plaintiff, who appeals.

[3] The court made the following findings of fact:

"In 1906 the plaintiff was a resident of Hill City, Graham county, Kan. He was then and now is a bachelor. He has no living relatives in this county excepting the defendant, and had no relative living here at the time of the transactions involved in this suit, other than defendant. Defendant is a nephew of plaintiff. In 1906 defendant came to this county and soon afterwards he entered the employ of plaintiff. At that time the plaintiff was the owner of about 100 quarter sections of land in Graham and Rooks, and about twenty quarter sections in Atchison county. He also owned the lots in question in this suit, being lots 7 and 8 in Hill City. This property was largely free from incumbrance. The business of plaintiff at this time was extensive and required constant supervision. In this state of plaintiff's business, the defendant entered the plaintiff's employ at a compensation of $2.75 per day. He assisted the plaintiff in all ways in looking after his business and property. Some time after entering the plaintiff's employ, plaintiff became a large owner of a telephone system and defendant was put in charge of it. In 1908 plaintiff was informed of the prospective marriage of defendant with one Miss Clara Law, of good family, who lived about twelve miles south of Hill City. Miss Law was the owner of some land lying in her neighborhood, where she and her husband-to-be had planned to make their home. Wishing to retain the defendant in his employ and to have defendant do his work from Hill City as his headquarters, and also desiring to make a home for his nephew and his wife and also for himself in the future in his declining years, plaintiff proposed to build a house on the lots in suit and give it and the land on which it was to be built to the defendant. The defendant agreed to accept such gift and to furnish a room in the proposed house for the use of plaintiff. The house has been built and occupied by defendant and plaintiff and his wife ever since. The defendant and Clara Law were married on February 5, 1908. The day before their marriage, defendant and plaintiff went to the office of one W. H. Hill, a notary public of this county, residing in Hill City, and had him prepare a warranty deed of the lots in suit for himself as grantor to defendant as grantee. At the same time a mortgage was made by defendant to plaintiff covering the same lots. The express consideration of both the deed and mortgage was $6,500, but no real consideration was given for it. This deed was delivered to defendant by plaintiff about the day of the wedding. It was kept by defendant for a short time, and afterwards was delivered into the possession of plaintiff for safe-keeping. When the mortgage was made it was retained by plaintiff. At the time of delivery of the mortgage it was agreed and understood between and by both the plaintiff and defendant that the mortgage was to be used only for the accommodation of plaintiff in case he so desired to use it, but otherwise was not to become of any force or effect as a lien upon the lots in the suit. It was not so used, but has been kept in the possession of plaintiff at all times since. This mortgage was made to fall due five years after date without interest. Neither the deed nor the mortgage have been recorded in the office of the register of deeds, nor has the mortgage at any time been returned by plaintiff to the assessor for taxation. At the time of the making of the deed and the mortgage a first mortgage rested on the lots in suit and on three quarter sections of land worth about the face value of such mortgage, and the lots themselves with their improvements were worth about $3,500. After the making and delivery of the deed and the mortgage, some additional improvements, which have increased its value to about $4,000. At the time plaintiff decided to make a gift of the property to defendant the house had not been begun, and the value of the property then did not exceed the sum of $1,000. Plaintiff gave possession of the property to defendant when the house was sufficiently finished for living in, intending that he should have it as his own, and defendant took possession of it and has ever since occupied it as his own, and plaintiff has made his home with defendant as a member of his family. Plaintiff has, since the house was built and occupied, put some other improvements on the lots, but he has done so voluntarily and for the benefit of the defendant. He has also paid some taxes assessed against the land, but he has done so voluntarily and for the benefit of the defendant, and has been paid the greater part of such advances. The property in suit was given to defendant by plaintiff as a free and voluntary gift. Its possession was taken by defendant and accepted as such gift. The mortgage was given without consideration having been given for it by plaintiff. It was given by defendant and accepted by plaintiff for the latter's accommodation, and not to hold it as a lien upon the lots, and with the understanding and agreement between them that it should never become a lien upon the lots, and that payment of it should never be exacted from defendant by plaintiff."

The findings are sustained by sufficient evidence. The defendants' claims in regard to the execution of the instruments are borne out by the circumstances set forth in the findings as to the relationship of the parties, and the business and friendly relations which existed between them at the time the instruments were executed and which continued for years afterwards.

[1, 2] The first contention is that the execution of the note and mortgage and of the deed are one transaction. This may be conceded; the answer alleges that they were both executed at the same time and place. They are to be considered as one transaction, so as to give force and effect to both when it can be reasonably done. But the application of this doctrine does not prevent either party from proving the facts as to the actual consideration for either or both instruments. The plaintiff was competent to make a voluntary gift of the property to his nephew. He might have made a voluntary gift to his nephew of $5,000 in government bonds, and at the same time and place he might have made an arrangement by which he borrowed the bonds from his nephew to use as collateral security with the understanding that he would return them to the nephew. In a sense the giving and the borrowing would be all one transaction. The possession of the bonds would be prima facie evidence that the uncle continued to own them, but the nephew might be able to establish by competent evidence the facts showing that the bonds belonged to him.

It is contended that the court erred in admitting parol evidence varying the terms of the note and mortgage. The evidence, however, was not offered for that purpose. The defendants concede that the instruments are precisely what the maker and the payee intended them to be—a note and mortgage, which in the hands of a holder in due course would be enforceable against the maker and against the property described in the mortgage. This is a suit between the original parties, and, as said in Bartholomew v. Fell, 92 Kan. 64, 139 Pac. 1016:

> "Between the original parties to a written instrument the rule excluding parol evidence in contradiction of a written agreement is not infringed by proof that the instrument was never delivered, or was delivered to take effect only upon the happening of some future event." Syl. 3.
>
> "The objection to parol evidence does not apply where it is offered not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but to disprove the legal existence or rebut the operation of the instrument, and in order to determine the validity of the writing the true character of the transaction may always be shown." 17 Cyc. 694.
>
> "The rule which prohibits the introduction of parol evidence to vary a written instrument has no application when the legal existence or binding force of the instrument is in question." Webster v. Smith, 72 Vt. 12, 13, 47 Atl. 101.

A case in point is Campbell v. Davis et al., 94 Miss. 164, 47 South. 546, 19 Ann. Cas. 239. The parol evidence went to show that the actual consideration was $200, but that at the payee's request the amount was stated as $700, in order that the payee might use the paper as collateral. The court held that this does not violate the rule against parol evidence to vary a writing, but is merely showing the real consideration for the note. In the opinion it was said:

> "This brings the case squarely within the well-established rule thus admirably stated by Judge Campbell: 'The terms of an obligation, assumed to be valid, cannot be varied by parol; but it may be shown by parol what caused the party to thus oblige himself. That consists with the written obligation, and does not vary it. The right to show the real consideration is a qualification of the general rule of the admissibility of parol evidence to alter the terms of a written contract, and is as well established as the rule itself. What I bind myself by writing to do cannot be varied by parol; but I may always show by parol what induced me to thus bind myself, and thereby test the question whether I was legally bound, as the writing imports, or whether I have been by any cause wholly or partially freed from my obligation.' Cocke v. Blackbourn, 57 Miss. 689." 94 Miss. 167, 47 South. 547 (19 Ann. Cas. 239).

The Negotiable Instruments Law (section 6543, Gen. Stat. 1915) authorizes the testimony of which the plaintiff complains. It reads:

> "As between immediate parties, and as regards a remote party other than a holder in due course, * * * the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument."

The finding of the court that at the time of the delivery of the mortgage it was understood and agreed between the parties that the mortgage was to be used only for the accommodation of plaintiff in case he so desired, but otherwise was not to become of any force or effect as a lien upon the property, that it had not been so used, but remained in the possession of the plaintiff at all times since, is a finding of the facts which brings the case within the section of the statute just quoted.

It is contended there was error in admitting the testimony of Mrs. Law, mother of Mrs. Rice, to the effect that L. H. Rice told her that the plaintiff had given the property to him. There was other competent evidence fully sustaining the court's findings of the facts with reference to the gift of the property, so that in any event the admission of the evidence cannot be regarded as reversible error. The trial was by the court, and the court ruled that the evidence would be considered only in connection with the testimony of L. H. Rice that the plaintiff directed him to make this communication to Mrs. Law, and the evidence tended to show that L. H. Rice was the agent of the plaintiff for the purpose of making the statement.

The findings sustain the conclusions of law by which the judgment barred the plaintiff from all interest in the property and denied his right to maintain the action upon the note and mortgage.

The judgment is affirmed. All the Justices concurring, except DAWSON, J., who did not sit.

(101 Kan. 161)

CRAVENS et al. v. PUTNAM, Mayor, et al.

(No. 20922.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS 🔑465—STREET PAVING—TAXING DISTRICT—SPECIAL ASSESSMENTS.

The statute having prescribed what shall constitute a taxing district in the matter of paving a street, and also the mode of making special assessments of private property to pay for the paving, it must be closely followed, and a substantial departure from the method prescribed by the Legislature will invalidate the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1108.]

(Additional Syllabus by Editorial Staff.)

2. MUNICIPAL CORPORATIONS 🔑465 — PAVING STREET—TAXING DISTRICT—"BLOCK."

Under Gen. St. 1915, § 1705, providing that in cities of the second class paving assessments shall be made for each block separately on all lots to the center of the block on either side of the street, the word "block" means the platted portion of a city surrounded by streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1108.

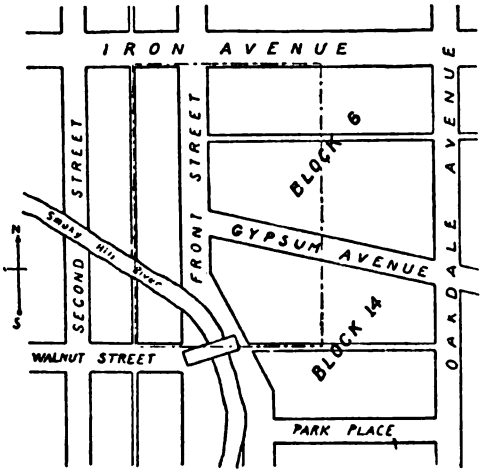
For other definitions, see Words and Phrases, First and Second Series, Block.]

Appeal from District Court, Saline County.

Action for injunction by R. P. Cravens and others against E. J. Putnam, Mayor of Saina, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. B. Crowther and H. C. Tobey, both of Salina, for appellants. Z. C. Millikin, of Salina, for appellees.

JOHNSTON, C. J. This was an action by the owners of lots in Salina to enjoin the officers of the city from levying and collecting illegal assessments made upon their lots for the paving of Front street, and also to prevent the issuance of bonds to pay for the paving. In the preliminary steps the officers of the city designated the extent of the paving district and undertook to make it include blocks and parts of blocks as indicated on the following plat:



Gypsum avenue, Iron avenue, Oakdale avenue, Walnut street, and Front street are regularly laid out streets of the city. The distance between the south line of Iron avenue and the north line of Gypsum avenue is 418 feet, and the west line of Front street between Iron avenue and Walnut street is not intersected by any cross street. Second street, west of Front street, runs parallel with Front street and 250 feet west of it. The part of Front street improved extends from Iron avenue past Gypsum avenue to Walnut street, and the authorities undertook to include in the paving district the territory to the middle of block 6, abutting on Front street, and also a large part of block 14 lying on the south side of Gypsum avenue; namely, the part which extends from Front street to the middle of the block and as far south as the north line of Walnut street. They also included one-half of the block lying west of Front street and extending from Iron avenue to Walnut street. The territory between Front street and Second street and extending from Iron avenue to Walnut street constitutes a single block, and has been in this form since the platting of the original townsite. The plaintiffs' lots are situated in block 6, and they insist that the inclusion of other blocks or parts of blocks in the paving district is contrary to the statute and fatal to the validity of the assessment. The court found that the assessments as made by the city upon plaintiffs' property were greatly in excess of what they would have been had the assessments been made for each block separately.

[1, 2] The Legislature has prescribed the extent of the paving district and the method of apportioning assessments of this character. It is provided that:

> In cities of the second class "* * * assessments shall be made for each block separately, on all lots and pieces of ground to the center of the block on either side of such street or avenue, the distance improved or to be improved, * * * according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon, which value shall be ascertained by three disinterested appraisers appointed by the mayor and council, or commissioners," etc. Gen. Stat. 1915, § 1705.

As the statutory rule requires that assessments shall be made upon each block separately, the attempt of the city to include other territory with block 6 was without authority. What constitutes a block to be separately assessed has been the subject of investigation a number of times, and it has been determined that it is a platted portion of a city surrounded by streets. City of Ottawa v. Barney, 10 Kan. 270; Blair v. City of Atchison, 40 Kan. 353, 19 Pac. 815; McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438; Bowlus v. Iola, 82 Kan. 774, 109 Pac. 405. The plaintiffs are entitled to have their property assessed according to the statutory method, and, as we have seen, the departure from that method resulted in a substantial increase in the assessments that were made. The city may not adopt a different plan of assessment because it may be more convenient for the mayor and council, or because its officers may think it to be more equitable in its application. The Legislature had the authority to make an apportionment, and it is well established that statutory rules making special assessments upon private property must be strictly followed. Simpson v. Kansas City, 46 Kan. 438, 26 Pac. 721. The fact that the block opposite block 6 in which plaintiffs' property is situated extends from Iron avenue to Walnut street and considerably farther south than does block 6 does not affect the application of the statutory rule. The block as platted is the unit in apportioning special assessments, and whether it is larger or smaller than another block abutting upon an improved street it must be separately assessed. Bowlus v. Iola, supra. The length of that block may slightly affect the assessments made upon the lots along the street, but absolute equality is not attainable. Some blocks abutting on a street are deeper than others, but a variation in depth has never been regarded as cause for departing from the statutory rule, nor as invalidating the assessments made.

There is a contention that as plaintiffs had petitioned for the improvement and allowed it to proceed, they are estopped to question the validity of the assessment. While they petitioned for the improvement, they did not ask for an invalid apportionment of the tax. There was a legal way in which to make the assessments, and the plaintiffs had a right to expect that the statutory and usual method would be used. They invoked action, but not illegal action, and the rule in the cited case of Stewart v. Com'rs of Wyandotte Co., 45 Kan. 708, 26 Pac. 683, 26 Am. St. Rep. 746, does not apply.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 103)

COOK v. LEAVENWORTH TERMINAL RY. & BRIDGE CO. (No. 20890.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Bridges 🔑46(13)—Public Toll Bridge—Action for Injury—Instructions.

Instructions defining the duty of a public toll bridge toward a drunken pedestrian examined, and *held* favorable to plaintiff.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 121.]

2. Bridges 🔑36—Public Toll Bridge—Duty to Intoxicated Patron.

A public service corporation owes no higher duty to a drunken patron than to a sober one, unless it knows or has reason to believe that such patron is so much incapacitated with intoxicants that he cannot take care of himself.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 82–85, 109.]

3. Bridges 🔑46(5)—Public Toll Bridge—Action for Injury—Evidence.

Where a plaintiff who is injured while crossing a toll bridge by being struck by a passing train bases his charge of negligence against the bridge company on the ground that custom and reasonable care required the defendant not to allow pedestrians on the bridge while trains were crossing it, it was competent for the defendant to prove that there was no such custom, that there was no danger to persons exercising ordinary prudence in passing trains on the bridge, and that hundreds of people had met and passed trains on the bridge daily for 20 years, and that no previous accidents had been occasioned thereby.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 114½, 116–118.]

4. Evidence 🔑147—Admissibility—Negative Evidence.

Under an issue of custom and a question as to the requisite requirements of reasonable care, negative evidence which does not tend to raise collateral or impertinent issues is admissible under the rules and limitations announced in Field v. Davis, 27 Kan. 400; City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933; Cunningham v. Clay Township, 69 Kan. 373, 76 Pac. 907.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 435–437.]

5. Appeal and Error 🔑302(3)—Record—Consideration of Evidence.

Rule followed that excluded evidence which is not brought on the record in conformity with section 307 of the Civil Code (Gen. St. 1915, § 7209) cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747.]

6. Appeal and Error 🔑1050(1)—Harmless Error—Admission of Evidence.

Where no prejudice is disclosed, a ruling that photographs offered in evidence might be admitted "for what they are worth" is not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

(Additional Syllabus by Editorial Staff.)

7. Trial 🔑343—General Verdict—Issues.

All the facts put in issue by the pleadings are conclusively resolved in favor of the defendant by the general verdict for him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809–812.]

8. Appeal and Error 🔑1032(1)—Reversal—Prejudice.

In view of Civ. Code, §§ 141, 581 (Gen. St. 1915, §§ 7033, 7485), it is not enough to disturb a judgment that some error or impropriety occurs in the trial, but appellant must show that the matter complained of prejudicially affected the net result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047, 4051.]

Appeal from District Court, Leavenworth County.

Action by John L. Cook against the Leavenworth Terminal Railway & Bridge Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Arthur M. Jackson, of Leavenworth, for appellant. A. E. Dempsey, of Leavenworth, and John Barton Payne, of Chicago, Ill., for appellee.

DAWSON, J. The plaintiff was severely injured by a Rock Island train while he was crossing the defendant's bridge over the Missouri river between Leavenworth, Kan., and Drydale, Mo. The bridge is a toll bridge erected by authority of Congress and constructed on plans approved by the War Department, and is used by railroads, vehicles, and pedestrians. Plaintiff brought this action against the bridge company, alleging that he purchased from defendant's agent a ticket which authorized and entitled him to cross the bridge from Leavenworth to Drydale in safety, and that the defendant's agent told him to proceed and told him that he could do so in safety, and that in reliance thereon he started eastward across the bridge, and when he was about half way an accommodation train of the Rock Island railway approached him from the east, and that there was not room for him between the train and the guard rail of the bridge, and that he, believing his life was in danger, turned and ran westward, but the train overtook him and he clung to the railing while hot and burning steam from the locomotive enveloped, blinded, burned, and confused him, and that the locomotive struck and knocked him down, whereby he sustained his injuries.

The defendant's answer pleaded that the plaintiff was under the influence of liquor, and insisted, notwithstanding the protest of the defendant's toll agent, in going upon the bridge after being informed that a train was about to cross from the east; that there was ample space for plaintiff and the train to pass in the usual and customary manner; that on account of plaintiff's intoxicated condition he threw himself against the side of the train, which caused his injuries; that at all times there was ample space for a pedestrian and train to pass if he exercised ordinary care for his own safety.

From a general verdict and judgment for defendant the plaintiff appeals, specifying the following errors:

> "1. Inasmuch as the defendant, by its amended answer and evidence, introduced the doctrine of last clear chance into the case, the trial court erred in giving to the jury instructions numbered 1, 2, 3, 4, 5, and 7, requested by defendant.
>
> "2. The trial court erred in allowing the defendant, over the continuous objections of plaintiff, to introduce the testimony of many witnesses, to the effect that no previous accident had occurred on the bridge; that they had never known of a previous accident on it and had no difficulty in crossing it.
>
> "3. The trial court erred in refusing to allow the plaintiff to show that since the accident the defendant bridge company has placed a board walk, outside the railing, on the south side of the bridge.
>
> "4. The trial court erred in allowing defendant to introduce certain photographs in evidence, and in allowing Oliver Ousler, the bridge superintendent, to give certain testimony relating thereto."

[7, 8] All the facts put in issue by the pleadings are conclusively resolved in favor of the defendant by the general verdict, so that phase of this lawsuit needs no attention on appeal.

[1, 2] Examining the errors assigned in the order of their presentation, it is not quite clear how the doctrine of last clear chance is involved in this case, nor would prejudicial error necessarily follow if it were. It is not enough to disturb a judgment that some error or impropriety transpires in a trial. It is necessary that the appellant go further and show that the matter complained of prejudicially affected the net result. Civ. Code, §§ 141, 581 (Gen. St. 1915, §§ 7033, 7485); Cox v. Chase, 99 Kan. 740, Syl. par. 11, 163 Pac. 184. But laying aside mere cavil about doctrines, and considering the instructions themselves, the trial court gave eight instructions at plaintiff's request, and seven at the request of defendant. These are too long for reproduction here, but the court has diligently and critically examined them. Those formulated by the plaintiff mainly outlined the law of the case under which plaintiff should prevail if the facts proved would permit it, and those formulated by defendant stated the law of the case if the facts should be resolved as pleaded and testified to by defendant. No inconsistency inhered in the instructions as a whole when read and considered together; and this is the attitude and method by which the jury should and presumably did consider them. Of course, if appellant's second specification of error relating to the admission of incompetent testimony is meritorious, the instruction directing the jury's attention to the legal effect of the facts established by such incompetent testimony would be prejudicial error. The question of the incompetency of the evidence will be considered in its place. The plaintiff could only recover on the grounds of negligence alleged in its petition. The allegation in the answer asserting the drunkenness of the defendant and his contributory negligence in attempting to cross the bridge in an intoxicated condition were a proper subject to be covered by the instructions. One of the instructions prepared by plaintiff and given to the jury reads:

> "3. You are further instructed that if you believe, from the evidence, that the plaintiff was in such an intoxicated condition at the time he purchased a ticket or toll entitling him to cross said bridge as to render him incapable of taking proper care for his safety, and the defendant, at that time, knew this to be a fact, a greater duty rested upon said defendant to guard and protect the plaintiff from injury than would have been required of it had said plaintiff not been under the influence of intoxicating liquor."

The complemental instruction on this point given at defendant's request reads:

> "4. The jury are further instructed that the defendant bridge company was under no obligation to anticipate or foresee that the plaintiff Cook was not or would not be in a sober condition, if he was not sober, or able to take care of himself, if he was not able to do so, and owed no other or different duty toward him than it owed toward others of the general public, and if the plaintiff, by reason of his intoxication or other negligence, unnecessarily exposed himself to risk or danger which caused or contributed to his alleged injuries, he has only himself to blame therefor and cannot recover damages from the defendant."

The latter instruction was necessary to make a complete statement of the law covering this feature of the case, without which the defendant's rights would have been overridden and disregarded. McIntosh v. Oil Co., 89 Kan. 289, 131 Pac. 151, 47 L. R. A. (N. S.) 730, Ann. Cas. 1914D, 112; Little Rock Ry. Co. v. Billings, 173 Fed. 903, 98 C. C. A. 467, 31 L. R. A. (N. S.) 1031, 19 Ann. Cas. 1173, and note. The two instructions do not conflict; they properly supplement each other. If the defendant's agent had known or had reasonable grounds for believing that the plaintiff was so thoroughly incapacitated by intoxication that he could not take care of himself, it would perhaps have been his official duty—at least it would have been expected of him as a natural impulse of humanity—to prevent if possible his going on the bridge when a train was approaching. This is somewhat akin to the doctrine of "last clear chance." But nothing in the evidence discloses that the agent knew or had reason to believe the plaintiff was so drunk that he could not take care of himself. The plaintiff's comrade bought the tickets for himself and plaintiff and when the agent told them a train was coming and if they would wait a few minutes it would be over, the one who bought the tickets said they had passed the train many a time on the bridge. The agent testified that he thought they were drunk, but not staggering, and he let them pass, as was his custom with all pedestrians who appeared to be able to take care of themselves. The statement of plaintiff's comrade would tend to dissipate any doubt which the agent might have as to the plaintiff's capacity to care for himself. The court is of opinion that the instructions quoted and the others given fairly covered the law applicable to these circumstances.

[3, 4] Was it error to permit the defendant's numerous witnesses to testify that they were familiar with the bridge and had met and passed trains on the bridge many times, that hundreds of people crossed the bridge without accident every day and every night? The plaintiff's petition alleged that it was the usual custom of the defendant to sell tickets to pedestrians when trains were not due, and that the exercise of reasonable care required the defendant not to allow pedestrians to cross at times when trains were due or about to cross the bridge. Defendant's answer put the latter allegation squarely in issue. Plaintiff introduced some evidence tending to support it. It would seem, therefore, that defendant's evidence to the contrary was competent on the issue which plaintiff tendered. The case of Ireton v. Ireton, 59 Kan. 92, 52 Pac. 74, cited in condemnation of this, merely holds that incompetent evidence is not rendered competent because the party introducing it had set it up in her pleadings and no motion had been made to strike it out. But here the evidence objected to was proffered to combat the allegations of the pleadings and evidence of the adverse party. Surely what the plaintiff may allege, the defendant may deny; and what the plaintiff seeks to prove, the defendant may endeavor to disprove. But plaintiff argues that this evidence does not show that the many pedestrians who daily passed trains on the bridge were intoxicated, that they did not meet the same train or one exactly similar, at the same time of day; in other words, that the conditions under which the witnesses had passed the bridge and had seen others pass the bridge in safety were not like those under which the plaintiff was injured, and that such evidence was therefore incompetent and irrelevant. This cuts the matter a little too fine. There is no reason to believe that there was so much difference in the width of engines and cars as to materially increase the hazard, if there was a hazard, to a sober and ordinarily careful person in meeting and passing a train on the bridge; and the distinction between the extent of the company's responsibility to sober and to drunken patrons was most favorably pointed out in the instructions. The defendant could not prove its whole defense at once. Under the negligence alleged and testified to by plaintiff it was incumbent upon the defendant to prove that its bridge was safe for ordinary pedestrians to meet trains on the bridge under ordinary conditions, and that it was not necessary to forbid them to enter the bridge when a train was approaching. The evidence was competent for such purposes. Field v. Davis, 27 Kan. 400; City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933; Cunningham v. Clay Township, 69 Kan. 373, 76 Pac. 907; Wigmore on Evidence, §§ 444, 445, 458.

In 32 L. R. A. (N. S.) 1161-1164, is part of an extended note showing the conflict of authority as to the admissibility of negative evidence; and the Kansas case (Field v. Davis, supra) is cited among those which permit such evidence when its admission is not likely to carry the inquiry too far afield or to raise collateral or impertinent issues.

Even the matter of the escape of steam from the engines passing pedestrians on the bridge was shown by some of the witnesses not to have been unusual or serious. This matter was covered by an instruction strongly favorable to the plaintiff, and it should be kept in mind that it was the bridge company, not the railroad company, which was sought to be held partly on account of the escaping steam and its consequences. Moreover, the trial court fully restricted the criticized evidence to its proper scope:

> "4. You are further instructed that even if you believe from the evidence that many other persons had crossed the bridge of the defendant on foot in safety, before the night of the plaintiff's alleged injury, that fact would not defeat a recovery in this case if you further believe, from the evidence, that said defendant, considering all of the circumstances surrounding the crossing of said bridge by said plaintiff on the night in question, did not exercise reasonable and ordinary care to keep said plaintiff off said bridge or to permit him to cross said bridge on foot in safety."

[5] The third assignment of error relates to the exclusion of evidence which it is asserted would show that a board walk outside the railing has been placed on the south side of the bridge. The excluded evidence was not brought upon the record by affidavits, deposition, or testimony supporting the motion for a new trial and cannot be considered on appeal. Civ. Code, § 307 (Gen. St. 1915, § 7209); Hamilton v. Railway Co., 95 Kan. 353, 148 Pac. 648; Scott v. King, 96 Kan. 561, 152 Pac. 653.

[6] Another error is based on the introduction of certain photographs of the bridge. Defendant's objection reads:

> "Counsel for plaintiff: Objected to because they will not help the issues; they would not show the distance from the track to the sides of the bridge; they are taken very close up to the west end and are deceptive in that particular; they are not taken when a train is crossing the bridge, or this Rock Island train in particular; and are objected to for the reason they are incompetent, irrelevant, and immaterial.

"The Court: * * * You do not object to them because they are not properly identified?

"Counsel for plaintiff: No. I presume they are actual photographs of the bridge; but I think they are incompetent because they would not help the jury any except as to the general appearance of the bridge."

The court has examined the photographs, and cannot see how their submission to the jury could have prejudiced the plaintiff, and the trial court's ruling that they might be admitted "for what they were worth" was not error. Higgs v. "Soo" Ry. Co., 16 N. D. 446, 114 N. W. 722, 15 L. R. A. (N. S.) 1162, 15 Ann. Cas. 97; Hughes v. State, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1263, and note; Dederichs v. Railroad Co., 14 Utah, 137, 46 Pac. 656, 35 L. R. A. 802.

Nothing approaching the gravity of reversible error is disclosed in this appeal, and the judgment of the district court is affirmed. All the Justices concurring.

(101 Kan. 91)

KELLY v. CENTRAL UNION FIRE INS. CO. (No. 20804.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. TRIAL 🔑343 — GENERAL VERDICT—DISPOSITION OF ISSUES.

Rule followed that a general verdict and consistent findings of fact dispose of all controverted issues of fact when based upon substantial, though conflicting, testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809–812.]

2. CORPORATIONS 🔑519(3) — CONTRACT TO SURRENDER STOCK — RATIFICATION — SUFFICIENCY OF EVIDENCE.

Record shows evidence sufficient to prove the contract in controversy, and to prove its authorization and ratification.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2089.]

3. CORPORATIONS 🔑376—PURCHASE OF OWN STOCK—FOREIGN STATUTE—CONSTRUCTION.

A statute forbidding a corporation to purchase or hold its own stock, either absolutely or as collateral, after it has once been issued, does not cover the transactions of a corporation during its formative stage, and before its corporate structure is perfected, in contracting for the surrender and cancellation of subscription stock to suppress an overissue in excess of its authorized capitalization, when such correction of the illegal overissue is done in good faith, free of any taint of fraud, and not in prejudice of the rights of third parties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530.]

4. CORPORATIONS 🔑388(2)—OBLIGATIONS — PLEA OF ULTRA VIRES.

A corporation cannot avoid its obligation on a plea of ultra vires when it has appropriated the consideration and received the benefits of it, and where the party seeking to enforce it has fully performed her share of the bargain.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1557.]

5. CORPORATIONS 🔑487(1) — OVERSALE OF CAPITAL STOCK—SURRENDER OF EXCESS—ACTION FOR VALUE OF SURRENDERED STOCK.

Where a corporation in its formative stage discovers that it has oversold its authorized maximum capital stock, the fact that all stock sold after the maximum had been reached should have been treated as void will not bar a recovery for the agreed value or reasonable price of valid stock surrendered by a prior lawful subscribing stockholder to relieve the company's embarrassment and to extinguish the overissue, when this method of correcting the company's capitalization is undertaken in good faith, free of any taint of fraud, and the rights of others are not affected thereby.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893, 1898.]

Appeal from District Court, Miami County.

Action by Katherine Kelly against the Central Union Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lyons & Smith, of Kansas City, Mo., H. L. Burgess, of Olathe, and Paul E. Bradley, of Kansas City, for appellant. Sheridan & Sheridan, of Paola, for appellee.

DAWSON, J. This appeal relates to matters which transpired during the formative period of the defendant's corporate existence, and requires a review of certain transactions relating to plaintiff's purchase of subscription shares of defendant's stock, the surrender and cancellation of plaintiff's stock to extinguish an overissue of capital stock, the partial payment to plaintiff for her surrendered stock, and the question of the defendant's liability to plaintiff for the balance of the agreed price, or reasonable value, of plaintiff's stock thus surrendered by her.

Plaintiff's petition alleged that in July, 1911, she purchased from defendant 900 shares of its capital stock and paid for the same in money and property amounting to $11,250, and that she received a proper stock certificate therefor; that about December 31, 1911, defendant discovered that it had overissued its capital stock to the number of some 1,500 shares in excess of its authorized capitalization; that its authorized capital was $350,000, being 35,000 shares at a par value of $10 per share; and that it was necessary that some of the stock thus issued be canceled so as to reduce the actual stock issue to its maximum legal limit. The petition continues:

"Such overissue of the stock having occurred through an inadvertence in having agents at various sections of the country taking subscriptions for and selling the stock. * * * But when it became apparent to the defendant company, and its various officers, of the said overissue of stock, and that it was necessary to call in and cancel about 1,500 shares of the stock so issued, thereupon the defendant, because of the foregoing, and in its effort to retire or cancel stock, * * * under an oral agreement on or about December 31, 1911, * * * in consideration that this plaintiff would return the said certificate and permit it to be canceled by the defendant, * * * it was at that time agreed between the defendant and the plaintiff that it would pay to the plaintiff the sum of $15 per share, or a total consideration of $13,500, for the said certificate of stock, * * * and the defendant, in pursuance thereof, at or

> about that time received the same, and caused the same to be canceled. * * * That the defendant paid to this plaintiff, on or about the ——— day of June, 1912, $6,000, under the terms of the said oral agreement; and that it has at all times since wholly refused and neglected to pay this plaintiff the remaining part of the said $13,500, which it agreed to pay, etc."

Defendant's answer denied, generally and specially, all of the plaintiff's material allegations, denied that there was an overissue of its capital stock at any time, denied that it was necessary to cancel any stock, denied that it purchased or canceled plaintiff's stock, denied that it paid her $6,000 thereon.

> "But if said stock was purchased, as alleged, from the plaintiff herein, * * * said contract and agreement was entered into, if at all, in the state of Missouri. That it was to be performed within the state of Missouri. That the defendant is an insurance company, organized under the laws of the state of Missouri. * * * That section 7063 of the Revised Statutes of the state of Missouri for the year of 1909, among other things, provides as follows: 'No insurance company shall, directly or indirectly, purchase or hold, either absolutely or as collateral, its own stock, after the same has been once issued.' * * * That said alleged contract for the purchase of said stock, if made at all (and defendant denies that any such agreement was made), was contrary to said statute of the state of Missouri, and was therefore ultra vires, void, and of no force or effect, and not binding upon the defendant company."

Answering further, the defendant alleged that from the spring of 1910 until August 8, 1911, the plaintiff's husband, T. T. Kelly, was secretary of the defendant company, and as such official he had charge of the promotion and organization of the company and the sale of its capital stock; that after August 8, 1911, he was the president and a director of the company, and was the principal officer and manager of the company and intrusted with its management and with control of its affairs; that on June 2, 1911, he caused a certificate for 1,000 shares of the stock to be issued to himself; that on July 20, 1911, he caused that certificate to be canceled, and in lieu thereof caused the issue of two certificates to be made, one for 100 shares in his own behalf and another for 900 shares to be issued to plaintiff; and that thereafter through the company's stock salesmen he effected a sale of 1,000 shares to a Dr. J. M. Singleton for the sum of $15,000, being $15 per share:

> "Said salesmen in selling said stock to Dr. J. M. Singleton supposed that they were selling treasury stock of said company, but that said Kelly upon his own initiative, and without the knowledge or consent of defendant company, for the purpose of making a personal profit for himself, caused the two certificates of stock then held by himself and his wife * * * to be surrendered and transferred upon the books of the defendant company and a new cetrificate, * * * for 1,000 shares to be issued to Dr. J. M. Singleton. * * *"

The gist of other matters pleaded in the answer was that the Singleton stock was an outright purchase of the stock of plaintiff and her husband, and not a purchase of treasury stock; that Singleton paid for his stock by giving promissory notes for the purchase price; that plaintiff's husband, as president of the company, made a real estate loan to Singleton, with defendant's funds, upon condition that one of the promissory notes for $7,500 given by Singleton should be paid with the moneys thus loaned to him; and that, pursuant thereto, plaintiff's husband received the sum of $7,500.

> "That this defendant has never exercised dominion or ownership of said notes, or either of them, and has never made any claim to or over the said notes, and it does not now claim any right, title, or interest thereto. That said notes have never been listed or scheduled among the assets or property of the defendant company, but at all times have been and now are in truth and in fact the property of the said T. T. Kelly."

Plaintiff's reply admitted that originally a certificate of stock in the name of her husband for 1,000 shares had been prepared, but never with her consent; that two certificates should have been prepared in the first instance, one representing her interest of 900 shares and one representing her husband's interest of 100 shares; that, when the overissue was discovered, her husband, as president of the company, offered to return to her the money and property (mortgages) which she had paid for her stock and pay her the balance of the then reasonable and agreed price, or, if the property could not be returned, the defendant would pay her $15 per share. Other features of the plaintiff's reply read:

> "That thereupon she surrendered the said certificate of stock, first indorsing it, and delivered it to T. T. Kelly, for the defendant company at Paola, Kan., on or about the latter part of December, 1911, or the fore part of January, 1912, and that thereafter the defendant has kept and retained the said certificate and has not paid to this plaintiff any of the said purchase price, except the sum as stated in plaintiff's petition.
>
> "Third. This plaintiff admits that T. T. Kelly is, and has been for many years, the husband of the plaintiff, and that he was the secretary of the defendant company as well as the president of the defendant company; that he had all the power and authority in behalf of the defendant expressed in the petition of the plaintiff; and further alleges that each and all of his acts and proceedings with relation to the defendant and in reference to the stock of this plaintiff and the surrender thereof were from time to time fully known and approved and ratified by the board of directors, stockholders, and the executive committee of the defendant, including the various officers of the defendant; and that the defendant and its said board and officers and the committees acquiesced in, approved, and consented, and had previously authorized, the procurement of the said certificate of stock by the said T. T. Kelly from this plaintiff. * * *"

On these issues, the cause was tried. The jury returned a general verdict for plaintiff, and answered certain special questions propounded by plaintiff:

> "(2) * * * State if the plaintiff, at the instance and request of the defendant, caused the said stock certificate to be delivered to the defendant with the intention and purpose on the part of the defendant and plaintiff that the defendant would cancel the said stock certificate and the rights of the plaintiff as the holder of such stock. A. Yes.
>
> "(3) * * * State if the defendant did can-

cel the said certificate and thereafter exercised absolute control over the said stock. A. Yes.

"(4) * * * State if it is true that, at the time the defendant so received the said certificate, it did so with the belief on its part that there was an overissue of stock of the defendant, and that it was necessary to procure at least as much as 900 shares, in order to cancel the same to reduce the stock issue of the defendant to 35,000 shares. A. Yes.

"(5) * * * State if the defendant at that time agreed to pay the plaintiff for the said stock, and, if so, the price of $13,500. A. Yes.

"(6) * * * What was the reasonable market value of the 900 shares of stock represented by the certificate of the plaintiff, at the time it was so delivered to the defendant? A. $15 per share, or $13,500.

"(7) How much did the plaintiff cause to be paid to the defendant for the 900 shares represented by her certificate No. 488? A. $12.50 per share, or $11,250.

"(8) Was there, at the time the defendant received the certificate of stock in question, an overissue of stock of defendant? A. Yes."

Also, certain questions of defendant:

"(3) Did the plaintiff in this action receive the check for $7,500 issued by the Central Union Fire Insurance Company to Henrie S. Dyson, given by Dr. J. M. Singleton in payment of one of his notes? A. Yes, she received the check.

"(4) Was said $7,500 received by plaintiff and applied by her in part payment for her 900 shares of stock? A. $6,000 was applied on her 900 shares of stock."

Defendant's principal contentions are: That the contract for the surrender and cancellation of plaintiff's stock was in violation of the laws of Missouri and prohibited by Missouri statutes, and that the laws of a corporation's domicile follow and govern its conduct into whatever jurisdictions the corporation may go; that the contract was also void under the laws of Kansas; that no contract was proven and no ratification shown; that, if there was an overissue of defendant's stock, the plaintiff's stock would not be affected thereby, but only the Singleton stock, or whatever stock was issued after the authorized capitalization was sold in full; that the holders of the excess issue of stock had their remedy against the corporation by demanding a return of the consideration paid for the excess issue; that defendant's acquisition of plaintiff's stock did not change the situation or cure the defect in the capitalization; that the verdict was excessive in the principal sum of $1,500 and interest computed thereon.

[1, 2] The general verdict and the special findings dispose of all controverted issues of fact. Although stoutly controverted by defendant, we find no difficulty in gleaning from the record ample evidence to prove the contract, its authorization, and ratification. Getty v. Milling Co., 40 Kan. 281, 287, 19 Pac. 617; Town Co. v. Morris, 43 Kan. 282, 284, 23 Pac. 569. There was, indeed, much evidence to the contrary. A skillful and persistent effort was made to prove that the cancellation of plaintiff's stock was merely to effect a sale and transfer of it to Dr. Singleton, and not at all to cure an overissue. But the jury has settled these matters. Bruington v. Wagoner, 100 Kan. 10, 164 Pac. 1057, Syl. par. 1.

[3] Statutes of Missouri, Missouri decisions, and Kansas decisions, are cited and quoted to show that the contract for the surrender and cancellation of plaintiff's stock to correct and cure the overissue was ultra vires and expressly prohibited, and that the contract was against public policy. These have been carefully examined. The Missouri statute forbids a corporation to purchase or hold its own stock, either absolutely or as collateral, after it has once been issued. Rev. Stat. Missouri 1909, § 7063; Chrisman-Sawyer Banking Co. v. Independence Mfg. Co., 168 Mo. 645, 647, 68 S. W. 1026. Such is the general rule. Whether the purchase of its own stock by a corporation is positively forbidden by statute or by mere judicial disapproval of such a practice, there is no doubt that the rule is based on sound public policy. Savings Bank v. Wulfekuhler, 19 Kan. 60; Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194; Steele v. Telephone Ass'n, 95 Kan. 580, 148 Pac. 661. There is usually some leeway allowed by statute, or by judicial interpretation, for a corporation's temporary acquisition or control of its own outstanding capital stock for the purpose of protecting itself against loss. Rev. Stat. U. S. § 5201; U. S. Comp. Stat. 1916, § 9762; Gen. Stat. 1915, § 2144; Rev. Stat. Mo. § 2990; Battey v. Bank, 62 Kan. 384, 63 Pac. 437; Faulkner v. Bank, 77 Kan. 385, 95 Pac. 153; Bank v. Strachan, 89 Kan. 577, 132 Pac. 200, 46 L. R. A. (N. S.) 668; St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142, Syl. par. 2. See, also, notes in 61 L. R. A. 621, and 25 L. R. A. (N. S.) 50.

But the transaction involved in the present case is unique. The corporation's purpose in procuring plaintiff's stock and canceling it was to correct a breach of its corporate powers which it had already committed, and it was not to reduce or hold within its own control its legitimate capital, nor to commit a breach of any rule of public policy governing the manipulation of its own stock. The corporation had illegally issued stock in excess of its authorized maximum capital. Some mode of correction had to be devised. It was necessary that a report of its corporate financial status be made to the Missouri superintendent of insurance. To apprise that officer of the excess issue of stock at that time might have brought down on the corporation the drastic consequences of usurping illegal powers. The predicament of the corporation was not one which could be corrected by an amendment to its charter. The statute relating to that subject (Rev. Stat. Mo. § 7001A; Laws Mo. 1911, p. 276) regulates the reduction of a previously authorized and valid capitalization and for the amendment of the corporate charter in accordance therewith. That statute does not pretend to govern the suppression or extinguishment of an illegal overissue of stock. It cannot be denied that the defendant corporation had power to correct the infirmity in its capitalization. It was its duty to do so. When the state creates a corporation, it not only confers authority upon it, but it imposes a duty upon it —the duty to exercise its corporate functions and to exercise them in conformity to its grant of powers. This corporation had erred, and it was bound to correct that error in some appropriate way. The mode of relieving itself from its predicament was simple and not seriously inappropriate. It certainly was a harmless mode of correcting the irregularity. It did not prejudice the rights of creditors. It was not done to escape a stockholder's liability. It had no taint of fraud. Defendant's bargain with plaintiff for the surrender and cancellation of her stock to cure the illegal overissue was not such a purchase of plaintiff's stock as is contemplated by the inhibitions of the Missouri statute, and the bargain by which defendant was relieved of its embarrassment did not offend against any rational rule of public policy. It does not appear that the creator of this corporation, the state of Missouri, has challenged the corporate acts of defendant in effecting the readjustment and correction of its stock issue. The defendant was vitally benefited by the arrangement—not necessarily in money, but in a more important way—by the restoration of its corporate integrity. The court is of opinion that the transaction involved here was not within the fair intendment of the statute cited and did not offend against it either in letter or in spirit.

[4] There are, indeed, two schools of jurists and two lines of authority on legal questions relating to ultra vires transactions. The case of Harris v. Gas Co., 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. (N. S.) 1171, discusses at length both the strict and the liberal view concerning the consequences of ultra vires transactions. A long line of well-considered decisions has committed this court to the liberal view that a corporation may not avoid its obligation on a plea of ultra vires when it has appropriated the consideration or received the benefits of it, and when the party seeking to enforce the obligation has fully performed his share of the undertaking. Cooper v. National Bank, 40 Kan. 5, 18 Pac. 937; Town Co. v. Morris, 43 Kan. 282, 23 Pac. 569; Town Co. v. Russell, 46 Kan. 382, 26 Pac. 715; Town Co. v. Lincoln, 56 Kan. 145, 42 Pac. 706; Railroad Co. v. Johnson, 58 Kan. 175, 48 Pac. 847; Opera House Co. v. Loan Association, 53 Pac. 761;[1] Harris v. Gas Co., 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. (N. S.) 1171; Saylors v. Bank, 99 Kan. 515, 519, 520, 163 Pac. 454, and cases cited; Bank v. Wilson, No. 20,740, 101 Kan. 72, 165 Pac. 859; Main v. Casserly, 67 Cal. 127, 7 Pac. 426; 10 Cyc. 1056–1067; 7 R. C. L. 677–681.

[5] It is suggested that the plaintiff's stock, being subscribed and paid for and issued before the excess issue occurred, was not affected by the overissue; and that the stock sold and issued after the authorized capitalization was completed was void. That is true. The plaintiff might have stood on her rights and held her valid stock, and let the defendant settle with Singleton, the last subscriber or one of the last, on the best terms possible. Singleton was very much desired as a stockholder and as a director, and the promoters of the corporation believed it to be very much to the corporation's advantage to have him interested in its success. In the formative stages of a corporation's development, considerable bona fide discretion must be allowed to its promoters to effect its success, and the wise apportionment of its stock and unselfish concessions of stock distribution by promoters to invoke and attach the interest of other influential and responsible parties, free of any taint of fraud or prejudice of third parties, are worthy of commendation rather than condemnation. Be that as it may, it would never do to deny redress to plaintiff, who parted with her stock to favor and benefit the defendant and to relieve it from its dilemma, merely because as lawyers and judges we happen to know that there was another and more strictly regular mode by which the corporation might have dealt with its overissue.

It needs but a word to dispose of the question relating to the excessive verdict. The plaintiff and her husband surrendered their stock as a part of the arrangement to extinguish the overissue. She received $7,500, of which $6,000 was a payment on her own stock, and $1,500 was to pay for her husband's stock. That matter was perfectly clear to the trial court and jury, and it is clear to us. The defendant owed her for the balance of the agreed price—or the balance of the reasonable worth of the surrendered stock, which in this case amounted to the same thing—and the verdict for that amount and interest is not excessive.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 45)

METZ v. CLAY et al. (No. 20691.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. CONTRACTS 🔑352(2)—ACTION FOR BREACH —QUESTION FOR JURY.

The evidence examined, and *held* sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1828.]

2. BONDS 🔑27—CONSIDERATION.

The bond executed by the defendant to stay out of the lumber business for a fixed time within certain territory *held* to have been a part of the transaction covering the sale of his lumber yard to the plaintiff and to have rested on the same consideration.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 59 Kan. 778.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 29, 30.]

3. DAMAGES 🔑78(3)—LIQUIDATED DAMAGES OR PENALTY — CONSTRUCTION OF BOND IN RESTRAINT OF TRADE.

Following Evans v. Moseley, 84 Kan. 322, 114 Pac. 374, 50 L. R. A. (N. S.) 887, and Kuter v. Bank, 96 Kan. 485, 152 Pac. 662, the bond sued on herein is construed, and *held* to be one for penalty, and not for liquidated damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 160.]

4. ASSIGNMENTS 🔑117—ACTIONS—PARTIES.

Although the plaintiff transferred the lumber yard in question to a corporation (in which he was largely interested officially and as a stockholder), he is not shown to have assigned the bond or to have disposed of another yard affected by the terms thereof. *Held* that, under the pleadings and evidence, the claim that he is without right to maintain the action cannot be sustained.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 189–191.]

Appeal from District Court, Clark County; L. M. Day, Judge.

Action by J. W. Metz against J. H. Clay and others. Demurrer to plaintiff's evidence sustained, and he appeals. Order reversed, and cause remanded.

Robert C. Mayse, of Ashland, and Noble & Tincher, of Medicine Lodge, for appellant. W. W. Harvey, of Ashland, for appellees.

WEST, J. This action was brought to recover liquidated damages for a breach of contract. A demurrer to the plaintiff's evidence was sustained, and he appeals.

In the spring of 1910 John H. Clay owned a lumber yard at Ashland, and with a minor boy was conducting it in the name of J. H. Clay & Son. J. W. Metz was a Wichita lumberman. After some talk in March, the parties, on April 2, 1910, entered into a contract, set out in the answer, to sell the yard and buildings for $4,000, $500 being paid in cash, "for the six lots, together with all appurtenances, office fixtures, my good will, influence, and business which I have established at Ashland, Kan., and to sign a contract not to engage in the lumber business within a radius of 50 miles of Ashland, Kan., for five years from date of the completion of the inventory of the stock," the lumber and other merchandise to be figured at the prices shown by the latest inventories, certain freight added. The writing was signed by John Clay, and contained, among other things, the following:

> "I hereby agree to commence invoicing the stock May 2, 1910, and continue the same until stock is completely listed and figured, and before the inventory is commenced I am to sign an agreement as set forth in the above for my good will and business that I have established and influenced for a period of five years within a radius of 50 miles. This contract is to be left in the hands of Judge Price until all settlements are ready to be made, and the delivery of this contract to J. W. Metz upon payment as set forth above."

The plaintiff alleged a purchase of the property in question from J. H. Clay & Son, and their business and good will, and as part of the consideration an agreement by J. H. Clay & Son not to engage in the lumber business in the city of Ashland or the trade territory adjacent thereto for a period of five years, either directly or indirectly, and not to lend their services to any one engaged in this line of business within that territory; that as a part of the consideration for the purchase they executed their contract of May 2d, which is set out as an exhibit. It was alleged that J. H. Clay violated the contract by engaging in the lumber business in Ashland in the name of Clay and another of his sons, and continuing in such business, furnishing the means therefor, and lending his services to the son in such business, in violation of the agreement. This agreement purported to bind the defendants in the penal sum of $4,000, to J. W. Metz, his heirs, assigns, or personal representatives, on the following condition:

> "Whereas, J. H. Clay and Chester Clay, his son, partners under the style and firm name of J. H. Clay & Son, have been engaged in the lumber business at Ashland, Kan., and desiring to sell the said business, have agreed with J. W. Metz, the purchaser, as a part of the consideration of the sale of said business, not to engage in the same line of business at Ashland, Kan., or within a radius of 50 miles therefrom, nor to engage or lend their services to any one in said business within said radius or territory for said period of time, and not to lend their name nor permit it to be used by any one in said line of business, and that if either of said principals should, either directly or indirectly, engage in the said lumber business, or engage or lend their services to any one in said line of business, or permit their name to be used in said line of business at Ashland, Kan., or within a radius of 50 miles therefrom, he or they should forfeit to the said J. W. Metz, purchaser as aforesaid, or to his heirs, assigns, or personal representatives, the sum of four thousand dollars as liquidated damages for such breach of contract and agreement:
>
> "Now, therefore, if the said J. H. Clay and Chester Clay shall well and truly keep their agreement and promise not to directly or indirectly engage in the lumber business at Ashland, Kan., or within a radius of 50 miles therefrom, nor engage their services to any one in said line of business, nor permit their names to be used by any one in said line of business, for a period of five years, this bond and obligation to be void; otherwise, in full force and effect."

The answer denied any agreement to give the bond sued on, and alleged that it was without consideration, and denied going into the lumber business since the sale of the yard in question, and further pleaded the two-year statute of limitation. The wife adopted the answer of her husband. The minor son, by guardian ad litem, filed a general denial.

[1] The purchase price was $13,722. H. L. Coat testified: That he managed the yard until October, 1915. That it occupied the site purchased until the spring of that year, when it was moved to another location in Ashland.

That after the sale of the yard to Metz, and in the spring of 1911, the witness saw J. H. Clay selling posts, and loading out posts and cement, in front of his residence. These posts were shipped from Belle Plain and hauled to Clay's house. The witness saw J. H. Clay showing men the posts, and saw Chester Clay loading them out to the parties, who had been looking at them in the morning. That in March, 1911, and in the fall of 1912, J. H. Clay was selling lumber in the yard of a new location, and told the witness he was going to start the boys up in business, and he wanted to get them on their feet, and was going to put up that building for them. Witness had seen J. H. Clay showing men lumber there. This occurred in 1911, and every year since. J. H. Clay seemed to go regularly to work. In the spring of 1912 the witness had written to J. W. Metz about Clay selling lumber, and one day J. H. Clay came to witness with a letter from Metz in his hand, and directed the witness to tell Metz:

> "That I am in the lumber business, and I am going to sell stuff, and if he wants to sue me on that contract I am ready for him."

Porter Seacat testified: That in 1914 he bought lumber for a granary at the Clay yard, made the contract with J. H. Clay, who filled the bill and made the price, but who gave witness to understand that it was his son's business, and told him to settle with his son, but directed that, if the son Lloyd did not settle according to agreement, to come back to him. That one overcharge by the son was refunded by J. H. Clay. That J. H. Clay told witness he was backing his son Lloyd in the business. Frank Anderson testified that he bought a few boards of J. H. Clay at the Clay lumber yard some time in 1911 or 1912, but settled the bill with the son. Some time in 1912 witness had a load of lumber on his wagon, which he had purchased elsewhere, when he was accosted by J. H. Clay:

> "He said, 'If you bought it of me, I would sell it so much cheaper.' I don't remember how much cheaper it was, but he told me I could get the lumber cheaper there."

A number of other witnesses testified to acts and conversations on the part of J. H. Clay indicating a more or less active interest in the business and a persistent disposition to solicit patronage for the yard which he claimed was conducted by the son. This showing, contrasted with the conditions of the bond, was such that the plaintiff had a right to go to the jury on the question of damages.

[2] It is argued that the bond was void and without consideration. But the testimony shows without dispute that it was the understanding that J. H. Clay was to give security for the performance of his contract, that no objection was made to signing the one in question, and it was really a part of the entire transaction covering the purchase and sale of the property, and supported by the same consideration.

[3] The oft-traversed ground of penalty or liquidated damages has been thoroughly gone over by counsel, each side claiming full support for its contention. The plaintiff testified to the effect that he thought, if the defendant should set up business in opposition, it might work a damage of $1,000 each year for five years. But it would be unreasonable to hold that opposition for one year should work the same recovery as opposition for five years. The question of penalty or liquidated damages was considered in Evans v. Moseley, 84 Kan. 322, 114 Pac. 374, 50 L. R. A. (N. S.) 889, and under that decision, and Kuter v. Bank, 96 Kan. 485, 152 Pac. 662, and others cited in the two, the bond must be treated as one for penalty, and not for liquidated damages.

[4] In the answer it was alleged:

> "That the plaintiff, at the time he purchased said stock from defendant, and for several years prior thereto and continuously since, was and still is the owner of a number of lumber stocks situated at various points in Kansas and Oklahoma, one of said stocks being at Sitka, Kan., six miles east of Ashland."

The plaintiff testified: That at the time he did not know just how he would run the business, but "he turned over the yard to the Metz Lumber Company, a Kansas corporation, which has operated it ever since." That he was still president and director, and owner of 1,598 of the 2,000 shares of stock, and at the time of the purchase was personally interested in a lumber yard at Sitka. That the stock was delivered by Clay & Son to the Metz Lumber Company, and from it they got their pay. That that company had conducted the business since. That he had personal supervision over it as president, but had conducted no lumber business personally in Ashland. The bond ran "to J. W. Metz, his heirs, assigns, or personal representatives." There is no evidence or claim that he assigned it to the company. The defendant contends that the plaintiff cannot maintain this action, as all the interest he has in it arises from his ownership of stock in the corporation. But as he apparently owns the bond, and was for some time, and according to the answer continued to be, the owner of another lumber yard near Ashland, and as no attempt was made below to settle the question of proper or necessary parties, it does not sufficiently appear that the plaintiff may not maintain the action for whatever damages he can show he has suffered by the breach of the bond.

The order sustaining the demurrer to the evidence is reversed, and the cause remanded for further proceedings. All the Justices concurring.

(101 Kan. 143)

In re BENNETT'S ESTATE.

BENNETT v. ARROWSMITH et al.

(No. 20916.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

COURTS 🔑200¼—PROBATE COURT—JURISDICTION—PARTITION.

The probate court has authority to approve a voluntary partition of real estate which is just and equal, agreed upon by the guardian of an insane person and his ward's cotenants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 476, 477.]

Appeal from District Court, Allen County.

Partition between F. S. Bennett, guardian, and Mabel C. Arrowsmith and another. From a judgment of the district court approving a judgment of the probate court, holding that it was without jurisdiction to authorize the partition, the guardian appeals. Reversed, and cause remanded, with directions.

Apt & Apt, of Iola, for appellant.

BURCH, J. The subject presented by this appeal is the jurisdiction of the probate court to authorize a partition of real estate agreed upon by the guardian of an insane person and his ward's cotenants.

A father deeded real estate to his three minor children. One of them became insane, and a guardian of her estate was duly appointed. The three children became of age, and partition being greatly desired, the agreement was made. The agreement was presented to the probate court, which found that the division was fair and just and equal, and if carried out would be to the benefit of the lunatic's estate. The probate court held, however, that it was without jurisdiction to authorize the partition. On appeal to the district court, the judgment of the probate court was approved.

The article of the Constitution relating to the judiciary contains the following provision:

> "There shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound minds, as may be prescribed by law." Article 3, § 8.

In the statute relating to lunatics, imbeciles, and drunkards, the Legislature authorized the probate court to appoint a guardian for the estate of a person incapable of managing his estate because of unsoundness of mind, and provided further as follows:

> "Every probate court by whom any such person is committed to guardianship may make an order for the support, care and safe-keeping of such person, for the disposition or sale of his personal property as may be found necessary, for the management of his estate, for the support and maintenance of his family and education of his children, out of the proceeds of such estate; to set apart and reserve for the payment of debts; and to let, sell or mortgage any part of such estate, when necessary for the purposes above specified. * * * The probate court shall have full power to control the guardian of any such person in the management of the person and estate and the settlement of his accounts, and may enforce and carry into execution its orders and judgments in the same manner as in cases of administration." Gen. St. 1915, §§ 6107, 6127; Code Civ. Proc. §§ 10, 30.

It is settled law in this state that the probate court is a court of general jurisdiction with respect to the subjects committed to it (In re Osborn's Estate, 99 Kan. 227, 161 Pac. 601), and manifestly one of those subjects is management of the estate of a lunatic.

It has been said that cotenancy is an association compelled by interest, but reprobated by every other consideration. Freeman on Cotenancy and Partition, p. 461, § 393. A cotenant may compel partition, and because of this fact, voluntary partition is permissible. Voluntary partition may be made even by parol, if subsequently acted on. McCullough v. Finley, 69 Kan. 705, 77 Pac. 696. The result accomplished by partition has been described as follows:

> "Each of the allottees is deemed to hold the same title which he held before the partition, the undivided interest which he held in the whole tract being by the partition severed from the interests of his cotenants and concentrated in the parcel set apart to him." 30 Cyc. 166.

Consequently partition of land belonging to a person under guardianship is essentially management of his estate, within the meaning of the statute already quoted.

In the case of Hunt v. Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563, partition of land made by the guardian of an incompetent was sustained. The syllabus reads:

> "Partition of lands by guardians of infants and incompetents will be sustained, where the partition is fair and equal." Paragraph 4.

In the opinion it was said:

> "We think partition of lands by the guardians of infants and incompetents is fully sustained by the authorities as well as by reason. Either cotenant could compel a partition. What may be compelled by the law parties should be allowed to accomplish amicably, so long as no advantage is taken and the partition is equal. Freem. Coten. §§ 414, 415; 2 Co. Litt. §§ 243, 258; Williard v. Williard, 56 Pa. 119; Brooks v. Hubble (Va.) 27 S. E. 585. The territorial law then in force authorized the guardian 'to divide the real estate in as full and ample a manner as the idiot, lunatic, non compos or distracted person might or could were they restored to the full use of their rational faculties.' 1 Terr. Laws, 377. Whatever may be the interpretation of this statute, it certainly evidences an intent to repose a broad power in the guardian." 125 Mich. 143, 84 N. W. 61, 84 Am. St. Rep. 563.

It will be observed that the decision was based on reason and authority rather than on the territorial statute of doubtful meaning. The statute of this state evidences an intent to impose a broad power in the guardian, subject to supervision of the probate court. Should an adversary proceeding be required to effectuate partition, the action provided by the Civil Code is available.

The judgment of the district court is reversed, and the cause is remanded, with direction to proceed in accordance with this opinion. All the Justices concurring.

(101 Kan. 146)

WALLINGFORD et al. v. McCRAY.

(No. 20917.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Sales 🔑96—Agreement as to Price—Rescission by Seller.

Where a contract is made by telephone for the sale of wheat, to be shipped within three weeks, and the buyer at once sends the seller a letter of confirmation in which it is stated that shipment is to be made in one week, and thereafter a controversy arises between the parties in which the buyer insists that the confirmation as written is correct, and disclaims any obligation to pay the agreed price on any other terms, his conduct amounts to such a repudiation of the contract as justifies the seller in calling off the deal.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 261.]

2. Sales 🔑111—Rescission of Contract—Reinstatement.

In that situation the buyer cannot afterwards reinstate the deal by undertaking to hold the seller to the contract as it was originally made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 283–285.]

3. Sales 🔑421—Buyer's Action for Damages—Instructions.

The trial court *held* not to have committed error in the giving or refusing of instructions.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1203.]

4. Sales 🔑87(3)—Trial 🔑355(1), 358—Evidence of Contract—Special Findings—Prejudice—Inconsistency.

The special findings *held* not to show passion or prejudice, or to be inconsistent with the evidence or with each other.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 245–247; Trial, Cent. Dig. §§ 846, 856.]

5. Costs 🔑214—Witnesses—Motion to Retax.

When an order taxing costs on account of witnesses from another county is made in the absence of a party affected, his remedy, if aggrieved, is by a motion to retax.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 798, 799, 801, 807, 809–813, 816, 818–820, 825.]

Appeal from District Court, Finney County.

Action by E. R. Wallingford and others, partners doing business under the firm name and style of Wallingford Bros., against J. D. McCray. Judgment for defendant, and plaintiffs appeal. Affirmed.

Campbell & Campbell, of Wichita, for appellants. Wm. Easton Hutchison and C. E. Vance, both of Garden City, for appellee.

MASON, J. On Monday, June 29, 1914, a representative of Wallingford Bros., grain merchants of Wichita, talked by telephone with the manager of an elevator at Attica, owned by J. D. McCray, with reference to the purchase from him of 8,000 bushels of wheat. On the same day the firm mailed to him a letter purporting to confirm a purchase of the wheat on terms which were specifically stated, and which included "this week shipment." On the next day the manager of the elevator, on receipt of this letter, called up the firm on the telephone, and told them that the contract was for shipment of the wheat in the first half of July. The firm at once (June 30th) wrote him another letter, in which they insisted that in the first conversation they had refused to pay more than the regular export bid for the first half of July, and that the offer they had made was for "this week shipment." In an answer written on the next day (July 1st) the manager said that in the conversation about the wheat deal he had refused to make it "this week shipment," but had said he would ship it as fast as he could after June shipments were over. The wheat was never shipped. On September 24, 1914, the firm sued McCray for damages resulting from his failure to ship it, alleging the making and breach of a contract for shipment "as fast as possible after June shipments were over." The plaintiffs appeal from a judgment in favor of defendant.

[1] The controversy is almost entirely one of fact, and turns upon the effect of the telephone conversations referred to and upon whether a later conversation was had. According to the plaintiffs' evidence, the conversation on June 29th resulted in an agreement for the purchase of the wheat, to be shipped that week; in the conversation of June 30th the defendant's manager said that the contract was for shipment as soon as his June contracts were filled; this conversation was confirmed by the plaintiffs in writing; and on July 2d, after receiving the manager's letter of the day before, the plaintiffs had a further conversation with the defendant's manager, in which they told him they would let the matter stand as per his letter of the 1st, in which he said, "I will ship as fast as I can after June shipments are over."

According to the defendant's evidence, the conversation of June 29th resulted in a contract for the purchase of the wheat, the defendant to have until the middle of July to make delivery, although his manager said he would get it out as fast as he could; in the conversation of June 30th the defendant's manager stated that the contract allowed until July 15th for delivery, and he expected the confirmation to be made accordingly, and that unless this was agreed to the deal was off, but that the plaintiffs did not consent to take the wheat on these terms; the conversation testified to by the plaintiffs' witness as having been had on July 2d never took place; the defendant's manager never said he would make a contract for delivery as soon as possible; and the plaintiffs never after the conversation on June 29th consented to accept the wheat unless it should be shipped within the week; after July 1st no further communication was had between the parties until July 7th or 8th, when an agent of the plaintiffs called on the defendant's manager, who told him that because of the plaintiff's attitude there was no contract in existence; this was the first notice the defendant had that plaintiffs were expecting the wheat.

The verdict and findings of the jury showed a complete acceptance of the defendant's version of the transaction, and a complete rejection of the plaintiffs'. Accepting the facts to be as claimed by the defendant, no ground for recovery by the plaintiffs existed. The contract having been made for shipment during the first half of July, the confirmation sent calling for a shipment by July 4th, coupled with the insistence of the plaintiffs upon that date, and their virtual denial of liability if shipments were made later, amounted to a refusal to abide by the agreement as it had been entered into, and justified the defendant in regarding the deal as at an end.

"Where one party repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the later party is excused from further performance." 6 R. C. L. 1012.

"Upon election to treat the renunciation of the contract by the other party, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist except for the purpose of maintaining an action for the recovery of damages." 6 R. C. L. 1026.

[2] 2. Although one of the plaintiffs testified that the conversation of June 30th, in which the defendant's manager was said to have spoken of the contract as one for shipment as soon as his June contracts were filled, was confirmed by them in writing, their letter of that date shows an insistence on shipment within the week, and the first letter of a different effect was dated July 21st. The plaintiffs having stood upon the proposition that the agreed price was effective only if shipment were made within a week, could not, after that period had expired and the bargain was seen to be a good one even upon the defendant's interpretation of it, shift their ground and demand a performance of the contract on that basis. The defendant's manager referred in his testimony to the failure of the plaintiffs to give any extension of the time of shipment. This language might seem to suggest an admission on his part that the contract had originally been made for delivery within a week, but the record as a whole makes it clear that by an "extension" he meant an admission by the plaintiffs that the period named in the confirmation did not control. He used that term having in mind a change of the confirmation.

[3] 3. The court gave an instruction in these words:

"If you find from the evidence that the conversation over the telephone on June 29th is as claimed by defendant, and that on June 30, 1914, defendant received a confirmation, through the mails, from the plaintiffs for the purchase of the 8,000 bushels of wheat in question, and that on June 30th he called plaintiffs over the telephone stating to them that the confirmation received was not in accordance with their conversation over the telephone on June 29th, and that on the same date he wrote the plaintiffs advising them of the fact, and that at no subsequent date did the plaintiffs and defendant agree upon a date of delivery of the 8,000 bushels of wheat in question, then I instruct you that the minds of the parties did not meet, and that no contract of purchase between buyer and seller was entered into, and you should return a verdict for defendant."

This instruction is criticised on the ground that, if the parties reached an agreement in the telephone conversation, no subsequent dispute as to its terms could alter the fact that their minds had met and that a contract had resulted. The criticism is chiefly verbal. If the conversation on June 29th was as claimed by the defendant, a contract was made for delivery by July 15th. The plaintiffs, having refused to abide by that contract, must recover, if at all, by virtue of a subsequent agreement, and, unless such an agreement were made, there was no meeting of the minds of the parties, and no contract for the sale of the wheat, so far as concerns any recovery by the plaintiffs. A further criticism of the instruction is that it makes the verdict turn upon whether there was a subsequent agreement upon a date of "delivery," whereas the controversy relates to the date of "shipment." It is, of course, true, as the plaintiffs suggest, that there is a difference between the date of shipment and the date of delivery, and in some circumstances the distinction might be very important. But here there was no room for any misapprehension by the jury as to what was intended. Objection is made to an instruction that an acceptance by the plaintiffs of the proposition of the defendant with reference to the time of shipment must have been within a reasonable time to be effective. We regard the instruction as correct and pertinent. If the plaintiffs had signified their willingness to go ahead with the contract according to the terms proposed by the defendant in the conversation of June 30th, this would have amounted to a valid acceptance if done within a reasonable time, say on July 2d, but not if done after an unreasonable delay, say on July 21st. Instructions were asked by the plaintiffs to the effect that if the contract made on June 29th called for a shipment as soon as possible, without a definite limit being fixed, the plaintiffs had a right to wait until a reasonable time had elapsed or until the defendant notified them that no shipment would be made. We think the rights of the plaintiffs in this respect were sufficiently protected by the instructions given. Moreover, it is quite evident that the jury did not accept the theory on which the rejected instructions were contingent.

[4] 4. The plaintiffs contend that the special findings show passion and prejudice and an inconsistency with the evidence and with each other. We do not regard the contention as well founded. The jury were asked whether on June 29th a deal was made whereby the wheat was sold, all the terms of the contract being fully agreed upon except the date of shipment. They answered in the negative, and the answer is justifiable on the ground that all the terms were agreed upon, without exception. They were asked whether the defendant's manager wrote on July 1st that he had sold the wheat for shipment as fast as he could after his June shipments were over. They answered in the negative, and we think they were right. As already mentioned, the manager wrote that he had said he would ship as fast as he could, but this was not necessarily inconsistent with his claim that under the contract he was to have until July 15th to make the shipment.

The next question, with the answer, reads as follows:

> "If you answer the foregoing question in the affirmative, state whether or not plaintiffs, upon receipt of such letter from defendant, took any exceptions thereto, or objected to the time of shipment of such wheat, as stated by defendant in said letter. Yes."

As the preceding question had not been answered in the affirmative, the jury were not required to answer this one at all, but what they obviously meant was that the plaintiffs did take exceptions to the letter which was written by the defendant on July 1st. This is manifest from the fact that, in response to the next question, they said that the plaintiffs did not advise the defendant by telephone on July 2d that they would let the time of shipment stand according to the letter to them of the day before. The jury returned a negative answer to the question whether the defendant ever notified the plaintiffs that he would not ship the wheat at all, plainly meaning that his refusal to ship the wheat was not absolute, but contingent on the plaintiff's insistence that shipment should be made by July 4th. An affirmative answer was returned to the question whether by August 24th was a reasonable time within which the defendant might have shipped the wheat. The meaning of this finding, or its bearing upon the controversy, is not apparent, but it affords no ground for disturbing the judgment.

[5] 5. The plaintiffs were taxed with costs on account of two witnesses from other counties, a proceeding allowed when the court so orders. Code Civ. Proc. § 326 (Gen. St. 1915, § 7228). The plaintiffs complain of the making of this order in their absence, and without notice to them. If error was committed in this regard, their remedy was by a motion to retax. Linton v. Housh, 4 Kan. 535.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 1

CORBETT v. CORBETT. (No. 20179.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

DIVORCE 🔑252 — DECREE—EQUITABLE DIVISION OF PROPERTY.

In a suit by the husband for divorce, the petition alleged that the defendant had induced him by means of threats and duress to convey his real estate to her, and asked that the deeds be canceled. The court canceled the deeds, granted plaintiff a divorce, and divided the real estate between the parties. *Held*, regardless of whether the evidence justified the cancellation of the deeds, the court on granting the divorce had the power to make an equitable division of the property, and that the division, appearing to be fair and equitable, will not be disturbed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713–715.]

Appeal from District Court, Osborne County.

Action by John Corbett against Fannie Corbett for a divorce and to cancel his deeds to defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Mahin, Mahin & Mahin, of Smith Center, J. L. Travers, of Osborne, and E. S. Quinton, of Topeka, for appellant. Smith & Else, of Cawker City, for appellee.

PORTER, J. In this case the husband sues for a divorce and to cancel deeds by which he had conveyed to his wife 200 acres of land, part of which was their homestead. As grounds for the divorce, he alleged extreme cruelty, and claimed that the deeds had been procured by duress and coercion, by threats made by his wife against his person and property. The action was brought within less than a year after he married the defendant. The court granted a divorce, canceled the deeds, and divided the real estate between the parties. The defendant appeals.

Plaintiff's first wife died in November, 1913. Three sons and two daughters, all married with families of their own lived on farms near him. He was 70 years of age and had lived in Osborne county for 45 years. He owned 520 acres of land. In the springtime of 1914, the old gentleman became lonesome, and his fancy was caught by an advertisement of the defendant in a matrimonial journal. He wrote to her, and they had considerable correspondence, in which they agreed upon a marriage. She was a widow 52 years of age and resided near Louisville, Ky. He went to see her, and they were married July 9, 1914, a few days after they met. She owned a one-third interest in 15 acres of land 15 miles from Louisville. The plaintiff furnished $300 to pay the back taxes on her land and paid for a fence and other improvements. He also gave her money for her personal use. Before starting to Kentucky, he conveyed 320 acres of his land to his children, reserving to himself a life estate therein. In the correspondence with defendant he represented himself to be 63 years of age, told defendant about his wealth, and explained that his land was only incumbered to the amount of $1,500. He also agreed to her request that some separate provision be made for her, and in one letter said he would make a will giving her the 200 acres at his death. In reply, she wrote that she had known of a number of instances where wills of that kind had been revoked and wanted something more substantial. He promised to arrange those matters to her entire satisfaction.

After their marriage, they returned to Kansas, and immediately trouble arose between plaintiff's wife and his children. In December, 1914, he went with his wife to a lawyer's office and stated he desired to convey the land to his wife. Deeds were drawn according to his request. He handed the deeds to his wife, and she gave them to the lawyer, who had them recorded. On March 1, 1915, he brought this action. The answer denied that the wife was guilty of cruelty, and alleged that the deeds were made voluntarily and in accordance with a promise made before the marriage.

The plaintiff testified that he executed the conveyances because of threats of defendant that she would leave him, that she would burn every building on the place, and also that she had threatened to kill some of his children, and that at one time she said that she would kill him if he did not make the deeds; that she threatened him in every way before he made the deeds, so that he had not a minute's peace or rest.

The testimony upon both of these issues was conflicting, and the principal error complained of is that there was no evidence to sustain the finding that the deeds were obtained by duress. The testimony as it appears in cold print does not seem very satisfactory upon this issue; but the trial court, after seeing and hearing the witnesses, deemed it sufficient, and the general rule that this court is bound thereby applies. However, we regard that question as of little consequence. There was sufficient evidence to justify the decree of divorce, and without canceling the deeds the court undoubtedly had the power to make an equitable division of the property between the parties. The wife was awarded 80 acres of the land upon which there are two sets of improvements, and the plaintiff was given 120 acres upon which there are no improvements. The testimony shows that the land awarded her is substantially of the same value as that awarded the husband. The court also gave to the wife her own property in Kentucky upon which plaintiff had advanced money for improvements and taxes, and she was given in addition some personal property, the value of which is not stated.

It cannot be doubted that the court had the power to divide the property beween the parties, regardless of how the title stood, so long as it belonged to one or the other, or both; and it has been repeatedly declared that this court will not interfere with a division made by the trial court unless it appears that there has been an abuse of discretion and that the division is so unjust and unfair that it should not be permitted to stand. Miller v. Miller, 97 Kan. 704, 156 Pac. 695, and authorities cited in the opinion.

Upon the facts and circumstances shown in the present case, we do not think the defendant has any just cause to complain of the division made by the trial court, and the judgment is affirmed. All the Justices concurring.

(101 Kan. 117)

BRANIFF et al. v. BLAIR et al. (No. 20897.)*

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. BROKERS 🔑40 — CONTRACT FOR COMMISSION—MUTUALITY.

While an agreement by an owner that a broker shall have the exclusive agency to find a purchaser for his land, for a fixed time, upon certain conditions, is unilateral when made, the element of mutuality is supplied when the broker accepts its performance by spending time and effort in doing the things that it was contemplated would be done by him under the agreement, and thereafter it is a binding obligation upon both.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 38-40.]

2. BROKERS 🔑63(1) — ACTION FOR COMMISSION—DEFENSES.

Where a purchaser is produced by the broker in substantial compliance with the terms of the agreement, and the owner makes no objection to the terms of the offer of purchase or the details of performance, but simply declares that he does not now desire to and will not sell his land, he is estopped, after suit is brought upon the agreement, to shift his position and defend upon objections to details that the broker might have supplied or corrected if they had been mentioned by the owner when the offer of purchase was made.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96.]

3. APPEAL AND ERROR 🔑889(3) — AMENDMENT OF PLEADING—CONFORMITY TO PROOF.

As the evidence shows that the name of the purchaser was other than that stated in the petition, the pleading will be deemed to be amended so as to conform to the proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3622.]

Appeal from District Court, Saline County.

Action by T. J. Braniff and others against Henry F. Baier and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

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*Rehearing denied July 11, 1917.

Z. C. Millikin, of Salina, for appellants. Burch, Litowich & Royce, of Salina, for appellees.

JOHNSTON, C. J. This was an action by T. J. Braniff, G. E. Holmberg, and A. Lynn against Henry F. Baier and Charles A. Baier to recover an agent's commission for procuring a purchaser for defendant's real estate. Holmberg and Lynn are the assignees of C. W. Talmadge's interest in the commission claimed, who was associated with Braniff in the transaction. Plaintiffs were awarded judgment in the sum of $702, and the defendants appeal.

Defendants engaged the services of Braniff and Talmadge on July 1, 1913 and signed the following memorandum:

> "We, the undersigned, H. F. Baier and C. A. Baier, do hereby appoint and constitute C. W. Talmadge and T. J. Braniff, or either of them, as our only agents to sell our forty acres of farm land in Fellsmere, Florida, known as tracts No. 1232, 1233, 1260 and 1261 in township 31, range 37, in St. Lucie county, Florida; and we also agree to accept from the above-named agents or either of them, the actual cash we have already paid on the above-mentioned contracts, plus $50.00 plus $8.00 for transferring contracts, as full payment to us for our interest in the above-named lands; the purchaser to assume all future payments. The above-named contract to remain good until October 1, 1913. Dated July 1, 1913."

After this appointment was made, the agents acted upon the authority by advertising the land, interviewing parties, and writing letters, and they spent considerable time and effort to find a purchaser. As a result of correspondence begun about August 1, 1913, George W. Auber of Fellsmere, Fla., on August 25th agreed to buy the land, and he sent the following letter inclosing payment:

> "Farmers' National Bank, Salina, Kansas: Inclosed you will find a check for $950.00 in favor of Henry and Charles Baier for their interest in tracts south range 37, east of the Fellsmere Farms, Fla., of land No. 1232, 1233, 1260 and 1261, township 31, said check to be given to said Henry and Chas. Baier when contracts or certificates of purchase have been properly transferred and signed by them in favor of me, George W. Auber. You will also find inclosed a check for $750 in favor of C. W. Talmadge and T. J. Braniff when said contracts are properly transferred to me and mailed and registered to my address, being Fellsmere, Florida."

About 10 days before the Auber letter was written, the defendants told Braniff that they did not desire to sell the land, and on August 26th they wrote a letter stating that the land was withdrawn from sale and the authority of the agents revoked as of the date of the oral notice. When defendants were informed by the agents that a purchaser had been found in accordance with the terms of their contract, defendants replied that the lands were no longer for sale and that the money sent would not be accepted. The jury found, in effect, that the agents had found a purchaser and had complied with the terms of the written contract, and that the only reasons given by defendants for not complying with the contract was that the land had been withdrawn from sale and that they did not care to sell it at that time.

[1] Defendants contend that the contract of agency was unilateral and subject to revocation at any time before a purchaser was produced. The employment or agency, it will be observed, was exclusive and for a fixed time. It is true, as defendants contend, that, when the promise of one party is the consideration for the promise of another, they must be obligatory upon both parties at the same time or they will not bind. The appointment or promise of defendants was unilateral when made; but, when it was accepted by the agents and they had spent time, effort, and money in carrying out its provisions, there was thereafter no lack of consideration. When the agents accepted the proposal and proceeded to perform the services which the appointment contemplated were to be performed by them, it became a mutual and binding obligation. As soon as the promises of the parties ripened into a contract, Braniff and Talmadge became the sole agents for the sale of the defendants' land with the exclusive right to sell it, until October 1, 1913. The defendants could not thereafter, by withdrawing the land from sale or by an attempted revocation, set aside the contract nor escape responsibility for the violation of its conditions.

In a litigation over a contract to find a purchaser for land, the question was raised that the contract was unilateral. The testimony showed that after receiving the owner's proposal the broker proceeded to find a purchaser and to do the things which it was contemplated would be done by him, and it was held that such action on his part constituted an acceptance and that thereafter the contract was a mutual and binding obligation. John E. De Wolf Co. v. Harvey, 161 Wis. 535, 154 N. W. 988.

In Pullman Co. v. Meyer, 195 Ala. 401, 70 South. 763, page 765, it was said:

> "Even though an agreement is, when made, unilateral, if the party in whose favor the promise is made accepts its performance, or does 'any act in recognition of its implied or intended, though unexpressed, consideration, this supplies the element of mutuality, and gives a right of action.'"

Other cases of like import are Rowan & Co. v. Hull, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998, 2 Ann. Cas. 884; Lapham v. Flint, 86 Minn. 376, 90 N. W. 780; Schoenmann v. Whitt, 136 Wis. 332, 117 N. W. 851, 19 L. R. A. (N. S.) 598; Novakovich v. Union Trust Co., 89 Ark. 412, 117 S. W. 246; Blumenthal v. Bridges, 91 Ark. 212, 120 S. W. 974, 24 L. R. A. (N. S.) 279.

Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205, is out of line with the cited cases, in this, that it appears to hold that the posting, advertising of property, and the individual soliciting of purchasers did not constitute an acceptance or convert a proposal into a binding contract. That court, in the later case of Lapham v. Flint, supra, stated that the only question before the court in the Stensgaard Case was whether the contract upon its face, unaided by evidence or allegations in the complaint, expressed a mutuality of obligation, and it was held that it did not, because there was nothing in the contract itself to indicate an acceptance of the obligation either in writing or by performance.

The general trend of authorities is that, if the agent proceeds in good faith to comply with the terms of the proposal or agreement like the one in question by advertising the property and spending time and effort to find a purchaser, these acts amount to an acceptance, and thereafter both parties are bound. Note, 19 L. R. A. (N. S.) 599.

[2] It is argued that plaintiffs were not entitled to recover because the offer of the purchaser did not comply with the conditions in the contract, insisting that the tender should have been $998, whereas only $950 was tendered by Auber. The price, according to the contract, was "the actual cash we have already paid on the above-mentioned contracts, plus $50.00, plus $8 for transferring the contracts." The amount "already paid" means the payments made at the time the contract was executed, and that was $900. It appears that the defendants had paid $40 additional about August 1st, shortly before the sale was effected or the purchaser was found. The offer of $950 was therefore a substantial compliance with the contract as made. The transfer fees of $8 were not payable until the transfer was effected, and these the agents were able and willing to pay when they became due. So far as the $40 payment was concerned, the defendants were given credit for that sum in the award of the jury.

It is also said that the purchaser in his letter remitting the money did not offer or agree to assume the balance due upon the land contracts that were to be assigned. This was a stipulation to be included in the contract transferring the defendants' interest in the land, and doubtless would have been included if defendants had allowed the contract to be carried out. It was one of the mere details of the transaction, to be written into the transfer, and one which it was unnecessary to mention in the letter. This objection, like that relating to the payment made between the making of the contract and the finding of a purchaser and the failure to include the transfer fees in the letter, was not the objection that was made when the performance of the contract was demanded. These were objections which the plaintiffs could easily have met at the time if the defendants had based their refusal upon them. Their objections were that they had taken the land off of the market and that it was not for sale. There was little occasion for the agents to go through the form of making a tender when the defendants had refused to carry out their contract. Having put their refusal solely upon the grounds mentioned, they are estopped after the suit is brought to shift their position and defend on grounds not then relied on and which the agents might have supplied, overcome, or corrected if they had been mentioned. Redinger v. Jones, 68 Kan. 627, 75 Pac. 997; Sandefur v. Hines, 69 Kan. 168, 76 Pac. 444; Stanton v. Barnes, 72 Kan. 541, 84 Pac. 116; Johnson v. Huber, 80 Kan. 591, 103 Pac. 99.

[3] The view taken by the court sufficiently answers the objections made to rulings on requested instructions and the objections to those given. In one instruction the court told the jury that the Auber letter did not come up to the terms set forth in the agreement; but, as we have seen, the absence of some of the details was not the basis of the defendants' refusal to complete the contract; and, besides, the special findings of the jury showed the instruction to be without materiality. In the petition it was stated that the name of the purchaser was Piffard, whereas the proof showed that Auber was the purchaser found by the agents. This is not a material objection. No prejudice could have resulted to defendants because of the variance, and, as is often done, the petition may be regarded as amended to conform to the proof.

No material error being found in the record, the judgment is affirmed. All the Justices concurring.

(101 Kan. 235)

SHAW v. LIFE & ANNUITY ASS'N (three cases). FALK v. SAME. MATTHEWS et al. v. SAME. (Nos. 19802-19806.)*

(Supreme Court of Kansas. June 19, 1917.)

(Syllabus by Editorial Staff.)

PARTIES ⚿51(5)—BRINGING IN NEW PARTIES.

In an action against an insurance company where judgment for the defendant must be affirmed, a transfer of defendant's property subsequent to such judgment could not affect the rights of the plaintiff, and hence an application for leave to make the defendant's transferees additional parties defendant will be denied.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 82.]

Appeal from District Court, McPherson County.

Actions by A. J. Shaw, by Mary A. Shaw, by Azro J. Shaw, by F. A. Falk, and by Robert T. Matthews and others against the Life & Annuity Association. Judgment for defendant in each case, and plaintiffs appeal. Affirmed.

Alex. S. Hendry, of McPherson, and J. B. Larimer, of Topeka, for appellants. Otis S. Allen and S. H. Allen, both of Topeka, Geo. R. Allen, of Kansas City, and A. R. Lamb, of Coffeyville, for appellee.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 11, 1917.

PER CURIAM. These appeals were pending here on November 14, 1914, when the case of Moore v. Annuity Association, 93 Kan. 398, 148 Pac. 981, involving exactly the same issues, was first decided. That decision was in favor of the contentions urged by the appellants, and directed the district court of McPherson county to grant a new trial. Immediately after the decision was announced the appellants dismissed their appeals. Subsequently a rehearing was granted in the Moore Case, and on May 8, 1915, the judgment of the district court sustaining a demurrer to the evidence was affirmed. Moore v. Annuity Association, 95 Kan. 591, 148 Pac. 981. Thereupon counsel for the appellants, who was likewise counsel for appellant in the Moore Case, asked that these cases be reinstated because they had been dismissed on the supposition that the first decision in the Moore Case was final and controlling. On the representations of counsel for the appellants that it was his intention to take the Moore Case to the Supreme Court of the United States by proceedings in error, and his representations that the issues involved were identical with those in the Moore Case, these appeals were reinstated, and at his further request they were continued generally in order to await the final disposition of the proceedings in error in the Moore Case. It is for these reasons that the cases have been allowed to remain on the docket without being called for disposition. No proceedings in error have been taken in the Moore Case, and the time for so doing has long since expired.

On January 11, 1917, appellants filed an application for leave to make additional parties defendants, representing that the defendant association in February, 1915, long after the second decision in the Moore Case, sold and delivered all its assets and property, including plaintiffs' share of the beneficiary and reserve funds of the defendant, to the North American Union of Chicago, a corporation under the laws of Illinois, and that the merger of these associations had been approved by the state superintendent of insurance; and, further, that on November 20, 1916, the Illinois corporation had sold and transferred all its assets and property to the Fraternal Aid Union of Denver, a corporation of Colorado, and it is stated that by reason of these mergers no property of the original defendant nor of the Illinois corporation can be reached by execution and judgment in favor of the plaintiffs in these actions.

We are asked to make the additional parties defendant and to set the cases down for hearing on their merits. So far as the merits of the cases are concerned they are controlled in each case by the decision in the Moore Case, and the judgments in each of the appeals must be affirmed on the authority of that case. Inasmuch as the judgments of the district court in favor of the original defendant must be affirmed it is not perceived how the transfer and sale of defendant's assets and property could affect in any manner the rights of the appellants. Since they can obtain no judgments against the original defendant it makes no difference to them that there is no property of the original defendant in this state subject to execution.

The application for leave to make additional parties defendants is denied, and the judgments are affirmed.

(101 Kan. 50)

ROSS v. WELLINGTON LODGE NO. 133, I. O. O. F. (No. 20693.)

(Supreme Court of Kansas. June 9, 1917. Rehearing denied July 11, 1917.)

(Syllabus by the Court.)

1. ACCOUNT, ACTION ON ⟹7—PLEADINGS—BURDEN OF PROOF.

It is not error for the trial court to hold that the burden of proof is on the plaintiff in an action on an unverified account, where the petition is met by an answer containing a general denial and an allegation of settlement.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 13–17.]

2. APPEAL AND ERROR ⟹1010(1)—EVIDENCE TO SUPPORT JUDGMENT—AFFIRMANCE.

A judgment based on a general finding will not be disturbed, where there is evidence to prove the facts necessary to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

Appeal from District Court, Sumner County.

Action by Charles Ferry Ross against Wellington Lodge No. 133, Independent Order of Odd Fellows. Judgment for defendant, and plaintiff appeals. Affirmed.

J. S. Dey, of Wellington, for appellant. W. W. Schwinn, of Wellington, for appellee.

MARSHALL, J. This is the second appeal in this case. Ross v. Odd Fellows Lodge, 94 Kan. 528, 146 Pac. 1003.

The contract, which is the basis of this action, was in part set out in the former opinion. That contract, so far as it is material to the present controversy, reads:

"Witnesseth: That, whereas, the party of the first part is the owner in fee simple of lot twenty-four (24) in block fifty-four (54) in the city of Wellington, Kansas, and the party of the second part is the owner in fee simple of lot twenty-three (23) in said block fifty-four in the city of Wellington, Kansas; and whereas, the party of the first part and the party of the second part desire and purpose to erect and construct upon the lots hereinbefore described a two-story rock stone cement building, 80 feet long and 50 feet wide in accordance with plans and specifications adopted and agreed upon by each of the respective parties hereto: Now, therefore, in consideration of the premises, it is hereby agreed and understood by and on behalf of each of the parties hereto that one-half of all the expense of every kind and character which is to be or will be incurred in the erection and construction of said building is to be equally borne and paid by the respective parties hereto; that is to say, each of said parties is to pay one-half thereof according to a correct and itemized account of said expenditures, which is to be kept by the parties to this agreement."

The trial was by the court without a jury, and no special findings of fact were made. A general finding was made in favor of the defendant, and judgment was rendered in its favor. The plaintiff appeals.

[1] 1. The court held that the burden of proof was on the plaintiff. Complaint is made of that ruling. The petition set out a number of items of expense incurred by the plaintiff in the erection of the building provided for in the contract. The petition was not verified. The answer consisted of a general denial and affirmative allegations that a settlement had been made. There was nothing to show that either party was denied the right to introduce any evidence to establish his contentions. Under these circumstances, it was not reversible error for the trial court to rule that the burden of proof was on the plaintiff. Hennig v. Gas Co., 100 Kan. 255, 164 Pac. 297; In re Holloway's Estate, 100 Kan. 368, 164 Pac. 298.

[2] 2. The plaintiff argues a number of other propositions, all of which are that certain facts were or were not established by the evidence. Four days were used in the introduction of evidence. The trial court heard that evidence, and on it the finding was made. That finding is conclusive in this court unless it is shown that the finding was not supported by evidence. That has not been done. The evidence, as abstracted, does not disclose that the trial court reached a wrong conclusion as to any fact that was in controversy on the trial. The plaintiff must show that the court made a mistake, and must also show that the mistake was prejudicial. Code Civ. Proc. § 581 (Gen. St. 1915, § 7485); Hamilton v. Railway Co., 95 Kan. 353, 359, 148 Pac. 648; Andrews v. Railroad Co., 99 Kan. 347, 350, 161 Pac. 600.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 165)

BOWMAN v. CLYDE. (No. 20924.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. MORTGAGES 🔑315(1)—SALE BY MORTGAGOR—ACTION ON NOTE—RECOVERY.

Where the mortgagor of land sells it subject to the mortgage, there being no assumption of the debt by the grantee, and a third person afterwards buys the mortgage and later obtains a deed to the land subject thereto, and then releases the mortgage, sells the land, and brings an action against the mortgagor upon his note, the plaintiff is entitled to recover the amount of the note less the reasonable value of the land at the time he sold it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 942, 943, 945, 946, 948.]

2. MORTGAGES 🔑315(1)—ACTION ON MORTGAGOR'S NOTE—RECOVERY.

The plaintiff's rights in the situation are not affected by the fact that the defendant had told him he would see that the property sold for enough to pay the mortgage, if it were foreclosed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 942, 943, 945, 946, 948.]

3. MORTGAGES 🔑319(3) — SUIT ON NOTE — VALUE OF LAND—SUFFICIENCY OF EVIDENCE.

The evidence *held* not to support a finding that the land was worth the full amount of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 863, 875, 913, 1366.]

Appeal from District Court, Wyandotte County.

Action by Winfield S. Bowman against H. M. Clyde. Judgment for defendant and plaintiff appeals. Reversed, and cause remanded to grant a new trial upon a certain issue.

C. A. Bowman, of Kansas City, for appellant. David F. Carson and James T. Cochran, both of Kansas City, for appellee.

MASON, J. H. M. Clyde was the owner of a quarter section of land in Oklahoma, subject to a mortgage for $500. On February 14, 1912, he executed a second mortgage thereon, securing a note for $550. A few days later he made a deed to the land, subject to the two mortgages. On October 23, 1913, Winfield S. Bowman bought the $550 note and mortgage. On October 5, 1914, he bought the land, subject to the two mortgages, for $10, having the deed made to his son, C. A. Bowman, his object being to prevent a merger. On December 10, 1914, he executed a quitclaim deed to his son, for the purpose, which was recited in the deed, of relieving the land from the $550 mortgage. He also paid off the first mortgage, but caused another for the same amount to be at once executed by his son. On March 3, 1915, he sold the land, subject to the $500 mortgage, which the buyer assumed, for $200, his son making the deed. On March 18, 1915, he sued Clyde upon his note for $550, giving credit, however, in his reply, for $200, the amount realized from the sale. A trial resulted in a verdict and judgment for the defendant, and the plaintiff appeals.

[1] 1. Although the various grantees had not assumed payment of the $550 mortgage, they had taken the land subject thereto, and the property was the primary fund for the satisfaction of the debt. 27 Cyc. 1342, 1343; 27 A. & E. Encyc. of L. 246. That is, the mortgagor was entitled to have the land applied to the reduction of his personal liability. The plaintiff as the holder of the note and mortgage could not release the land from the lien and still look to the mortgagor for the full payment of the note. 27 Cyc. 1275; 2 Jones on Mortgages, § 1226; 1 Pingrey on Mortgages, § 928. Expressions are to be found in the authorities to the effect that by releasing the lien the holder of a mortgage completely loses his remedy on the personal obligation of the mortgagor. Where that rule has been applied it has been because the circumstances were such as to make it equitable. Ordinarily the rights of the mortgagor will be fully protected if he receives credit on the note for the value of the land at the time the lien is released. This was substantially the basis of adjustment adopted by the trial court. The release of the mortgage probably entitled the defendant to a credit upon the note equal to the value of the land at that time, but as the plaintiff until he sold the land could have recognized a right to redeem

doubtless the defendant could elect to regard the date of the sale as the time for the determination of the value. The trial court treated the latter date as controlling. The defendant, having sold the land subject to the mortgage, was entitled, as between himself and any subsequent owner of the property, to insist that it should be applied to the reduction of his personal indebtedness, but as there was no assumption of the debt by any of the grantees this was the extent of his demands against them. 27 Cyc. 1343.

[2] 2. There was testimony that after the plaintiff had acquired the title to the land he told the defendant that the first mortgagee was about to foreclose; that the defendant then asked him to let the foreclosure proceed and have it include his own mortgage, in which case the defendant would see that the property brought enough to cover both incumbrances. This had no tendency to establish a defense. The plaintiff had the privilege of paying off the first mortgage if he saw fit, and in failing to foreclose his own mortgage, having acquired the fee title, he committed an act somewhat analogous to the conversion of personal property by one holding it as security. We hold, as the trial court did, that his liability in this case is limited to the value of the land.

[3] 3. The verdict implied a finding that the land was worth $550 over and above the $500 mortgage. The plaintiff contends that there was no substantial evidence that it was worth more than $200 in excess of the lien. A number of witnesses called by the plaintiff testified to the value, placing it at from $500 to $700. The defendant produced no direct evidence on the subject. The jury were asked upon what they based their finding that the land was worth more than $700, and answered, "On W. S. Bowman's evidence." The plaintiff testified that he never saw the land; that he held it for five months, and sold it upon the first offer he received. This can hardly be regarded as evidence that it was worth more than he got for it, and is certainly not evidence that it was worth as much as $1,050. The fact that he paid $10 for the land subject to the two mortgages, one for $500 and the other for $550, does not indicate that it was worth that amount. He was at the time the owner of one of the mortgages and might well have been willing to give a small sum for a deed, regardless of whether the land was worth the amount for which it was incumbered. The verdict was therefore not warranted by the evidence upon which it was avowedly based. Various deeds to the land were introduced which recited large considerations, but these recitals were not competent evidence of the amount actually paid. Perkins v. Gregory, 87 Kan. 303, 124 Pac. 168. Evidence was given that one of the plaintiffs' witnesses had stated that the land was worth $1,900, but as this was admitted solely for the purpose of affecting his credibility, it cannot be considered as affirmative evidence of value. The fact that the first mortgage was for a loan of $500, made by an insurance company, is not substantial evidence that the property was worth over twice that amount. The defendant testified that in 1912 there were on the land a three-room house, a barn, a wind-mill, five acres of orchard, and fences; that the ground was leased and 30 acres were in cultivation; that a tenant paid $33.75 and spent $15 in repairs for the use of the pasture land six weeks. This likewise falls short of a basis for a finding that the property was worth $1,050. Upon these grounds we conclude that the verdict was not sustained by the evidence.

No other error being found, the judgment is reversed and the cause is remanded, with direction to grant a new trial upon the issue of the value of the land; the rights of the parties to be adjusted in accordance with the finding. All the Justices concurring.

(101 Kan. 303)

BINGER v. READ. (No. 20910.)

(Supreme Court of Kansas. July 7, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT 🔑286(22)—GUARD FOR JOINTING MACHINE—REASONABLE CARE — QUESTION FOR JURY.

Under section 5889, and under subdivision "b" of section 5896 of the General Statutes of 1915, the triers of fact must determine, as a question of fact, whether or not a guard provided in obedience to section 5889, or voluntarily furnished under section 5896, is safe, reasonable and proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1028.]

Appeal from District Court, Shawnee County.

Action by H. Binger against J. M. Read, doing business as the Topeka Planing Mill Company, for compensation under the Workmen's Compensation Act. Judgment for plaintiff, and defendant appeals. Affirmed.

Adrian F. Sherman and T. B. Landon, both of Kansas City, Mo., and Edwin A. Austin, of Topeka, for appellant. Edwin D. McKeever, of Topeka, for appellee.

MARSHALL, J. An opinion was handed down in this case on June 9th, but it was not printed for the reason that an application for rehearing discloses that there was omitted from the opinion a proposition which should have been discussed. The plaintiff recovered judgment for $1,289.25, under the Workmen's Compensation Act, and the defendant appeals.

While in the defendant's employ in a planing mill, the plaintiff had the thumb of his right hand cut off by a jointer. The defendant had provided a guard to be placed over the knives of the jointer when in operation, and had posted, on the door of the box in which was located the switch that turned on the electricity that operated the machine, a notice in substance as follows: "There is a guard for this machine and must be kept on." The guard was not on the machine at the time the plaintiff was injured, although it was in a convenient place and could have been easily attached. The commissioner of labor of the state had ordered that a guard be placed on this machine. This guard was placed there in obedience to that order. The guard had been seen by inspectors from the office of the commissioner of labor and had not been objected to by them. At times when the premises were being inspected, the guard was not in use. The inspectors had then directed that the guard be kept on the machine. Part of the time the machine was operated with the guard, and part of the time without it.

The court instructed the jury as follows:

"The court instructs you, however, that under the facts of this case the failure of the plaintiff to use the guard provided by the defendant was, as a matter of law, 'willful,' and you will consider that fact as established in your deliberations.

"You will observe, however, that, before the plaintiff can be precluded from recovering under the terms of section 1 of the act referred to, it must be proved that the injury to him resulted from the failure to use the guard, and, further, that the guard or protection must be one required pursuant to the statute and provided for him, or must be a reasonable and proper guard and protection voluntarily furnished by the employer. Therefore, before you can find for the defendant under the last preceding instruction, you must find that plaintiff's injury resulted from the failure to use a guard or protection required pursuant to some statute and provided for him, or from the failure to use a reasonable and proper guard and protection voluntarily furnished by the defendant. Whether the guard furnished was such as required, under the terms of a statute which will be stated to you, or whether the same was a reasonably proper guard and protection voluntarily furnished by defendant, are questions for your determination. If the guard in question was such a guard or protection as required by the statute, or if it was a reasonable and proper guard voluntarily furnished by defendant, that was sufficient, and, if the injury resulted from failure to use such guard, plaintiff cannot recover.

"As to what is a guard or protection required pursuant to statute, I instruct you that the law known as the Factory Act requires that every person owning or operating a manufacturing establishment in which machinery is used is required, where practicable, to properly and safely guard such machinery for the purpose of preventing and avoiding the death of or injury to persons employed or laboring in such establishment, and it is made the duty of all persons owning or operating such establishments to provide and keep the same furnished with such safeguards."

One of several special questions answered by the jury was as follows:

"Question 1: Did defendant furnish a guard or protection against accident to be attached to the jointer at which the plaintiff was working when injured, which when in place on the machine set in against the board being planed with a spring and covered the knife of the machine so that the plaintiff's hand or fingers pushing the board over the knife could not touch the knife, and receive an injury without pushing the guard away? Answer: Yes, but under the circumstances we consider the guard as inadequate."

The question for our determination is: Was it within the province of the jury to pass on the sufficiency of the guard?

Section 5889 of the General Statutes of 1915 reads:

"Every person owning or operating any manufacturing establishment in which machinery is used shall furnish and supply for use therein belt shifters, or other safe mechanical contrivance, for the purpose of throwing on or off belts or pulleys; and wherever it is practicable, machinery shall be operated with loose pulleys. All vats, pans, saws, planers, cog gearing, belting, shafting, set screws, and machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified."

Section 5896 of the General Statutes of 1915 in part reads:

"(b) If it is proved that the injury to the workman results from his deliberate intention to cause such injury, or from his willful failure to use a guard or protection against accident required pursuant to any statute and provided for him, or a reasonable and proper guard and protection voluntarily furnished him by said employer, or solely from his deliberate breach of statutory regulations affecting safety of life or limb, or from his intoxication, any compensation in respect to that injury shall be disallowed."

How was it to be determined that the jointer was properly and safely guarded, as required by section 5889, or that the guard was reasonable and proper, as described in section 5896? There was only one way, and that was to show by evidence the machine, its operation, and its dangers, and the guard, with its operation, and, from that evidence, determine the matter as a question of fact, and not one of law.

In this action, the issues were submitted to a jury. It was therefore for the jury to determine that question under instructions given by the court.

The defendant argues that the adequacy or inadequacy of the guard is not the question at issue; that the question is: Did the willful failure of the plaintiff to use the guard provided produce his injury? The defendant's argument would be good if the guard provided had been safe, reasonable and proper. A failure to use a guard that is not safe, reasonable or proper does not come within the provisions of the statutes. The court properly instructed the jury concerning the willful failure of the plaintiff to use the guard, and, after that instruction had been given, there yet remained the question of the adequacy or inadequacy of the guard. There was no way to avoid submitting that question to the jury. It was submitted, and the jury found, in substance, that the guard was not safe, reasonable and proper.

What has been said disposes of the defendant's contentions, the first of which is that the court erred in overruling the demurrer to the plaintiff's evidence; the second, that the court erred in overruling the defendant's motion for judgment on the special findings of fact; and, the third, that the court erred in overruling the defendant's motion for a new trial.

The application for a rehearing is denied, and the judgment is affirmed. All the Justices concurring.

(101 Kan. 222)

ROHR et al. v. CRANCER et al. (No. 21309.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS 🔑368—STREET PAVING CONTRACT—REPAIR—STATUTE.

Under section 1237 of the General Statutes of 1915, a city of the first class may contract for repaving a street, and in the contract provide that a part of the contract price shall be retained in the city treasury as a guaranty that the contractor will keep the pavement in repair for a period of fifteen years after its construction, and may provide that annually there shall be paid to the contractor, to pay for keeping the pavement in repair, a certain portion of the amount retained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901.]

2. MUNICIPAL CORPORATIONS 🔑327—STREET PAVING CONTRACT—PAYMENT FOR REPAIRS—CONSTITUTIONALITY OF STATUTE.

Section 1237 of the General Statutes of 1915, giving to cities of the first class the powers named in section 1 of this syllabus, is not unconstitutional.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 850.]

Appeal from District Court, Leavenworth County.

Action for injunction by A. Rohr and others against E. W. Crancer and others. Judgment for defendants, and plaintiffs appeal; G. C. Davis being substituted as appellee in place of E. W. Crancer, as Mayor of the City of Leavenworth. Affirmed.

W. W. Hooper and D. W. Hooper, both of Leavenworth, for appellants. Humphrey Biddle, C. P. Rutherford, and Lee Bond, all of Leavenworth, for appellees.

MARSHALL, J. In this action the plaintiffs sought to enjoin the defendants from entering into a contract with E. L. Meek & Co. to repave a street in the city of Leavenworth. Judgment was rendered in favor of the defendants, and the plaintiffs appeal. By stipulation of the parties, G. C. Davis is substituted as appellee in the place of E. W. Crancer, as mayor of Leavenworth.

Under the plans and specifications prepared by the city for repaving this street, the contractor agrees that all imperfections, settlements, defects, or damages to or in any part of the paving occurring at any time during the period of 15 years from and after the acceptance of the work by the board of commissioners shall be promptly repaired by the contractor; that out of the contract price the city shall retain in its treasury the sum of $18,000 as a guaranty for the maintenance of the street; and that, if the pavement is maintained as provided for in the contract and specifications, $1,800 shall be paid the contractor for each year's maintenance of the pavement during the period of 10 years after the expiration of five years from the date of the final acceptance of the work by the commissioners, $1,800 to be paid at the expiration of 6 years, and $1,800 at the end of each year thereafter until the expiration of 15 years.

On the trial the following admissions were made:

> "It is agreed that the plaintiffs are the owners of the property described in the petition.
>
> "It is further agreed that all preliminary proceedings leading up to the pavement of the street thereof have been complied with, and are legal and regular, and the only question in this case is the power of the city to enter into the contract that is contemplated to be entered into under the plans and specifications.
>
> "It is further admitted that the commissioners have acted in good faith."

[1] 1. The plaintiffs argue that, after the work has been completed, the city must pay for keeping the pavement in repair out of the general revenue fund; that special assessments cannot be levied on the abutting property for that purpose; and that therefore the city has no power to retain $18,000 of the price to be paid for the improvements, as a guaranty that the contractor will keep the pavement in repair for a period of 15 years. Section 1237 of the General Statutes of 1915 reads:

> "The mayor and council shall have power to provide, in any contract made by them for curbing, guttering or paving any street or alley, that the contractor shall guarantee to maintain and repair the same for such time as the mayor and council shall deem proper, and no special assessment shall be affected or invalidated on account of such guaranty."

The statute does not prescribe by what method or means the city may provide for the maintenance and repair of an improved street. That is left to the discretion of the governing body of the city. Any method by which a contractor agrees to keep the pavement on a street in repair contemplates that the cost of that maintenance shall be assessed against the abutting property in the apportionment of the cost of the improvement. There is no substantial difference between an effective contract by which a contractor agrees to keep a street in repair and a contract by which a part of the contract price is retained in the city treasury to be paid out in installments after the lapse of designated periods of time during which the street has been kept in repair. In either instance the cost of the upkeep or maintenance is assessed against the abutting property. This proposition is disposed of by La Veine v. Kansas City, 67 Kan. 239, 72 Pac. 772, where this court said:

> "By section 3, c. 81, Laws of 1899, the mayor and council of cities of the first class are given power to require a contractor putting in curbing, guttering, or paving to maintain and repair the same for such time as they shall deem proper, and assessments levied against abutting property for such improvements, under a contract made since the passage of said act, are not void because the cost of maintenance is included in the cost of such improvement." Syllabus.

But, it is argued, the statute under which the La Veine Case was decided has been repealed, and section 1237 of the General Statutes of 1915 has taken its place. That is true, but the two statutes are identical, so far as the question under discussion is concerned. The provisions of the new statute, so far as they are the same as those of the old, are construed as a continuation of such provisions, and not as a new enactment. Gen. Stat. 1915, § 10973, subd. 1. The contract now under consideration comes within the provisions of section 1237 of the General Statutes of 1915.

[2] 2. The plaintiffs argue that, if the Legislature has attempted to confer on cities such power as is attempted to be exercised by the defendants in this action, the act is unconstitutional. Under our Constitution the cost of paving or repaving streets may be assessed against abutting property. If the cost of paving streets or of repaving them may be so assessed, no reason is perceived why the cost of keeping streets in repair may not be assessed in like manner. The reasoning by which the constitutionality of statutes authorizing that the original cost of street improvements may be assessed against abutting property is upheld applies with equal force to statutes authorizing that the cost of keeping such improvements in repair may be so assessed. It follows that the statute is not unconstitutional. La Veine v. Kansas City, supra.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 82)

CITY OF LEAVENWORTH v. GREEN RIVER ASPHALT CO. et al. *

(No. 20770.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

VENUE 🔑49(2)—CHANGE OF VENUE—DISQUALIFICATION OF DISTRICT JUDGE.

Where the judge of the district court has been of counsel in the case or subject-matter thereof he is disqualified to sit, and it is error to refuse to grant a change of venue as provided in section 57 of the Code of Civil Procedure (section 6947, Gen. St. 1915).

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 72.]

Appeal from District Court, Leavenworth County.

Action by the City of Leavenworth against the Green River Asphalt Company and the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendants appeal. Reversed, with directions to order a change of venue.

Lee Bond, of Leavenworth, and W. L. Wood and J. E. McFadden, both of Kansas City, for appellants. C. P. Rutherford, Floyd E. Harper, and Humphrey Biddle, all of Leavenworth, for appellee.

PORTER, J. In September, 1902, the Green River Asphalt Company contracted with the city of Leavenworth to pave certain streets of the city with Kentucky rock asphalt according to plans and specifications furnished by the city, and by a separate contract the United States Fidelity & Guaranty Company furnished the city a maintenance bond for ten years from the acceptance of the work, guaranteeing the pavement to remain in good repair and free from all defects and damages due to the use of defective or imperfect material, or poor workmanship, or the proper use of said streets and alleys as a roadway, or to the action of the elements. Shortly prior to the expiration of the ten years mentioned in the maintenance bond and on April 2, 1914, the city brought this action upon the bond to recover damages sustained by reason of the failure of defendants to comply with the contract and the bond. The surety company filed its motion for a change of venue, which was overruled. A jury was waived, and the case was submitted to the court upon evidence, and the court made findings of fact and conclusions of law, and rendered judgment against the surety company for the sum of $30,639, which is the judgment appealed from.

The surety company filed a separate answer admitting the execution of the bond, alleging that the contract and specifications for the paving were prepared by the city and the work done under its superintendence and in full conformity with its plans and specifications; that the work when finished was duly accepted and paid for by the city, and that the damages were caused as the result of imperfect and defective plans prepared by the city, and that because of the materials specified and the workmanship required by the plans, the pavement when completed under the terms and conditions of the contract and specifications would not endure for the ten-year period of limitation mentioned; that these matters were known or could have been known to the city, but were not known to the surety company until after the filing of the suit. It further alleged that the material used by the asphalt company for the paving of the street under its contract was of the express kind that was called for in the specifications, and had been inspected and approved and accepted by the city, and denied that the material was of an inferior grade, and alleged that if the pavement became out of repair and in a defective condition as alleged it was entirely through the fault of the city in specifying faulty and improper material and the improper laying of the same.

The answer further alleged the failure to give notice to make the repairs as required under the terms of the contract, and that after the acceptance of the work the city had permitted many cuts and excavations to be made in the paving by plumbers and other persons unknown to defendants, which cuts caused great damage to the pavement, and were allowed to remain open and unprotected for long periods of time, and were after-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 11, 1917.

wards filled with material inferior to that specified in the contract. It was also alleged that shortly after the work was completed two blocks of the pavement were destroyed by the bursting of the water mains of the city, and that neither of the defendants were bound under those circumstances to make repairs resulting therefrom. It alleged that during the period covered by the contract and bond the defendants made repairs on the street, and had expended therefor $3,156.63, and if plaintiff is entitled to recover any amount, then this sum so expended should be deducted therefrom.

The contract provided that the material for the paving should be Kentucky rock asphalt "equally as good as the best quality of asphalt mined at the Buck Horn Mines in the Chickasaw Nation or that mined in Breckenridge County, Ky." It was alleged in the petition that the material used was not in accordance with the terms of the contract, and a great deal of evidence was offered on both sides of this issue. The defendants moved for a change of venue for the reason that the Hon. J. H. Wendorff, judge of the district court, had been of counsel in the subject-matter of the litigation, and was therefore disqualified. The motion was supported by the affidavit of J. A. Thompson, agent and adjuster of defendant surety company, alleging that on June 3, 1908, J. H. Wendorff was city attorney of Leavenworth, and as such attorney wrote a letter to affiant inclosing copies of the contract for paving and the maintenance bond sued on in this action, which letter stated the number of yards of paving necessary to be repaired as estimated by the city engineer, and requesting that the matter be attended to at once by the surety company. The affidavit set forth a copy of this letter and also one from the mayor of Leavenworth, dated July 22, 1908, as follows:

> "Our city attorney, Mr. Wendorff, advises me in a conversation that you made him a promise some time ago that you would urge upon the Barber people the importance of commencing repair work on Fourth avenue and Broadway street in this city at once. Mr. Wendorff states that this conversation occurred some two or three weeks ago, and that you promised him at that time that the work would commence in very short time. It is our purpose, in the event repairs are not commenced here within the next twenty days, to bring suit against your company to have this work done. We would regret very much being compelled to do this, and we earnestly hope that you will not compel us to do so. I would be pleased to hear from you at once as to what your intentions are in the matter."

The affidavit alleged further that while city attorney Mr. Wendorff had been called upon at various times by the city commissioners for counsel and advice concerning the subject-matter of the litigation, and that on June 30, and July 22, 1908, the affiant conferred with him as attorney for the city concerning the character and quality of the pavement in question and defendant's liability therefor, and that in the conference the city attorney took the position that defendant was liable on the bond for the repairs.

The record contains a statement made by the trial judge in substance that in May, 1908, the paving in question was reported out of repair, and that as city attorney, acting under the directions of the city commissioners, he wrote the defendant surety company at Baltimore, stating that it had signed the maintenance bond for the term of ten years, that the pavement was badly out of repair in many places, and that the city commissioners requested the company to have the repairs made, and that if this was not done the city would take such steps as it was authorized to do under the bond. In the statement the trial judge said he did not believe he had ever examined the particular bond, but was familiar with the form; that Mr. Thompson, agent of the surety company, called at his office and asked him for copies of the contracts and bond and to have the city engineer make an estimate of the amount of repairing; that in pursuance thereto he sent him copies of the contract and bond and wrote the letter set forth in the affidavit. He further stated that in the conversation with Mr. Thompson the latter promised that the surety company would have the Barber Asphalt Company do the work of repairing just as soon as possible, and that he reported to the commissioners what Mr. Thompson had said. He denied having advised the city further than as stated; did not remember of talking to Mr. Thompson except the one time mentioned, and denied discussing the liability of the defendants or the quality or character of the pavement.

The first question necessary to decide arises over the refusal of the court to grant a change of venue. If the defendants have not had a trial upon the facts before a duly qualified judge, it is unnecessary to pass upon the questions of law raised by the appeal for the reason that the facts determined at a subsequent trial may be entirely different and the questions of law depend very largely upon the facts. As was said in the case of Tootle v. Berkley, 60 Kan. 446, 447, 448, 56 Pac. 755, 756:

> "None of the essential facts as to the disqualification of the judge is in dispute, and that he was disqualified is hardly open to controversy. Our statute expressly provides that a judge who is 'interested or has been of counsel in the case or subject-matter thereof' is disqualified to sit; and to prevent a failure of justice by reason of his disqualification provision is made for a trial before a judge or tribunal not disqualified to hear and decide the controversy." Section 57, Code Civ. Proc. (section 6947, Gen. St. 1915).

It was further said in the opinion in that case:

> "The principle of law which incapacitates a person from being judge in his own cause is extended so as to disqualify a judge who may have been of counsel for one of the parties in the case. It is the purpose of the law that no judge shall hear and determine a case in which he is not wholly free, disinterested, impartial, and inde-

pendent. 'Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge.' 12 A. & E. Encycl. of L. 40." 60 Kan. 448, 56 Pac. 756.

Undoubtedly the trial judge believed that because he had not been concerned as an attorney in bringing the action, and had acted in a more or less perfunctory way as an attorney for the city in connection with the subject-matter of the controversy, and that all this had occurred several years prior to the filing of the suit, he could try the case fairly and impartially; but in the Tootle Case, supra, all that the trial judge did was to revive a judgment in an action wherein he had been of counsel, and it was said in the opinion:

> "It is generally held that the rule of disqualification should not have a narrow or technical construction, but should rather be broadly applied in all cases where one is called upon to act judicially or to decide between conflicting rights. There was no necessity to trench upon the rule in this case as ample provision is made by statute for the hearing of the matter before a judge who is qualified." 60 Kan. 449, 56 Pac. 756.

The order of revivor was held in that case without force or validity. In the present case it appears beyond question that the judge of the district court had been at one time the counsel and attorney of the city in relation to the subject-matter of the controversy, and the defendants have not therefore had a trial before a judge qualified to sit in the case, as the statute declares they are entitled to have before a valid judgment can be entered against them.

The judgment is reversed, with directions to order a change of venue. All the Justices concurring.

(101 Kan. 225)

STATE ex rel. BREWSTER, Atty. Gen., v. MAYOR AND COM'RS OF CITY OF LAWRENCE. (No. 21394.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

STATUTES 🔑120(4)—SUBJECT AND TITLE—CONSTITUTIONAL PROVISIONS—"NOW."

A title to an act which describes it as authorizing cities of a certain class "now" owning a system of waterworks to issue bonds for their extension is broad enough to cover a provision for the issuance of such bonds by cities which owned no waterworks at the time of the enactment, but which acquired them thereafter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 172.

For other definitions, see Words and Phrases, First and Second Series, Now.]

Original mandamus by the State of Kansas, on relation of S. M. Brewster, Attorney General, against the Mayor and Commissioners of the City of Lawrence, Kan. Judgment for plaintiff.

S. M. Brewster, Atty. Gen., and S. D. Bishop and J. H. Mitchell, both of Lawrence, for plaintiff. Thos. Harley, of Lawrence, for defendant.

MASON, J. This is an original proceeding brought in the name of the state to require the commissioners of Lawrence to issue bonds for the extension of waterworks owned by the city. The refusal of the defendants is based upon a doubt respecting the validity of the statute which purports to authorize such action.

The act in question was enacted in 1913 (Laws 1913, c. 124). It undertakes (section 1) to confer power to issue bonds for the purpose indicated upon "cities of the second and third class, whose total indebtedness shall not exceed 15 per cent. of its total assessed valuation now owning and operating, or hereafter acquiring a system of waterworks." Gen. Stat. 1915, § 855. The city of Lawrence did not own a system of waterworks when this law took effect, but it has since acquired one. It is a city of the second class, and its indebtedness is within the prescribed limit. It is therefore covered by the terms of the act. But the contention is made that the words "or hereafter acquiring," in the portion of the statute above quoted, are without effect because they are not within the scope of the title, which reads:

> "An act authorizing cities of the second and third class whose total indebtedness shall not exceed 15 per cent. of its total assessed valuation now owning and operating a system of waterworks to issue bonds for the purpose of enlarging, repairing, extending and improving such system."

The word "now," as used in a statute, ordinarily refers to the date of its taking effect. Clark v. Lord, 20 Kan. 390, 396. Construed strictly and literally, the title therefore applies only to cities which at the time the act was published owned a system of waterworks, and not to those which might thereafter acquire one. The word "now," however, is sometimes used, not with reference to the moment of speaking, but to "a time contemporaneous with something done." 21 A. & E. Encyç. of L. 676; 29 Cyc. 1140.

> "The intent with which this word is used must be gathered from its peculiar significance in each case." Note to last text cited.

It may mean "at the time spoken of or referred to" as well as "at the time of speaking." One of the examples of this given in the Oxford English Dictionary is:

> "What season more important than the hour of death? Everything now conspires to fill the soul with gloom."

The expression is somewhat rhetorical, corresponding to the "historical present" of the grammarians, but it could leave no one in doubt that the speaker referred to the time of death, and not to the time of utterance. That this use of the term is not confined to poetical discourse is illustrated by this sentence from a scientific paper in a recent review:

> "Curiously enough, in the early stages of this firm condition the ice is perhaps more dangerous to venture upon than when it has the 'rubbery' structure; for it is now brittle and yet not of sufficient thickness to support a considerable weight at one point." The Natural History of Ice, Harper's Magazine, March, 1917, p. 559.

It is entirely clear that the draftsman of the statute under consideration, when in the title he referred to the issuance of bonds for the extension of waterworks by cities which "now" owned them, had in mind cities which owned them at the time of the proposed extension, and not those which happened to own them at the time the act took effect. His idea manifestly was that a city which owned waterworks should for that reason be given the power to use its credit for their repair and improvements. If he had substituted "already" for "now" where it occurs in the title, the literal meaning would have been much the same; yet in that case probably it would not have been suggested that it was the condition at the time of the publication of the act that was to control. We think the intention to make the application of the statute depend on the conditions at the time it should be invoked is reasonably clear from the language employed. We are required to give the title any reasonable construction that will carry out the expressed purpose of the legislature, and we think, as has been said of another statute, the one under consideration "is not unconstitutional or void, or at least it is not so clearly unconstitutional and void that we can declare it to be so." State v. Haskell County, 40 Kan. 65, 68, 19 Pac. 362, 363. If the title, in describing the cities to be affected, instead of saying "whose total indebtedness shall not exceed 15 per cent.," had said "whose total indebtedness does not exceed 15 per cent.," it would have referred literally to the percentage of indebtedness existing at the time of the enactment. But in that case no one would have doubted that the subject of the act was the granting of power to issue bonds to cities having less than 15 per cent. of indebtedness at the time of the proposed issuance. Moreover, if the statute is to be construed as giving power to issue the bonds which it describes to the cities which at that particular time owned a system of waterworks, while denying the power to all other cities, even although they might afterwards meet the same requirements, its validity is at least open to a very serious doubt on the ground that it would then confer corporate power by an act which would be special because it related to certain designated cities, the number of which could not be increased or diminished, thereby transgressing the constitutional rule in that regard. Constitution, art. 12, § 1; City of Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800.

> "A statute * * * which confers corporate power upon an unchangeably fixed number of corporations is * * * usually regarded as special, and therefore unconstitutional." Bull v. Kelley, 83 Kan. 597, 602, 112 Pac. 133, 135.

Upon these grounds we hold that the statute is valid, and that it is the duty of the defendants to issue the bonds in question.

Judgment is therefore rendered for the plaintiff. All the Justices concurring.

(101 Kan. 54)

KURT et al. v. COX et al. (No. 20706.)*

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. FRAUD 🔑13(2)—FRAUDULENT REPRESENTATIONS—EXCHANGE OF LAND—LIABILITY.

A grantor who makes representations, as to the character and quality of land situate a considerable distance away from the place of negotiations, which he knows to be untrue and with the intention to deceive and defraud the grantee, and whereby he induces the grantee to purchase the land without inspecting it, to his injury and loss, cannot escape liability for the fraud by the statement to the grantee at the time the sale is completed that he has never seen the land nor by telling him that the information he has was obtained from others.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 4.]

2. FRAUD 🔑58(2)—FRAUDULENT REPRESENTATIONS—CIRCUMSTANTIAL EVIDENCE.

That the grantor made representations knowing them to be untrue and for the purpose of deceiving and injuring the grantee may be shown by circumstances as well as by direct and positive proof.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 56, 57.]

3. FRAUD 🔑58(2)—FRAUDULENT REPRESENTATIONS—EVIDENCE.

The evidence herein is deemed to be sufficient to uphold the findings of the jury that the representations were untrue and made with the fraudulent purpose of injuring the plaintiffs.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 56, 57.]

Appeal from District Court, Sedgwick County.

Action by A. A. Kurt and another against Clinton V. Cox and others. Judgment for plaintiffs, and defendant Clinton V. Cox appeals. Affirmed.

Holmes, Yankey & Holmes, of Wichita, for appellant. William Keith and Monroe Wright, both of Wichita, for appellees.

JOHNSTON, C. J. In this action the plaintiffs, A. A. Kurt and F. C. Kurt, asked a recovery of damages as against Clinton V. Cox, Tipton Cox, F. M. Newcom, Tom Mott, F. M. Hamilton, and Lawrence Bowers for misrepresentations and fraud in the exchange of a stock of goods for a tract of land. Plaintiffs entered into an agreement with Clinton Cox, whereby they traded their stock of merchandise, valued at about $14,000, for 960 acres of land in Oklahoma and for $4,000 cash; plaintiffs giving back a note for $2,060 secured by a mortgage on the land. A. A. Kurt acted

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*Rehearing denied July 11, 1917.

for both plaintiffs. Prior to coming to any agreement of exchange, Kurt had hesitated about going further in the transaction because he had not seen the land, and Cox told him that he himself had not seen the land, but that his father, Tipton Cox, had seen it. According to Kurt's testimony, Cox in the final negotiations stated and agreed to guarantee the good quality of the land, and Kurt was finally prevailed upon to make the trade without seeing the land. Shortly after consummating the deal, plaintiffs discovered that the land was practically worthless and was located on top of a mountain. They then brought this action to recover damages resulting from the fraud practiced upon them by Clinton Cox and others assisting him in bringing about the exchange. It was claimed that Boyd Newcom and Tom Mott, real estate brokers employed by Kurt, co-operated with Cox in the fraud, and F. M. Hamilton, an agent acting for Cox, Tipton Cox who advised the younger Cox as to the value of the stock to be purchased, and Lawrence Bowers, through whom the title to the Oklahoma land was transferred, were also joined as defendants. The case was tried three times, and in the final trial the only defendants involved were Newcom, Mott, and Clinton Cox. Plaintiffs secured judgment against Clinton Cox only, for the sum of $4,750, and Cox appeals.

He contends that the evidence did not sustain the charge of fraud nor the findings and verdict of the jury. It is insisted that it was not shown that Clinton Cox made any representations to Kurt as to the quality and character of the land, nor that he had knowledge that the representations made were untrue. There was evidence introduced that several days before the exchange Clinton Cox, under an assumed name, had gone to Herington, where plaintiffs' stock of merchandise was located, and made an examination of it, and had also had his father, Tipton Cox, who was experienced in such matters, examine it and give his judgment upon its value. Kurt testified that during the negotiations for the trade he was told that, as the Coxes were reliable people and were willing to guarantee the land, he ought to be willing to exchange his stock for it without waiting to look at it, and that Clinton Cox, not only did guarantee the quality of the land, but at the final meeting he signed a paper describing it and guaranteeing it to be good tillable land, with good growth of grass and about one-third covered with a good quality of timber; this statement being in substantial accord with the oral representations that had been made. It was testified that the written guaranty was turned over to one of the defendants' agents to keep, and that the plaintiffs had not been able to get possession of it since. Plaintiffs were unable to get possession of the abstract of title to the land until several weeks after the exchange had been effected, and it was then discovered that on the day of the exchange Tipton Cox, in whom the title had stood, had transferred it to Lawrence Bowers, who was an employé in the Cox store and not a man of means; that the land was cheap government land which had never as yet been fully paid for; and that Tipton Cox had bought it at the price of $2.50 an acre.

[3] In view of the direct and positive testimony of Kurt that Clinton Cox, just before the agreement of exchange was effected, made a statement as to the quality of the land, which he also reduced to writing and which was material, untrue, and was relied upon by the plaintiffs, it must be held that the verdict was not without support. The statement was not qualified as to the source of his information nor as to the grounds of his belief. The jury in effect found that he made the false representations upon the day when the contract was closed by guaranteeing that the land had good soil, a good growth of saw timber, good growth of grass, and that there was a quantity of it that was good tillable land; and that the representations were false. It is true that the jury found that he had told Kurt that he had never seen the land, and also that the statements which he had made as to its character and description were statements which he had obtained from others. The fact that he had gained his information from others and had never seen the land does not protect him from liability if he made positive and unequivocal statements and the guaranty that has been mentioned. If he made the statements, as Kurt has testified, knowing them to be untrue, with the intention of deceiving plaintiffs and inducing them to part with their property, it amounts to a fraud, and he cannot shelter himself behind the defense that he had not seen the land and that he told Kurt that his information had been obtained from others.

In Westerman v. Corder, 86 Kan. 239, 119 Pac. 868, 39 L. R. A. (N. S.) 500, Ann. Cas. 1913C, 60, where false representations were made by the grantor in the sale of property and the excuse was that they were made in good faith, the court said:

> "While admitting that the representations were made and that they were untrue, it is contended that because they were made in good faith, believing them to be true, and no fraud was intended, therefore an estoppel was not created. It must be conceded that the effect is the same as it would have been if guilty knowledge had been shown. It does not repair the loss of the grantee to be told that the grantor supposed he was telling the truth." 86 Kan. page 241, 119 Pac. 869 [39 L. R. A. (N. S.) 500, Ann. Cas. 1913C, 60].

The court was applying the doctrine of equitable estoppel in that case, but in disposing of the case it was remarked that:

> "It has often been held that false representations made and acted upon to the injury of another, although not known to be false by the party making them, may nevertheless in a proper case afford ground for the recovery of dam-

age." 86 Kan. pages 241, 242, 119 Pac. page 869 [39 L. R. A. (N. S.) 500, Ann. Cas. 1913C, 60].

The Supreme Court of Michigan, in Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497, stated:

> "Careful examination of the cases adjudicated in this state satisfies me that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity." 69 Mich. page 399, 37 N. W. page 498.

See, also, Aldrich v. Scribner, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379; Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485; Johnson v. Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629.

The authorities are not in agreement as to whether or not good faith and intention to tell the truth will relieve the speaker from liability if the representations are untrue. A distinction is made in some cases where the representation is made by a mere volunteer who has no interest in the transaction and one who has contractual relation to it. The one, it is said, has no higher duty than to answer honestly and in good faith, while it is the duty of the latter to be careful and accurate, and hence ignorance and mistake will not relieve him from liability. Note, 7 L. R. A. (N. S.) 646.

[1, 2] In view of the testimony in this case, it is not necessary to rest the decision upon the doctrine of Westerman v. Corder, supra, as there is testimony tending to support the claim of the plaintiffs that Cox knew the representations made were untrue and that they were fraudulently made to deceive the plaintiffs. It has been said that:

> "Fraudulent representations are those proceeding from or characterized by fraud. Their purpose is to deceive. A fraudulent representation in law is one that is either knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it." Sallies v. Johnson, 85 Conn. 77, 82, 81 Atl. 974, 976 [Ann. Cas. 1913A, 386].

See, also, Edgington v. Fitzmaurice, 29 Ch. D. (Eng.) 459. The fraudulent purpose of the defendant may be shown by circumstances as well as by direct and positive proof. Morse v. Ryland, 58 Kan. 250, 48 Pac. 957.

While the defendant had not seen the land, his father, who was engaged in business with him and co-operated with him in making the trade with plaintiffs, had seen it and, of course, had knowledge of its character and quality. According to Kurt's testimony, Hamilton, the agent of the defendant who acted for him in the negotiations, confirmed the statements of Newcom to the effect that the land was tillable, covered with a good growth of grass, about one-fourth in oak and pine saw timber, that it was in the gas and mining belt, and within two miles of the biggest coal mine in Oklahoma, where the annual rainfall was about 44 inches per year. At the outset, Cox examined the stock of goods himself, and then he called his father, who also inspected the stock; but for some reason he did not choose to deal directly with plaintiffs, but made his statements and offers through his agent, Hamilton. The parties appeared to be anxious to close the deal without an inspection of the land by the plaintiffs, and they urged upon Kurt that the guaranty of Cox made it a safe proposition. At the close of the negotiations, Cox gave the guaranty, which appeared to satisfy Kurt, and the exchange was made. Legal title to the land appears to have been placed in an employé of Cox who was holding it for him, and in the transfer Cox must have known that the property which he was putting in at $12 an acre had been transferred to his father for $2.50 per acre. When he made the statement to Kurt that he had not seen the land, he coupled with it the statement and assurance that his father had seen it. While Cox denied that he made and gave the guaranty as to the character and quality of the land, it was admitted that he had made and issued an advertisement, a copy of which was given to Kurt, and which was as follows:

> "For Sale or Exchange: 960 acres of land located in Pittsburg county, Okl., oak, pine and hickory timber. Good ranch proposition, part tillable, well watered, within two or three miles of one of the largest coal mines in Oklahoma; also near the oil and gas developments, within two or three miles of the largest cement plant in Oklahoma. The timber alone should almost pay for this land. Located within three miles of Interurban and Railroad. Three miles from town of 4,000 people. Legal description E. ½ of Sec. 30, all of Sec. 31, Twp. 4 N. Range 17 E. Will exchange for good income property or merchandise. Address the owner direct and save commission."

These facts and circumstances were sufficient to warrant the inference that Cox knew that the representations were untrue and were made with the purpose of defrauding plaintiffs, even if the written guaranty had not been given. They are sufficient to overcome his declaration of an honest purpose and a lack of actual knowledge. To willfully shut his eyes to obvious facts within his control, so that when called to account he might say that he had no personal knowledge of the facts, is itself a fraud.

Complaint is made of instructions 10 and 11. The jury were advised that it was necessary for plaintiffs to prove that the representations were false and known to be false by the defendants, and that their falsity might be proven by showing:

> "First. Actual knowledge of the falsity of the representations by the defendants. In this case the proof must show that the representations were false and that the defendants had actual knowledge that they were false.
>
> "Second. That the defendants made the representations as of their own knowledge, or in such absolute, unqualified, and positive terms as to imply their personal knowledge of the facts, when, in truth, the defendants had no knowledge whether the representations were true or

false. In this case the proof must show that the representations were in fact false, and, in addition, that the defendants made the representations as of their own knowledge, when in fact they had no knowledge whether they were true or false, without belief in their truth, or recklessly careless whether they were true or false.

"Third. That the defendant's special situation or means of knowledge were such as made it their duty to know as to the truth or falsity of the representations. In this case, the proof must also show that the representations were in fact false, and, in addition, that the defendants' special situation or means of knowledge were such as made it their duty to know as to the truth or falsity of the representations."

The principal criticism is that, as Kurt's own testimony showed that he was informed that Cox had not seen the land and had derived his information from others, there was no warrant for referring to statements that would imply knowledge, or for mentioning any substitute for actual knowledge. Knowledge might have been gained from other sources than a personal inspection of the land. It is immaterial whether it is designated as "actual knowledge" or just "knowledge." As there was testimony of positive declarations by Cox and also of circumstances tending to show that he must have known that the representations were untrue, the instructions appear to have been warranted.

Complaint is also made of the eighteenth instruction, which first stated that if the defendants Clinton Cox, Boyd Newcom, and Tom Mott made representations as to the character and quality of the land believing them to be true and informed the plaintiffs that they had derived their information from Tipton Cox and fully disclosed the source of their information without anything more, they would not be liable, and the court added:

"But, if you find that Clinton Cox or Newcom or Mott, or either of them, went further and stated that Tipton Cox had seen the land and that his representations in reference thereto could be relied upon, then you are instructed that the person or persons communicating such facts, if you find it to be a fact, to A. A. Kurt, are deemed to have adopted the representations of Tipton Cox as their own; and if the representations of Tipton Cox as to the character, quality, and location of the Oklahoma land were not true, then you are instructed that the person or persons communicating the representations, if any, made by Tipton Cox, are responsible for them, and they constitute fraud on their part. If you find that the defendants believed the representations which they made to Kurt were false, then they will be liable to the plaintiffs, even though you may find that they informed Kurt that they had never seen the land, that their own information as to the land was derived from Tipton Cox and others and from a written statement which was delivered to Kurt, and that they fully disclosed to him the sources of their information."

There is no good reason for Cox to complain of this instruction. Under it, the defendants were to be exonerated if the representations which they made were believed by them to be true and they had fully disclosed to the plaintiffs the source of their information and nothing more; but, if they had added to their information that the information which they had obtained from Tipton Cox could be relied upon as true, the adoption of the representation and assurance thus given are the same as if they had made the statements upon their own responsibility. A positive assurance of that kind is treated as if made upon personal knowledge, and, where it is made with the purpose of deceiving and defrauding parties, the liability is the same as if they had derived their information from a personal inspection. Tipton Cox, referred to in the instruction, had been the owner of the land up to the day of the exchange made with plaintiffs and had been active in promoting the exchange, and his relations were so close to the defendant and to the transaction that he cannot be regarded as a stranger. It is complained that the instruction makes the defendant liable regardless of the falsity of the representations or the fraudulent purpose. Those features of the law had been fully stated in other instructions, and it was unnecessary to repeat all those points in the instruction in question. The instruction really went no farther than to say that if a party repeats what another has stated, and then adds his own assurance that the statements might be relied upon, he is responsible the same as he would have been if he had made them without information from others. Besides that, the special finding of the jury which places the liability of Clinton Cox on the unqualified statement which he made himself, and which he put in the form of a guaranty and which, under the plaintiff's evidence, must be assumed to be true, makes this objection as well as some of the other objections to the instructions of little consequence.

The findings of the jury support the judgment, and, no prejudicial error having been found in the proceedings, the judgment is affirmed. All the Justices concurring.

(101 Kan. 18)

In re LINDERHOLM.*

EKBLAD v. LINDERHOLM.

(No. 20523.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

MANDAMUS 🔑52—SUBJECT-MATTER—CORRECTION OF JOURNAL ENTRY.

Where, after a dispute between counsel as to what a journal entry of judgment on a motion and demurrer should contain, the trial judge signs a journal entry reciting the judgment of the court, a writ of mandamus will not issue to compel the correction of the journal entry so as to make it recite the evidence or other showing on which the judgment was based.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 101.]

Appeal from District Court, McPherson County.

Petition by Mrs. Agnes Ekblad for letters

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*Rehearing denied July 11, 1917.

of guardianship, opposed by Justus B. Linderholm. Judgment for petitioner, and Linderholm appeals and brings mandamus to compel trial judge to correct the journal entry signed by him. Writ of mandamus denied.

John F. Hanson, of Lindsborg, for appellant. F. O. Johnson, of McPherson, for appellee.

MARSHALL, J. Justus B. Linderholm asks that a writ of mandamus be issued to compel Judge R. L. King to correct the journal entry of proceedings had before him in McPherson county. The journal entry, which is the subject of this controversy, is as follows:

"And now, to wit, on this 21st day of December, 1915, being an adjourned day of the regular December term of the said court. The Honorable R. L. King, judge of the Eighth judicial district of the state of Kansas, who had been called in by Judge F. F. Prigg to try this case, and the said Judge R. L. King is sitting in this case with the consent of all the parties concerned. The appellant appearing by John F. Hanson, his attorney, and the appellee by Frank O. Johnson.

"And thereupon came on to be heard the motion of the appellee to dismiss the appeal from the probate court of this county for the reason that no bond had been given as required by the statute, which motion was overruled by the court and duly excepted to by the appellant.

"And thereupon came on to be heard the motion of the appellant for an order requiring the probate court to cancel the letters of guardianship issued by the probate court of said county and state to Frank O. Johnson, which motion was by the court overruled and duly excepted to by the appellant.

"And thereupon came on to be heard the demurrer of the appellant to the petition for letters of guardianship filed by Agnes Ekblad, in the probate court of McPherson county, Kan., which demurrer was duly overruled by the court and duly excepted to by the appellant.

"The appellant was granted a stay of 30 days."

Linderholm alleges:

"That said appellant's counsel submitted a form of journal entry of rulings on said matters, but the same was not signed by the said judge, but on the contrary a form prepared by the opposing counsel was signed; the same not having been submitted to appellant's counsel, and no opportunity being given appellant or his counsel to be heard in the matter as provided by rule No. 4 of said court."

Linderholm further alleges that, when it was discovered that the journal entry had been filed, his counsel filed a motion to correct it, and asked that Judge King come into McPherson county to hear the motion. It has not been heard. Linderholm's application does not state wherein the journal entry is incorrect.

It appears that there was a difference between counsel as to what the journal entry should contain, and that counsel for Linderholm and opposing counsel each prepared a form of journal entry. These were submitted to Judge King, and he signed the journal entry prepared by opposing counsel.

On the oral argument before this court, it appeared that F. O. Johnson, who, as counsel, opposed the motions and demurrers mentioned in the journal entry, had agreed that the files in the probate court in the insanity proceedings against Justus B. Linderholm might be introduced in evidence in the district court without identification. The ground of Linderholm's complaint appears to be that the journal entry does not recite the evidence or showing on which the judgment was based. It does not appear that Linderholm offered to introduce the files in evidence, nor does it appear that it was necessary for them to be introduced on the hearing of either of the motions. It was not necessary for the files to be introduced on the hearing of the demurrer, and it was not necessary for the journal entry to recite the showing that was made on the motions or the demurrer.

No reason appears why a writ of mandamus should issue to compel R. L. King to correct the journal entry that was signed by him.

In this court, Linderholm complains, and has, on a number of occasions, complained, of the adjudication of insanity against him. The statute provides an easy and effective method by which he can be declared sane. For some reason he prefers not to pursue that remedy.

The writ of mandamus is denied. All the Justices concurring.

(101 Kan. 122)

FRASER v. CHICAGO, R. I. & P. RY. CO.

(No. 20899.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT 🔑129(1) — INJURY TO SERVANT — MASTER'S LIABILITY — INDEPENDENT CRIMINAL ACT.

The defendant, an interstate carrier, maintains a large freighthouse having many doors. It was known there were persons about the freighthouse at different times of the night watching for an opportunity to steal property in the defendant's care. At the close of business each day, it was the duty of an employé known as the doorman to close all doors and bolt them. The plaintiff was night watchman of the freighthouse, and his duties were to look after and protect the property in the defendant's custody. The first duty of the watchman, on coming into the building in the evening, was to see that all doors were closed and bolted; but this duty had not been communicated to the plaintiff. At 1:05 a. m., while going his rounds, the plaintiff discovered that one of the doors was open. Suspecting the presence of an intruder, he commenced to draw his revolver, when he was shot in the arm by which he carried his lantern, by a man who escaped through the open door. The plaintiff had passed by the door hourly since 7:05 of the evening before, and the door had been closed. Assuming the doorman failed to bolt the door, it is held the omission merely created a condition which made entrance into the building less difficult, and that the cause of the plaintiff's injury was the independent, unrelated, criminal act of the intruder, who used the door to gain admission to the building.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 257.]

(Additional Syllabus by Editorial Staff.)

2. NEGLIGENCE ⇨56(1)—"PROXIMATE CAUSE." When an act or omission has bound up in it perils which, in the natural order of things, are liberated or eventuate through the conduct of a responsible human being and which might have been anticipated, and injury results, the original act or omission is "proximate cause."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69.

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

Appeal from District Court, Wyandotte County.

Action by Henry D. Frazer against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded, with directions to enter judgment for defendant.

Paul E. Walker and Luther Burns, both of Topeka, and O. L. Miller, of Kansas City, for appellant. W. B. Sutton and W. B. Sutton, Jr., both of Kansas City, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained by the plaintiff, who was an employé of the defendant. The plaintiff recovered, and the defendant appeals.

The defendant maintains two freighthouses in Kansas City, Mo., which extend north and south and are connected by a dock or platform. At the close of business each day, a doorman sees to it that all doors are closed and bolted. About 6 o'clock in the evening, a watchman comes in and remains until 6 o'clock the next morning. The watchman is the only man in charge of the company's property at night, and his duties are to protect and look after such property in all respects—the lights, fire, water, theft, and, if doors be not secured, to secure them. Two registry boxes are installed in each building. In case of fire, the watchman breaks the box, pulls down a lever, and so gives an alarm. Besides this, the watchman is required to visit each box at stated intervals throughout the night, and by means of the bell indicate to the Western Union Telegraph office in the Stock Exchange building a block and a half from the freighthouses that he is awake and on duty. Frank Holland was the watchman for both buildings. The work was too heavy for one man, and the plaintiff took Holland's place as watchman of the north building. The plaintiff had been fireman of the heating plant which heated the freighthouse office. It required but a small amount of work to attend the heating plant, and he continued to do so after he assumed the duties of watchman. One night as the plaintiff was going his rounds, he saw an open door on the west side and toward the north end of the building. He had passed by the door hourly from 7:05 p. m. to 12:05 a. m., and the door had been closed; but, as he came to it at 1:05 a. m., it was open. He carried a lantern at his side in his left hand and a revolver in a holster under his left arm. Upon seeing the open door, he reached for his revolver with his right hand, and was immediately shot in the left arm by a man who escaped through the open door.

The plaintiff's petition does not contain the word "watchman." He framed his petition, and he framed his testimony to make it appear that aside from his duties as fireman his duties consisted in ringing those two bells, installed for the purpose of compelling him to make an hourly record of the fact that he was awake and about his business. He said the registry boxes were for protection against fire, and had to be rung every hour. He had no orders covering anything except his duties as fireman and turning in those registry boxes. He said Holland was a watchman, and had pulled the bells as part of his duties as watchman. Holland was relieved of all duty in the north building, but the plaintiff said one of Holland's duties was taken away and given to him, and that was to pull the bells, and he pulled them as fire protection. The plaintiff's superior officer left the order for him to ring those bells. He had no orders about doors, except the one through which he entered the building. That one he was required to shut, so people could not steal or burn or do any damage, and he locked it behind him to keep anybody from coming in after him. But there his duties in respect to doors ended. True, he said, "While working there I went round some with Holland, and found doors open, and we closed them"; but when he took Holland's place, and there was no other employé except himself in the building, sometimes he glanced around when going to ring his bells, and sometimes he did not. When not ringing the bells, he stayed in the office.

The supposed foundation for the defendant's legal liability in damage is this: The plaintiff was obliged to pass by the door through which the intruder entered every hour of the night, in going from the office to the places where he worked the bell ringing charm against fire. The door was left unlocked, and no guard was set to prevent desperadoes from making a breach through this weak place in the fortifications behind which the plaintiff rung his bells. These culpable omissions exposed the plaintiff, who was entirely without fault, to great bodily harm, and even to death, and did in fact, through a series of events linked together in natural sequence, proximately cause the plaintiff to be shot.

Testimony which the plaintiff himself produced, and the testimony of witnesses produced by the defendant whom the plaintiff did not undertake to contradict, cut the underpinning from the fabrication that bell ringing was an independent employment, and not a means of making hourly reports, and established the fact that the plaintiff was watchman of the north building in place of Holland, and succeeded to Holland's duties there. There are doors and doors of the north freighthouse, which is 600 feet long and 45 feet wide. A rolling door at the south end opens on the dock between the two buildings, and has bolts in the sides. Another door fastens in that way. The west doors, about 30 in number, are sliding doors, and when closed are fastened by bolts pushed down with the foot into slots. Sometimes it would be discovered that in closing the building in the evening a bolt had not been pressed down, and the proof, coming from the lips of the plaintiff's own witness as well as the witnesses for the defendant, was that the watchman's first duty on coming into the building in the evening was to see that doors were closed and fastened. The plaintiff did not dispute this proof, but on rebuttal merely reiterated his claim that he had no instructions regarding doors, and said he was carried on the pay roll as a fireman. The plaintiff had pleaded that he was engaged in interstate commerce, the defendant being an interstate carrier, and the case was submitted to the jury to say whether or not the defendant was negligent in not furnishing the plaintiff a safe place in which to pursue his nocturnal, indoor, interstate commerce pastime of bell ringing.

There was just one fair dispute concerning the facts, and that was whether or not, when the plaintiff became watchman as well as fireman, he was drilled with respect to looking after the doors of the building. There was no rational ground for dispute to be settled by the jury that the plaintiff was watchman, "ringing bells" being a freighthouse expression denoting the duties of watchman, and the court should have instructed the jury to that effect. There was no dispute to be settled by the jury that the first thing for the watchman to do when he came on duty was to see that the doors were secured. A watchman of ordinary capacity might be expected to understand this fact without instruction. The plaintiff admitted he had gone about the building with the watchman, had observed open doors, and had closed them. But, if the plaintiff needed instruction, the defendant's negligence consisted, not in leaving the door unbolted, or failing to appoint a watchman to guard its watchman while on guard, but in not telling the plaintiff to see that the door was bolted. This negligence was not relied on as a basis for recovery.

There was evidence that it was generally known there were persons about the freighthouse at different times of night looking for an opportunity to steal property in the defendant's care. An unlocked door would facilitate an attempt to steal should one be made. The defendant, however, had taken precaution against theft. Besides providing a man whose instructions were to close and bolt the doors each evening, it provided a watchman, who went through the freighthouse with a lantern hour by hour throughout the night, and the plaintiff testified there were other watchmen about the freighthouse and railroad yards. The duty to take precaution to protect the property of shippers from theft was owed to shippers, and not to the plaintiff. That duty was performed, and was performed in part through the agency of the plaintiff himself.

[1, 2] The omission of the doorman to bolt the closed door, and the shooting of the plaintiff, did not bear to each other the relation of cause and effect. Omission to bolt the door was fraught with no peril to the plaintiff, active or latent. Bolted or unbolted, the door was not a hazard which plaintiff encountered in his rounds, and omission to bolt it neither supplied nor set in action any dangerous instrumentality or agency. It merely created a condition which made entrance to the building less difficult than it otherwise would have been, should any one desire to enter. The injury resulted from the violent and malicious act of a desperate person who took advantage of the condition to enter the building for some purpose not disclosed. He may have gone there to steal. When surprised, he exhibited such conduct as he willed, shot the plaintiff, and fled, but conduct which originated with him, and which did not originate with the doorman or the door the evening before.

The plaintiff cites the well-known authorities to the effect that, if the action of an intervening cause might have been anticipated, the intervening cause will not interrupt the connection between the original cause and the injury. The rule is sound, but it presupposes an original cause of injury which manifests consequences in an injurious result. We all anticipate pocket picking when the circus comes, and housebreaking during fair week; but the circus and the fair are not the causes of such crimes. We know, too, that should a housebreaker be discovered in the act of committing burglary, he might do violence to a person interrupting his depredation. But if, knowing the city to be infested with such characters, we go out for the evening leaving the back door unlocked and leaving a servant in the house, omission to lock the door is not the cause of the burglary, should one occur, or the cause of injury to the servant who tries to intercept commission of the crime. The cause of injury originates with the burglar, whose entrance into the house was not obstructed by a locked door. On the other hand, when an act or omission has bound up in it perils which, in the natural order of things, are liberated or eventuate through the conduct of a responsible human being, which might have been anticipated, and injury results, the original act or omission is proximate cause. Potency to do harm was contained in the act or omission from the beginning, continued to threaten throughout the chain of events, and came to fruition in the ultimate injury, albeit the ultimate injury was promoted or precipitated through the agency of an intervening third person.

The principle involved is well illustrated by the case of Clark v. Powder Co., 94 Kan. 268, 146 Pac. 320, L. R. A. 1915E, 479, which is cited by the plaintiff. Van Gray, the driller of an oil well, left solidified glycerine lying at the well. McDowell, an employé of the driller, carried the dangerous substance home with him. McDowell's mother required him to take it away, and he placed it in the fence surrounding an abandoned graveyard, where some boys found it and exploded it. In the opinion of the court prepared by Mr. Justice Dawson it was said:

> "No new power of doing mischief was communicated to the solidified glycerine by the acts of young McDowell. The power of doing mischief was inherent in the glycerine all the time. That some terrible accident was likely to happen in letting it out of the close custody of some one skilled in its use was not only natural and probable but almost inevitable." 94 Kan. 276, 146 Pac. 322, L. R. A. 1915E, 479.

The plaintiff cites the case of Horan v. Watertown, 217 Mass. 185, 104 N. E. 464, which is clearly against him. The sewer department of the town kept dynamite in a tool chest, which could be opened without a key, which was not guarded, and which was left on a highway. Boys unlawfully took the dynamite from the box and threw it into a bonfire. The court stated the rule with reference to anticipating the independent act of a third person, and said:

> "Tested by this rule, the plaintiff's case fails. While the dynamite and the other contents of the box were left in such a way that a thief might not find it very difficult to steal them, it cannot be said that the defendant was bound to anticipate that this might be done and to guard against the consequences that might follow if a thief should steal the dynamite and so use it as to do injury to others. The general assumption of innocence would be inconsistent with this." 217 Mass. 186, 104 N. E. 465.

Let it be supposed that the court held the action of the boys should have been anticipated. The case would then afford no comfort to the plaintiff. The danger lay in the dynamite from the beginning, which merely waited for some one to explode it to cause injury, as in the powder company case just referred to.

The plaintiff cites the case of Norton v. Chandler & Co., 221 Mass. 99, 108 N. E. 897, which does not sustain his contention. Friction strips on the revolving door of a store were out of order and did not keep the door from spinning. As a woman was entering the store, a wing of the door behind her struck her in the back. The door had been set spinning by a customer leaving the store in a hurry. It was held the act of the customer might have been anticipated. Here again the power to do mischief inhered in the defective door, and the wing of the door was the thing which struck the woman, not the customer.

In this case, no faculty for harm resided in the door, or was imparted to the door by the doorman, which finally functioned upon the plaintiff through the instrumentality of the intruder's pistol.

The plaintiff cites the case of Filson v. Express Co., 84 Kan. 614, 114 Pac. 863, as a parallel case. The express company left a portable package worth $600, the value of which was plainly marked on the package, in a frame depot at the outskirts of a small town over night. The depot had no police protection or watchman, was used for the deposit of express matter, freight, and mail received on night trains, and had been burglarized. The doors of the building were locked, and the windows were fastened; but some one broke a window and carried off the package in the nighttime. The question was whether or not the bailee used due care to prevent loss of the property in its custody, considering its tempting character, the security afforded, and all other circumstances. It was held the question was one for the jury. The point was made that the lack of better protection was not the proximate cause of the loss, and it was held that if, under all the circumstances, loss by burglary might have been foreseen, it was the proximate result of the breach of duty complained of.

The difference between the two cases has been indicated by what has already been said. The plaintiff seeks to appropriate a cause of action for breach of duty which did not relate to him. It was the duty of the defendant to protect the property of shippers from theft. An unbolted door would make theft easier, and theft of property might be anticipated as a result of not bolting the door, if the property had no other protection. As to the plaintiff, however, the unbolted door was merely a condition, and not a cause of injury. In the case of Railway Co. v. Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399, it was said:

> "A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing more than furnish the condition, or give rise to the occasion, by which the injury was made possible, if there intervened between such prior or remote cause and the injury, a distinct, successive, unrelated, and efficient cause of the injury." Syl. ¶ 2.

If it could be conceived that because a door was not bolted the plaintiff fell through it into some space and was injured, the unsafe condition of the door would be the cause of his injury. The injury would be the natural, foreseeable, proximate result of the cause. Here the proximate and efficient cause of the plaintiff's injury was the un-

related and independent act of a reckless ruffian, who used the door to gain admission to the building. While the plaintiff tried to reduce himself to the status of the inert and inanimate personal property in the building, he was part of the protection afforded to that property. He accepted employment as part of the barricade against theft, and not as a thing to be surrounded by an impregnable barricade. He was a guard over property, and not a thing to be guarded. The bell ringing theory of his employment broke down. He had no case, and the motion for a directed verdict in favor of the defendant should have been sustained.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendant. All the Justices concurring.

(101 Kan. 26)

TATLOW v. BACON et al. (No. 20557.)*

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Constitutional Law 🔑83(3) — Criminal Law 🔑1213—Execution 🔑422—Imprisonment for Debt — Cruel and Unusual Punishment—Statute.

The statutory provision (Code Civ. Proc. § 509 [Gen. St. 1915, § 7413]) that an execution may issue against the person of a debtor for certain fraudulent acts is not violative of section 16 of the Bill of Rights, which prohibits imprisonment for debt, except in cases of fraud, nor of the limitation against cruel and unusual punishment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151½; Criminal Law, Cent. Dig. §§ 3304-3309; Execution, Cent. Dig. § 1208.]

2. Constitutional Law 🔑315 — Due Process of Law—Notice and Hearing.

The act does not conflict with the Fourteenth Amendment of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 935, 937, 941, 947.]

3. Execution 🔑433 — Issuance Against Debtor—Statute—Hearing and Notice.

As the statute provides that before issuing an execution the court or judge must be satisfied from evidence produced that the statutory grounds upon which it may issue exist, it is obvious that the Legislature contemplated that a hearing should be had and that notice of the hearing should be given to the debtor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1232-1236.]

4. Execution 🔑433—Body Execution—Notice and Hearing.

The rule applied that a statutory provision for such notice and hearing need not be made in the statute in express words, but may be implied.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1232-1236.]

5. Jury 🔑16(5) — Trial by — Execution Against Debtor.

In such a proceeding a jury trial may not be demanded as a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 89.]

6. Statutes 🔑201—Reference to Another Statute—Correction of Mistake.

Where a statutory provision refers to a section of the statute by the wrong number, and it is manifest from the context that another section was the one intended by the Legislature, the wrong number will be disregarded, and the correct one will be deemed to be substituted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 279.]

7. Execution 🔑433—Fraud—Statement of Facts.

In an affidavit made to obtain the issuance of an execution against the person, mere conclusions are not sufficient. The facts upon which the charges of fraud are based should be specifically stated.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1232-1236.]

8. Execution 🔑433—Charges of Fraud—Conclusion by Judgment.

Where the charges of fraud against the debtor were properly put in issue and determined in the original case, the facts so determined by the judgment are conclusive between the parties, and are not open to relitigation in the subsequent proceeding to obtain an execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1232-1236.]

9. Execution 🔑421 — Execution Against Person—Fraud—Remedy.

The proceeding herein is purely statutory, and when the creditor alleges and shows to the satisfaction of a court or judge that the debtor has committed the acts of fraud which under the statute constitute grounds for the issuance of an execution, he is entitled to his remedy, although other remedies may be available.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1207.]

10. Execution Against Person of Debtor—Fraud—Evidence.

The evidence examined, and *held* to be sufficient to sustain the findings of the trial court.

Appeal from District Court, Shawnee County.

Execution proceeding by Marion A. Tatlow against W. E. Bacon, Bert Rucker, and others. From an order issuing execution against the person of Bert Rucker, he appeals. Affirmed.

J. M. Stark and Waters & Waters, all of Topeka, for appellant. Monroe, McClure & Monroe, of Topeka, for appellee.

JOHNSTON, C. J. This was a proceeding in which an execution was issued against the person of Bert Rucker, a judgment debtor, and from the order he appeals.

In an action brought by Marion A. Tatlow against W. E. Bacon and Bert Rucker, it was found and adjudged that they had conspired together to defraud plaintiff, Tatlow, of his land by inducing him to exchange it for a worthless deed; and that judgment was affirmed in this court. Tatlow v. Bacon, 95 Kan. 695, 149 Pac. 745. The plaintiff then filed an application, accompanied by an affidavit, setting forth that Rucker had fraudulently contracted the debt and incurred the obligation on which the judgment was rendered, and stating the manner in which the fraud was accomplished; also

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*Rehearing denied July 11, 1917.

that since the rendition of the judgment he had assigned and disposed of his property with the intention to defraud his creditors and prevent such property from being taken on execution; and also that he fraudulently concealed his property with the intention to prevent the collection of money due on the judgment. After notice and a hearing, in which the defendant participated, the order issuing the execution was made.

[1-4] There is complaint that the affidavit upon which the application for the execution was based was insufficient. It set forth in detail the fraudulent purpose and acts upon which the judgment rested, and made the evidence and proceedings in the main case a part of the application for the issuance of the execution. The conspiracy and fraud by which the defendant was induced to exchange his land for a worthless instrument, having been adjudicated, were no longer open to inquiry. This part of the affidavit was specific, and of itself sufficient to warrant the issuance of the execution against the person of the defendant. The statements that the defendants had fraudulently concealed their property to prevent the collection of the judgment, and had assigned and disposed of it to prevent it being taken on execution, were general in character, and did not specifically set forth the facts upon which the charges were based. In this respect the affidavit was defective. The facts relied on as fraudulent should have been specifically stated in the affidavit. Gillett v. Thiebold, 9 Kan. 427; Bryan v. Congdon, 54 Kan. 109, 37 Pac. 1009. However, the facts relating to the manner in which the defendant fraudulently incurred the obligation were specifically and fully stated, and this afforded a sufficient basis for the proceeding.

It is contended that the statute under which the proceeding was had is unconstitutional, in that it does not provide for a notice to the debtor of a hearing, nor in fact for any hearing, before the execution is issued. The statute pertinent to the question reads:

> "An execution against the person of the debtor, except as prescribed in section 511 [Gen. St. 1915, § 7415], can be issued only when the same is allowed by the Supreme Court, the district court, or any judge of either, upon being satisfied, by the affidavit of the judgment creditor or his attorney, and such other evidence as may be presented, of the existence of one or more of the particulars mentioned in section 522 [Gen. St. 1915, § 7426]." Civ. Code, § 509 (Gen. St. 1915, § 7413).

According to this provision a judicial hearing is contemplated, as the execution against the person cannot issue until a court or judge thereof shall determine upon evidence that the statutory grounds for such an order exist. It is not issued as a matter of course upon an application, but before making such order the Supreme Court, or the district court, or a judge of either, must be satisfied by the evidence presented in support of the application. The requirement that evidence shall be presented to the satisfaction of a court or judge clearly implies a hearing, and other provisions of the Code require notice of applications for an order of this kind. Civ. Code, §§ 556-560 (Gen. St. 1915, §§ 7460-7464). It has already been determined that a statute is not invalid merely by reason of the fact that it does not expressly provide for notice and hearing. It may be implied by the courts, unless the language of the statute excludes the theory that notice and hearing are necessary. Gilmore, County Clerk, v. Hentig, 33 Kan. 156, 5 Pac. 781; Railroad Co. v. Abilene, 78 Kan. 820, 98 Pac. 224. In the Abilene Case it was said:

> "Provision for notice and hearing need not be made in the statute by express words. It may be implied. In reality the courts simply read the provision into the statute in order to uphold taxation schemes against the Fourteenth Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law. This was done in the case of Gilmore, County Clerk, v. Hentig, 33 Kan. 156, 5 Pac. 781. But the statute must be one which will allow notice and a hearing to be interpolated. If it arbitrarily fixes the steps to be taken, in a manner indicating that notice and a hearing upon some subject, like benefits, are excluded, it must be judged accordingly." 78 Kan. 827, 828, 98 Pac. 227.

Here the statute is not only open to an interpolation of notice and hearing, but its own language carries the plain implication that a hearing is to be had, and the Code provision relating to notices applies to a proceeding like the one in question, the same as it does to provisions for numerous other orders where there is no special mention that notices are to be given. In this case notice was given and a protracted hearing was had, in which the defendant participated.

It is contended that the statute is invalid, because it permits imprisonment for debt contrary to the provisions of the state Constitution. While the Bill of Rights (section 16) provides that there may be no imprisonment for debt, except for fraud, it in effect authorizes imprisonment in cases where there is fraud, and as the statute enacted under that provision expressly authorizes imprisonment for fraud, the objection must be overruled. In re Heath, Petitioner, 40 Kan. 333, 19 Pac. 926.

The defendant argues that the summary proceeding under the statute was not due process of law, and conflicts with the Fourteenth Amendment of the federal Constitution. It had been determined in the original case, which was tried by the jury, that the defendant was guilty of fraud. The fact having been properly put in issue and determined by a final judgment in the original action between the parties, it became a fixed fact, which was not open to relitigation. Hentig v. Redden, 46 Kan. 231, 26 Pac. 701, 26 Am. St. Rep. 91; C., K. & W. Rld. Co. v. Com'rs of Anderson Co., 47 Kan. 766, 29 Pac. 96; Sanford v. Oberlin College, 50 Kan. 342, 31 Pac. 1089. Proof of the adjudication was sufficient proof of the facts included in the judgment; but, of course, it is not conclusive as to facts occurring since the judgment was rendered.

Greenwell v. Moffett, 77 Kan. 41, 93 Pac. 609, is somewhat analogous to the present case. In a foreclosure proceeding an issue was adjudicated, and afterwards, upon a motion to set aside a sheriff's sale made under the judgment, the losing party sought to litigate the same issue, and it was held that, the fact having been tried and determined in the original action, the adjudication was conclusive as between the parties.

In proceedings of this kind it is competent for the Legislature to prescribe what the procedure shall be and what evidence shall be received, so long as they do not conflict with some provision of the state or federal Constitution. McGehee, Due Process of Law, p. 162; 2 Willoughby on the Constitution, § 462. It is insisted by the defendant that the statute is bad for the reasons stated and also because it imposes cruel and unusual punishment. It has been held in many cases that such statutes are not violative of the provision prohibiting deprivation of liberty without due process of law, or the one forbidding cruel and unusual punishment. Light v. Canadian County Bank, 2 Okl. 543, 37 Pac. 1075; 5 C. J. 438.

[5] A complaint is made that a jury trial was not awarded in the proceeding. No application for a jury trial was made, and perhaps it was for the reason that a jury trial could not have been demanded as a matter of right. The constitutional guaranty that "the right of trial by jury shall be inviolate" (Bill of Rights, § 5) has no application to proceedings of this character, and does not extend beyond cases where such right existed at the common law, but only applies to cases that were triable by jury before the Constitution was adopted. Kimball et al. v. Connor et al., 3 Kan. 414; State v. Cutler, 13 Kan. 131; In re Burrows, Petitioner, 33 Kan. 675, 7 Pac. 148; State ex rel. v. Durein, 46 Kan. 695, 27 Pac. 148; Swarz v. Ramala, 63 Kan. 633, 66 Pac. 649; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

[6-8] It is further contended that the statute is not enforceable against the defendant because of ambiguity. In section 509 of the Civil Code it is provided that an execution may issue when evidence is offered showing the existence of one or more of the particulars or grounds mentioned in section 522 of the Code. The latter section, however, does not mention any particulars upon which an execution might be based, nor has it any application to executions against the persons of debtors. It is an obvious mistake, as the preceding section, 508 (Gen. St. 1915, § 7412), is the one which does prescribe the particulars or grounds which must be shown to exist before the execution shall issue. In the earlier compilations of the statutes the preceding section is correctly named (Gen. Stat. 1868, c. 80, § 507; Gen. Stat. 1901, § 4984), but wrong numbers were mistakenly used in printing the Revised Code of 1909. It is manifest from a reading of all the provisions that one number was erroneously used for another, and there is no difficulty in ascertaining the number which the Legislature intended to use. The rule was well stated in Coney v. City of Topeka, 96 Kan. 46, 49, 149 Pac. 689, 690, where it was said:

> "It is familiar law that legislative enactments are not, any more than any other documents, to be defeated on account of errors, mistakes, or omissions. Where one word or figure has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word or figure will be deemed substituted or supplied. This is only making the naked letter of the statute yield to its obvious intent."

See State v. Knoll, 69 Kan. 767, 77 Pac. 580; Reese v. Hammond, 94 Kan. 459, 146 Pac. 997.

[9] Another contention is that the plaintiff should have resorted to the supersedeas bond before obtaining an execution against the person of the defendant. The proceeding is a statutory one, and the conditions upon which the execution may be issued have been definitely prescribed. When these conditions are shown to exist, the creditor is entitled to the remedy, although other remedies may be available. Under the statute it is not necessary to allege or prove that no recovery can be had under a supersedeas bond, nor that all other remedies have been exhausted. The court would not be warranted in adding to the requirements upon any ground, not even because the proceeding involved the imprisonment of the debtor.

[10] The evidence appears to be sufficient to establish the fraud of the defendant, and upon an examination of the proceedings and the objections of the defendant we find no ground for reversal.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 66)

FIDELITY & DEPOSIT CO. OF MARYLAND v. CITY OF STAFFORD et al.

(No. 20717.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS ⇨373(4)—CLAIMS FOR LABOR—PROPORTIONATE REDUCTION.

The contract price of a municipal improvement having proved insufficient to meet all the claims for labor and material, and a proportionate distribution of the loss among claimants having been ordered, it is *held* that the claim of one who is subrogated to the rights of a number of laborers and materialmen should be reduced only in the proportion that the total loss bears to the total cost of the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913.]

Appeal from District Court, Stafford County.

Action by the Fidelity & Deposit Company of Maryland against the City of Stafford, and the Farmers' National Bank of Stafford, Kan. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to reduce the judgment.

C. M. Williams, of Hutchinson, for appellants. Paul R. Nagle, of St. John, and New, Miller, Camack & Winger and P. E. Reeder, all of Kansas City, Mo., for appellee.

MASON, J. The city of Stafford entered into a contract for the construction of a waterworks system and electric light plant, to cost it $27,500. The contractor abandoned the work before completion, and his bondsman, the Fidelity & Deposit Company of Maryland, finished it. The Farmers' National Bank of Stafford provided money for the payment of bills for work and material furnished to the contractor, amounting to $2,000, under circumstances which it maintained entitled it to subrogation to all the rights of the original claimants. The city paid the bank this amount in full, and the payment left $5,534.02 as the balance of the $27,500 appropriated to the work. The bonding company had incurred expenditures of $6,888.62, and contended that the city should have paid the $2,000 to it instead of to the bank. It brought an action against the city and the bank on this theory and recovered a judgment. The defendants appealed, and on the appeal the principal question considered was whether the bank was subrogated to the rights of the original claimants who had furnished labor and material to the amount of $2,000. This court answered that question in the affirmative, saying:

> "Had these labor and materialmen retained their claims they would have been entitled to look to the city for their pro rata share of the contract price, but the city could not be held liable for more for it did not agree to pay more than the contract price. The excess is $1,354.60, and it would not be fair or equitable for the bank to lose its entire claim or for the plaintiff to collect the full amount of its claim. The city, without authority and over the protest of the surety, paid the bank's claim in full, and the surety company may rightfully look to it and to the bank for the difference between the $2,000 and the pro rata portion thereof which would have been enforceable against the city by the original holders of the claims paid by the bank had they retained them. This amount can be ascertained if not readily agreed upon by the parties." Deposit Co. v. City of Stafford, 93 Kan. 539, 550, 144 Pac. 852, 855.

On the case being remanded the district court held in effect that the bank's proportion of the loss should be $489.55, and rendered judgment accordingly. The defendants again appeal, insisting that the bank should have been allowed to retain all of the $2,000 excepting $93.89. The decision of the trial court was based upon an apportionment of the loss in accordance with the relative amounts claimed by the parties to the controversy at the time of the settlement. We think this adjustment prejudicial to the rights of the bank. The city is a mere stakeholder in the matter. The dispute is between the bonding company and the bank. The total cost of the improvement turned out to be $28,854.60. The city's liability was limited by the contract price of $27,500, and a loss to some one necessarily resulted. This court held that the bank should suffer a proportionate scaling down of its claim. But as the bank was held to stand in the shoes of the original claimants, who furnished labor and material for the improvement, and had no connection in any way with the manner in which the funds provided for the improvement had been disbursed, it was not responsible for the payment in full of any claims that ought to have been scaled down. The cost of the improvement was $28,854.60. The contract price was $27,500, involving a loss of $1,354.60. In the absence of some reason to the contrary each claim should suffer a reduction in the proportion that $1,354.60, the total loss, bears to $28,854.60, the total amount of claims. In the case of the bank's claim of $2,000, this would be $93.89. We regard this as the extent to which the bank should suffer. As there is no showing of any overpayment through the fault of the city, the rest of the loss must fall on the bonding company.

The judgment is reversed, and the cause remanded, with direction to reduce the judgment in favor of the bonding company to $93.89 and interest. All the Justices concurring.

(101 Kan. 32)

WALLACE v. WALLACE et al. (No. 20673.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR 🔑1064(1)—HARMLESS ERROR—MISLEADING INSTRUCTION.

An instruction that an indorsement of a payment, placed on a note by the payee thereof, or with his knowledge or consent, is evidence of such payment, is not an instruction that the indorsement is conclusive evidence of payment, and is not so misleading as to warrant the reversal of a judgment based on a general finding that the payment was made as shown by the indorsement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219.]

2. ALTERATION OF INSTRUMENTS 🔑27(2, 3)—NOTE—INDORSEMENT OF PAYMENT—ERASURE—BURDEN OF PROOF.

The trial court correctly instructed the jury as to the burden of proof concerning the indorsement of payments made on the note in controversy in this action.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 240–247.]

3. APPEAL AND ERROR 🔑1053(2)—HARMLESS ERROR — ADMISSION OF INCOMPETENT EVIDENCE—CURE.

The error committed in admitting the testimony of an incompetent witness was cured by striking out the testimony and instructing the jury not to consider it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4179.]

4. Witnesses 🔑158—Competency—Transactions with Decedent.

A witness, incompetent under section 320 of the Code of Civil Procedure (Gen. St. 1915, § 7222), may testify to all matters in controversy which did not concern any transaction or communication had personally by the witness with the deceased person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 663, 665, 698, 699.]

5. Witnesses 🔑177—Competency—Transaction with Representative of Decedent.

A witness, incompetent under section 320 of the Code of Civil Procedure, may testify to the details of a conversation had by him with another witness, who, in behalf of the personal representative of the deceased person, has testified to the conversation, although in that conversation the incompetent witness detailed a transaction had by him personally with the deceased person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 718.]

6. Witnesses 🔑140(9) — Competency — Transactions with Decedent.

The wife of a person incompetent to testify as a witness, under section 320 of the Code of Civil Procedure, may testify to a conversation between her husband and the deceased person, but in which she took no part.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 608.]

7. Sufficiency of Evidence.

The evidence, as shown by the abstracts, has been examined, and, though conflicting, was sufficient to sustain the verdict of the jury.

Appeal from District Court, Harvey County.

Action by Ella Wallace, as administratrix, etc., against John Wallace and others. Judgment for defendant John Wallace, and plaintiff appeals. Affirmed.

Ezra Branine and H. W. Hart, both of Newton, for appellant. W. H. Carpenter, of Marion, for appellees.

MARSHALL, J. In this action, the plaintiff seeks to recover on a promissory note, and to foreclose a mortgage given to secure its payment. The defense was payment. The issues were submitted to a jury, and a verdict was returned in favor of defendant John Wallace. Judgment was rendered in his favor. The plaintiff appeals.

Defendant John Wallace had given his father, Charles Wallace, three separate promissory notes, one for $1,200, one for $1,700, and one for $2,100, each secured by a mortgage on real property. The two smaller notes were paid prior to the death of Charles Wallace. While Charles Wallace was in California, defendant John Wallace paid $200 on the $2,100 note, and indorsed thereon: "Paid on principal, two hundred dollars, Feb. 22, 1913." Previous to this, six interest payments had been made on the $2,100 note, the indorsements of which were all in John Wallace's handwriting. After Charles Wallace returned from California, and about May 16, 1913, he and defendant John Wallace went into the bank in which they both did business, and there engaged in conversation and made calculations and memoranda. After this conversation, the indorsement of "two hundred dollars" appeared as an indorsement of "two thousand dollars"; the word "hundred" having been erased, and the word "thousand" written in place thereof. The evidence tended to show that the word "hundred" was not erased by defendant John Wallace. The evidence did show that the word "thousand" was written by him.

Charles Wallace died December 2, 1914. After the conversation in the bank, the note was constantly in his custody or control until his death. On the trial, the controverted questions revolved around the indorsement of $2,000. The plaintiff, who was the administratrix of the estate of Charles Wallace, insisted that no payment had been made on the note, and that the indorsements had been wrongfully and unlawfully placed thereon without her knowledge or consent or that of Charles Wallace. Before the commencement of this action, John Wallace tendered to the plaintiff $100 as final payment on the note. There was no interest then due, the interest having been paid as shown by indorsements made subsequent to the $2,000 indorsement. Charles Wallace did very little writing, and, when convenient, had some one write for him.

[1] 1. The court gave the following instruction:

"The jury are further instructed that if you believe from the evidence that the indorsements on said note were placed there by the deceased, Charles Wallace, or with the knowledge or consent of the deceased, Charles Wallace, then such indorsements would be evidence of such payments, and defendant would be entitled to credit for the amounts so indorsed."

Plaintiff argues that this instruction was erroneous for the reason that it made the indorsements conclusive evidence of payment, rather than prima facie evidence thereof. The instruction did not say that the indorsements were prima facie evidence of payment, nor that they were conclusive evidence thereof. The indorsements were evidence of payments, although they were not conclusive and could have been disputed. The court probably should have instructed the jury that the indorsements were prima facie evidence of payments; but the difference between the instruction as it should have been given, and as it was given, was so slight that it cannot be said that the plaintiff was prejudiced by the instruction given. Other complaints involving the same question are made concerning other instructions given or requested. It is not necessary to discuss these propositions further.

[2] 2. Complaint is made of the following instructions:

"The jury are instructed that the burden is on the plaintiff to prove, by a preponderance of all the evidence, that the defendant erased an indorsement on said note of a smaller amount and wrote in place thereof a larger amount.

"The jury are further instructed that, if you believe from the preponderance of the evidence that the defendant John Wallace erased an indorsement on said note of a smaller amount and then wrote in place thereof a larger amount, the burden of proof would then be on the defendant to prove, by a preponderance of all the evidence, that said larger amount was the true amount for which defendant was entitled to credit, or that such erasure and change were made by the direction or with the consent of said Charles Wallace."

These instructions correctly stated the rules concerning the burden of proof.

[3] 3. The plaintiff complains that defendant John Wallace was permitted to testify that he and his father had made a settlement of the note in question. The evidence complained of is as follows:

"Q. Did you at any time have any settlement with your father? A. Yes, sir."

This evidence was admitted over objection, but was afterward stricken out by the court, and the jury was instructed not to consider it. The argument is made that the instruction did not cure the error committed in admitting the evidence. The evidence was not of a character that must necessarily have produced such an impression on the minds of the jurors that they could not obey the instruction of the court. This evidence comes within the rule declared in Townsdin v. Nutt, 19 Kan. 282; State v. Fooks, 29 Kan. 425; State v. Furbeck, 29 Kan. 535; Whittaker v. Voorhees, Sheriff, 38 Kan. 71, 15 Pac. 874; Woods v. Hamilton, 39 Kan. 69, 17 Pac. 335; City of Kinsley v. Morse, 40 Kan. 577, 20 Pac. 217; State v. Blakesley, 43 Kan. 250, 252, 23 Pac. 570; Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52; Insurance Co. v. Haskin, 69 Kan. 863, 77 Pac. 106; and Gulliford v. McQuillen, 75 Kan. 454, 89 Pac. 927.

[4] 4. The plaintiff complains that defendant John Wallace was permitted to testify, in substance:

"That on February 22d, while his father was in California, he paid $200 to Mr. Hawk, the banker, and that he (the appellee), at that time, indorsed on the back of the note, 'Paid on principal, two hundred dollars'; that afterwards, and about the 16th or 18th day of May, following, he and his father were in the bank; that he saw the note at that time in the bank; that he did not erase the word 'hundred' from said indorsement, but that of his own knowledge he did know who erased it; that he wrote the word 'thousand' in said indorsement where the word 'hundred' had been erased, which made the indorsement then read, 'Paid on principal, two thousand dollars'; that the first time he saw the indorsement so reading was on said date in the bank; that the only time he saw the note in the absence of his father was on the 22d of February; and that every time he saw the note after the meeting in the bank this indorsement remained on said note."

The plaintiff argues that this was testimony of personal transactions had by defendant John Wallace with his father. The testimony objected to probably goes to the limit of that which a competent witness may give, but a close examination of that testimony shows that John Wallace did not testify to any transaction or communication that he had with his father.

[5] 5. Complaint is made that defendant John Wallace was permitted to testify to a conversation had with his sister, in which conversation he detailed the transaction had with his father at the time the $2,000 was indorsed on the note. The sister, as a witness for the plaintiff, testified to the conversation between herself and John Wallace. He afterward testified concerning that conversation, giving the details thereof and contradicting his sister in a number of particulars. The plaintiff insists that the conversation testified to by the sister was a different one from that testified to by defendant John Wallace. An examination of the evidence discloses that both testified to one conversation. There was no error in permitting defendant John Wallace to detail that conversation after his sister had given her version of it. Harris v. Morrison, 100 Kan. 157, 163 Pac. 1062, and cases there cited.

[6] 6. Edith Wallace, the wife of defendant John Wallace, testified that she overheard a conversation in her home, between her husband and his father, in which she took no part. Her testimony was, in part, as follows:

"Q. What did your father-in-law say to your husband? A. He said, 'John, there is no use in your working so hard.' He said, 'You got the places clear, all but $100.'"

This evidence was objected to on the ground that the witness was incompetent to testify in respect to any transaction or communication had with Charles Wallace. Edith Wallace was a defendant in the action. The plaintiff asked for judgment against both John Wallace and Edith Wallace, although Edith Wallace had not signed either the note or the mortgage and was not liable thereon. She did not testify concerning any transaction or conversation had by her with Charles Wallace. The conversation was wholly between her husband and Charles Wallace. The testimony given by her does not come within the prohibition of the statute. Civ. Code, § 320 (Gen. St. 1915, § 7222). Under the rule announced in Sarbach v. Sarbach, 86 Kan. 894, 122 Pac. 1052, that this statute is to be strictly construed, Edith Wallace was competent to testify to the conversation beween her husband and Charles Wallace.

[7] 7. The plaintiff's last contention is that the verdict was not sustained by the evidence, but was contrary thereto. The abstract of the evidence has been examined. That abstract shows that the evidence was very conflicting. The abstract also shows that there was evidence sufficient to sustain the verdict of the jury. The trial court approved the verdict and rendered judgment thereon. Under these circumstances, the verdict and judgment will not be set aside by this court.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 205)

KNOWLING v. MORRIS & CO. (No. 21284.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT 🔑398—PRESENTATION OF CLAIM FOR COMPENSATION — WAIVER—EVIDENCE.

The pleadings and agreed facts considered, and *held*, that presentation of a claim for compensation had not been waived or rendered unnecessary, and was a matter in issue.

Appeal from District Court, Wyandotte County.

Action by Dollie Knowling against Morris & Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

Keplinger & Trickett, of Kansas City, for appellant. Brady & Henning, of Kansas City, for appellee.

BURCH, J. The action was one for compensation for the death of a workman. Judgment was rendered for the plaintiff on the pleadings and a stipulation with reference to facts. The defendant appeals.

The stipulation was that the workman, an employé of the defendant, was injured in the course of his employment while icing refrigerator cars on the track of the Missouri Pacific Railway Company, adjacent to the defendant's packing plant. The workman was obliged to work on top of the cars. As he was about to step from one car to another, they were separated by employés of the railway company, without notice or warning, and the workman fell to the ground. The accident occurred on September 14, 1914, and the workman's death followed on September 24, 1914. On October 14, 1914, the plaintiff sued the railway company for damages, and that action is still pending. The present action was commenced in December, 1915. The stipulation did not refer to the subject of claim for compensation.

The petition pleaded with much particularity an oral claim for compensation. The answer, besides denying the averments of the petition, pleaded with much positiveness that no claim for compensation had ever been made. The answer further pleaded that the defendant had requested the plaintiff to present a claim for compensation, in order that the defendant might be subrogated to the rights of the plaintiff against the railway company; but that the plaintiff refused to claim or accept compensation, and in lieu thereof elected to sue the railway company for damages. Other facts were pleaded showing prejudice to the defendant because of the plaintiff's election, should she now be allowed to prosecute the action. The district court seems to have held that, because the defendant endeavored to secure presentation of a claim for compensation, liability was confessed, and hence that no claim was necessary.

Any admission of liability attending the defendant's conduct was conditioned on presentation of a claim for compensation. The defendant could waive compliance with that statutory prerequisite to recovery, but an endeavor to secure compliance with the statute was the very opposite of a waiver.

The pleaded request upon the plaintiff to make claim for compensation so that the defendant could be subrogated to her rights against the railway company was, in the absence of specific allegations to the contrary, a sufficient admission upon the record that she was entitled to claim compensation, and that the rights of the parties were governed by the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216).

The judgment of the district court is reversed, and the cause is remanded for further proceedings. All the Justices concurring.

(101 Kan. 14)

EDWARD THOMPSON CO. v. FOSTER.
(No. 20419.)*

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. PAYMENT 🔑62 — APPLICATION — PLEADINGS.

A controversy regarding application of payments *held* to be foreclosed by the pleadings.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 151.]

2. APPEAL AND ERROR 🔑671(4)—RECORD—QUESTIONS FOR REVIEW.

The record *held* not to present for review any question with regard to the effect upon a written contract of a contemporaneous oral agreement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2870.]

3. NEW TRIAL 🔑95—GROUNDS—SURPRISE—DILIGENCE.

An application for a new trial on the ground of surprise *held* not to have been supported by a sufficient showing of diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 190–194.]

Appeal from District Court, Finney County.

Action by the Edward Thompson Company against Edgar Foster. Judgment for plaintiff for the amount admitted to be due, and it appeals. Affirmed.

C. L. Marmon, of Garden City, for appellant. W. C. Pearce, of Garden City, for appellee.

MASON, J. Edward Thompson Company sued Edgar Foster, its petition setting out two causes of action, separately stated. The first was for the full purchase price of a set of law books for which the defendant had given a written order. To this a defense was interposed to the effect that the books had been sold on approval, with the privilege of returning them upon examination, which had

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*Rehearing denied June 15, 1917.

been exercised. On this issue the defendant prevailed. The second cause of action was for the balance due on another set of books, not referred to in the written order. On this count no issue was raised except with respect to the agreed price, which was resolved in favor of the defendant, and judgment was rendered for the amount which he admitted to be due. The plaintiff appeals.

No specification of errors has been made, and no specific rulings are complained of. The grounds upon which a reversal is asked seem to be substantially these: (1) Credit for the several payments that were made should have been applied to the two claims jointly, instead of wholly to that set out in the second count; (2) the rule was violated which forbids the variation of a written contract by evidence of a contemporaneous oral agreement; (3) new and material evidence on the controverted matter of fact was produced at the hearing of the motion for a new trial. Of these several propositions it may be said:

[1] 1. The first count made no reference to any payments, but specifically alleged that no part of the purchase price of the books for which the written order was given had been paid. The second count alleged that there was due thereon "the sum of $72 (the purchase price) less the following credits as shown by the ledger account of both causes of action (setting out three cash items, totaling $37.50), which leaves the sum of $32.50 (apparently a miscalculation for $34.50)." The reference to the credits being shown by "the ledger account of both causes of action" had no tendency to contradict the allegations that no payments had been made on the first, and that all the payments shown were credits upon the second. Without an amendment of the pleading—and none was made or offered—there could be nothing to try with respect to the application of payments.

[2] 2. The defendant testified that at the time the written order was signed, a letter was written by the plaintiff's agent which modified its terms by giving him the privilege of returning the books after examination. The counter abstract quotes the defendant as testifying: "We entered into an agreement with the company by letter, signed by their agent, who provided that * * * the contract was not to become binding until I had time to examine the digest." This might seem to refer to an arrangement made orally by the agent. But the transcript shows the language of the witness to have been: "We entered into an agreement with the company by letter, signed by their agent, which provided," etc.—thus making it clear that the defendant relied upon a written and not an oral modification of the order which he signed, although he testified incidentally to the conversation leading up to it. No objection was made to the evidence of the talk that preceded the signing of the order, nor was any instruction asked regarding it. The modern view is that the rule which denies effect to an oral agreement, where it contradicts a written contract entered into at the same time or later, is one not merely of evidence, but of positive law (4 Wigmore on Evidence, § 2400; 3 Jones' Commentaries on Evidence, § 434, especially page 154; 21 A. & E. Encyc. of L. 1079; 17 Cyc. 570), and therefore that the failure to object to the admission of evidence of such an oral agreement does not alter the legal rights of the parties (10 R. C. L. 1018; Rochester Tumbler Works v. M. Woodbury Co., 215 Mass. 194, 102 N. E. 438; Pitcairn v. Philip Hiss Co., 125 Fed. 110, 61 C. C. A. 657; Dollar v. International Banking Corporation, 13 Cal. App. 331, 109 Pac. 499; Piretti v. Firestone Tire and Rubber Co., 120 N. Y. Supp. 782; Loomis v. N. Y. C. & H. R. R. Co., 203 N. Y. 359, 96 N. E. 748, Ann. Cas. 1913A, 928; Lock v. Citizens' National Bank [Tex. Civ. App.] 165 S. W. 536), although there are earlier cases to the contrary (8 Encyc. of P. & P. 234, and 2 Supplement, 353; see, also, Brady v. Nally, 151 N. Y. 258, 45 N. E. 547). As suggested in the case last cited parties to litigation may of course by their voluntary act deprive themselves of the benefit of any rule of law, except when the interests of the public might thereby suffer. A deliberate purpose, to waive the rule as to the binding force of a written contract is hardly inferable from a mere omission to object to evidence of a contemporaneous oral agreement, which under the law could not affect it. But here there is no reason to suppose that the jury found for the defendant on the theory that the written order was modified by the agent's talk. His testimony was that the additional agreement was itself reduced to writing and signed, and the fair presumption is that the jury accepted his version of the transaction throughout. The abstract through an obvious clerical error quotes an instruction as saying:

> "If you find that the contract was all in writing, as claimed by the plaintiff, the plaintiff will be entitled to recover the sum of $112 on the first cause of action."

This would indicate that the jury in deciding for the defendant must necessarily have found that the contract was not all in writing, and therefore must have given effect to an oral agreement. But the original record shows that the instruction as given read: "If you find that the contract was all in writing, and as claimed by the plaintiff," etc. Even if the instruction as a whole permitted a verdict for the defendant on the strength of an oral agreement, the plaintiff is not in a position to ask a reversal on that ground, for no objection to it in any form is shown, the motion for a new trial not referring to it specifically or covering it by any general reference.

[3] 3. The motion for a new trial alleged that the plaintiff was surprised at the evidence of the writing of a letter modifying

the written order, but the answer pleaded a modification, and to have been effective it must have been in writing. Moreover, no evidence that such a letter was not written was produced until the motion for a new trial had been overruled. On a motion to reconsider the ruling (filed over a month later) an affidavit of the plaintiff's agent was filed, denying the writing of the letter. This was of course too late to be effective, but in any event the plaintiff did not show such diligence as to entitle it to a new trial. The evidence regarding the contents of the letter went in without objection. Although doubtless it could have been excluded in the absence of a showing of a due demand under the statute for the production of the letter. Hull v. Allen, 84 Kan. 207, 210, 113 Pac. 1050. No request was made for a continuance to enable the plaintiff to meet this evidence, and having taken its chances with the jury as the matter stood, without objection, it is not in a position to demand a further opportunity for a trial of the facts.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 100)

COLORADO SAV. BANK v. BALES.

(No. 20888.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. MORTGAGES 🔑282(2) — CONVEYANCE — GRANTEE'S LIABILITY TO MORTGAGEE.

A grantee who, in a deed, assumes and agrees to pay a mortgage on the land conveyed, is not personally liable to the mortgagee unless the grantor in that deed is liable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 752.]

2. NEW TRIAL 🔑100—GROUND—NEWLY DISCOVERED EVIDENCE.

Under the circumstances set out in the opinion, a new trial should have been granted in this case on payment of costs.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 201-204, 208, 209.]

West and Marshall, JJ., dissenting.

Appeal from District Court, Greenwood County.

Action by the Colorado Savings Bank against W. S. Bales. Judgment for defendant, and plaintiff appeals. Reversed, and a new trial granted on condition that plaintiff pay all the costs.

Howard J. Hodgson, of Eureka, for appellant. O. C. Zwicker, of Eureka, for appellee.

MARSHALL, J. In this action, the plaintiff sought to recover on the defendant's agreement in a deed to pay a mortgage on the property conveyed. Judgment was rendered in favor of the defendant. The plaintiff appeals.

The plaintiff's evidence established that W. H. Barber executed to the Ramey-Udlock Investment Company a mortgage on certain real property in Colorado, to secure the payment of a $3,500 note; that Barber conveyed the land to Clarence W. McCrillus; that McCrillus conveyed the land to the defendant, W. S. Bales; and that the deed from McCrillus to the defendant contained the following provision:

> "Except deed of trust recorded in Book 150 at page 472, Mesa County Recorder, of which $500 has been paid.' Balance of $3,000 party of second part assumes and agrees to pay with interest from Jan. 1, 1914."

There was no evidence to show that McCrillus had assumed, or in any way agreed to pay, the mortgage. The court sustained a demurrer to the plaintiff's evidence.

[1] 1. The first question for consideration is: Did the words contained in the deed to the defendant bind him for the payment of the mortgage debt, in the absence of any showing that McCrillus, Bales' grantor, was under any legal obligation to pay that debt? That question has not been answered by this court. In Stephenson v. Elliott, 53 Kan. 550, 36 Pac. 980, Gowans v. Pierce, 57 Kan. 180, 45 Pac. 586, and Hendricks v. Brooks, 80 Kan. 1, 101 Pac. 622, 133 Am. St. Rep. 186, this court said, in substance, that where the grantee, as a part of the consideration for the conveyance of a tract of land accepts a deed which provides that he assumes and agrees to pay a mortgage indebtedness on the land, he becomes personally liable for the payment of the indebtedness. In each of these cases, the grantor in the deed was himself personally liable. In New England Trust Co. v. Nash, 5 Kan. App. 739, 46 Pac. 987, the Court of Appeals said:

> "The liability of a grantee who assumes the payment of a mortgage on land conveyed to him depends upon the personal liability of his immediate grantor. If the grantor is not so liable, the mortgagee cannot claim any deficiency from such grantee." Syl. par. 2.

A petition was filed in the Supreme Court to have the judgment of the Court of Appeals reviewed. That petition was denied. Under the practice as it then existed, that denial was practically an affirmance of the judgment of the Court of Appeals. See, also, Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58; Lockrow v. Cline, 4 Kan. App. 716, 724, 46 Pac. 720; and Anthony v. Mott, 10 Kan. App. 105, 61 Pac. 509. Notes on the question under discussion are found in 8 L. R. A. 315; 22 L. R. A. (N. S.) 492; 39 L. R. A. (N. S.) 151; and 2 Jones on Mortgages (7th Ed.) p. 760.

From these notes, the conclusion must be drawn that the weight of authority is against liability on the part of the grantee in a deed where the grantor therein is not personally liable. In the note found in 22 L. R. A. (N. S.) 492, the author uses this language:

> "In those states which refer the liability of the grantee to the doctrine that the promise is collateral security which by subrogation inures to the benefit of the mortgagee, the promise is held to render the grantee the principal and the grantor the surety for the debt; the promise being to indemnify the latter in case he has to pay the debt. It necessarily follows that where

this theory prevails, if the grantor is not himself liable, no liability can attach to the grantee, and it is so held in very many cases."

In Stove Works v. Caswell, 48 Kan. 689, 29 Pac. 1072, this court said:

> "Where property is sold, and the purchaser agrees to pay the consideration therefor, or a portion thereof, to a creditor of the vendor, the purchaser, as between himself and the vendor, becomes the principal debtor, and the vendor only a surety." Syl.

See, also, Bowling v. Garrett, 49 Kan. 504, 520, 31 Pac. 135, 33 Am. St. Rep. 377; Mulvane v. Sedgley, 63 Kan. 105, 64 Pac. 1038, 55 L. R. A. 552; Fisher v. Spillman, 85 Kan. 552, 118 Pac. 65; Bank v. Livermore, 90 Kan. 395, 402, 133 Pac. 734; Morlan v. Loch, 95 Kan. 716, 149 Pac. 431; and McAndrew v. Sowell, 100 Kan. 47, 163 Pac. 653.

It follows that the question with which this discussion was commenced must be answered in the negative.

[2] 2. One of the grounds of the motion for a new trial filed by the plaintiff was:

> "Newly discovered evidence material for the plaintiff, which could not, with reasonable diligence, have been discovered and produced on the trial."

An affidavit of F. P. Evans, the plaintiff's cashier, was produced at the hearing of the motion. This affidavit showed that, when Evans looked through the papers pertaining to this loan, he overlooked the fact that McCrillus had executed an extension agreement. The affidavit further showed that McCrillus had entered into an agreement for the extension of this loan, and, in the extension agreement, had agreed to pay the mortgage debt with the interest thereon; that this agreement was made with the plaintiff as agent for the legal holders of the mortgage; and that, after judgment had been rendered, Evans again made a search through the papers pertaining to the loan, found the extension agreement, and immediately wrote to plaintiff's attorney, Howard J. Hodgson, and sent the extension agreement to him. The motion for a new trial was denied. Under the decisions of this court above cited, if an extension agreement had been introduced on the trial and that agreement had shown that McCrillus had agreed to pay the mortgage debt, then the assumption of that debt by the defendant, in the deed from McCrillus to him, would have been a valid and binding obligation on the part of Bales, and judgment should have been rendered in favor of the plaintiff. Under these circumstances, in order to prevent a failure of justice, a new trial should have been granted—not, however, without the imposition of terms.

The judgment is reversed, and a new trial is granted on condition that the plaintiff pay all the costs of the action up to and including the hearing of the motion for a new trial.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and DAWSON, JJ., concurring.

WEST and MARSHALL, JJ. (dissenting). The decision of this court is in contravention of section 305 of the Code of Civil Procedure (Gen. St. 1915, § 7205). The showing on the motion for a new trial disclosed that the plaintiff was negligent, and not reasonably diligent.

(101 Kan. 170)

LAGNEAU v. BOURCE et al. (No. 20930.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑1010(1)—NEW TRIAL 🔑105—FINDINGS OF FACT—IMPEACHING EVIDENCE.

Rules followed that findings of fact supported by the evidence must stand, and that usually new trials will not be granted for newly discovered evidence which is at most only impeaching.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024; New Trial, Cent. Dig. §§ 183, 221–223, 229.]

Appeal from District Court, Cherokee County.

Action by Felix Lagneau against Arthur Bource and others. Judgment for defendants on a cross-petition, and plaintiff appeals. Affirmed.

C. A. McNeill, of Columbus, and Maurice McNeill, of Kansas City, Mo., for appellant. A. L. Majors and Al. F. Williams, both of Columbus, for appellees.

WEST, J. The plaintiff sued to recover $100 damages for failure to satisfy a mortgage, for cancellation, to quiet title, and to recover attorney's fee, all arising out of an alleged failure to satisfy a deed taken as security for a $525 loan which the plaintiff claimed had been paid. The defendant denied payment, and on his cross-petition recovered judgment for the full amount of the loan. The plaintiff appeals.

The case was tried by the court, the evidence was conflicting, and there was enough to support the findings of fact and conclusions of law which were against the plaintiff. The chief complaint is of the refusal to grant a new trial for newly discovered evidence. The plaintiff testified that he got the money to repay the loan from his father, and paid it to the defendant between 7 and 8 o'clock in the evening; that he went down with his wife to pay him; that the defendant, his father-in-law, procured the money to make the loan from August Ovine, who was paid on the day the defendant was paid; that when the payment was made himself and wife, defendant and wife, and Ovine were all in the house; that he paid the $500 in $20 bills, interest in a $10 bill and a $1 bill. The plaintiff's father testified that he loaned the son $500 on the 22d day of December, all the family being present. Two brothers testified that they saw the father hand $500 to the son. The defendant swore that the money belonging to the plaintiff was borrowed partly from Ovine and partly from a brother; that he paid Ovine in two $200 payments, and had receipts therefor, which he produced. He denied any payment by the plaintiff. Plaintiff's wife testified that she never saw him give her father any money; that she was not living with her husband at the time of the trial. The defendant's wife denied the payment, and testified to knowing that her husband paid back the money to Ovine, and that the money they paid Ovine came from the sale of cattle, $188.90, and the work of three men; that the cattle were sold in 1913 to Mr. Beltram; that they sold stock and pigs to him.

On a motion for new trial an affidavit of Mr. Beltram was offered to the effect that the only sum ever paid him by defendant or his wife in the year 1913 was $35 for one black cow. Mrs. Beltram made an affidavit covering the same matter, and also told of an attempt of defendant's wife to try to induce Mr. Beltram to say that he had paid her about $40 for produce. The affidavit of two witnesses was tendered to the effect that in the spring of 1914 they were visiting at the home of the plaintiff when his wife, in speaking of the home, said it was very nice, "but we owe Mr. Lagnau, Felix's father, $500 borrowed money, or that in substance." The theory of the plaintiff seems to be that his wife became alienated from him and undertook to help her parents swear the case through for them.

The affidavits present nothing which would necessarily work a different result with another jury, and nothing which is more than to some extent impeaching. They were presented to the trial court, which had full cognizance of the entire situation, and deemed them insufficient to require a new trial, and it cannot be held that its ruling in this respect was an abuse of discretion. See Pittman Co. v. Hayes, 98 Kan. 273, 157 Pac. 1193, and cases cited on page 278, and Pasho v. Blitz, 99 Kan. 421, 162 Pac. 1161.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 130)

JINNINGS v. AMEND et al. (No. 20900.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

LANDLORD AND TENANT 🔑329—FARM LEASE—CONVICTION OF TENANT—RESCISSION.

Where a written contract in the form of a three-year lease of farm land provides that the lessee shall reside upon it and cultivate it in a good and careful manner, raising wheat and delivering one-third of the crop to the lessor, and the lessee, after doing considerable work on the place, but before sowing any wheat, is arrested on a charge of having committed a felony, and on conviction imprisoned in the county jail for about six months, the lessor is entitled to rescind the contract and take and retain possession of the land, notwithstanding the contract contains no provision giving a right of forfeiture or re-entry for any fault of the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1364–1366.]

Appeal from District Court, Gray County.

Action of forcible entry and detainer by T. M. Jinnings against W. A. Amend and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded.

Osmond & Cole, of Great Bend, and John Harper, of Cimarron, for appellants. Edgar Foster, of Dodge City, for appellee.

MASON, J. W. A. and E. R. Amend, residents of Great Bend, were the owners of 960 acres of land in Gray county. In February, 1915, they entered into a written agreement with T. M. Jinnings, providing that he was to occupy and farm it for three years, one-third of the crop (wheat) to go to the owners. The contract also provided for his breaking out 500 acres of new land the first year and raising a wheat crop thereon for the benefit of the owners, to be paid in cash for his services in this connection. By September 28, 1915, Jinnings had broken the 500 acres of sod and plowed 400 acres of cultivated land, but had not sowed any wheat. On that day he was arrested, charged with a felony. He was held in custody until the October term of the district court, when he was convicted and sentenced to serve six months in the county jail. He appears not to have attempted to make any arrangement for the carrying on of the work, and to have been out of funds and credit. He remained in jail until about March 1, 1916, when he was paroled. Within a day or two after the arrest the Amends took possession of the land, which they have ever since retained. Upon the parole of Jinnings they told him that they would not permit him to return to the premises. On April 11, 1916, he brought an action of forcible entry and detainer against them, joining as a defendant John Ratzloff, to whom they had given a lease. By the consent of the parties the case was transferred to the district court under an agreement that all the matters in controversy should be determined in one action. A referee heard the evidence and made detailed findings covering all transactions connected with the land contract. Judgment was rendered, awarding the plaintiff possession of the land, and requiring him to pay $1,859.10, the amount found due the Amends on an accounting. The defendants appeal.

The plaintiff invokes the rule that, in the absence of an express provision on the subject in the lease, a lessor cannot terminate the tenancy on account of a breach of covenants by the lessee. 18 A. & E. Encyc. of L. 369, 370; 24 Cyc. 1349; 24 Cyc. 1392; 16 R. C. L. 969; 16 R. C. L. 1115. He contends that the written contract was a lease, creating the ordinary relation of landlord and tenant, and that, inasmuch as it contained no provision for a forfeiture no failure to perform the agreements on his part could give the defendants a right of re-entry. The defendants maintain that, if the contract was a lease at all, it was not an ordinary one; that it was more in the nature of a "cropper's" agreement for the cultivation of land on shares, and that an essential part of it was the plaintiff's undertaking to perform personal services; that when, by his own misconduct, he was disabled from carrying out a material part of the agreement he had undertaken, they were at liberty to rescind the contract, settling with him on an equitable basis for what he had already done.

The contract used language appropriate to a lease; it purported to create a tenancy for three years. That consideration, however, is not necessarily controlling, as the effect of the instrument is to be determined from its real intent, as gathered from its entire contents, regardless of the technical words used. 16 R. C. L. 584. It included clauses reserving a right to the owners to go upon the place at all times, requiring the plaintiff to pay the defendants one-third of any receipts for pasturing cattle on the wheat, and providing for a delivery of possession in case of a sale, compensation to be made for the growing crop. We do not consider it necessary to decide what expression most fitly describes the relationship into which the parties entered. There is nothing peculiar about a lease that takes it out of the operation of the rules of fair dealing that govern in other contractual relations. Here the essence of the arrangement was that the defendants were to furnish the land and certain implements, material, and money, and the plaintiff was to furnish his care, skill, and labor, and the proceeds were to be divided. Although the contract may be said to have created an estate in the land, it was essentially executory; its provisions were mutually dependent. The plaintiff was not in control of the land, to use it at his pleasure. He was bound to handle it in a stated way, and to perform certain acts with regard to it, and these obligations were as important as any other part of the contract. His personal services were engaged; his skill as a farmer was involved; he had no power of substitution or subletting. See, in this connection, Randall v. Chubb, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165, and Myer v. Roberts, 50 Or. 81, 89 Pac. 1051, 12 L. R. A. (N. S.) 194, 126 Am. St. Rep. 733, 15 Ann. Cas. 1031. Notwithstanding the absence of any reference in the contract to a right of re-entry, it cannot be doubted that if he had completely abandoned the place, or had utterly refused compliance with the agreement, the owners would not have been required to permit the land to remain idle for several years. A clause of the agreement gave them a right to furnish additional help in the management of the farm, at the charge of the plaintiff, if thought by them to be necessary. But this cannot be regarded as an exclusive remedy. It is not adapted to such a situation as that suggested; nor were the defendants bound to pursue it.

The matter to be determined is the effect upon the relations of the parties of the plaintiff having been arrested, convicted, and confined. There seems to be a dearth of cases bearing upon that question. In Leopold v. Salkey, 89 Ill. 412, annotated in 31 Am. Rep. 100, an employer was held to have the right to discharge an employé who had been hired for a fixed period, because of his being arrested and held in custody for two weeks. That contract was perhaps not closely analogous to the one now under consideration. Moreover, the loss of time was treated as one for which the person arrested was not to blame, so that the principle applied would not be particularly helpful here. The gravity of the charge of which the plaintiff was convicted indicates that it implied moral turpitude. While the doctrine of res judicata has no application, we must act upon the theory that the conviction was rightful. It cannot be assumed that a miscarriage of justice occurred, nor could an inquiry into that matter be permitted, where it is collaterally involved in civil litigation. Burt v. Union Central Life Insurance Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216. This situation is therefore presented: The plaintiff, having obtained possession of the land under a three-year contract, a material part of the consideration being that he should put in a wheat crop in the fall of 1915, was disabled to perform his agreement in that respect (as well as in some others) by reason of his having committed a crime. The disability was self-imposed. He was entitled to no more favorable treatment than if he had purposely interposed an insurmountable obstacle to the carrying out of the contract, or had abandoned or repudiated it.

> "Where one of the parties to a contract, before the time for performance arrives, has placed himself, by his voluntary act or conduct, in such a situation that he is unable to fulfill his part of the agreement, it may be treated as an anticipatory breach of the contract, or as a case of impossibility of performance subsequently arising; and in either view the other party to the contract may thereupon rescind it, and recover whatever consideration he may have given under it, or treat it as abandoned, and sue at once for such damages as he may have sustained. The inability to perform need not relate to the whole and every part of the contract, but it must exist with reference to some substantial particular, going to the very essence of the contract and defeating its main purpose and object, or to a part so essential to the residue of the contract that it cannot reasonably be supposed that the other party would have made the contract without it." 1 Black on Rescission and Cancellation, § 210.

The right of the plaintiff to occupy the land for three years was expressly granted in consideration of his personal occupancy and services. By fair implication it was conditioned upon his being able to comply with that requirement—at least upon his not voluntarily divesting himself of such ability. His enforced withdrawal from active life was not within the contemplation of the parties to the contract. There was practically a destruction of an important part of the subject-matter of the contract. The fact that the defendants were willing to agree that the plaintiff should have the right to occupy the farm for three years, assuming that he was to remain a free agent, affords no presumption that they would have been willing to grant him that privilege if he was to be imprisoned for a considerable part of the time. No question of forfeiture, strictly so called, is involved. We think the defendants were entitled to rescind the contract by reason of the plaintiff having disabled himself from performing a material part of his agreement —a part going to the very foundation of the contract, without which it presumably would not have been entered into, that their conduct amounted to an enforcement of this right, that they should be allowed to retain possession of the land, and that the plaintiff should be compensated on an equitable basis for the services performed and expenditures incurred by him prior to his arrest.

The findings of fact, made by the referee and approved by the court, need not be disturbed; but, as the accounting was made upon the theory that the plaintiff would be restored to possession, a readjustment will be necessary.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(101 Kan. 62)

STATE v. BURTON. (No. 20708.)

(Supreme Court of Kansas. June 9, 1917. On Petition for Rehearing, June 22, 1917.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES 🔑233 — SALE BY MORTGAGOR—PROSECUTION—DEFENSES—EVIDENCE.

In the prosecution of a mortgagor under section 6513, General Statutes of 1915, for selling property covered by chattel mortgage without written consent of the mortgagee, proof of oral consent of the mortgagee to the sale is not sufficient to defeat the action, but such proof may be admitted, as bearing upon the question whether or not the sale was made for the purpose of defrauding the mortgagee.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 494.]

2. CHATTEL MORTGAGES 🔑233 — SALE OF MORTGAGED PROPERTY—PROSECUTION—EVIDENCE.

Proof that the bill of sale by which the mortgagor disposed of the property recited that it was sold subject to the mortgage is not sufficient to defeat the action.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 494.]

3. CHATTEL MORTGAGES 🔑233 — SALE BY MORTGAGOR—PROSECUTION.

Assignments of error involving consideration of the sufficiency of evidence examined, and *held* to be unsubstantial.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 494.]

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW 🔑543(2) — ABSENT WITNESS—TESTIMONY AT PRELIMINARY EXAMINATION.

In a criminal prosecution, the reading of testimony at preliminary examination given by witness not present at the trial was proper, where the state showed that his whereabouts was unknown and could not be ascertained after diligent search.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236.]

5. CRIMINAL LAW 🔑410—ADMISSION—AGENT.

In prosecution of mortgagor under Gen. St. 1915, § 6513, for selling property covered by chattel mortgage without mortgagee's written consent, evidence of statement of mortgagee's alleged agent was properly excluded, where there was no proof of agency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 897, 1254.]

Appeal from District Court, Sedgwick County.

E. C. Burton was convicted of selling personal property covered by chattel mortgage, and he appeals. Affirmed.

Adams & Matson, of Wichita, for appellant. S. M. Brewster, Atty. Gen., Ross McCormick and Glenn Porter, both of Wichita, and H. O. Caster, of Topeka, for the State.

BURCH, J. The defendant was convicted of selling personal property covered by chattel mortgage, and appeals.

[4] Testimony given at the preliminary examination by a witness who was not present at the trial was read to the jury. It is said the testimony was improperly admitted because the state did not show that the witness was beyond the jurisdiction of the court and did not show reasonable diligence to procure the attendance of the witness. It was sufficient for the state to prove that the whereabouts of the witness was unknown and could not be ascertained after diligent search. State v. Stewart, 85 Kan. 404, 116 Pac. 489; State v. Chadwell, 94 Kan. 302, 146 Pac. 420. The implied finding of the trial court that due diligence had been used to discover and produce the witness is approved.

[5] Complaint is made that evidence was rejected of statements material to the case made by one who, it is claimed, was the agent of the mortgagee. The evidence was properly excluded because there was no proof of agency.

[3] The defendant claims that the prosecution was barred by the two-year statute of limitations. The subject was presented to the jury by very full and clear instructions. The several questions of fact involved depended for their solution upon the credence

and weight to be given to oral testimony. Probably little of the defendant's evidence was believed, and, if so, the verdict of the jury was well sustained.

[1, 2] The statute under which the defendant was convicted provides that any mortgagor of personal property who shall sell or dispose of such property without written consent of the mortgagee shall be guilty of larceny, and shall be punished for petit larceny or for grand larceny according to the value of the property. Gen. Stat. 1915, § 6513. The defendant claims immunity from punishment because the bill of sale by which he disposed of the property recited that it was sold subject to the mortgage. The chattel mortgage contained no stipulation that the legal title to the property should not vest in the mortgagee. Gen. Stat. 1915, § 6501. Consequently any sale the mortgagor might make would necessarily be subject to the mortgage. The statute contains no exemption from liability such as the defendant proposes, and the court cannot interpolate one. If such an exemption were allowed, a sale subject to the mortgage to a confederate who dissipated the property, as occurred in this case, would make waste paper of the statute.

The defendant produced testimony which the court admitted, that oral consent of the mortgagee to sell the property was given at the time the mortgage was made. The defendant claims such consent was sufficient to relieve him from liability. The statute requires written consent of the mortgagee, and the court properly instructed the jury that the defendant was not justified in selling or disposing of the property without that kind of consent. The statute is of course a statute to circumvent fraud. Formerly it provided merely that any mortgagor of personal property who should sell or dispose of such property for the purpose of defrauding the mortgagee should be guilty of a misdemeanor. Deeming the statute insufficient to accomplish the purpose for which it was designed, the Legislature at its session in 1897 inserted the provision relating to written consent of the mortgagee, and made the crime of selling or disposing of the property without such consent larceny. Laws 1897, c. 161. Since then the statute has been further improved. The provision relating to written consent of the mortgagee was designed to check the commission of perjury in aid of fraud, and cannot be disregarded in criminal cases.

The court instructed the jury that it was essential the sale charged should have been made with intent to defraud the mortgagee, and further instructed the jury as follows:

> "Evidence has been introduced for the purpose of showing that the mortgagee orally consented to the defendant's selling or disposing of the mortgaged property. While such evidence as to oral consent is not competent as showing that an oral consent could take the place of a written consent and that the requirement of the statute that the consent should be written would be satisfied by an oral consent, still such evidence is permitted by the court to be introduced solely for the purpose of bearing upon the question as to whether or not, in selling or disposing of the mortgaged property, the defendant intended to defraud the mortgagee. If the mortgagee orally consented to a sale or disposition of the mortgaged property, then you should consider this circumstance in determining whether or not the defendant, in selling or disposing of the mortgaged property, intended to defraud the mortgagee."

These instructions were correct, and gave the defendant all the benefit of his testimony which the law allows.

The defendant cites two decisions of the Supreme Court of Iowa interpreting the criminal statute of that state, which the defendant says is similar to the statute of this state. The Iowa statute is distinctly unlike the statute of this state, in that consent of the mortgagee is not restricted to written consent. 2 Revised Code of Iowa 1880, § 3895. In the case of Walker v. Camp, 69 Iowa, 741, 27 N. W. 800, cited by the defendant, it was held that the rule excluding parol evidence to vary the terms of a written contract did not preclude evidence of oral consent of the mortgagee to a sale of the mortgaged property, given at the time the mortgage was made. The reason given was that a seller of mortgaged property is not to be convicted without a criminal intent, and if because of the mortgagee's consent the seller believe he has the right to sell, his honest act cannot be converted into a crime by the parol evidence rule. In the case of Tootle, Hosea & Co. v. Taylor et al., Garnishees, 64 Iowa, 629, 21 N. W. 115, cited by the defendant, the court said:

> "A subsequent mortgage or sale of the property is not declared void, for the reason, we may suppose, that the mortgagor has an equity of redemption which he may sell, and, if he may do this, we see no reason why he may not execute a mortgage which will cover such interest. If the statute is literally construed, he would be liable to the penalty, although he sold the property for the express purpose of paying the debt, if the sale was made without the consent of the mortgagor; and this is true, even if he tendered the money in payment of the debt. Such cannot be the true construction of the statute. Under it, the mortgagor may fully use and control the property, provided he does not impair the security of the mortgagee." 64 Iowa, 632, 21 N. W. 116.

The case was a civil case. The matter decided was the legal effect of the second mortgage. Considering the decision, however, as interpreting the statute for criminal as well as civil cases, it means no more than that a mortgagor should not be regarded as guilty of larceny in disposing of mortgaged property without the mortgagee's consent unless the transaction be fraudulent. The result is, the Iowa decisions, so far as they are applicable at all, are not in conflict with the views which have been expressed.

The judgment of the district court is affirmed. All the Justices concurring.

On Petition for Rehearing.

PER CURIAM. A petition for a rehearing has been filed containing the following statements:

> "That the court, in rendering an opinion in this action, has apparently overlooked one of the main points, if not the main point and chief defense, to wit:
>
> " 'That the statutes of limitations had run in favor of the appellant prior to the time of his arrest.'
>
> "That as the court in their opinion made no mention of that portion of the case hereinabove described, said appellant believes that the court in arriving at its decision may have overlooked a very important part of the case."

The subject referred to was fully treated in the fourth paragraph of the opinion, beginning near the bottom of page 1 of the typewritten copy.

The petition for a rehearing is denied.

(101 Kan. 179)

DONDELINGER v. DONDELINGER.

(No. 21113.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE ⟹281—SEPARATION AGREEMENT—AMOUNT.

The evidence considered, and *held* sufficient to sustain the judgment denying a divorce to either party, and refusing to set aside a property agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1061.]

(Additional Syllabus by Editorial Staff.)

2. DIVORCE ⟹184(4)—APPEAL—PRESUMPTION—EVIDENCE.

In a husband's action for divorce, with answer praying for a divorce and for the cancellation of a contract relating to property rights, the presumption was that, if any improper testimony was admitted, the court disregarded it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 570.]

Appeal from District Court, Kingman County.

Action for divorce by George Dondelinger against Sarah E. Dondelinger, on ground of abandonment, with answer praying for divorce on ground of extreme cruelty, and for cancellation of a contract relating to property rights. Relief denied both parties, and both appeal. Affirmed.

Carr W. Taylor, of Hutchinson, and Walter & Connaughton, of Kingman, for appellant. Charles C. Calkin and J. Q. Jenkins, both of Kingman, for appellee.

BURCH, J. The action was one for a divorce on the ground of abandonment. The answer prayed for a divorce on the ground of extreme cruelty, and for cancellation of a contract relating to property rights. Relief was denied both parties, and both appeal.

On the plaintiff's side it is said that he was denied a divorce because he did not seek the defendant's return after her final departure. There were no special findings, and there was some evidence that the plaintiff was as much responsible for his wife's leaving as she was.

[1, 2] On the defendant's side it is said that a former attorney for the defendant was allowed to testify to privileged matter. A careful scrutiny of the transcript fails to disclose any improper testimony, and if improper testimony had been admitted, the presumption would be that the court disregarded it.

The defendant says the contract was not freely and fairly and understandingly entered into on her part. There was abundant evidence to the contrary. It is further said that the amount which the plaintiff contracted to pay the defendant was not sufficient. This is not a ground of error. The question is whether or not the judgment of the trial court is so manifestly unjust as to shock the conscience.

The parties were married in January, 1914. In July of the same year the defendant left the plaintiff, and he agreed to pay her $1,000 in installments. Some six weeks later she returned, and they lived turbulently together until January 6, 1915, when she again went away. Two hundred dollars had been paid on the previous contract, and it was in effect renewed for the remainder of the amount. One of the defendant's witnesses valued the plaintiff's property, consisting of real estate, by tracts, at the aggregate sum of $7,440. The property was subject to a mortgage of $3,650, so that its net value was $3,790. Under the circumstances no abuse of discretion in refusing to abrogate the contract appears.

The judgment of the district court is affirmed. All the Justices concurring.

(23 N. M. 26)

STATE v. DICKENS. (No. 1919.)

(Supreme Court of New Mexico. July 31, 1917.)

(Syllabus by the Court.)

1. Homicide 🔑116(5)—Self-Defense—Belief as to Imminent Danger—Reasonableness.

The standard by which the jury must determine the reasonableness of belief of accused that danger is so apparently imminent that he must act in self-defense is that of an ordinary person of firmness, reason, and prudence, not that such question should be determined from the standpoint of the accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 162.]

2. Homicide 🔑297 — Justification — Provoking Words—Instruction.

Where, immediately after slaying deceased, defendant justified his act upon the ground that deceased had used insulting language toward him, an instruction to the effect that provocation by words or mere threats or the use of abusive language by the deceased to or concerning the defendant cannot justify or excuse the taking of human life was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611.]

3. Homicide 🔑290—Instruction — Definition of Terms.

It is not error for the court in instructing the jury to define a deadly weapon in the terms of the statute.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 595.]

4. Criminal Law 🔑824(11) — Defendant's Right to Testify—Instruction.

Where a defendant testifies as a witness in his own behalf, if he desires an instruction to the effect that the statute makes him a competent witness, it is his duty to prepare such an instruction and tender it to the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999.]

5. Criminal Law 🔑829(1)—Given Instructions—Cumulative Instructions.

Courts are not bound to give instructions which, even if correct, are merely cumulative and state in another form a proposition of law already given to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

(Additional Syllabus by Editorial Staff.)

6. Homicide 🔑308(3) — Murder in Second Degree—Evidence—Instruction.

Where there was testimony that defendant walked over to where deceased was standing, took up a heavy instrument, and struck deceased on the side of the head, without any previous threatening act or move on the part of deceased, an instruction as to the law of murder in the second degree was warranted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 644.]

Appeal from District Court, Curry County; McClure, Judge.

Thomas Marion Dickens was convicted of murder in the second degree, and he appeals. Affirmed.

Patton & Bratton, of Clovis, for appellant. H. S. Bowman, Asst. Atty. Gen., for the State.

ROBERTS, J. [1] Appellant was convicted of murder in the second degree, and the first point upon which he relies for a reversal is alleged error in instruction No. 14 given by the court of its own motion. This instruction dealt with the law of self-defense and made the standard of the defendant that of a reasonably courageous and prudent man. Appellant contends that the test to be applied as to appearance of danger is not whether or not the danger would have been apparent to a reasonable man, but was it reasonably apparent to the defendant?

The prevailing rule in the United States is that the apprehension of danger and belief which will justify killing in self-defense must be a reasonable apprehension and belief, such as a reasonable man of courage or a reasonably courageous man would, under the circumstances, have entertained. The same question was before the court in the recent case of State v. Chesher, 161 Pac. 1108, and the court there held that:

> "The standard by which the jury must determine the reasonableness of belief of accused that danger is so apparently imminent that he must act in self-defense is that of an ordinary person of firmness, reason, and prudence, not that such question should be determined from the standpoint of the accused."

[2, 3] It is next urged that there was no evidence justifying the giving of instruction No. 17, which reads as follows:

> "You are instructed that provocation by words or mere threats or the use of threatening or abusive language by the deceased to or concerning the accused, however insulting or aggravating the same might have been, cannot justify or excuse the taking of human life."

This argument is based upon the fact that the defendant upon the stand denied that there had been provocation by words or threats or the use of abusive or threatening language by the deceased, and that the defendant did not base his right of self-defense upon the use of words or threats. The evidence shows, however, that immediately after the killing defendant gave as a justification for his act the fact that the deceased had called him a son of a bitch. No error was committed in giving this instruction under the evidence in the case. Objection is also made to the giving of instruction No. 11, which defined a "deadly weapon." This instruction defined the term "deadly weapon" in almost the identical language of section 1707, Code 1915; hence is not subject to criticism.

[6] The court instructed the jury as to the law of murder in the second degree. This action of the court is assigned as error upon the assumption that there was no evidence in the record to sustain a verdict of murder in the second degree. The record, however, amply justifies the action of the court in so instructing. The testimony of the witness McFarland to the effect that he saw the defendant walk over to the place where the

deceased was standing and pick up the flatter, a heavy instrument of iron with a wooden handle, with which the deceased was killed, and strike him on the side of the head with this instrument, felling him to the ground, without any prior threatening act or move on the part of the deceased, furnished sufficient evidence alone to sustain the verdict of murder in the second degree and justified the giving of the instructions in question. Hence there is no merit in this contention.

[4] The court did not give the customary instruction relative to the defendant's right to testify in his own behalf. This failure of the court is assigned as error. The court, however, fully instructed the jury upon the subject of the credibility of witnesses, and the defendant testified as a witness in his own behalf. The failure of the court to instruct further upon the subject as to the competency of the defendant as a witness was more favorable to defendant than otherwise; hence he cannot complain in this regard. Further, if the defendant desired such an instruction, it was his duty to prepare and tender it to the court. Territory v. Gonzales, 11 N. M. 301, 68 Pac. 925; State v. Padilla, 18 N. M. 573, 139 Pac. 143.

[5] Complaint is also made of the refusal of the court to give requested instructions Nos. 1 and 4, relative to burden of proof. The court in its instructions given to the jury fully and fairly stated the law upon this subject; hence no error was committed in refusing to give the requested instructions. In the case of State v. Bellsle, 161 Pac. 168, it is said:

> "Courts are not bound to give instructions which, even if correct, are merely cumulative, and state in another form a proposition of law already given to the jury."

Finding no error in the record, the judgment of the lower court will be affirmed; and it is so ordered.

PARKER, J., concurs.

HANNA, C. J. (specially concurring). I find it necessary to agree with the result in the majority opinion, but cannot agree with a statement therein contained to the effect that the testimony of the witness McFarland that he saw the defendant walk over to the place where the deceased was standing and pick up the flatter, a heavy instrument of iron with a wooden handle with which the deceased was killed, and strike him on the side of the head with this instrument, felling him to the ground, without any prior act or move on the part of the deceased, furnished sufficient evidence alone to sustain the verdict of murder in the second degree and justified the giving of the instruction as to murder in the second degree. The testimony of the witness McFarland as a whole does not justify the statement quoted. It is true he made substantially the statement referred to, but on cross-examination I find he qualified his testimony to such an extent as to render it valueless in this respect. For example, he said that he was not paying any particular attention to the actions or movements of the men, and did not take any particular notice of just what they were doing at the time of the trouble; that there was considerable noise going on in the blacksmith shop, and if the deceased and accused had been carrying on any conversation he could not have heard it.

I agree in the result and in the correctness of this particular instruction, however, upon the ground that mere language, however opprobrious or indecent, is not deemed sufficient to arouse ungovernable passion, and thereby reduce a homicide from murder to manslaughter. 13 R. C. L. 795.

(23 N. M. 532)

CRAIG v. HENNING et al. (No. 2072.)

(Supreme Court of New Mexico. Aug. 1, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 🔑515(2)—RECORDS—STENOGRAPHER'S TRANSCRIBED NOTES.

The transcribed notes of the stenographer in an equitable action, upon the trial of which issues are submitted to the jury for determination, can only be made a part of the record by being incorporated into a bill of exceptions, under the provisions of section 4495, Code 1915.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2323.]

Appeal from District Court, Chaves County; McClure, Judge.

Action by L. B. Craig against W. H. Henning and others. Judgment for defendants upon a directed verdict, and plaintiff appeals. Motion to strike from the transcript all parts thereof to which the court's certificate of the correctness of the stenographer's transcribed notes was attached granted.

Tomlison Fort and J. C. Gilbert, both of Roswell, for appellant. Harold Hurd and Hiram M. Dow, both of Roswell, for appellees.

ROBERTS, J. This action was instituted in the district court of Chavex county by appellant against the appellees to recover the sum of $2,509 alleged to have been owing to appellant by appellees, as evidenced by a certain judgment set out in the complaint. Appellees answered, tendering payment of one-half of the amount sued for, and set up certain equitable defenses which they alleged relieved them from payment of the remainder. Issue was joined, and without objection by either party the case was submitted to a jury. Evidence on behalf of the plaintiff (appellant here) was taken, and the court, on motion of the appellees, instructed the jury to return a verdict for the defendants on the litigated question. From this judgment appellant prosecuted an appeal to this court, and has filed a transcript of the record which contains, in addition to the record proper, the transcribed notes of the stenographer, certified by the court to be true and correct, under the provisions of section 4493, Code, 1915. Appellees moved to strike from the transcript all that portion thereof to which such certificate is attached, on the ground that, the case having been submitted to a jury, it was not competent for appellant to make the evidence and proceedings occurring upon the trial a part of the record in such manner. This motion must be sustained. The section in question, in so far as material, reads as follows:

> "In all actions tried without a jury the testimony taken before a court or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee, and all motions, orders or decisions made or entered in the progress of the trial of any such action shall become and be a part of the record for the purpose of having the cause reviewed by the Supreme Court upon appeal or writ of error, without any bill of exceptions."

Section 4495 provides for the making up of a bill of exceptions and settling the same, and authorizes this method of procedure in all cases, whether tried by the court with or without a jury. Appellant argues that, because there were equitable issues involved in the present case, it should have been tried by the court without a jury; hence they are entitled to make the testimony a part of the record in the manner adopted.

The statute, however, does not make the test of the right depend upon whether the action was legal or equitable, but upon whether or not the action was tried with or without a jury. A law action, properly triable by a jury, but heard by the court, comes within the provisions of section 4493, and in an equitable action, where issues are submitted to the jury, the transcribed notes of the stenographer can only be made a part of the record by having the same incorporated in a bill of exceptions under the provisions of section 4495.

For the reasons stated, the motion of appellees will be sustained; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(101 Kan. 237)

SMITH BROS. & COOPER v. HANSON.*

(No. 20654.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. SALES 🔑416(1)—SUIT TO RECOVER FOR SHRINKAGE—EVIDENCE.

In view of the issues involved and attitude of the parties, it was error to exclude proffered testimony as to the correctness of the defendant's method of measuring the hay involved herein.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1171.]

2. SALES 🔑420—ACTION TO RECOVER FOR SHRINKAGE—ISSUES—AMOUNT PURCHASED.

Under the circumstances of this case, the issue of fraud is practically negligible; the vital question being the amount of hay actually purchased.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1202.]

3. APPEAL AND ERROR 🔑1046(1)—HARMLESS ERROR—SUBPŒNA—JURORS NOT CALLED AS WITNESSES.

The issuance of a subpœna for certain jurors not called as witnesses, although no substantial prejudice is shown in this instance, not approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128, 4131.]

Appeal from District Court, Cloud County.

Action by Smith Bros. & Cooper against Robert Hanson. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded.

See, also, 93 Kan. 284, 44 Pac. 226.

Pulsifer & Hunt and Clyde L. Short, all of Concordia, for appellant. S. N. Hawkes, of Topeka, and Sturges & Sturges, of Concordia, for appellees.

WEST, J. The plaintiffs bought a large amount of alfalfa with which to feed sheep and after having paid for the same and claiming to have discovered a large shrinkage in the amount brought this suit to recover the difference. They alleged, among other things:

> That the defendant represented that the alfalfa amounted to about 900 tons. "That defendant, to induce plaintiff to pay for more hay or alfalfa than there really was, did falsely state, represent, and warrant to them that 400 cubic feet of said hay, measured as defendant measured it, would equal or amount to one ton; that he had often measured and weighed the hay grown upon said premises under other contracts in reference to the sale thereof similar to this with plaintiffs, and had never been required to settle by weight, for that, in such instances, after weighing, the measurements of defendant had been found correct and favorable to the purchaser, upon a basis of 400 cubic feet to the ton, all of which statements and representations were false and untrue, and so known by said defendant to be, and 400 cubic feet of said hay, measured as defendant measured it, would not make a ton, nor hardly two-thirds thereof, which said defendant well knew. * * *"

It was agreed that the plaintiffs should have the option of weighing certain stacks, and from the weight should be ascertained the entire number of tons in all the stacks measured. It was alleged that by the measurement of the stacks about which there is no dispute there were, according to the plaintiff's theory of 400 cubic feet to the ton, 952¾ tons; that upon weighing certain stacks the correct amount of hay was found to be only 599 tons, leaving a difference which at $8 a ton would make an excess of $2,830 paid. The trial resulted in a jury, allowing the plaintiffs just one-half of the amount claimed, and on appeal to this court (Smith v. Hanson, 93 Kan. 284, 144 Pac. 226)

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*For opinion on petition for rehearing, see 166 Pac. 497.

it appeared that according to the plaintiff's theory of weight they were entitled to twice what the jury had allowed, and that in order to substantiate their claim they had introduced evidence as to the amount of alfalfa a sheep would consume in a given time. But according to the defendant's theory of measurement they were entitled to nothing. It was said that under the circumstances it was competent to show the oral agreement as to the time the weighing was to be done, that if the weights controlled the plaintiffs were entitled to the full amount claimed. Also:

> "If the weight was decided by ascertaining the number of tons in two of the stacks, and applying the proportionate correction to the whole, that result would govern. * * * The defendant maintains that, through some mistake, the measurements applied to the two stacks, which were weighed, were not those of these two stacks, and the jury may have so found. But in that case no reason is apparent why the correct measurement should not have been applied, and the weight determined in that manner. The jury could determine which stacks were actually weighed, and, whichever they were, it would seem there should be no difficulty in ascertaining their measurement. Upon these grounds the judgment is reversed, and a new trial ordered." 93 Kan. 287, 144 Pac. 226.

[1] As to the evidence of how much alfalfa a sheep would consume, it was said that the court regarded the contract as fixing the manner in which the weight of the hay should be determined. It seems that this was construed by the trial court and by counsel for defendant as holding substantially that the only question to try was the identity of the stacks weighed. Objection was made to any testimony as to the statements of defendant that 400 cubic feet would make a ton; also attempts to exclude such evidence after it had been received. But whether because such assurances were a part of the conversation as to when the weighing should be done, or for some other reason, it was received; and it was permitted to be testified that the money would not have been paid before the stacks were measured had not these statements been relied upon. Plaintiffs also again offered evidence touching the amount of alfalfa which one sheep would consume, which was rejected. The defendant offered proof by expert hay men that 400 cubic feet would make a ton. This was rejected, and the ruling is complained of because the evidence sought to be introduced was to meet the issue and evidence of false assurances as to the method of measurement, and also because it would have aided the jury in ascertaining which party was right in the dispute as to which particular stacks were in fact weighed.

It is suggested that, if it could have been demonstrated that the 400 cubic feet theory is correct, it would have had a strong tendency, if not the inevitable effect, to show that the defendant must have been right in his contention as to the identity of the stacks weighed. So long as the plaintiffs did not concede the correctness of the defendant's system of measurement, but permitted their allegation of its falsity to stand, together with their assertion that it would fall one-third short, either the question of assurances as to its correctness should have been kept from the jury or else the proffered testimony should have been received. The contract fixed two methods of ascertainment—measuring and weighing. If 400 cubic feet in fact make a ton, any fraudulent intent on the part of the defendant would effect nothing, even if it proved to have existed; if not, any guaranty to that effect would have been equally potent whether made fraudulently or honestly. Hence in reality the question of fraud is in no effective sense in the case at all. It is also true that if the stacks had all been weighed, or if no dispute had arisen as to which ones were in fact weighed, the question of measurement would be entirely out of the case. But, in view of the sharp conflict in the evidence as to the identity of the two stacks selected and weighed by the plaintiffs, the correctness of the defendant's method of measurement became a matter of competent and material character, for it is not possible that a stack containing 10 tons by weight could contain one-third less than 4,000 cubic feet, if as a matter of fact 400 cubic feet make a ton.

[2] Complaint is found with some of the instructions for making prominent the alleged false guaranty and the reliance thereon, because accentuating and calling special attention to the idea of fraud to the prejudice of the defendant in the minds of the jury. With the issues remaining as they were, it was difficult to state them, or instruct, without including the matter of fraud, and, indeed, the defendant requested a number of instructions thereon, which were substantially given. This but makes it the more plain that the rejected testimony as to the system of measurement should have been received. On the other hand, it is insisted that the defendant's counsel led the court into the error of trying to confine the testimony to identity of stacks weighed, and that it should have no right to complain of the result. The fact remains, however, that the defendant sought to eliminate all question of measurement, but succeeded in eliminating only his own expert testimony relating thereto.

[3] Two jurors on the regular panel were discharged, when it was disclosed on their examination that they had been subpœnaed as witnesses for the plaintiffs. They were not called to testify. The controversy over this point is spirited. While no substantial prejudice appears to have resulted in this instance, the practice is not to be encouraged.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(101 Kan. 77)

AULTMAN & TAYLOR MACHINERY CO. v. SCHIERKOLK. (No. 20747.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. SALES ⚷124—RESCISSION ON GROUND OF FRAUD—EVIDENCE.

The evidence considered, and *held*, the dedefense of rescission on the ground of fraud was not established, because of failure to return or offer to return the property sought to be replevined, to the plaintiff at the place of sale. *Held*, further, the defense that the debt for which the property was claimed as security had been paid was not sustained.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303–312.]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR ⚷553(1)—RECORD—MATTERS CONSIDERED.

Statements of facts not shown by the record, but made in defendant's brief to aid his case, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2466–2471.]

Appeal from District Court, Washington County.

Replevin by the Aultman & Taylor Machinery Company against E. Schierkolk. Demurrer to defendant's evidence sustained, and he appeals. Affirmed.

Edgar Bennett and Charles W. Clarke, both of Washington, Kan., and T. H. Polack, of Marysville, for appellant. J. R. Hyland, of Washington, Kan., and Pulsifer & Hunt, of Concordia, for appellee.

BURCH, J. The action was one of replevin by a chattel mortgagee for a threshing machine. A demurrer was sustained to the defendant's evidence, and he appeals.

[1] The controversy was before the court on the occasion of a former appeal. Machinery Co. v. Schierkolk, 95 Kan. 737, 149 Pac. 680. As there indicated, the principal defense was rescission on the ground of fraud. The evidence disclosed that the sale was negotiated at Lincoln, Neb., and was completed by delivery of the engine at Lanham, Neb., the defendant paying the freight from Lincoln to Lanham. The evidence further disclosed no return of the engine to the plaintiff at the place of sale, or offer to return, except a conditional one. Frick Co. v. Fry, 75 Kan. 396, 89 Pac. 675; Cooper v. Ragsdale, 96 Kan. 772, 153 Pac. 516. Therefore the defense of rescission failed. Another defense was that the debt secured by the chattel mortgage had been paid before the action was commenced. The evidence, which need not be recited, failed to sustain the defense.

[2] Certain statements of facts not shown by the record made in the defendant's brief to aid his case cannot, of course, be considered.

The judgment of the district court is affirmed. All the Justices concurring.

(101 Kan. 172)

GERMAN-AMERICAN STATE BANK v. WOODWARD. (No. 20931.) *

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. INDEMNITY ⚷12 — OBLIGATION — DISCHARGE.

One of a number of parties who each contracts to indemnify a bank against loss to the amount of a certain share of that part of an obligation left after the application of the proceeds of a sale of certain property, or to deposit a sufficient sum to assure the payment of that share of the obligation, is not discharged by reason of the fact that the amount deposited in good faith by another of the contractors finally turns out to be insufficient to pay his share.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 26, 27.]

2. INDEMNITY ⚷9(1)—CONSTRUCTION OF CONTRACT—APPLICATION OF ASSETS—LIABILITY.

A baseball association was indebted to a bank. Directors of the association individually indemnified the bank against loss, each to the amount of one-seventh of tho indebtedness remaining after the application of the proceeds derived from the sale of tho assets of the association. The sale contemplated was a private sale. All the assets had been mortgaged to the bank. They were sold to the bank at chattel mortgage sale for $1,000. About five weeks later the bank sold the assets for $7,500. *Held* that, in an action against the indemnitors, the $7,500 should be credited on the debt of the association to the bank, and judgment should be rendered against the indemnitors for the remainder of the debt, in accordance with the terms of their contracts.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 16.]

Appeal from District Court, Shawnee County.

Action by the German-American State Bank against Chester Woodward. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Thos. M. Lillard, B. R. Wheeler, and John L. Hunt, all of Topeka, for appellant. E. D. McKeever, of Topeka, and A. E. Crane, of Atchison, for appellee.

MARSHALL, J. This action was brought to recover on three contracts. The case was tried by the court without a jury. The court made findings of fact and conclusions of law and rendered judgment in favor of the plaintiff. The defendant appeals.

Such findings of fact as are necessary for a consideration of the questions presented, are as follows:

"The Topeka Baseball Association was and is a corporation organized under and by virtue of the laws of the state of Kansas.

"That on the 5th day of August, 1912, the said Topeka Baseball Association was indebted to the plaintiff in the sum of $9,800, evidenced by certain promissory notes.

"That, in pursuance of the request of the state bank commissioner of the state of Kansas, the plaintiff demanded further security of the directors of the Topeka Baseball Association for the payment of their indebtedness to the plaintiff, and in pursuance thereto a certain contract in writing was executed and delivered to the plaintiff, a copy of which is as follows:

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*Rehearing denied July 11, 1917.

" 'In consideration of the German-American State Bank having agreed to carry the loan heretofore made by the Topeka Baseball Association, amounting now to $9,800, until the franchise, property, and players of said association can be sold, I hereby agree to indemnify said bank against loss to the amount of one-seventh of the balance of said sum remaining due after the application of the proceeds of the sale of said franchise, players, and all other property and assets of said association to the payment of said indebtedness: Provided, however, and this agreement is upon the express condition, that each of the remaining six directors of said association shall obligate himself to pay one-seventh of said deficit after exhausting the assets of said association as aforesaid, or shall deposit a sufficient sum to assure the payment of his proportion of said deficit, and this agreement shall not be binding upon the undersigned until all of said directors have obligated themselves as aforesaid.

" 'Dated Topeka, Kan., August 5, 1912.

" '[Signed] Chester Woodward.
" 'S. J. Bear.
" 'Arch M. Catlin.
" 'F. P. Metzger.
" 'Guilford Dudley.
" 'C. B. Merriam.'

"Afterwards, and on the 17th day of August, 1912, the said baseball association borrowed of the plaintiff the further sum of $3,000, which was evidenced by a note of that date.

"That at or about the time the plaintiff loaned the baseball association the said sum of $3.000 six of the directors of said baseball association individually executed an agreement of that date, which agreement is as follows:

" 'In consideration of the German-American State Bank having agreed this day to loan to the Topeka Baseball Association, at our request, $3,000 additional to the $9,800 already loaned to the said association, I hereby agree to indemnify said bank against loss to the amount of one-fifth of the balance of said sum of $3,000 remaining due and unpaid after the application of the proceeds of the sale of the franchise, players, and other property and assets of said association to the payment of all indebtedness due to the German-American State Bank: Provided, however, that in the event that the two directors, Mr. Henry Auerbach and Mr. Chester Woodward, shall also sign this agreement to indemnify, or shall deposit a sufficient sum with the German-American State Bank to assure the payment of his proportion of said deficit, then and in that event this agreement shall not be binding upon any of the undersigned for more than one-seventh of said deficit.

" 'Dated Topeka, Kan., August 17, 1912.

" '[Signed] Arch M. Catlin.
" 'S. J. Bear.
" 'C. B. Merriam.
" 'Guilford Dudley.
" 'F. P. Metzger.
" 'Chester Woodward.'

"The defendant, Woodward, was absent from Topeka at the time the other parties signed the agreement, but signed the same on his return three or four weeks later.

"That Henry Auerbach on December 16, 1912, for the purpose of complying with the provisions of said contracts of August 5 and August 17, 1912, deposited with the plaintiff the sum of $1,100 to assure the payment of his proportion of said deficit, and that said agreement and deposit was made by the said Auerbach, the remaining director of the Topeka Baseball Association, and the same was accepted by the bank in compliance with the terms of said agreement, and at said time, taking into consideration the value of the property, franchise, and players of the Topeka Baseball Association, it appeared upon reasonable grounds to be a sufficient amount to pay one-seventh of such deficit had the property been sold at the time.

"That on the 28th day of September, 1912, the Topeka Baseball Association borrowed from the plaintiff an additional sum of $2,000, which debt was evidenced by demand note executed by the baseball association in the sum of $2,000.

"That to secure the payment of said $2,000, or any deficit that might result after the sale of the franchise, property, and players of the Topeka Baseball Association and the application of the proceeds to the indebtedness of said ball association to the plaintiff, the directors, acting individually, entered into a further agreement with the plaintiff, a copy of said agreement is as follows:

" 'In consideration of the German-American State Bank having agreed this day to loan to the Topeka Baseball Association at our request $2,000, additional to the $9,800 and $3,000 already loaned to the said association, I hereby agree to indemnify said bank against loss to the amount of one-sixth of the balance of said sum of $2,000 remaining due and unpaid after the application of the proceeds of the sale of the franchise, players, and other property and assets of said association to the payment of all indebtedness due to the German-American State Bank: Provided, however, that in the event that the absent director, C. B. Merriam, shall also sign this agreement to indemnify, or shall deposit a sufficient sum with the German-American State Bank to assure the payment of his proportion of said deficit, then and in that event this agreement shall not be binding upon any of the undersigned for more than one-seventh of said deficit.

" 'Dated Topeka, Kan., September 28, 1912.

" '[Signed] Arch M. Catlin.
" 'S. J. Bear.
" 'Chester Woodward.
" 'Guilford Dudley.
" 'F. P. Metzger.
" 'C. B. Merriam.'

"That Henry Auerbach, September 30, 1912, in furtherance of the agreement, deposited with the plaintiff the sum of $300 to assure the payment of his proportion of said deficit, after the sale of the property of the Topeka Baseball Association, and the proceeds thereof were applied to the indebtedness of said association to the plaintiff, and that said deposit was made by the said Henry Auerbach in compliance with said agreement, and was so accepted by the plaintiff, and that under the circumstances existing at that time, and in view of the value of the property of the Topeka Baseball Association, it appeared upon reasonable grounds to be sufficient to pay one-seventh of the deficit if the property had been sold at that time for its value and the proceeds applied upon said indebtedness.

"At the time of the execution of each of said contracts of August 17 and September 28, 1912, the indebtedness from the baseball association to the plaintiff therein referred to was secured by a mortgage to the plaintiff covering the property of the association, and it was the understanding of the parties signing said contracts that the sale of the assets of the association, referred to therein, should be a private sale, and not a forced sale under the mortgage.

"After the execution of said contracts, and at the request of the plaintiff said ball association executed and delivered to the plaintiff a new mortgage dated June 1, 1914, covering all of its property and assets, including the franchise of the said ball association, for the purpose of securing the payment of the debt then owing to the plaintiff by the said ball association.

"That on the 30th day of June, 1914, five of the directors of said baseball association, one of whom was the defendant in this action, acting individually, executed and delivered to the plaintiff a contract, a copy of which is as follows: 'We, the undersigned, in consideration of the German-American State Bank of Topeka, Kan., renewing the existing indebtedness of the Topeka Baseball Association, and extending the time for the payment of the same to March 1, 1915, do hereby give our consent to the said renewal, and we do hereby further agree that our individual guarantees protecting said German-American State Bank against any loss, each to the extent of one-seventh of any balance or deficiency of the sum remaining due upon said debt after the application of the proceeds of the sale of the franchise, players, and all other property and assets of said association to the payment of said indebtedness, shall continue and shall cover any renewal notes covering said indebtedness executed by the Topeka Baseball Association.'

"That afterwards, and prior to the 18th day of January, 1915, the plaintiff, deeming itself insecure, declared the indebtedness due, took possession of the property described in the mortgage, and in pursuance of the terms of the mortgage, and after due notice, in accordance with the statutes of the state of Kansas, sold in bulk, at public sale, all of the property and assets, including the franchise of the Topeka Baseball Association, for the sum of $1,000.

"The sale conducted under said mortgage was held in the back or directors' room of the plaintiff bank at the place stated in the written notice of sale introduced in evidence, marked P-15, and made a part hereof. Copies of this notice were posted on telephone or telegraph poles within two or three blocks of the bank and place of sale at least ten days prior to the sale, said poles being public places within said city. The place of sale was about a mile and a half from the ball park owned by the baseball association, the lease covering which and all the buildings and improvements thereon were covered by said mortgage and sold at said sale. None of the property sold was exhibited at such sale.

"The property of the baseball association sold at said sale had no cash salable value at the time of such mortgage sale, or at the time it was sold to Savage, as hereinafter found. In connection with the franchise the property has a contingent value of from $5,000 to $10,000, depending largely on the sale of players held under contract.

"After the sale of said property, and with the knowledge of the circumstances of the sale and price for which the property was sold, the baseball association, acting through its directors, and upon the proposition made by the plaintiff that it and its directors should have ten days within which to repurchase the property for $10.000, which was to be in full payment of the indebtedness to the bank, tried to sell the property to one Savage. Being unable to sell the property within ten days, a further extension of time was asked for by them within which to sell the same, which further extension the plaintiff refused to grant.

"On March 3, 1915, the plaintiff, through one of its officers, sold to John Savage the property purchased at the mortgage sale by written contract of sale of said date, introduced in evidence and marked D-22, and made a part hereof, which sale was for the sum of $7,500, payable in a note of a new baseball corporation to be formed, for $5,000, indorsed personally by Savage, due in two years, with interest, with $15,000 of the capital stock of the new corporation deposited with the plaintiff as collateral security to the note, the balance of the purchase price, $2,500, to be paid in stock of said new corporation, as appears by the terms of said contract of sale.

"The plaintiff had performed the conditions and agreements of the contract of indemnity set up in the amended petition of plaintiff. It did not, however, wait upon the baseball association for the payment of all the indebtedness until March 1, 1915, the date named in the contract of June 30, 1914, a copy of which is set out in finding 14, but declared the indebtedness due and sold the property in January, 1915, as hereinbefore found, applying the sale price, $1,000, on the indebtedness. The balance of the indebtedness has not been paid.

"The defendant is indebted to the plaintiff in the sum of $2,278.72, the same being one-seventh of the deficit remaining unpaid after the application of the proceeds of the sale of the assets and property of the Topeka Baseball Association to the indebtedness hereinbefore found of the association to the plaintiff bank."

[1] 1. The defendant urges that, because Auerbach did not deposit a sum sufficient to discharge one-seventh of the obligation, the defendant is not liable on either of the first two contracts. The obligations described in these contracts amounted to $12,800, one-seventh of which was more than $1,800. Auerbach deposited $1,100 to cover his share of these obligations. There was nothing to show that either Auerbach or the bank fraudulently did anything to avoid Auerbach's depositing a larger sum. It must be assumed that they acted in good faith and took into consideration the value of the property of the defendant association. The property at that time had some value. The defendant should not be released from his obligation on account of the smallness of Auerbach's deposit, until it is shown that Auerbach or the defendant, or both, acted without good faith in the matter.

[2] 2. The defendant contends that he is not liable on either of the contracts for the following reasons: That there was no sale of the property such as was contemplated in the contracts; that the sale took place before March 1, 1915, in violation of the contract of June 30, 1914, and that the judgment rendered against him was for more than one-seventh of the loss sustained by the plaintiff. These propositions are so interwoven that they can best be discussed and disposed of together.

The chattel mortgage sale was a forced sale, made in violation of the spirit of all the agreements between the plaintiff and the defendant. The sale was within the terms of the contract between the plaintiff and the baseball association. The liability sought to be enforced was not the liability of the baseball association, but that of the defendant. The defendant's contract was to indemnify the plaintiff against loss. The loss sustained by the plaintiff was the difference between the value of the property at the time it was sold to Savage, and the amount of the plaintiff's claim against the baseball association. It was difficult to determine the value of the property and of the franchise sold to Savage. The amount for which the property sold at the chattel mortgage sale cannot be said to represent its value at that time. The amount named as the price paid by Savage for the property and the franchise was probably as near their value as could be ascertained. That amount was $7,500.

Auerbach, by depositing $1,100 to meet his share of the obligation under the contracts set out in the fifth and sixth findings of fact, and by depositing $300 to meet his share of the obligation under the contract set out in the tenth finding of fact, complied with those agreements on his part; and if the amounts deposited by him were not sufficient to pay one-seventh of the entire obligation, the loss occasioned thereby must be sustained by the plaintiff, and cannot be used to augment the obligation of Woodward. It does not appear from the abstract how this matter was determined by the trial court.

Seven thousand five hundred dollars should be deducted from the total debt of the baseball association, the payment of which was guaranteed by the defendant and his associates, and judgment should be rendered against the defendant for one-seventh of the remainder.

The trial court is directed to modify its judgment as herein indicated, and, upon being so modified, the judgment is affirmed. All the Justices concurring.

(101 Kan. 110)

NIESCHBURG v. NOTHERN et al.*

(No. 20893.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. CONTRACTS 🔑19—REVOCATION OF OFFER—ACCEPTANCE.

Where an offer is made by a vendor to assign his right in a certificate of purchase, issued under a foreclosure sale, for a certain sum if accepted within a fixed time, it may be revoked by him until it is accepted; but, if the vendee elects to accept the offer and gives notice of his acceptance within the time limited, such an accepted offer fixes the obligations of the parties and becomes a binding contract, and the execution of the assignment and the payment of the consideration must then be made within a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 57-60.]

2. CONTRACTS 🔑22(1), 24—OFFER—FORM OF ACCEPTANCE.

To be effective, the acceptance must comply with the terms of the offer, and, if it prescribes a method of signifying acceptance or the conditions upon which the acceptance must be made, such method or conditions must be followed; but, when it is not so prescribed, acceptance may be made by any legal means.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 67-77, 79-84, 87-92, 100-108.]

3. CONTRACTS 🔑16—MORTGAGES 🔑552—ASSIGNMENT OF CERTIFICATE OF PURCHASE — REASSIGNMENT—DEFENSE OF ILLEGALITY.

When the contract becomes effectual by an acceptance, the vendee may assign his rights in it to another, and it is held herein that the vendor, having recognized the validity of the assignment made by the vendee and the rights of the assignee, is not permitted thereafter to set up the defense that the assignment was illegal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 49-56, 71-92; Mortgages, Cent. Dig. § 1580.]

Appeal from District Court, Saline County.

Action by Albert F. Nieschburg against J. R. Nothern and others. Judgment for plaintiff, and defendant J. R. Nothern appeals. Affirmed.

David Ritchie, of Salina, for appellant. J. A. Fleming and Burch, Litowich & Royce, all of Salina, for appellee.

JOHNSTON, C. J. J. R. Nothern, who held a second mortgage on property belonging to W. T. Chase, foreclosed the same, bid in the property at sheriff's sale for $1,550, and afterward on February 10, 1916, offered to assign his interest in the property, under the certificate of purchase, to Chase for $1,200, providing the latter acted upon the proposition on or before Saturday the 12th of February. The following memorandum was made:

> "I hereby agree with W. T. Chase to take $1,200.00 in cash on or before Saturday night 2—12—1916, for my second mortgage on S. ½ S. W. ¼ 33—13—3 and release it of record with all expenses paid, and W. T. Chase agrees to either take or reject same on said date. J. R. Nothern. W. T. Chase."

The next day Chase's agent, Kell, telephoned an acceptance to Nothern, telling him the money would be ready for him, and arrangements were made at that time for the parties to meet the following day to close the transaction. Some time before the next day, Chase assigned his rights under this agreement to Albert F. Nieschburg, to whom he also conveyed his equity in the property. On the following day, Nothern and Kell met at the office of Nothern's attorney, who insisted that the proper method of transferring the certificate was by written assignment, and he, accordingly, drew up an assignment of the certificate to Nieschburg, and the instrument was signed and acknowledged by Nothern and his wife. Due to the fact that it was necessary to take the assignment out in the country for Mrs. Nothern's signature and the fact that the bank would be closed by the time it was returned, the parties all agreed to postpone the final transfer and payment until the following Monday. On Monday morning, Nothern refused to complete the transaction unless he received $1,400 for the assignment. On the previous Friday, Nieschburg had placed money in the bank for use in fulfilling his contract, but his offer of payment of $1,200 was refused.

Nieschburg brought this action to enforce Nothern's contract, and he alleged that the memorandum made on February 10th, through mutual mistake of the parties, failed to show the exact agreement made, and that the contract should be reformed to show that the defendant in consideration of $1,200 agreed to assign the certificate of purchase and his interest in the premises to Chase, and that the "second party agrees that he will on or before said time accept or reject the proposition of first party to accept said sum for said certificate of purchase, and if he

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*Rehearing denied June 15, 1917.

so accepts that he will pay to first party at said time said sum of money." The petition prayed for a specific performance of the contract as reformed. Defendant alleged that he was induced by Chase's agent, Kell, to make the $1,200 offer by false representations that the party who held the first mortgage on the premises, which was executed by defendant, was about to enforce it against the latter. It was also alleged that the agreement was without consideration, and that the offer made by defendant was withdrawn before acceptance or performance by plaintiff. The court found in favor of the plaintiff, ordering the contract to be reformed and decreeing that it be specifically enforced.

[1, 2] The merits of the controversy lie within a very narrow compass. Did the offer made by defendant and accepted by Chase become a binding and valid contract, or was it no more than an offer which defendant was at liberty to withdraw at any time before payment of the consideration was made? Defendant's agreement was an offer to sell and transfer his interest acquired under a certificate of purchase at a fixed price within a given time. It was subject to revocation until there was a valid acceptance of the offer. Although unilateral at its inception, it became bilateral and absolute when the offer was accepted according to its terms, and thereafter the obligations of the defendant and the vendee were mutual and could be specifically enforced. Chadsey v. Condley, 62 Kan. 853, 62 Pac. 663. The acceptance in such a case must, of course, correspond with the offer, and, if they accord, the agreement becomes complete and binding from the date of acceptance. Caldwell v. Frazier, 65 Kan. 24, 68 Pac. 1076. The reciprocal promises of the parties afforded sufficient consideration. The unequivocal promise of the vendee that the offer was accepted and that payment would be made when the assignment was executed on the following day consummated a valid contract. If the offer had prescribed a particular method of acceptance, or had prescribed certain conditions, compliance with such method or conditions would have been essential to a valid acceptance. There was nothing in the defendant's offer prescribing a method by which the vendee should signify his acceptance, and no question was raised by the defendant as to the sufficiency of the notice or the form of acceptance when they were given and made. The offer did not provide that it should not become binding and effective until payment or tender of payment was made, and if, when the offer was first made, the vendee had then agreed to accept it, the contract would at once have become binding, and the parties would have had a reasonable time to execute the assignment and make the payment.

In Breen v. Mayne, 141 Iowa, 399, 118 N. W. 441, there was an option to purchase land before a fixed time at an agreed price payable upon the delivery of the deed, and it was held that the vendee might indicate his acceptance within the specified time in any lawful method, and that the making of the deed and the payment of the purchase price were matters to be performed within a reasonable time and were not essential to the completion of the contract. See, also, Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544; Penna. Mining Co. v. Smith, Appellant, 207 Pa. 210, 56 Atl. 426; Penna. Mining Co. v. Martin, Appellant, 210 Pa. 53, 59 Atl. 436; Watson v. Coast, 35 W. Va. 463, 14 S. E. 249.

Here the defendant treated the acceptance as sufficient when it was made and agreed to complete the transaction and make the transfer on the following Saturday, which was within the time fixed in the offer; not only that, but he executed the assignment and procured his wife to join in the execution, and the delivery would have been made and the transaction closed on Saturday but for the agreement of the parties, made for their own convenience, to postpone the completion until the following Monday.

Defendant cites Winders v. Kenan, 161 N. C. 628, 77 S. E. 687, which holds that the acceptance must accord with the terms of the offer, and, if they do not accord, the parties are not bound. Some of the language used proceeds on the theory that something more than notice of acceptance is essential to a valid contract. However, the contract in that case was interpreted to mean that payments were essential to the acceptance of the offer, and it was also held that the vendee had never offered to pay the stipulated amount.

Ind. & Ark. Lbr. & Mfg. Co. v. Pharr, 82 Ark. 573, 102 S. W. 686, is also cited as opposed to the ruling herein. That case approves the rule that, if the optionee elects to accept an offer according to its terms within the time limited and gives notice of acceptance to the owner, the accepted offer becomes a binding contract. There, however, the letter written by the holder of the option was deemed to be insufficient to constitute an acceptance. It did not say that the defendant accepted the offer, and, besides, the letter showed that the steps which he proposed to take towards acceptance were not to be taken until after the expiration of the option.

[3] There is nothing substantial in the objection that the rights of Chase could not be assigned and transferred to the plaintiff. When the offer was accepted by Chase, it became a valid contract for the sale of the interest held by the defendant, and it was subject to assignment. When defendant was informed of the assignment, no objection was made upon that ground, nor in fact upon any other. The assignment of the certificate which was prepared and which was signed by the defendant was made to the plaintiff, and not to Chase, and by agreement it was left in the custody of defendant's attorney

until the transfer should be completed on the following Monday. Having recognized the validity of the assignment to plaintiff and his rights as assignee, it was too late for him to "mend his hold," when the action was brought, by an objection to the assignment to plaintiff.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 72)

FIRST NAT. BANK OF EUREKA v. WILSON et al. (No. 20740.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. BANKS AND BANKING 🔑201(3)—NATIONAL BANK — ACTS OF OFFICERS — DEFENSE OF ULTRA VIRES.

Where a national bank undertakes through its officers to assist a customer in the financial transaction of exchanging her land for certain lien notes and other property, and agrees to hold the deed conveying the land to the customer until the lien notes should be properly indorsed by the other party guaranteeing their payment, and the officers of the bank after receiving compensation for their services accept the notes without the proper indorsement and then deliver the customer's deed to the land, in violation of their agreement, by reason of which the customer suffers loss, the bank may not, when sued for the loss so occasioned and after enjoying the benefits of the transaction, set up the defense that the agreement made and the business done was in excess of its charter powers, nor escape liability upon the ground that the acts of its officers were ultra vires.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 996, 997.]

2. BANKS AND BANKING 🔑262 — NATIONAL BANK—ACTS OF OFFICERS—AGENCY.

Under the evidence, it is *held*, that the officers of the bank in making and carrying out the agreement were acting for the bank, and not for themselves individually.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001-1006.]

Appeal from District Court, Sedgwick County.

Action by the First National Bank of Eureka against Nannie Wilson and another, with cross-petition setting up a counterclaim. Judgment for defendants, and plaintiff appeals. Affirmed.

Howard J. Hodgson, of Eureka, and Campbell & Campbell, of Wichita, for appellant. Foulke, Matson & Wall, of Wichita, for appellees.

JOHNSTON, C. J. The First National Bank of Eureka brought this action against Nannie Wilson and Mamie E. Wilson upon a promissory note given in renewal of a note dated December 17, 1910. The defendants filed a cross-petition setting up a counterclaim to the bank's demand. The jury's verdict was in favor of the defendants, who recovered judgment for costs. The plaintiff appeals.

[2] The facts upon which the defendants' counterclaim was based were substantially as follows: About September, 1910, the defendant Nannie Wilson entered into an oral agreement with Ira A. Braden to exchange her land in Greenwood county and some personal property for certain land in Texas and five vendor's lien notes belonging to Braden. Desiring to have her agreement in writing and her interests carefully protected, she sought the assistance of the plaintiff bank, and the assistant cashier referred her to Ira P. Nye, then vice president of the bank. He undertook to draw up a contract showing the agreement between defendant and Braden, to look after her interests in the transaction, and to see that she was fully protected in the exchange of properties. The vice president was instructed to deliver the papers conveying the defendant's property to Braden upon the latter's fully complying with his part of the agreement, part of which was to furnish an abstract showing a good merchantable title to the Texas property and also to guarantee the payment of the vendor's lien notes by his indorsement. This part of the agreement as incorporated in the contract written by Nye was expressed as follows:

> "And to furnish abstract showing good merchantable title and to indorse, assign, transfer and set over to said first party (Nannie Wilson), five certain promissory notes for $1,158.60 each."

The first of these notes became due January 1, 1911. Nye delivered to Braden the papers conveying title to defendant's property, but accepted the vendor's lien notes from Braden indorsed without recourse, and the abstract which he accepted failed to show good title to the Texas land. The defendant was unable to collect payment of the lien notes when due, and, being unable to resort to Braden for their payment, had to take the land securing the notes, from which she was unable to realize their full value. This fact, together with the partial failure of title to the Texas land, subjected defendant to a loss much greater than the amount of the plaintiff's demand; but, the statute of limitations having run against her claim, she was not allowed to offset more than the amount of the plaintiff's claim against her. It was in expectation of realizing upon the first lien note due January 1, 1911, which was left with plaintiff bank for collection, that defendant had borrowed from plaintiff the $700 for which she executed her note. A renewal note for this indebtedness was the note sued upon in this action by plaintiff.

The bank contends that Nye acted for himself in the transactions with defendant, and not for the bank, nor as an officer of the bank. This was a question of fact upon which the evidence was conflicting, and it may safely be said that the finding that he was acting for the bank is not without support. Defendant was unwilling to close the deal unless the bank would take care of her interests and see that she had a square deal. She therefore applied to the bank, and its vice president undertook to protect her interests, and, among other things, to obtain the indorsement of the lien notes by Braden. At this time, she asked the vice president the question: "Will your bank stand back of me in this transaction? Will you draw the contract and stand by it?" And he answered, "Certainly." In the contract which was drawn up it was provided that the deeds, abstracts, and papers should be deposited in the bank. In the correspondence conducted in carrying out the transaction most of the letters written by Nye were signed as vice president. After the deed was executed by defendant and left in the bank and the question of its delivery arose, the vice president said:

> "You can trust this bank, Mrs. Wilson. It will be all right for you to leave this deed signed here, and we will see that it is not delivered to Mr. Braden until his securities are approved."

In one letter written by Nye to defendant as to the collection by the bank of one of the lien notes he said:

> "You see he made it payable to you, and without your indorsement we could not collect it."

Later, according to the defendant's testimony, the cashier told Mamie Wilson, the daughter of defendant, that the bank had handled the deal very badly for her mother, and added:

> "If I had been in the bank at the time, your mother should never have made the deal."

A number of other letters written by the vice president tended in some degree to show that it was a bank, rather than an individual, transaction. A charge of $20 was made for transacting the business, and this the defendant paid. Under the evidence, it must be held that the verdict settles the dispute as to the capacity in which the vice president was acting, and is a final determination that he was acting for the bank throughout the transaction.

[1] There is a contention, however, that the business was beyond the scope of the bank's charter powers, and that it could not be bound by the acts or agreements of its officers. The preparation of the contract and examination of abstracts are probably outside the scope of the ordinary business of banking, but the handling of the notes and securities and the collection of them were incidental to the banking business. It is well known that country banks exercise many of the duties and powers of loan and trust companies and assist their patrons in closing up financial deals like the one under consideration. But granting that the officers exceeded the charter powers of the bank to some extent, it undertook the business, transacted it in a way, and accepted compensation for its services and for the responsibility which it assumed. It failed to perform its agreement, in that it accepted the notes without indorsement and guaranty and delivered the executed deed of defendant which it was holding. Banks, like individuals, are liable for the wrongs which they commit and the injuries which they cause. In a consummated transaction wherein it gained an advantage and occasioned an injury and loss to defendant, it cannot defend by saying that it exceeded its charter powers when it made the agreement and undertook to perform it. It is not permitted to enjoy the benefits of a transaction like this, even if it be not strictly within the business of banking nor incidental to it, and escape liability upon the ground that its acts were ultra vires. Cooper v. National Bank, 40 Kan. 5, 18 Pac. 937; Town Co. v. Morris, 43 Kan. 282, 23 Pac. 569; Town Co. v. Russell, 46 Kan. 382, 26 Pac. 715; Town Co. v. Lincoln, 56 Kan. 145, 42 Pac. 706; Railroad Co. v. Johnson, 58 Kan. 175, 48 Pac. 847; Opera House Co. v. Loan Association, 59 Kan. 778, 53 Pac. 761; Harris v. Gas Co., 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. (N. S.) 1171.

It must be held therefore: First, that the agreement was made by the bank; and, second, that it is responsible for the injury and loss which resulted from the negligent acts of its officers.

The view taken disposes of the objections made to the rulings upon evidence and also to the instructions. We find no material error in the proceedings, and therefore the judgment is affirmed. All the Justices concurring.

(101 Kan. 231)

REYNOLDS v. CLARK et al., Board of Grainfield Rural High School Dist. No. 4 et al. (No. 21401.)

(Supreme Court of Kansas. June 19, 1917.)

(Syllabus by the Court.)

1. Schools and School Districts 🔑97(4)—Construction Bonds—Election—Statute.

After a rural high school district has been organized by proceedings conducted under chapter 311, Laws 1915, but not extending to the voting of bonds for the construction of a building or the selecting of a site, an election to determine the question of issuing bonds for the construction of a building may be called by the rural high school district board on petition presented to such board.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226.]

2. Injunction 🔑169 — Temporary Injunction—Dissolution—Notice.

When a temporary injunction has been granted after notice and a hearing, it is within the discretion of the district court, or judge, to hear a motion to dissolve the injunction, notice having been given, before the time for trial on the merits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 372, 384.]

Appeal from District Court, Gove County.

Action for injunction by S. S. Reynolds against Frank B. Clark and others as the Board of Grainfield Rural High School District No. 4 and others. Temporary injunction dissolved, and plaintiff appeals. Affirmed.

R. H. Thompson, of Gove, and T. L. Bond, of Salina, for appellant. J. P. Coleman, of Topeka, for appellees.

BURCH, J. The action was one to enjoin the issuance of bonds voted by a rural high school district to enable it to construct a rural high school building. A temporary injunction was dissolved, and the plaintiff appeals.

The district was organized under the rural high school district act, chapter 311, Laws 1915, but the organization proceedings did not extend to the voting of bonds or the selecting of a site for a building. For a year or more a rural high school was conducted in a rented building. In February, 1917, a petition for an election to vote bonds for the construction of a building was presented to the rural high school board. The board called the election, the election was held, and the result was favorable to the issuance of bonds. The plaintiff contends the election was void because the petition was not presented to the board of county commissioners, and the election was not called by that body.

Section 1 of the act authorizes electors residing in certain territory to form a rural high school district. Section 2 reads in part as follows:

> "Whenever a petition, signed by two-fifths of the legal electors residing in the territory of the proposed rural high school district, to be determined by an enumeration taken for this purpose, shall be presented to the board of county commissioners of the county in which lies the greatest portion of territory comprising said district, reciting the boundaries of said proposed district and requesting said board of county commissioners to call a special election to vote on establishing and locating a rural high school and to vote bonds for the construction of a high school building, the proposed location and the amount of the bonds proposed to be stated in the petition, it shall be the duty of the board of county commissioners forthwith to call a special election in said proposed district to vote on establishing and locating a rural high school and to vote bonds therefor." Gen. Stat. 1915, § 9348.

Section 3 provides among other things that if the territory of the proposed district embrace an incorporated city of more than 300 population, the vote in city and country must be taken and counted separately, and the proposition to form a rural high school district must carry in both city and country. Section 4 relates to canvass of the vote, report of the result, and election and term of office of rural high school district officers. Section 5 relates to district meetings, board meetings, and the levy and collection of taxes. Section 6 reads as follows:

> "The rural high school board shall have the care and control of all property belonging to the high school district and, except as herein provided, shall have the powers prescribed by law for school district boards. The rural high school board is hereby authorized to secure a site, selected as provided in section 2 of this act, either by donation or purchase; or such site may be condemned in the manner provided in chapter 86, Session Laws of 1909, for the condemnation of property for school sites in cities and school districts." Gen. Stat. 1915, § 9352.

Other provisions of the act cover the subjects of taxation when the district lies in two or more counties, supervision by the county superintendent, course of study, admission of pupils, and annexation of adjacent territory.

[1] Considering the entire act in the light of the purpose to be accomplished, the legislative intention is clear enough. To facilitate not merely the institution but the speedy institution of rural high schools, authority was given to organize a district, select a site, and vote bonds for the construction of a building, all at one election. Electors are not obliged, however, to avail themselves of all their privileges at once. They may organize a district, and the district may then elect officers, maintain a school, levy taxes, and otherwise fulfill the general purpose of the act. In the beginning, whether full advantage of the act be taken or not, it is necessary that some competent authority pass on the petition, call the election, canvass the returns, and declare the result. The board of county commissioners was chosen as the proper body to do this for a "proposed" district. After a district has been organized, there is no reason why it should not conduct a bond election and select the site for a high school building without outside assistance or supervision, as well as conduct other elections, construct the building, maintain the school, levy taxes, and perform other corporate functions.

The plaintiff argues that the provisions of section 6 relating to selection of a site are inconsistent with the view just stated. Those provisions of section 6 were intended as a grant and not as a limitation of power. If in the initial proceeding a site has been selected, the district board may acquire that site by donation, by purchase, or by condemnation. If no site were selected when the district was organized, then the board has the power prescribed by law for school district boards (Gen. Stat. 1915, § 8972), as well as the power of condemnation.

The district contains the city of Grainfield, an incorporated city of more than 300 inhabitants. The plaintiff says a separate vote of electors of town and country was not taken, as prescribed by section 3 of the act. Section 3 was designed to prevent the electors of an incorporated city from forming a rural high school district which includes outside territory, without the consent of a majority of the electors of the outside territory voting at the election. Bonds for the construction of a building are not mentioned. It is not necessary to decide whether or not the town and country vote on the proposition to issue bonds at an election called under section 2 should be taken and counted separately. The provision for a separate vote does not apply to an election held after a district has been organized.

[2] A matter of practice is presented. A temporary injunction was granted after notice and a hearing. Afterwards a motion to dissolve the temporary injunction was filed. Notice of hearing was given, and after a full hearing the motion was sustained. The appeal is from the order dissolving the tem-

porary injunction. Section 262 of the Civil Code (Gen. St. 1915, § 7160) contains this provision:

> "If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same."

The plaintiff says he ought not to have been put to the trouble and expense of a rehearing of the case before the time for trial on the merits arrived. That was a matter to be considered by the district court. Section 262 of the Civil Code does not forbid a re-examination of the grounds for restraint, and the vexation or injustice occasioned by a temporary order may quite outweigh the inconvenience and expense attending a hearing on a motion to dissolve.

The judgment of the district court is affirmed. All the Justices concurring.

(101 Kan. 135)

COLLINS v. MORRIS. (No. 20902.)*

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

NEW TRIAL 🔑74—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

In an action under the statute (section 11672, Gen. Stat. 1915) to recover treble damages for the destruction of several shade trees of plaintiff, the defendant admitted that because he was angry at the plaintiff he set fire to one of the trees, which all the evidence showed to be of some value. *Held*, that a verdict in defendant's favor should have been set aside, and a new trial ordered. Collins v. Morris, 97 Kan. 264, 155 Pac. 51.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 150.]

Appeal from District Court, Miami County.

Action by J. C. Collins against John Morris. Judgment for defendant, motion for new trial overruled, and plaintiff appeals. Reversed, and new trial ordered.

E. J. Sheldon and S. J. Shively, both of Paola, for appellant. A. Lane and M. A. Lane, both of Paola, for appellee.

PORTER, J. This action is to recover treble damages for the alleged destruction by defendant of six shade trees which plaintiff claims were growing on his land near the division fence between his farm and that of the defendant. The jury found generally for the defendant. A motion for a new trial was overruled, and the court rendered judgment against plaintiff for costs, from which he appeals.

At a former trial there was a judgment for the defendant, which on appeal was reversed. Collins v. Morris, 97 Kan. 264, 155 Pac. 51. The facts are set forth quite fully in the former opinion, and it will be unnecessary to restate them. The former judgment was reversed because it was manifestly contrary to the evidence, and therefore it was held that the court should have set aside the verdict and granted a new trial.

It was pointed out in the former opinion that there was error in the admission of certain testimony respecting the value of plaintiff's land for farm purposes before and after the trees were destroyed, from which testimony the court applied an erroneous measure of damages. Although the error was not properly raised by the appeal, the law was declared in the former opinion so that the correct rule might be applied on the second trial. There is no claim of error in respect to that matter in the present case.

In this appeal errors are alleged respecting the admission of testimony, the giving of instructions, and in permitting the jury over plaintiff's objection to be taken out to view the premises. We find no error in any of these rulings. It is true the trees had been destroyed a considerable time before the trial, but there was no abuse of discretion in sending the jury to view the place where the stumps of the trees stood; the court having fully charged the jury not to talk with any person in regard to the case. Moreover, there is no showing that anything improper took place.

The only claim of error which requires consideration is the refusal to grant a new trial. The former reversal was placed squarely upon the ground that the defendant admitted that he set fire to one of the trees, and, when asked why he did this and whether he intended to burn the tree, stated, in substance, that trouble arose between him and Collins because the latter claimed he was farming part of the public highway; that he was angry and set fire to the tree. His testimony at the second trial was to the same effect. In answer to questions asked him by counsel he testified:

> "Q. Did you burn one of those trees a little on the north side? A. I did. Q. Which one was it? A. There on the corner. Q. The west tree? A. Yes. Q. What were you doing there that day when you burned that tree? A. Plowing. Q. What, if anything, happened to you while you were plowing there? A. I was plowing. Of course, he said I was farming the public highway, and went down there and talked to their neighbors, and I took the brush and straw and burned that tree; that is what I did. Q. When you testified before I believe you said about catching your plow on a root? A. Oh, yes; I catched it to a root, and he monkeyed with me long enough and got me mad. Q. What did you do? A. I went after a bunch of straw. Q. Where did you go to get the straw? A. I went to Cap Collins' pasture, right opposite it. Q. How big a bunch of straw did you get? A. Well, a handful. Q. What did you do with the straw? A. Flung it over there and put a match on it and set it afire. Q. Which side of the tree did you set it on? A. On the south side. Q. Then after you put it on the south side of the tree what did you do? A. I went on plowing. Q. Did the straw just lay there? A. Oh, I lit the straw; I set it afire. Q. Did it scorch the tree a little? A. Just a little. Q. That was the west tree? A. Yes; that was the west tree; that is, on the corner. Q. Now, John, did

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 11, 1917.

> you ever burn any other tree along that line? A. No, sir. Q. Never burned any other tree? A. No, sir."

On cross-examination he was asked why he burned the tree, and replied:

> "Mr. Collins write for me and said I farmed 20 feet of the public highway;' that is where the trouble came in there."

Several other trees near the partition fence were shown to have been burned or girdled, and a finding that defendant was responsible for their destruction could not be said to have been unwarranted by the evidence. But he denied having anything to do with their destruction, and there was a conflict in the evidence as to their exact location and whether they were on the plaintiff's land or that of the defendant. Notwithstanding the general verdict is against the plaintiff as to all the other trees, it was just as much the duty of the trial court to set aside the verdict and to grant a new trial in the present instance as it was before. There was evidence of the value of the tree destroyed, although it was conflicting; but a shade tree such as all the evidence shows the one in question to have been has some value, a fact of which courts should and will take judicial notice. Upon the undisputed facts the jury had no right arbitrarily to find that such a tree had no value. It was the duty of the jury to find its value and allow the plaintiff three times the amount as damages for the willful trespass. Where a jury refuses upon undisputed facts to return a proper verdict, it becomes the duty of the court to set the verdict aside and order a new trial.

For the reasons stated, the judgment is reversed, and a new trial ordered. All the Justices concurring.

(101 Kan. 78)

SENNING v. ARKANSAS VALLEY INTERURBAN RY. CO. (No. 20768.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. CARRIERS 🔑304(1)—DUTY TO LICENSEE—NOTICE OF STARTING OF CAR.

In an action against an interurban electric railway company, the plaintiff's evidence tended to show these facts: He came to the company's station about dusk with friends who were leaving. After they had boarded the car, and before it started, he went down into the space between it and the station platform to look for a coin his little daughter had dropped. The platform was about 2 feet above the ground and 5 feet from the track. Passengers were received and discharged by a gangplank laid to the rear steps. As the defendant was stooping over, facing away from the car, it started without any signal being given, and as the front wheels turned in the other direction on a curve the rear step protruded and struck him. *Held:*

In the aspect most favorable to the plaintiff, he was but a licensee while in the place between the platform and the track, and the company owed him no duty to give him warning of the starting of the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1104, 1110–1114, 1124.]

2. CARRIERS 🔑304(1)—STARTING CAR—NEGLIGENCE.

If such a duty had been owing to him, the omission to perform it would have constituted mere negligence, and not wanton misconduct.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1104, 1110–1114, 1124.]

3. CARRIERS 🔑325—INJURY TO ONE AT STATION—CONTRIBUTORY NEGLIGENCE.

In that case his own failure to use reasonable care for his safety would bar a recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1348.]

Appeal from District Court, Sedgwick County.

Action by George Senning against the Arkansas Valley Interurban Railway Company. Demurrer to plaintiff's evidence sustained, and he appeals. Affirmed.

Earl Blake, W. A. Ayres, and C. A. McCorkle, all of Wichita, for appellant. Chester I. Long and A. M. Cowan, both of Wichita, for appellee.

MASON, J. George Senning, while standing beside the track of the Arkansas Valley Interurban Railway Company, was struck by the rear step of a car as it swung around a curve. He brought an action against the company on account of the injury received. A demurrer to his evidence was sustained, and he appeals.

The accident took place just as the car was leaving the station at Wichita. The platform used by passengers is about 15 feet wide and 2 feet high, and a little longer than one of the cars. The track is about 5 feet east of the platform, paralleling it for its full length, but a curve to the east begins about opposite its south end. Passengers are received and discharged by means of a gangplank placed from the platform (near the north end) to the rear step of the car. The plaintiff had gone to the station with friends who were leaving by the 7 o'clock car on the evening of October 14th. When the party reached the station, the car was already there. The plaintiff accompanied his friends to the gangplank, and after they had crossed it he walked south along the platform about two-thirds of the length of the car, to where his wife and little daughter were standing. He passed them, and stopped for 5 or 10 minutes talking with an acquaintance. His daughter then came to him and told him she had dropped a coin to the ground below the platform. He undertook to find it. He descended the steps at the south end of the platform, which brought him upon the sidewalk of the street, which runs east and west. He then walked north between the car and the platform about a third of the length of the car and lit several matches, looking for the coin. While he was stooping over, facing to the west, the car started, moving to the south. As the front wheels turned to the east on the curve, the rear steps protruded to the west and struck the plaintiff over the right kidney, causing the injury of which he complains. As the car stood upon the straight track, the overhang was about a third of the distance from the rail to the platform. The curve caused the rear steps to protrude, at the point where the plaintiff was struck, to about half the distance. The nearest the steps were brought to the platform by the swing at any point was about 2 feet. The negligence relied upon is the starting of the car without signal or warning. The defendant maintains that it owed no duty to the plaintiff in this regard, and that in any event his recovery is precluded by his own conduct.

[1] 1. The failure of the defendant's employés to give a signal before starting the car cannot be a basis of liability to the plaintiff, unless the omitted duty was one they owed to him (Express Co. v. Everest, 72 Kan. 517, 83 Pac. 817); and this could not be the case unless they knew of his presence or had reason to expect it. Clearly the ground between the track and the platform was not a place where passengers, passers-by, or bystanders were ordinarily to be looked for. The plaintiff, in the most favorable aspect, was a mere licensee, and the defendant was under no obligation to be actively vigilant in protecting him against danger. 33 Cyc. 767; 29 Cyc. 452; note, 17 L. R. A. (N. S.) 916; note, L. R. A. 1915B, 827. A suggestion is made that, as the plaintiff lit several matches, it may be inferred that he was seen by some of the defendant's employés; but we regard the inference as too remote. The petition did not allege that any employé saw the plaintiff.

[2] 2. Even if it should be assumed that the defendant did owe a duty to the plaintiff to give a signal before the car was started, the omission to do so could amount to no more serious misconduct than ordinary negligence. The evidence was not capable of supporting a reasonable inference that the defendant's employés anticipated or should have anticipated that the car would strike the plaintiff, and were indifferent to the consequences.

"One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence; his conduct must be such as to put him in the class with the willful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not." Railway Co. v. Baker, 79 Kan. 183, 189, 98 Pac. 804, 807 (21 L. R. A. [N. S.] 427).

In the case just cited it is said of the circumstances necessary to warrant characterizing as wanton the conduct of trainmen towards a person in a position of peril:

"Nor is it enough that they know some one might be in the place of danger; the probability must be so great—its obviousness to the employés so insistent—that they must be deemed to realize the likelihood that a catastrophe is imminent and yet to omit reasonable effort to prevent it because indifferent to the consequences." 79 Kan. p. 187, 98 Pac. 804, 21 L. R. A. (N. S.) 427.

[3] 3. If, therefore, the defendant did omit a duty which it owed to the plaintiff, the omission was not such as to create a liability, regardless of his own conduct. He knew, when he went between the platform and the track, that the car was likely to start within a short time. The place, although obviously not intended for the use of the public, was not necessarily one of great danger. There was abundant room for a person to stand between the platform and the nearest point to which any part of the car could approach it. The exercise of reasonable care required the plaintiff to keep himself beyond the reach of the end of the car as it swung around the curve. The outward swing of the rear steps as the front wheels took the curve was a matter of which he was chargeable with knowledge, since it is a common, if not universal, characteristic of such cars, and is a necessary consequence of the end of the car projecting over the wheels. Note, Ann. Cas. 1916E, 679; note, L. R. A. 1915C, 605, and prior notes in that series. Incidentally, if he was not aware of this phenomenon, then notice that the car was about to move would not have advised him of his danger.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 200)

STATE v. HANKS. (No. 21265.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. Arson 🔑18—Information—Insurance.

In a prosecution for arson in the third degree, an information is not fatally defective because it fails to allege that the property was at the time insured against loss or damage by fire.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 30–32, 34–37.]

2. Indictment and Information 🔑137(6)—Quashing—Grounds.

In a prosecution under section 98 of the Crimes Act (section 3425, Gen. Stat. 1915) for arson in the third degree, the information charged that defendant burned certain personal property which was insured in the Sun Insurance Office with the intent to defraud the insurer. A motion to quash the information on the ground that it did not allege that the property was insured against loss by fire is *held* to have been properly overruled.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 486.]

3. Arson 🔑37(1)—Conspiracy 🔑47—Sufficiency of Evidence.

The evidence examined and *held* sufficient to sustain the charge of conspiracy to burn and the burning of the property charged in the information.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 71; Conspiracy, Cent. Dig. §§ 105–107.]

4. Criminal Law 🔑944—New Trial—Newly Discovered Evidence.

For reasons stated in the opinion, the action of the trial court in denying the motion for a new trial is approved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2335.]

Appeal from District Court, Saline County.

William Hanks was convicted of arson in the third degree, his motion for a new trial was overruled, and he appeals. Affirmed.

G. A. Spencer and A. R. Buzick, Jr., both of Salina, for appellant. S. M. Brewster, Atty. Gen., and W. B. Crowther, L. W. Hamner, C. W. Burch, B. I. Litowich, and La Rue Royce, all of Salina, for the State.

PORTER, J. William Hanks and Robert Kelly were jointly charged with a conspiracy to burn and with having burned the furniture in Kelly's house, which was insured in the Sun Insurance Office, with the intent to defraud the insurer. Hanks demanded and was given a separate trial, and was tried and convicted of arson in the third degree. Kelly had made an oral and written confession as to the facts of the conspiracy and was a witness for the state. After the conviction of Hanks the charge against Kelly was dismissed.

On the hearing of the motion for a new trial Kelly repudiated his confession and attempted to exonerate Hanks. He was immediately arrested and placed in jail on a charge of perjury, and the hearing was postponed several days. Later he testified again reiterating his confession, and said that his repudiation had been procured at the suggestion of Hanks; that his brother had also told him that the attorneys for Hanks had said that, the charge against him having been dismissed, there was no reason why he might not testify in favor of Hanks. The court overruled the motion for a new trial, and Hanks appeals.

[1, 2] There was a motion to quash because the information did not allege that the insurance on the furniture was against loss by fire, and it is insisted that the information was fatally defective in this respect, because the insurance might have been against loss by tornado or lightning, or some hazard other than fire. The information was drawn under section 98 of the Crimes Act (section 3425, Gen. Stat. 1915), which defines arson in the third degree as:

> The burning of "any building, boat or vessel, or any goods, wares, or merchandise, or other chattels, which shall at the time be insured against loss or damage by fire, with intent to defraud or prejudice the insurer," etc.

The defendant cites in support of his contention the following statement from 5 Corpus Juris, 567:

> "So it must be alleged that the property burned was at the time insured against loss or damage by fire."

We have carefully examined nearly every case cited in the note. The majority of them do not support the text, although a few of them do. In many of the cases the indictment expressly charged that the property was insured against loss by fire, and in several of the cases the question is not mentioned. This court has already taken the contrary view in State v. Jessup, 42 Kan. 422, 22 Pac. 627, where an indictment worded substantially as the one in the present case was held sufficient as against a motion in arrest of judgment. The defendant seeks to draw a distinction between the two cases because there was no motion to quash the information in the Jessup Case. In the opinion, however, independently of the manner in which the question was raised, it was said:

> "We think that the averments of the information as made were in legal effect equivalent to a charge that the barn at the time of its destruction was insured against loss or damage by fire. It is a principle of pleading that whatever is included in, or necessarily implied from, an express allegation, need not be otherwise averred. Baysinger v. People, 115 Ill. 419 [5 N. E. 375]. The defendant, the court, and the jury all well understood from the information the offense with which the defendant was charged; this is too clear to admit of serious doubt." 42 Kan. 424, 22 Pac. 628.

In Hart v. State, 181 Ind. 23, 103 N. E. 840, the indictment alleged that the property was insured in a policy which had been issued by the Connecticut Fire Insurance Company of Hartford, Conn. The statute contained the same requirement as ours. The motion to quash was based solely upon the absence of a direct averment that the insurance was against loss or damage by fire. The court held the indictment sufficient "since the name of the company, standing alone, would warrant the inference that the insurance was against fire loss, and the further allegation that the property was fired to defraud that company compels such inference." Syllabus 4. It was said in the opinion that it was necessary to allege that it was insurance against loss or damage by fire, but that the Indiana Code of Criminal Procedure "requires no greater degree of certainty in criminal pleadings than is required in civil ones," and that "certainty, to a common intent, at least under the Code system, is attained when the pleading shall be deemed to allege all that can be implied from the direct allegations therein, by a reasonable and fair intendment." 181 Ind. 25, 103 N. E. 846.

In the case at bar the name of the insurance company mentioned in the information does not contain the words "fire insurance," but it seems absurd to contend that the defendant was not fully informed of the exact nature of the charge against him. The insurance must necessarily have covered the kind of loss naturally resulting from the act of setting fire to the property. If the insurance had been against some kind of loss other than by fire, burning the property could not have defrauded the insurer, and the purpose of the conspiracy is alleged to have been to defraud the insurance company. We regard the point, however, as too technical to invite serious consideration except for the fact that the numerical weight of authority appears to be in favor of defendant's contention. The conflict of authority can only be explained by the different attitude courts take as to the relative importance of purely technical omissions and defects in criminal procedure. In this state technical objections which do not affect the substantial rights of the defendant are disregarded. Section 293, Crim. Code; section 8215, Gen. Stat. 1915; State v. King, 165 Pac. 665.

[3] It is seriously insisted that "there is not one word of evidence in this record which even remotely tends to show the existence of a conspiracy between this appellant and Robert Kelly," and it is further said that the defendant was convicted solely upon the testimony of a confessed perjurer. Quite naturally the defendant did not testify directly to the conspiracy, but there was circumstantial evidence to prove it in addition to the confession of Kelly. The furniture burned was in a house rented by Robert Kelly and occupied by himself and family. He held a policy of fire insurance to the amount of $300 on the furniture. Guthrie, brother-in-law of Kelly, lived about two blocks distant. Hanks is a cousin of Guthrie. The evidence was that defendant, took an empty five-gallon oil can from Guthrie's to Kelly's house on the 20th of September. Later in the day he took the same oil can to a grocery store near by where he purchased and paid for five gallons of coal oil and ordered it delivered at the Kelly home. He returned to the Kelly home and ate his noon meal and his supper there. The oil was delivered about 5 o'clock in the afternoon and placed upon an outside back porch. After supper the Guthrie family, the Kelly family, and Hanks left the Kelly house together and walked to the post office. The Guthries and the Kellys went to an air dome show, leaving the defendant near the post office at about 8 o'clock. The fire was discovered at 10:20 p. m. The fire chief found that coal oil had been thrown upon the bed and furniture in one room where the furniture was practically consumed, and the bedding in another room was saturated with oil and partly burned. There was no connection between the two rooms. A hole had been broken in the wall between the kitchen and another room and a broom saturated with coal oil had been placed in the hole. The house was closed, and the fire had apparently burned very slowly. The five-gallon can was found to be half full of oil, and a two-gallon can used by the Kelly family stood in the kitchen half full. Hanks attempted to prove an alibi and had a number of witnesses testify that he went to bed that night very early. He had a room at another place.

[4] After Kelly confessed to the officers, he was taken into the presence of Hanks, where he accused Hanks of burning the property and of persuading him to allow it to be done. He accused Hanks of having told him after the fire that he had burned it and how he burned it. The officers asked the defendant if these statements were true, but he refused to answer. He was asked a number of times whether he would say that Kelly was lying, and said:

"No; he wouldn't say that he was."

He was certainly very considerate of Kelly's feelings. His attitude was the same as if he had remarked:

> "I would not go so far as to say that my friend here has made a false statement; possibly he may be laboring under a misapprehension of the facts."

There was abundant circumstantial evidence to sustain the charge of the conspiracy and of the offense of arson. Our views of the ruling denying a new trial are well expressed by the following observations made by the trial court in passing upon the motion:

> "The motion for a new trial contains all the statutory grounds, but the only one seriously urged in this hearing is that of newly discovered evidence. The defendant relies upon the State v. Keleher, 74 Kan. 631, 87 Pac. 738. I am familiar with the facts in that case, and I do not think I misapprehend the law as stated in that decision. Neither do I fail to recognize the wisdom and justice of that decision. But the case at bar is easily distinguished from the Keleher Case.
>
> "Immediately after the conviction of Hanks and the dismissal of Kelly, Hanks began to importune Kelly to repudiate the statement made by him to the county attorney. It will be noted

that he did not say to Kelly: 'Kelly, you have done me a great wrong. The statement you made to the county attorney is false, and you know it is false. That statement helped to convict me, and I want you to right that wrong. I want you to be a witness for me at the hearing of my motion for a new trial, and I ask you to say to the court that I am innocent, that I had nothing to do with the transaction.' What he did say to Kelly was: 'Now, Kelly, you are out of danger. The case against you has been dismissed. No one can trouble you any more. I want you to repudiate your statement to the county attorney and swear that I had nothing to do with setting fire to the furniture.' And it appears that it had required several weeks of persuasion to get Kelly to repudiate that statement and to testify at this hearing as he has testified.

"The defendant has had a fair trial. The verdict of the jury is a righteous verdict, and the court can without hesitation approve it. Having observed what occurred at the trial of this case, including the demeanor of the witnesses, as well as all the proceedings in this hearing, and having no doubt whatever of the defendant's guilt, I feel that to grant a new trial simply because Kelly has been induced to repudiate a confession that I firmly believe was true would be to make of this case a ridiculous farce."

The judgment is affirmed. All the Justices concurring.

(101 Kan. 195)

GRAY v. BOARD OF COUNTY COM'RS OF SEDGWICK COUNTY et al. (No. 21260.)

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT 🔑348—WORKMEN'S COMPENSATION ACT—GENERAL PURPOSE.
The general purpose of the Workmen's Compensation Act (Gen. St. 1915, § 5896 et seq.) is to provide for compensation to workmen injured in hazardous employments carried on for the purpose of business, trade, or gain.

2. MASTER AND SERVANT 🔑364—WORKMEN'S COMPENSATION ACT—EMPLOYERS SUBJECT—COUNTY—"TRADE OR BUSINESS."
A county in resurfacing a county road is not engaged in trade or business within the terms or operation of the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business; Trade.]

Johnston, C. J., dissenting.

Appeal from District Court, Sedgwick County.

Suit under the Workmen's Compensation Act by G. S. Gray against the Board of County Commissioners of Sedgwick County, Kan., and others. Demurrer to petition overruled, and the defendants appeal. Order overruling demurrer to petition reversed and cause remanded, with directions to sustain the demurrer.

Ross McCormick and Glenn Porter, both of Wichita, and H. O. Caster, of Topeka, for appellants. Campbell & Campbell, of Wichita, for appellee.

WEST, J. The plaintiff was employed by the county commissioners to work with his team hauling gravel for use on a county road in Sedgwick county, which the board and engineer were grading and surfacing. While thus engaged his foot slipped and was caught under the wheels of his loaded wagon and injured. He sued the county under the Workmen's Compensation Act. A demurrer to the petition was overruled, and the county appeals, averring that it was not an employer engaged in trade or business within the terms of the statute.

[1] The general scheme of this legislation has been to enable those engaged in operating hazardous industries to compensate workmen injured therein and add the cost to the price of the product, thus extending the burden to the consumer.

[2] Assuming without deciding that hauling gravel from the gravel pit to place on a public highway is within the act on the theory that the employment is "on, in or about a * * * mine or quarry" (section 5900, Gen. Stat. 1915; section 5903, defining "mine"; section 5903, subd. D, defining "quarry"), the question arises as to whether the county was an employer engaged in its trade or business. Section 5900 provides:

> "This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain. * * *"

This section seems to cover first employment in the course of the employer's trade or business in certain places or kinds of work, and, second, all employments dangerous in the way mentioned and conducted for the purpose of business, trade or gain. The words "county and municipal work" were added by the Legislature of 1913, and if applied only to the case of one who contracts to do county or municipal work and employs workmen therein, are clear enough. But running through the entire language are the two ideas not only of an employment in certain classes of work, but an employment therein by an employer in the course of his trade or business conducted for a profit. The provisions of the statutes of various other states are quoted showing that in many of them the clear use of terms has left the matter as to municipalities free from doubt, but they do not aid much in the construction of the statute before us. As applied to this case the amended provision may be thus read:

> "This act shall apply only to employment in the course of the employer's trade or business on, in or about * * * county and municipal work, and all employments wherein a process * * * is carried on, which (employment) is conducted for the purpose of business, trade or gain: each of which employments (all those previously mentioned) is hereby determined to be especially dangerous * * * and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen."

If engaged in county work in the course of employer's trade or business for profit the workman is within the statute, whether the work is actually hazardous or not, such work being deemed and declared dangerous. Agricultural pursuits and employments incident thereto are declared non-hazardous and exempt. In amending the section it was the intention to add county and municipal work and exclude agricultural work, thus changing the kinds of employment to which the act was to apply. It was a change in employments, not in employers. Before the amendment a contractor doing county or municipal work was not within the statute, unless engaged in doing work actually hazardous. Now such work is in effect made hazardous by being declared so and brought within the operation of the act. The definition of "employer" was left as before to include "any person or body of persons corporate or incorporate, and the legal representatives of a deceased employer or the receiver or trustee of a person, corporation, association or partnership." But persons corporate or incorporate in order to be employers within the act must employ the workmen in the course of their trade or business, terms which do not naturally or properly apply to a county in the administration of its affairs. "Business" has been held to be synonymous with "calling," "occupation," or "trade," and defined as "any particular occupation or employment engaged in for a livelihood or gain." City of Topeka v. Jones, 74 Kan. 164, 86 Pac. 162, 87 Pac. 1133.

Under the provisions of section 8765 of the General Statutes of 1915, the county engineer or township trustee was required to keep certain roads in repair and authorized to enter upon adjoining land and carry away gravel, the expense thereof to be allowed by the highway commissioners and paid by the board of county commissioners when such matter is used upon a county or state road. Counsel in his brief asks:

> "When Sedgwick county undertook to operate a sand pit and to build or resurface the North Lawrence Avenue road by direct employment of labor, instead of by contract, the county doing the identical work that a contractor is now doing on the South Lawrence Avenue road, was it exercising a governmental function?"

In Pfefferle v. Com'rs of Lyon Co., 39 Kan. 432, 436, 18 Pac. 506, 508, it was said of counties:

> "They are usually denominated quasi corporations, and their principal functions are governmental and political, and not private or of a strictly corporate character. Counties are principally mere political subdivisions of the state, mere instrumentalities of the state government, brought into existence merely for the purpose of aiding and assisting the state in promoting justice, in preserving peace, quiet and good order in the state, and of promoting the welfare and happiness of the citizens thereof; and these objects are the ones which counties are designed to subserve when they are authorized to build, own, and keep county jails. These objects do not partake at all of a private character; and they are not engaged in as business transactions, nor for the purpose of increasing the wealth of the county as an organization."

In Silver v. Clay County, 76 Kan. 228, 91 Pac. 55, it was held that counties are mere auxiliaries to the state government, and partake of the state's immunity from liability, and are in no sense business corporations. In that case damages were sought for the abandonment of a highway and the removal of a bridge. In the opinion it was said that since the organization of the state it has been the duty of counties and townships to maintain public roads and bridges. In Shawnee County v. Jacobs, 79 Kan. 76, 81, 99 Pac. 817, 819 (21 L. R. A. [N. S.] 209), it was held that a county engaged in building a bridge upon a public highway acts as a subdivision of the state government, and is not liable for the negligent performance of such work unless expressly made so by statute. In the opinion it was said:

> "The duty of building bridges and maintaining the public highway has devolved upon the counties and townships of this state since its organization. In the performance of this duty the county acts as an agency of the state, and is no more liable for its acts while so engaged than the state itself would have been if doing the same work."

In Griswold v. City of Wichita, 99 Kan. 502, 504, 162 Pac. 276, 277, an action to recover for the death of a policeman killed in the discharge of his duties, in holding that the deceased was not a workman as defined by the compensation act, and in speaking of th amendment of 1913 adding the words "county and municipal work," it was said that it may have been the intention of the Legislature to relieve any doubt that might exist as to the application of the act to county and municipal work "which is conducted for the purpose of business, trade or gain," "provided the nature of the work is such as to render it especially dangerous and hazardous to life and limb of the workmen engaged therein." It was also said that the theory of the act is that the employer may without loss to himself distribute the burden upon the consumers which constitute the public. "Many good reasons might be suggested for including within the scope of the act workmen employed in hazardous enterprises by cities engaged in conducting a business for profit, as electric light or waterworks plants, because a city, like any private individual engaged in trade or business, could pass on to the public at large the burden by adding to the cost of the service. But where a city is engaged merely in the exercise of its governmental functions we think it clear that the workman, no matter how hazardous his employment, would not come within the spirit and purpose of the compensation act any more than the clerks and stenographers in the case of Udey v. City of Winfield [97 Kan. 279, 155 Pac. 43], supra. So that even though a policeman be regarded as a workman in the employ of the city, and notwithstanding the performance of his duties places him at times in a dangerous and hazardous situation, still, the employer, the city, is not engaged in trade or business, and therefore a policeman is not within either the spirit or letter of section 2 of the act, which limits its application to persons employed for the purpose of the employer's trade or business." 99 Kan. p. 506, 162 Pac. 277.

The distinction between cities and counties was pointed out in Beach v. Leahy, 11 Kan. 23, and referred to in Fisher v. Township, 87 Kan. 674, 677, 125 Pac. 94, 41 L. R. A. (N. S.) 1074, Ann. Cas. 1914A, 554, and Haddock v. McDonald, 98 Kan. 628, 159 Pac. 402. Cities have been held liable for certain acts or omissions from which counties are relieved, and in view of the unvarying rule to relieve the latter from all liability not expressly imposed by statute it would be a departure to hold the defendant county liable. In Udey v. City of Winfield, 97 Kan. 279, 155 Pac. 43, and Knoll v. City of Salina, 98 Kan. 428, 157 Pac. 1167, the question before us was not raised. It is now presented for the first time. It must be held that the county was not engaged in trade or business so as to bring this case within the application of the compensation act.

The order overruling the demurrer to the petition is reversed, and the cause remanded. with directions to sustain such demurrer.

BURCH, MASON, PORTER, MARSHALL, and DAWSON, JJ., concurring. JOHNSTON, C. J., dissenting.

(101 Kan. 228)

ROBERTS et al. v. CITY OF OTTAWA.

(No. 21256.)

(Supreme Court of Kansas. June 9, 1917. Rehearing Denied, July 11, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT 🔑364—WORKMEN'S COMPENSATION ACT—EMPLOYER—CITY.

A city in constructing a lateral sewer, while exercising its proprietary power, is not engaged in an enterprise involving any element of gain or profit, and therefore is not within the terms or operation of the Workmen's Compensation Act (Gen. St. 1915, § 5900).

Johnston, C. J., dissenting.

Appeal from District Court, Franklin County.

Action by Fannie Roberts and others against the City of Ottawa. Judgment for plaintiffs, and defendant appeals. Reversed.

F. M. Harris, of Ottawa, for appellant. W. S. Jenks, of Ottawa, for appellees.

WEST, J. The plaintiff sued for the death of her husband caused by the caving in of a lateral sewer in which he was at work. The plaintiff recovered, and the defendant appeals.

Some point is sought to be made touching the failure of the deceased to use certain safeguards, but the only material question concerns the applicability of the Workmen's Compensation Act to the defendant city in this case. A lateral sewer to be paid for entirely by property owners and in no part by the city at large was to be built and the work was let to certain men who employed the deceased. The specifications contained many provisions to the effect that the work was to be done under the supervision of the city engineer or such assistants as might be placed in charge of the work by the mayor and council. Incompetent persons engaged upon the work were to be discharged upon the written requisition of the engineer and in various ways not necessary to recount the construction of the sewer was to progress under his supervision.

It is claimed by the city that in constructing this sewer at the sole expense of the property owners it was not engaged in trade or business, but in a purely health measure carried on under the governmental side of its activities. On the other hand it is urged that the city is within the act because it was engaged in its municipal business, and although it had let the work out to contractors it was still sufficiently in charge thereof to be within the purview of the statute. This is a companion case to Gray v. Com'rs of Sedgwick County, 165 Pac. 867, just decided, a somewhat different question, however, being involved. Was the city engaged in its trade or business within the meaning of section 5900 of the General Statutes of 1915? That the rule applying to cities is quite different from that affecting counties and other quasi municipalities is indicated in the decision referred to and authorities therein cited. In Freeman v. Chanute, 63 Kan. 573, 66 Pac. 647, in distinguishing between the different powers of a city, it was said:

> "In the exercise of its quasi private or corporate power a municipality is like a private corporation, and is liable for a failure to use its power well or for an injury caused by using it negligently. In building its waterworks, gas, electric light plants, sewers, and other internal improvements which are for the exclusive benefit of the corporation, it is in the exercise of its quasi private power and is liable to the same extent as are private corporations." 63 Kan. 577, 66 Pac. 648.

In Bowden v. Kansas City, 69 Kan. 587, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955, the following expression from Johnston v. District of Columbia, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75, was quoted with approval:

> "But the construction and repair of sewers according to the general plan so adopted are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured." 69 Kan. 593, 77 Pac. 575, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955.

In the opinion itself it was said:

> "When a municipal corporation assumes the performance of a public duty which was permissive only and enters upon the discharge of such duty, and through the negligent performance thereof by its authorized agents one is injured either in person or property, the corporation cannot escape liability by saying that the performance of this duty was not imperative."

In Fisher v. Township, 87 Kan. 674, 125 Pac. 94, 41 L. R. A. (N. S.) 1074, Ann. Cas. 1914A, 554, numerous authorities were cited touching the different sorts of liability attaching to cities and merely quasi corporations, and it was said:

> "While the soundness of this distinction has been questioned it is too firmly fixed in the jurisprudence of this state, following the weight of authority elsewhere, to be overturned except by legislative action."

In Butler v. Kansas City, 97 Kan. 239, 155 Pac. 12, L. R. A. 1916D, 626, Hibbard v. City of Wichita, 98 Kan. 498, 159 Pac. 399, L. R. A. 1917A, 399, and Frost v. City of Topeka, 98 Kan. 636, 161 Pac. 936, a pesthouse, a public park, and a detention hospital, respectively, were involved and held to concern only the governmental action of a city.

Under the rulings referred to distinguishing between a city's governmental and proprietary powers the building of the lateral sewer in question doubtless comes within the latter rather than the former. But, as pointed out in the Gray Case, in order to bring the city within the statute this proprietary work must have been in the nature of a business or trade involving the idea of profit or gain. Certainly the construction of a lateral sewer to be paid for by the property owners of a given sewer district is not trade or business in the sense of profit, or in any commercial sense. The question of subcontractor is discussed by counsel, but section 4 of the act (section 5898) imposes on the principal only such liability as would rest on him had he employed the workman himself. Hence the question is not one requiring further discussion.

If the Legislature intended to bring cities and counties within the operation of the act it is remarkable that no apt or clear language indicating such intention was used. On the contrary, section 2 of chapter 218 of the Laws of 1911—the original act—provided for an election in certain cases involving "the individual negligence * * * of the directors or of any managing * * * agent of such employer if a corporation, or of any of the partners if such employer is a partnership." The term "managing agent" does not naturally or ordinarily apply to cities. Section 16 (section 5910) provides that: "Employers affected by this act shall report annually to the state commission and factory inspector," certain things including particulars as to all releases of liability, the penalty for failure to report being the invalidation of such releases. Can it fairly be said that the Legislature intended to require these reports from cities and other municipalities?

The statute must be liberally construed, but the courts cannot go beyond the Legislature and add what was omitted, or change the character and manifest object, purpose, and limitations of the enactment. There being an utter absence of all elements of business or trade in the usual sense and meaning of the words and no possibility of gain to the city by way of profit out of the work it was doing or having done, it must be held that the compensation act does not apply.

The judgment is therefore reversed.

BURCH, MASON, PORTER, MARSHALL, and DAWSON, JJ., concurring. JOHNSTON, C. J., dissenting.

(101 Kan. 37)

FARMERS' & MERCHANTS' STATE BANK OF CONCORDIA v. BOARD OF COM'RS OF CLOUD COUNTY. (No. 20675.) *

(Supreme Court of Kansas. June 9, 1917.)

(Syllabus by the Court.)

1. ANIMALS 🔑32—CONDEMNATION—CERTIFICATE—ATTACK.

In an action against a county founded upon a certificate issued by the state live stock commissioner, reciting the condemnation of certain cattle as infected with tuberculosis, and ordering payment to their owner of the amount fixed by the appraisement, such certificate is not open to attack except on account of fraud, collusion, or similar misconduct. Following Cory v. Graybill, 96 Kan. 20, 149 Pac. 417.

[Ed. Note.—For other cases, see **Animals**, Cent. Dig. § 82.]

2. ANIMALS 🔑32—CONDEMNATION—CERTIFICATE—FRAUD.

In such a case evidence that the appraisers, by advice of the live stock commissioner, appraised the cattle at their sound value, has no tendency to show fraud or its equivalent.

[Ed. Note.—For other cases, see **Animals**, Cent. Dig. § 82.]

3. APPEAL AND ERROR 🔑289—REVIEW—EXCLUSION OF EVIDENCE.

A ruling excluding certain evidence *held* not to be reviewable because it was not produced at the hearing of the motion for a new trial.

[Ed. Note.—For other cases, see **Appeal and Error**, Cent. Dig. §§ 1691-1696.]

4. ANIMALS 🔑32 — CONDEMNATION — ACTION ON CERTIFICATE—PROOF.

In such a case it was not necessary for the plaintiff to plead that the cattle were not within certain excepted classes for which no compensation is allowed, nor to prove in the first instance any fact other than the issuance of the certificate.

[Ed. Note.—For other cases, see **Animals**, Cent. Dig. § 82.]

Appeal from District Court, Cloud County.

Action by the Farmers' & Merchants' State Bank of Concordia, Kan., against the Board of County Commissioners of Cloud County, Kan. Judgment for plaintiff on a directed verdict, and defendant appeals. **Affirmed.**

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 21, 1917.

M. V. B. Van De Mark and Sturges & Sturges, all of Concordia, for appellant. Pulsifer & Hunt and Clyde L. Short, all of Concordia, for appellee.

MASON, J. The state live stock commissioner issued to M. P. Knudson three certificates stating that cattle belonging to him had been condemned as being infected with tuberculosis and disposed of in accordance with the statute (Gen. Stat. 1915, §§ 11083–11086), and ordering the payment by Cloud county of half their appraised value, and in the case of four animals, which a post mortem examination showed not to have been infected, of the whole value. Knudson assigned the certificates to the Farmers' & Merchants' Bank of Concordia. The bank presented them for payment, and on this being refused brought an action upon them against the county. A verdict was directed in favor of the plaintiff, on which judgment was rendered. The defendant appeals.

[1] 1. A reversal is asked principally on the ground that the defendant was not allowed to introduce evidence tending to show that irregularities were committed with respect to the condemnation of the cattle, that the appraisement was excessive, and that the cattle were brought into the state under such circumstances that compensation to the owner is forbidden by the statute. It has already been determined in a mandamus for the payment of a similar certificate (and the rule is necessarily the same in an action like the present) that the certificate given by the live stock commissioner is conclusive upon the county in the absence of fraud, collusion, or similar misconduct. Cory v. Graybill, 96 Kan. 20, 149 Pac. 417.

[2] 2. The defendant maintains that the evidence introduced and offered was sufficient to take to the jury the question of fraud in the appraisement. Its evidence on this point was mainly to the effect that the cattle were appraised at too high a figure. This had no tendency to show fraud. State v. White, 82 Kan. 777, 109 Pac. 402. There was also testimony, however, that the appraisers, under the advice of the assistant live stock commissioner, valued the cattle as if they were not diseased. If an appraisement were shown to have been made under a radical mistake of law as to the proper basis of valuation, it might be set aside on the ground that it did not represent the judgment of the appraisers as to the matter committed to them. See, in this connection, 2 Page and Jones on Taxation by Assessment, § 672; 26 Cyc. 162; 28 Cyc. 1168; Notes 7 L. R. A. (N. S.) 525, 98 Am. St. Rep. 871; State v. Stockwell, 7 Kan. 103. "But the statute does not contemplate that a condemned animal shall be appraised at the value of the carcass because diseased and because it is to be slaughtered at once. If this were true, the alternative given the owner by section 23 (Gen. Stat. 1915, § 11101) would amount to nothing." Cory v. Graybill, supra. The law manifestly intends that the cattle condemned as tubercular, upon which disease has produced no effects visible to ordinary observation, shall be appraised at their sound value. Its policy is that an animal which after expert examination is believed to be infected shall be killed, the loss to be borne wholly by the public if the belief proves ill founded, and otherwise to be shared equally with the owner. To make a deduction from the apparent value of the suspected animal because of the suspicion would defeat the purpose of the statute.

[3] 3. The defendant called the live stock commissioner as a witness and asked him whether he had made any inquiry as to the origin of the cattle or as to how long they had been in the state. An objection to questions of this character was sustained. The defendant then offered to prove that the cattle were brought into the state in violation of the rules of the live stock sanitary commission, and the offer was rejected. In the defendant's brief it is argued that error was committed in these rulings because the evidence if admitted would have had a tendency to show that the commissioner made no investigation as to the origin of the cattle, and neither knew nor cared where they came from, and that such conduct tended to prove fraud and collusion. From the abstract it appears that no offer in this connection was made at the trial beyond what has just been stated—that no explicit suggestion of a want of good faith on the part of the commissioner was made in connection with the offer. And upon the hearing of the motion for a new trial there was no showing that in fact the commissioner had not investigated the origin of the cattle. Therefore no ruling in connection with this matter is reviewable. Code of Civil Procedure, § 307 (Gen. St. 1915, § 7209).

[4] 4. These considerations practically dispose of the case, and only brief mention need be made of the complaints of specific rulings. The petition is criticized for its failure to allege facts showing that the cattle were not within any of the classes for which under the statute no compensation is to be made. Inasmuch as the certificates were sufficient to make a prima facie case, and were only assailable for fraud or its equivalent, it was not necessary for the plaintiff to plead the nonexistence of the exceptional conditions that would have prevented liability on the part of the county. Objections are made to the competency of evidence introduced by the plaintiffs showing the disposition of the cattle. As the certificates were sufficient in themselves until successfully attacked the introduction of other evidence by the plaintiff, although unnecessary, could not have been prejudicial. Complaint is made that the order to pay was addressed to the county in-

stead of to the board of county commissioners, but the difference in the form of expression is not important. The official title of the county as a litigant is "the board of county commissioners" (Gen. Stat. 1915, § 2532); but doubtless any apt designation would serve the same purpose.

The judgment is affirmed. All the Justices concurring.

(101 Kan. 44)

PATTERSON v. UNCLE SAM OIL CO.

(No. 20682.)

(Supreme Court of Kansas. June 9, 1917.)

Appeal from District Court, Sedgwick County. Action by George W. Patterson against the Uncle Sam Oil Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded, with directions to grant a new trial upon terms to be imposed by the court.

Redmond S. Brennan, of Kansas City, Mo., for appellant. Dedrick & Dedrick and Adams & Adams, all of Wichita, for appellee.

PER CURIAM. This case was submitted in connection with the foregoing case of Hortense Patterson v. Uncle Sam Oil Co., 165 Pac. 661; and, the questions in issue being substantially identical in the two cases, the judgment in this case is also reversed, and the cause remanded, with directions to grant a new trial upon terms to be imposed by the court.

(97 Wash. 43)

MEZGER et ux. v. HAZELWOOD IRRIGATED FARMS CO. et al. (No. 13766.)

(Supreme Court of Washington. June 19, 1917.)

1. Vendor and Purchaser 🔑110—Rescission of Contract—Grounds.

The fact that trees had not been properly cared for would not furnish a ground for rescission, by the purchaser, of a contract for the purchase and sale of real estate; but the remedy for breach of that portion of the contract would be an action for damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 196, 197.]

2. Vendor and Purchaser 🔑44—Rescission of Contract—Evidence—Sufficiency.

In an action by the purchaser, seeking to rescind a contract for the purchase of real estate, on the ground that the vendor fraudulently represented that the land was suitable for a home, evidence *held* to support a finding that the representations made by defendants were made in good faith, and were in fact true, and that the land was suitable for a home site.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69–76.]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by George E. Mezger and wife against the Hazelwood Irrigated Farms Company and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Carl Ultes, Jr., of Spokane, for appellants. Cullen, Lee & Matthews, of Spokane, for respondents.

MAIN, J. The purpose of this action was to rescind a contract for the purchase of real estate. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and a judgment denying the rescission. From this judgment, the plaintiffs appeal.

The facts are these: On January 25, 1909, the appellants, being then residents of the city of Chicago, in the state of Illinois, purchased from the Hazelwood Irrigated Farms Company, a corporation doing business at Spokane, Wash., five acres of irrigated land, located near the city of Spokane. The selling agent, through which this transaction was consummated, was Neely & Young, a corporation located in the city of Spokane. The negotiations leading up to the purchase of the land were conducted by correspondence. The appellants at no time saw the land prior to February 13, 1914, when they came West for the purpose of locating thereon. By the terms of the contract of purchase, the Hazelwood Irrigated Farms Company was to prepare the land, set it to trees, and care for the same for a period of one year. In addition to this, it was contracted between the parties that the Hazelwood Irrigated Farms Company would cultivate and take care of the orchard for a period of four or five years additional for a stipulated consideration. When the appellants came West, and viewed the land and the trees thereon, they were dissatisfied in two respects: First, that the trees were not in as good condition as they should be; and, second, that there was a depression on the south end of the tract, next to the highway, which rendered it undesirable as a home site. After tendering a deed to the Hazelwood Irrigated Farms Company, demanding the return of their money, and giving notice of a rescission, the appellants instituted the present action.

[1] The fact that the trees had not been properly cared for, if it be a fact, would not furnish a ground for rescission, because the remedy for a breach of that portion of the contract would be an action for damages. Crampton v. McLaughlin Realty Co., 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823; 3 Elliott on Contracts, § 2049. If we understand the contention of the appellants correctly, they claim that it was represented to them, prior to the purchase, that the land was capable of producing a commercially bearing orchard, and that the trees would come into bearing between four and five years after planting, and that the tract was a suitable place for a home, all of which, it is claimed, was false and untrue. There is little evidence in the record that would sustain the contention that the tract of land was incapable of producing a commercially bearing orchard, and that the trees would not come into bearing within five or six years.

[2] The principal contention, however, is

that the tract of land was not suitable for a home, because there was a depression on the south end thereof, upon which, during the spring rains and freshets, water would accumulate. The evidence upon the extent to which the water would cover the land, its depth, and the duration of time that it would remain thereon was conflicting. If that offered by the appellants correctly described the extent, depth, and duration of the time that the water remained upon the land, the representation that the tract was suitable for a home site would doubtless be fraudulent. On the other hand, if the evidence offered by the respondents correctly presents the situation, there was no false representation. The trial court found that the representations made by the respondents were in good faith, and were in fact true, and that the particular tract in question was suitable for a home. After a careful consideration of all the evidence, we think it supports the findings and judgment of the trial court.

There are a large number of assignments of error, by which questions of fact only are presented. It would serve no useful purpose to review in detail the evidence of the respective parties, balancing one against the other, and show wherein the preponderance lies, by pointing out the weakness of one and the strength of the other. It is sufficient to say that, in our opinion, the appellants failed to establish their charge of fraud, and, as above stated, the question of damages for breach of the contract to properly care for the trees cannot be determined in this action.

The judgment will be affirmed.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(97 Wash. 18)

SMITH et al. v. BARBER et al. (No. 13923.)

(Supreme Court of Washington. June 18, 1917.)

1. Specific Performance 🔑97(1) — Sufficiency of Plaintiff's Performance—"On the Contract."

Under a land contract making time of the essence and calling for payment by plaintiff on the land of $143.50 to the state on the contract outstanding, plaintiff could not require specific performance, where he had not made such payment, and, on defendant's paying the amount due the state, had merely demanded of defendant a statement of the amount so paid by her; for the phrase "on the contract" means according to the terms of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-290, 294, 295.]

2. Specific Performance 🔑3 — Performance by Plaintiff of Contract.

In suit for specific performance, whether or not defendant was entitled to rescind and forfeit the contract was immaterial, since plaintiff must recover, if at all, upon the strength of his own case and not upon the weakness of the defense.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 3, 3½.]

3. Specific Performance 🔑99 — Performance by Plaintiff of Contract.

A party cannot enforce specific performance of a contract while in default of its terms.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 299-304.]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Del Cary Smith, administrator and others, against Anna Barber and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Tolman & King, of Spokane, for appellants.
E. J. Farley, of Spokane, for respondents.

MORRIS, J. Appeal from a decree denying specific performance of a contract for the purchase of real estate. Prior to October, 1910, Owen H. Barber and Anna Barber were husband and wife. On the 3d day of August, 1907, they entered into a contract with the state of Washington for the purchase of certain real estate in the city of Spokane. The purchase price was fixed at $300, of which $30 was paid at the time of the execution of the contract and the remainder was to be paid in nine annual installments on March 1st, with interest on all sums then unpaid. By a decree of divorce in October, 1910, this property was set aside to Anna Barber as her separate property. In November, 1910, Owen H. Barber and Anna Barber entered into the contract which forms the basis of this action, and which is as follows, so far as material:

"It is hereby agreed, by and between Anna Barber, divorced wife of O. H. Barber, the party of the first part, and O. H. Barber, the party of the second part, that the said party of the first part will sell to the said party of the second part, his heirs and assigns; and the said party of the second part will purchase of said party of the first part, her heirs, executors, or administrators, the following described lot, tract or parcel of land situated in Spokane county, state of Washington, to wit: An undivided half interest in lot 12, block 31, subdivision of school section 16, township 25, range 43, E. W. M., with the appurtenances thereto belonging, on the following terms:

"1. The purchase price of said land to be $1,000 of which the sum of $1,000 has this day been paid as earnest money, the receipt of which is hereby acknowledged by the said party of the first part, and the further sum of $143.50, to be paid the state of Washington, on a contract now outstanding with interest thereon from date until paid at the rate of six per cent. per annum.

"2. Said land to be conveyed by good and sufficient deed to the said party of the second part, when said purchase price shall have been fully paid.

"3. Time is the essence of this contract.

"4. If the said party of the second part fails to pay the whole sum of said purchase price and interest, within the time above specified, then the said party of the first part may if she so elect rescind this contract, and in that case all payments made by said party of the second part shall be forfeited."

Owen H. Barber died the following April, and the appellants are his administrator and heirs. On July 18, 1913, nothing having been paid upon the contract by Owen H. Barber, Anna Barber served upon his administrator a notice of forfeiture, appellants being given until the 29th day of July to comply with the contract and make the payments therein designated; and on December 24, 1913, the contract still being uncomplied with, a second notice of forfeiture was served in which the contract was declared rescinded and forfeited. On December 7, 1914, the administrator tendered to respondent the sum of $180 as payment of the amount due under the contract, which tender was refused, and the same, with interest, was repeated at the trial and the amount deposited with the clerk of the court. The lower court found that plaintiffs had failed to show any right to recover, and that the action should be dismissed.

[1-3] Appellants' first contention is that under his contract Owen H. Barber was privileged to pay the sum of $143.50 to the state at any time within the term of the contract, and that a payment as late as March 1, 1916, the day of the final payment, would be a compliance with his contract with Anna Barber. The contract calls for a payment of $143.50 to be paid the state of Washington by Owen H. Barber "on the contract now outstanding with interest thereon from date until paid at the rate of six per cent." The phrase "on the contract" means according to the terms of that contract. There was due the state at that time, according to the terms of the contract, a sum in excess of $143.50. There was neither allegation nor proof that prior to instituting this action Owen H. Barber or his representatives had made a payment of any sum to the state, or had attempted in any way to comply with the terms of the contract. The second amended complaint upon which the action was tried alleges that subsequent to the death of Owen H. Barber in April, 1911, Anna Barber paid the state the amount due upon the contract of purchase with the state; that appellants have demanded of her a statement of the amount so paid, which demand has been refused, and that they were informed by Anna Barber that she would reject and refuse to accept any tender that might be made. The proof goes no further. Certainly this is not sufficient to support an action for specific performance. Appellants say little in their brief concerning their right of recovery but say much concerning respondent's right to a forfeiture. Whether or not respondent was entitled to rescind and forfeit the contract is immaterial. Appellants must recover, if at all, upon the strength of their own case, and not upon the weakness of the defense. Their right to a specific performance of the contract between Owen H. Barber and Anna Barber depends upon strict compliance with that contract on the part of Owen H. Barber. This they failed to prove. Nor did they offer any justification or waiver of their failure in this respect. A party cannot enforce specific performance of a contract while in default of its terms.

Kiefer v. Carter Contracting & Hauling Co., 59 Wash. 108, 109 Pac. 332. Under the terms of the contract between the Barbers it contemplated a future, not a present, sale, conferring neither right nor title upon the vendee until by compliance with its terms he had himself performed. The term of the contract necessary to be complied with in order for Owen H. Barber to have the right of performance was the payment of $143.50 to the state of Washington. No proof of such compliance having been offered, no conveyance under the contract could be enforced. Younkman v. Hillman, 53 Wash. 661, 102 Pac. 773; Tieton Hotel Co. v. Manheim, 75 Wash. 641, 135 Pac. 658.

The record is susceptible to no other judgment than that appealed from. It is affirmed.

ELLIS, C. J., and CHADWICK, MAIN, and WEBSTER, JJ., concur.

(97 Wash. 22)

GRIFFITH et al. v. GIFFORD et al.

(No. 13924.)

(Supreme Court of Washington. June 18, 1917.)

1. VENDOR AND PURCHASER ⚿36(2) — MISREPRESENTATIONS.

The presence of wild snapdragon upon a farm was of such material consequence as to justify rescission of the contract for purchase of the farm because of misrepresentation as to its existence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 53.]

2. VENDOR AND PURCHASER ⚿44 — ACTION FOR RESCISSION.

In action to rescind a contract for purchase of real estate on the ground of fraud, evidence *held* to show material misrepresentations by vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69-76.]

3. CONTRACTS ⚿99(1)—RESCISSION.

Where fraud is charged as the basis of rescinding a contract, it must be established by clear and convincing evidence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 448-453, 1197.]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by H. S. Griffith and others against Charles Gifford and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with direction.

Zent & Powell, of Spokane, for appellants.

MAIN, J. This action was brought to rescind a contract for the purchase of real estate on the ground of fraud. The trial in the superior court resulted in a judgment denying rescission, from which the plaintiffs appeal.

The facts out of which the litigation arose are these: For some time prior to the month of March, 1916, the appellants had owned and occupied a farm in Grant county, which they had sold a short time prior to entering into the transaction out of which this controversy arose. After selling the farm in Grant county, Mr. Griffith, in looking about for the purchase of another place, came to Latah, in Spokane county. This was in what is referred to in the evidence as the "Palouse country." After coming to Latah, he met friends there, who warned him against purchasing a farm upon which there was any "wild snapdragon." After being so warned, he fully made up his mind not to purchase a farm if there was growing thereon any of that weed. A few days after coming to Latah, Griffith was taken by one J. S. Farrelly, who lived in, or near, that town, six miles into the country to look at a place then owned by the respondents. Two or three days after having made this trip, Griffith met the respondent Charles Gifford in Latah, and talked with him relative to the farm. During this conversation, Farrelly asked Gifford if there was any snapdragon on the farm, and received the reply, "not to my knowledge." Shortly after this conversation, or within a few days, Gifford took Mr. and Mrs. Griffith out to see the farm, and, as the Griffiths both testified, while they were driving along the highway ajacent thereto, they inquired whether there was any snapdragon on the place, and received the positive answer that there was not. Gifford denies this conversation. Upon this trip, the parties did not go over the place; but, a few days later, Gifford and Griffith again visited the farm and walked over it. The place had been owned by the respondents for seven years prior to this time, and had been occupied by them during all of that time, with the exception of one year. The negotiations referred to resulted in a contract on March 30, 1916, by which the respondents sold to the appellants the farm, consisting of approximately 70 acres, for the sum of $8,300. Of this sum, $1,780 was paid in cash, and the balance was to be paid by the transfer of notes and a mortgage then owned by the appellants. After making this contract, and on the 17th day of April, the appellants went into possession of the farm. Thereafter, and on the 28th day of that month, Mr. Griffith, while plowing, preparatory to planting a crop, discovered what he thought might be wild snapdragon. He had never seen it before, as it did not grow where he had previously lived and farmed land. After inquiry, Griffith learned that the weed he had discovered was wild snapdragon. He then sought Mr. Gifford, and demanded his money back, as well as rescission of the contract. This, the latter, after considering for a few days, declined to do. Thereafter, and during the succeeding month, the appellants vacated the place and instituted this action. Neither party to the controversy being willing to exercise control over the farm during the litigation, by mutual arrangement the management thereof was given to a third person.

[1] The first question is whether the presence of wild snapdragon upon the farm was of such material consequence as to justify a rescission of the contract, providing there had been misrepresentation relative to its existence. The evidence shows that wild snapdragon is a noxious weed, and, when it once appears upon a farm, it is practically impossible to eradicate it. So serious is its presence considered that, when it appears, some farmers build a fence around it and cover the ground with salt. The appellants offered evidence to the effect that the presence of snapdragon upon a farm would materially reduce its salable value. The respondents offered no evidence on this question. The amount of snapdragon which was discovered upon the place after the appellants went into possession thereof consisted of approximately ten patches, located near the center of the farm. These patches varied in size from about 11 by 13 feet, down to places where there was only an individual plant. The party to whom the management of the place was committed, during the pendency of this litigation, testified that he had covered the three larger patches with tar paper, and that it took about 250 square feet thereof. One of the witnesses, testifying for the respondents, referred to a patch of snapdragon 6 feet across as "quite a large patch." Taking into consideration the character of the weed, and the difficulty, if not the impossibility, of its total extinguishment, as well as the size and number of patches, together with the fact that the presence of such weed will materially reduce the value of a farm, we cannot hold that a misrepresentation relative thereto would be upon an immaterial matter, such as would not justify the rescission of a contract.

The next question is whether there was a misrepresentation. The trial court made no formal findings of fact and conclusions of law, but recited in the judgment that wild snapdragon was growing upon the farm in the fall of the year 1915. The evidence shows that this weed has a distinctive flower, and a pronounced odor, especially when cut or bruised. During the year 1915, the portion of the farm where the snapdragon was produced a crop of oats. When this crop was harvested, Mr. Gifford testified that he shocked the oats, and admitted that he shocked the oats over the very place where the snapdragon was found by Griffith. The stubs, from which the plant had been cut, along with the oats, were still on the ground during the following spring. If Griffith, who had never seen snapdragon, before moving upon this farm, was able to discover its presence there within 12 days after he took possession, and at a time of year when its discovery would be much more difficult than when the flower would appear later in the season, it does seem strange that its presence there was not known to the former owner, who admitted that he knew what snapdragon was when he saw it. The testimony of the Griffiths on the one side, and Gifford on the other, as to the conversation relative to snapdragon, hereinbefore referred to, cannot be reconciled. It might be said that a way of reconciliation could be found by assuming that the Griffiths might have confused this conversation with the previous conversation, occurring in Latah, where Gifford admits that he stated that there was no snapdragon upon the place, to his knowledge; but this assumption would overlook the fact that Mrs. Griffith was not present at the previous conversation. It seems altogether reasonable that the Griffiths, after having been warned relative to purchasing a farm with this weed upon it, and after having determined not to purchase such a farm, should inquire specifically in relation thereto. The trial judge, in seeking to reconcile this conflicting testimony, thought that the Griffiths might have confused the conversation that they testified to as occurring upon the highway adjacent to the farm with the previous conversation in Latah, but doubtless overlooked the fact, as already pointed out, that Mrs. Griffith was not present at that conversation.

[2, 3] We cannot escape the conclusion that, under the evidence in this case, the appellants were entitled to a rescission of the contract. The rule undoubtedly is, as pointed out by the respondents, that fraud, where charged, must be established by clear and convincing evidence; but we think the appellants have met the requirements of this rule.

The judgment will be reversed and the cause remanded, with direction to the superior court to enter a judgment in favor of the appellants.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(96 Wash. 632)

WILLETT et ux. v. CITY OF SEATTLE. (No. 13408.)

(Supreme Court of Washington. June 15, 1917.)

1. MUNICIPAL CORPORATIONS 🔑1021, 1022—IMPROVEMENTS — DAMAGES — NECESSITY OF CLAIM—STATUTE.

Under Charter of City of Seattle, art. 4, § 29, requiring claims against the city for damages to accurately locate and describe the defect which caused the injury, accurately describe the injury, contain the items of damage claimed, and providing that claims for damages, whether sounding in tort or contract, must be presented within the time and in the manner therein provided, a claim for damages from flooding due to a street improvement not being a damaging which was an indispensable and integral part of the improvement nor necessarily anticipated by the plan, and intended in the performance of the work, but a consequential or resulting damage sounding in tort, no action therefor could be maintained, where such item was not included in the claim previously filed by the property owner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2193.]

2. MUNICIPAL CORPORATIONS 🔑1021, 1022—IMPROVEMENTS — DAMAGES — EVIDENCE — ADMISSIBILITY.

In view of Charter of City of Seattle, art. 4, § 29, in an action for damages caused by a street improvement, where it appeared that the claim filed did not mention an item of damage by reason of overflow of plaintiff's land, testimony as to the overflow was properly excluded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2193.]

3. MUNICIPAL CORPORATIONS 🔑404(3) — IMPROVEMENTS — ACTION FOR DAMAGES — JURY QUESTION.

Whether the lot was damaged by steam shovels during the progress of the work, and the amount of such damages, *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 997.]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by O. L. Willett and wife against the City of Seattle. Judgment for defendant, and plaintiffs appeal. Affirmed.

Edward Judd, of Seattle, for appellants. Hugh M. Caldwell and Robert H. Evans, both of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damage to property by reason of the improvement of a city street. The cause was tried to the court and a jury, and resulted in a verdict in favor of the defendant. the plaintiffs appeal.

The facts are these: On the 19th day of June, 1908, and for some time prior thereto, the appellants were the owners of a tract of land, consisting of approximately 15 acres, which had been platted into blocks and lots, and was known as O. L. Willett's addition to the city of Seattle. Extending along the south side of this addition was Graham street, with which the streets appearing upon the plat of Willett's addition intersected. On the date mentioned, the respondent city contracted for the improvement of Graham street. This improvement, in front of a portion of Willett's addition, involved a deep cut; in front of another portion, a fill of considerable height. Across Willett's addition was a small perennial stream, flowing to the south, and across Graham street. In making the fill, the city failed to provide an adequate drain or culvert under the fill, through which the water of the stream could pass, and, as a consequence, a portion of Willett's addition was flooded and damaged. During the time the work was being performed, some of the lots of the addition, abutting upon the cut, were dug into by the steam shovels. The action, as first brought, sought an injunction restraining the improvement, because of its interference with the access to Willett's addition. After this action was brought, a stipulation was entered into by which the work was permitted to continue. Prior to the institution of the action, and on April 19, 1909, the appellants filed a claim for damages with the city council, "by reason of the grading of Graham street," and "entirely cutting off access to Graham street from Thirty-Fifth Avenue South, one of the streets dedicated in the plat of said addition (Willett's addition); and that the said grading is being so conducted that a heavy cut is being made along and on Graham street in front of the center and west side of said addition, so as to cut off access to Graham street from Thirty-Third Avenue South, one of the streets dedicated in the plat of said addition." In this claim for damages, no mention is made of the flooding of a portion of Willett's addition by reason of inadequate drainage. Another claim for damages was filed on May 31, 1913, and in this no item of damages for flooding is mentioned. On September 15, 1914, an amended complaint was filed, upon which issue was joined by answer, and the cause, in due time, proceeded to trial.

Upon the trial, the appellants offered evidence as to damages sustained by reason of the flooding, to which objection was made by the city, and sustained by the trial court. The reason for this ruling was that the flooding was not claimed as an item of damages in either of the claims filed.

[1] Upon this appeal, the first question is whether the filing of a claim with the city is a condition precedent to the maintenance of an action for damages caused by the flooding. Section 29 of article 4 of the charter of the city of Seattle requires, among other things, that claims for damages "must accurately locate and describe the defect that caused the injury, accurately describe the injury, * * * contain the items of damages claimed, and be sworn to by the claimant." Under this charter provision, claims for damages, whether sounding in tort or contract, must be presented within the time and in the manner therein provided. International Contract Co. v. Seattle, 69 Wash. 391, 125 Pac. 152; International Contract Co. v. Seattle, 74 Wash. 662, 134 Pac. 502. Where, however, the property taken or damaged is contemplated by the plan of the work, and is a necessary incident to the making of the public improvement, no claim is necessary, because, strictly speaking, the property owner's action rests neither in tort nor contract. In other words, where the taking or damaging is an indispensable and integral part of the improvement, necessarily anticipated by the plan, and intended in the performance of the work, no claim is necessary, because the property owner is only recovering the compensation which he would have received had the city, prior to making the improvement, brought an action in condemnation for the purpose of having the damages for the taking or damaging determined. Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; Jorguson v. Seattle, 80 Wash. 126, 141 Pac. 334. In the Kincaid Case, damages were sought, because the toe, or foot of the slope of a fill necessarily extended over onto the plaintiff's lots, and consequently the taking there was contemplated by the plan of the work, and was a necessary incident to the making of the public improvement. This question is fully and thoroughly discussed in the Kincaid and Jorguson Cases, and the limitations of the rule pointed out, and it seems unnecessary to again enter upon a discussion of the question. In the present case, the item of damages for flooding was neither contemplated by the plan of the work, nor a necessary incident in making the improvement in Graham street. Such damages were consequential or resultant, and therefore sound in tort, for which no action could be maintained, unless a claim therefor had been filed as required by the provision of the city charter above referred to. In the cases of Wendel v. Spokane County, 27 Wash. 121, 67 Pac. 576, 91 Am. St. Rep. 825, and Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 Pac. 18, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027, cited by the appellants, the question of the necessity of filing a claim was not involved. It may be that there is some language in the opinion in each of those cases that is not in harmony with the views expressed in the Jorguson Case, supra; but, if those cases are not in accord with the Jorguson Case, they are necessarily modified to the extent that there is lack of harmony.

[2] It is next claimed that, if the filing of a claim is necessary, under the claims filed, the testimony as to the flooding should have been admitted. In neither of these claims was there any mention made of an item of damages by reason of the overflow of the land, caused by an inadequate drain under the fill. The charter provision requires that the claim shall specify the items of damages. In Casassa v. Seattle, 75 Wash. 367, 134 Pac. 1080, it was held that, under this charter provision, an action could not be maintained for an item of damage not covered by the claim. It follows that the ruling of the trial court in sustaining the objection to the offered testimony should not be disturbed.

[3] Lastly, it is contended that the trial court erred in not entering judgment for the appellants for damages in a substantial amount, notwithstanding the verdict of the jury. The basis of this contention is that the appellants were entitled to damages to the lots abutting upon the cut, which were dug into by the steam shovels during the progress of the work. Whether there was damage in this regard, and, if so, how much, under a proper instruction, was submitted to the jury. The

evidence was conflicting. That offered in behalf of the appellants, if accepted by the jury, would sustain a verdict in a substantial amount. That offered by the respondent, if accepted by the jury, would result in a verdict in favor of the respondent. Upon this conflicting evidence, the question was one for the jury.

The judgment will be affirmed.

ELLIS, C. J., and MORRIS, CHADWICK, and WEBSTER, JJ., concur.

(96 Wash. 683)

BUCK v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES. (No. 13810.)

(Supreme Court of Washington. June 15, 1917.)

1. INSURANCE ⇨400 — LIFE POLICY — "AMOUNT DUE."

"The amount due," in provision of life insurance policy that it shall be indisputable after a year as to amount due, means the amount due in law and fact, and not an amount written therein by mistake as its cash surrender value.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086.

For other definitions, see Words and Phrases, Second Series, Amount Due.]

2. CONTRACTS ⇨93(5)—MISTAKE—RELIEF.

Relief from error in contract shown with certainty will be granted where to enforce it as written would be harsh, though the mistake be unilateral.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 419.]

3. ESTOPPEL ⇨95—BY SILENCE.

Where insured shortly after issuance of his life policy was informed by insurer's letter that the cash surrender value at end of 15 years of $1,000 written in the policy was a mistake, and under the application should be $408, and that only $408 would be paid, he was estopped by his silence, preventing action for reformation, to claim more.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 285-287.]

4. LIMITATION OF ACTIONS ⇨40(1) — DEFENSES.

The general statute of limitation merely bars actions, and not defenses of mistake and estoppel.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 212.]

Department 1. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Seralpha A. Buck against the Equitable Life Assurance Society of the United States. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Kerr & McCord, of Seattle, for appellant. Cooley, Horan & Mulvihill, of Everett, for respondent.

MORRIS, J. On January 8, 1901, appellant issued to respondent a life insurance policy in the sum of $1,000 containing the following option:

"If the assured be living and this policy is in force on the twenty-second day of December, 1915, the said assured, or assigns, may surrender the policy to the society and draw the guaranteed cash value of $1,000 together with the cash dividend then apportioned, consisting of the policy's full share of the surplus profits as determined by the actuaries of the society."

It was further provided in the policy that it should be indisputable after one year from its issue, providing all premiums were duly paid. Upon the expiration of the 15-year period provided for in the option respondent gave notice of his election to surrender the policy and withdraw $1,000 as the guaranteed cash surrender value thereof, together with the cash dividends then apportioned to the policy in the sum of $161.07. The appellant in its answer set up affirmatively that the sum of $1,000 included in the option as the cash surrender value of the policy was inserted therein by mistake of a clerk in its office at the time the policy was issued, and that the correct amount should be the sum of $408. Reformation of the policy was asked for in this respect. The lower court found in favor of the respondent.

On behalf of the appellant it was shown that the blanks in the printed form of policy were filled out by an employé who had been in its service at that time but one day. His duty was to prepare policies for execution by the officers of the company and to fill in the blanks from the document furnished him, known as the "application heading," which showed the kind of policy, the face amount thereof, the amount of the cash reserve, and other details. The application heading furnished the clerk in this instance was as follows:

"No. 1016922
Premium Dividend 15 Yrs. C. R. 408.
Agency Seattle - 1st pay't.
Reg. date Dec. 22, 1900
Form No. 22700—2 Made out Amt. 1,000
Age 53. Kind P. D. Life
Dec. 22, 1915
A. 56. 64"

The policy issued herein complies with the application heading with the exception of the amount of the cash reserve, the correct amount of the cash reserve being indicated on the application heading by the symbols "C. R. 408," which amount should have been inserted in the option instead of $1,000. There is no question but that the insertion of the sum of $1,000 instead of $408 as the cash reserve value of this policy was a clerical error. It is also undisputed that policy holders at the age of respondent must pay an annual premium of $86.59 not only upon policies in the appellant company, but in all life insurance companies in order to receive a cash surrender of $1,000 at the end of 15 years. It is also undisputed that the payment of an annual premium of $56.64, the amount paid by the respondent, by a policy holder of his age would in no life insurance company entitle the policy holder to recover at the end of 15 years a cash reserve value of more than $408. It appears from the testimony of respondent that he was surprised when he received this policy, though he contends it is the policy the soliciting agent told him would be written. He seems to have known enough about life insurance to appreciate this unusual feature of his policy. He told other agents about it, and when they expressed doubts as to a man of his age having a policy with a 15-year cash reserve value of $1,000, he made a wager with them and exhibited the policy. He commented upon the unusual feature of the policy to some representative of appellant at its Seattle office, which was the first intimation appellant had of the mistake in the option. The Seattle office reported the condition of the policy to the home office, and the home office on September 22, 1904, wrote the following letter:

"September 22, 1904.

"S. A. Buck, Esq., Monroe, Wash.—Dear Sir: Information has come to the society to the effect that policy No. 1016922, issued by the society on your life in December, 1900, is not in accordance with the terms of your application therefor; that is to say, it is alleged that the guaranteed cash value of your policy, at the end of its accumulation period in 1915, is written in option 1, on the third page of the policy contract as $1,000, when the amount should be $408. You are hereby notiued, therefore, that if policy No. 1016922, is continued in force hereafter by the payment of further premiums, the amount which the society will pay as the guaranteed cash value of the contract at the end of the period is $408.

"We would state further that if the change from $408 to $1,000 was made after policy No. 1016922 left this office the society is not bound thereby. If you will return this policy No. 1016922 to this office for inspection we shall be glad to look it over, and, if it is found to be incorrect, to reissue it in accordance with the terms of your application.

"Yours very truly,
"S. S. McCurdy, Assistant Registrar."

Respondent received this letter in due course of mail, but made no reply thereto other than he says he told some one in the Seattle office on the occasion of a subsequent visit that it was not his mistake, and he intended to enforce the policy as it was written, unless the company would refund him his money with interest. Under these circumstances we do not think the lower court was justified in holding the policy as written represented the true contract between the parties. The policy as written lacked mutuality, a necessary ingredient to all contracts. Respondent, it is clear, knew of the mistake, and with the knowledge of the error retained his policy and refused to submit it for correction. Knowing of the error and refusing its correction, he cannot now take advantage of it. Gray v. Supreme Lodge, Knights of Honor, 118 Ind. 293, 20 N. E. 833; Doll v. Prudential Insurance Co., 21 Pa. Super. Ct. 434.

Respondent's application and the premiums he paid called for a policy with a cash surrender value of not to exceed $408. That was the contract he made and the cash reserve, and the only cash reserve he paid for. He should be content with his bargain, and not seek to take advantage of an obvious mistake.

It is suggested that, when it realized that a mistake had been made in the cash reserve valuation, appellant should have taken some steps looking to a reformation of the policy. Appellant had indicated in its letter to respondent its purpose to recognize $408 as the guaranteed cash reserve value of this policy if continued in force for the 15-year period. It could not surrender the policy or cancel it, because there could not be any change if respondent should die before the expiration of the 15-year period nor after that period, unless respondent elected to exercise the option he only could exercise.

[1] The provision in the policy that it should be indisputable after one year as to the amount due avails naught to respondent. The appellant is not attempting to dispute the policy nor prevent a recovery thereon. It is simply contesting as to the amount due thereon. "The amount due" in the language of this clause can mean no other sum than the amount due in law and fact. Appellant is seeking, not to avoid the payment of this amount, but to have the policy truthfully express the amount correctly due. The vice of respondent's contention that the amount written in the policy is incontestable after one year is shown by a simple illustration. Suppose that, instead of writing the amount correctly as $408, the decimal point had been omitted and the amount read $40800. No one would have the hardihood to contend that in case of nondiscovery of the mistake until after the lapse of one year appellant would be bound to pay such sum to respondent and was forever barred both in law and fact from contesting the amount shown to be due on the face of the policy.

[2] Respondent argues that, if there was a mistake, it was not mutual, but only on the part of appellant, and that the evidence lacks that clearness that must be shown before either party can take advantage of the mistake. This case falls within all rules in which litigants have been granted relief from contractual errors. So far as we know, it has always been the law that, where there is certainty of error, appropriate relief will be granted. Courts are always open to receive and enforce equitable considerations, and even in cases of unilateral mistakes it has been held that the contract would not be enforced when it would be harsh to do so. 36 Cyc. 606; 6 R. C. L. 623.

[3] Respondent knew that the company regarded his policy as written enforceable only to the extent of its straight life feature, and that, if continued as to its guaranteed cash value in case he survived the 15-year period, it would refuse to pay him more than $408. If this was not satisfactory to respondent and if he was not willing to keep his policy

under this condition, he should have replied to the letter written him. Good faith would at least demand that much. Not to do so would lead the company to believe that he acquiesced in its intent as expressed in its letter of September 22d. These facts support appellant's plea of estoppel. When duty calls for speech silence will work an estoppel when such silence operates a fraud upon the other party. It was a fraud upon appellant when respondent by his silence encouraged the belief that the policy would be satisfied by the payment of $408 at the end of the 15-year period in order to prevent them from taking some action looking to the reformation of the policy in this respect, while respondent intended to thus mislead it and enforce the policy as written when the time arrived.

[4] Neither does any general statute of limitation defeat appellant's defense. So long as respondent had a cause of action upon his policy, so long could appellant assert any defense thereon which would excuse it from subjecting itself to respondent's demand. Statutes of limitation bar actions, and not defenses to actions. Appellant was not seeking any affirmative relief against respondent. It was seeking only to defend against an unjust claim.

The judgment is reversed, and the cause is remanded, with instructions to enter a judgment for plaintiff in the sum of $569.07, which sum is the aggregate of the cash surrender value of this policy and $161.07, cash dividend apportioned to the policy.

ELLIS, C. J., and CHADWICK, MAIN, and WEBSTER, JJ., concur.

(96 Wash. 665)

LARSON v. ALASKA S. S. CO. (No. 13708.)

(Supreme Court of Washington. June 15, 1917.)

1. MASTER AND SERVANT ⇨276(3) — PROXIMATE CAUSE OF INJURY — SUFFICIENCY OF EVIDENCE.

Evidence that plaintiff seaman in descending a hatchway grasped an insecure table pedestal which failed to support him, etc., *held* to sustain a verdict that the pedestal's insecurity proximately caused his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959.]

2. MASTER AND SERVANT ⇨288(16), 289(37) —CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Plaintiff seaman's contributory negligence and assumption of risk in grasping an insecure table pedestal when descending a hatchway pursuant to a boatswain's order are jury questions, since such boatswain was a vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1086, 1129.]

3. ADMIRALTY ⇨2 — PERSONAL INJURY TO SEAMAN—SAVING OF COMMON-LAW REMEDY.

Under Act March 3, 1911, c. 231, § 24, 36 Stat. 1091 (U. S. Comp. St. 1916, § 991[3]), giving federal district courts original jurisdiction of admiralty causes, but saving to suitors the right to a common-law remedy, where the common law is competent to give it, a state common-law court has jurisdiction of an action in personam by a seaman for personal injuries occurring off Alaskan coast and arising from the vessel's unseaworthiness.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 18-28.]

4. DAMAGES ⇨132(1)—EXCESSIVENESS.

Two thousand and six hundred dollars damages *held* not excessive for permanent personal injuries to a seaman.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 372.]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Alex Larson against the Alaska Steamship Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bogle, Graves, Merritt & Bogle, of Seattle, for appellant. Walter S. Fulton, of Seattle, for respondent.

CHADWICK, J. Alex Larson brought this action to recover damages for personal injuries sustained while working as a seaman on the steamship Victoria. The ship was anchored off shore in Alaska on the 14th day of June, 1915. Larson was ordered by the boatswain to go down into the hold preparatory to working cargo. No. 4 lower hold is covered by a hatch which is 12 by 14 feet. When in place it makes a part of the dining saloon floor. It has no combing, and, as described by one of the witnesses, is "as smooth as a table." A dining room table and a row of chairs on iron pedestals are built directly over, and screwed to the doors of, the hatch. When the hatch is opened, the chairs and table are removed, and the doors are folded back on either side by means of a line from a winch. The hold is about 25 feet deep. It is reached by means of a perpendicular ladder placed some 7 or 8 inches back of and under the hatch opening. Directly forward of the hatch opening is another table, and a row of chairs. The pedestals supporting the chairs for this second table are screwed into the deck or the floor of the dining saloon about 2 or 3 feet from the edge of No. 4 hatch. It was the custom of the seamen to hold onto one of the forward stationary pedestals while securing a foothold and handhold on the ladder when descending into the hold of the ship. The testimony shows that when the pedestals supporting the chairs over the hatch doors were removed, one of them was left standing loose near the fixed pedestals of the forward table. When respondent started to descend the ladder, he took hold of the unfastened pedestal with his right hand and a fastened pedestal with his left hand. To secure a hold with his hand on the ladder, he released his left hand, thus throwing his weight on the unfastened pedestal which, giving way, caused him to fall into the hold below. The jury found that Larson had received permanent injuries, and returned damages in the sum of $2,600. The facts will be further noticed in the course of the opinion.

From a judgment upon the verdict, defendant has appealed. Respondent predicates his right to recover upon appellant's alleged failure to furnish respondent with a safe place to work, and the lack of proper appliances to enable him to safely carry out the boatswain's order to go down into the hold, as well as its negligence in placing the loose pedestal in front of the hatch ladder. The manner of descending into the hold may be more particularly described. One doing so must lie flat on the floor with his feet and legs over the opening. The ladder cannot be safely reached with the feet without some secure hold for the hands, or for one hand after a foothold has been secured. One hand must be released and reached under the edge of the hatch and gripped upon the uppermost rung of the ladder when the act of descending can be finished without inconvenience or danger.

While the act of descending is, under any circumstances, attended with some danger, and puts a seaman to the exercise of great care for his own safety, and while it may be, as the testimony tends to show most strongly, that toggles, a ring bolt, or a rope to be thrown around the stationary pedestal should have been provided, we think it unnecessary to follow counsel in their rather elaborate discussion of this phase of the case, for, whatever may have been necessary under ordinary conditions, we have here to deal with an extraordinary condition. That is the placing of a loose pedestal at a place where one of experience, in the proper course of his employment, might throw his weight upon it to his own hurt or injury. Indeed the experienced man, the one most accustomed to do the thing required, would be the one most apt to reach for the pedestal without conscious thought of the possible insecurity of the thing.

[1] Passing then to the ultimate fact, we have no hesitation in saying that the jury was justified in finding that the proximate cause of the injury was the placing of the loose pedestal at a place where a man in the exercise of ordinary care for his own safety might take hold of it. It is not charged that respondent put the pedestal where it was, and surely there is no principle that would hold him to the rule of contributory negligence for acting upon appearances, and without a particular examination as to the security of the pedestals immediately in front of the place where he was compelled to descend. But if respondent is not to be exculpated from the charge of contributory negligence as a matter of law, the facts are clearly sufficient to carry the case to a jury, and appellant is concluded by the verdict.

Appellant's first hope must necessarily lie in the contention that the loose pedestal was placed in a position to invite disaster by a fellow servant; that the negligence, if any, was that of a fellow servant, and not of appellant, and hence no recovery can be had. We think the doctrine of fellow servant cannot apply for two reasons, equally obvious. The clearing of the hatch for removing cargo from the hold was done under the immediate direction of the boatswain who was in the exercise of all the authority possessed by the master or mate. He was a vice principal. The duty of care for the safety of the workman was upon the ship. The work being under the personal direction of one of higher authority than any of the seamen, the principal was bound to answer for the negligence of men as well as the insecurity of methods or means. For it would be the ultimate of illogic to hold that a principal could be held when directing, or for failure to direct, and could not be held for a thing when done under his direction. The principal must act through an instrumentality of his own choosing which is but another way of saying that it is the duty of the principal to furnish a reasonably safe place to work, and to keep that place reasonably safe during the progress of the work. Such duty is not performed by offering a safe place to work, but extends to "all the instrumentalities, machinery, and appliances which, from the nature of the work, directly affected the safety of the place." Westerlund v. Rothschild, 53 Wash. 626, 102 Pac. 765.

[2] That the boatswain, supervising the work and executing the will of the master of the ship, was a vice principal, we have no doubt. Respondent being hurt while following the directions of the boatswain, the question of contributory negligence and assumption of risk were for the jury.

The second reason which finds response in our minds, although we do not bottom our decision upon it for reasons hereinbefore assigned, is that before the question of fellow servant can be considered by the court we must find as a matter of law that the fixed pedestal was itself a safe appliance, and that the accident would not have happened if the loose pedestal had not been left where it was. Whether the fixed pedestal was a safe appliance was clearly a question for the jury. Many witnesses testified that there should have been a ring bolt or toggles, or a rope to aid the seamen. One of appellant's own witnesses says that there should have been a rope to throw around the fixed pedestal to relieve the reach between the pedestal and the ladder below.

[3] Appellant finally contends that respondent cannot recover because the obligations of the parties are governed by the maritime law; that under the maritime law all members of the crew, with the possible exception of the master, are fellow servants:

that the liability of the master or owner exists whether the accident is attributable to negligence or accident, but the remedy in all cases is limited to a recovery for maintenance and cure. The Osceola, 189 U. S. 159, 23 Sup. Ct. 483, 47 L. Ed. 760. The right to maintain an action in the state courts depends upon a proper construction of section 9 of the federal Judiciary Act. 1 Stat. L. 77, R. S. § 563, re-enacted March 3, 1911, § 24, 36 Stat. L. 1091:

> "The District Courts shall have original jurisdiction as follows: * * * Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

If we understand counsel aright, it is contended that there is no such thing as a common-law action under the maritime law; that there is a definite distinction between a common-law action, or right of action at common law, and a common-law remedy; that it is not a remedy in the common law which is saved, but "a common-law remedy"; that the right to recover for maintenance and cure irrespective of negligence was in no case allowable at common law, and that therefore the remedy lies in the statute and, so resting, a right at common law cannot be asserted, for—

> "surely a vessel and its owners are not to be subjected to all the liabilities of both the common law and the admiralty law, in an action brought in a common-law court without being entitled to the corresponding benefits (as far as its defenses are concerned) of such laws. Either the admiralty law in its entirety is enforceable in such courts or it is not enforceable to any extent."

Appellant cites The Moses Taylor, 4 Wall. 431, 18 L. Ed. 397; The Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Golden Gate, Fed. Cas. No. 574; The Isabella, Fed. Cas. No. 7100; Knapp v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921; Schuede v. Zenith S. S. Co. (D. C.) 216 Fed. 566. In Schuede v. Zenith, supra, which is asserted to be a case directly in point, it is said:

> "But for the exception in the act of 1879 (section 711, R. S.), carried into the present Judicial Code, allowing suitors recourse to a competent common-law remedy, it would seem that the citations above, asserting the controlling force of general and statutory maritime law, indicate the necessity to overrule the motion before the court. To advance that saving clause as a reason why the plaintiff may escape what he may assume to be the disadvantages incident to his maritime contract and seek the advantages of the state law in his suit in a state court upon such a contract is, in our judgment, to misapprehend what is meant in this provision by the word 'remedy.' It must be observed, as suggested by Justice Field, in The Moses Taylor, supra, quoted approvingly in The Glide, 167 U. S. 606, 617, 17 Sup. Ct. 930, 42 L. Ed. 296, that what is saved to a suitor 'is not a remedy in the common-law courts, but a common-law remedy'; that is, as we paraphrase it, the suitor who has a right of action growing out of a maritime contract may not go into a law court to find a new remedy, but he may employ a common-law forum, if one is found competent to work out the rights involved in his contract. In the case before us, the maritime law is not so favorable to the plaintiff touching the range of defense to his action as would be the Ohio law; but those defenses which he seeks to avoid are incidents to and, as against him, liabilities of his contract. They help define his contract of employment, and hence, although employable against him in defense, are no part of the remedy, as that term is used in the saving clause of the Code. The clause 'leaves open the common-law jurisdiction of the state courts over torts committed at sea' (The Hamilton, 207 U. S. 398–404, 28 Sup. Ct. 133, 52 L. Ed. 264), and, in our judgment, does nothing else. The extent of liability for such a tort to be enforced in a common-law jurisdiction is to be restrained by the law which created the relation in which it was committed. * * * In the case of a cause of action for an injury incurred in the course of a maritime employment, to avoid the manifest inconveniences and inequalities involved in plaintiff's interpretation of the saving clause in question, it is not only reasonable, but well within the language of the law, to require whichever court, state or federal, is entered to work out a remedy, to enforce the general and uniform law maritime under which the contract of employment was made."

In Cornell Steamboat Co. v. Fallon, 179 Fed. 293, 294, 102 C. C. A. 345, 346, it was held:

> "The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty. A seaman injured in the service of the vessel has a right to recover against the vessel and her owners for his wages and the expenses of his maintenance and cure to the end of the voyage, or as long as he has a right to wages, whether he is or they are guilty of negligence or not. And this is the extent of his right to recover. There is an exception, apparently a departure from the maritime law, but established by so many decisions that the Supreme Court has declined to disturb it, viz. that if the seaman's injury is due to the personal negligence or default of the shipowners, as, for instance, to the unseaworthiness of the vessel or her tackle, or failure to supply proper medical treatment and attendance he may recover full indemnity. The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955; The Osceola, supra; The Troop, 128 Fed. 856, 63 C. C. A. 584. As no personal negligence or default is imputed to the defendant, the decedent would not have had a right to full indemnity if he had lived, but only to his wages and the expense of his maintenance and cure."

It is asserted that this court has inferentially held that the remedy afforded by the maritime law is exclusive. Sanders v. Stimson Mill Co., 32 Wash. 627, 73 Pac. 688. On the other hand, respondent contends that this case falls within the exception noted in the case cited in the Cornell Steamboat Co. Case. That is, any defect in the ship, its tackle, or appliances for working its cargo is enough to render the ship unseaworthy within the meaning of that term as employed in the case of The Osceola, supra, and to permit a recovery of full indemnity to the extent of the injury. That such a defect brings the case within the rule of unseaworthiness is held in the case of The Argo, 210 Fed. 872, 127 C. C. A. 456, where a recovery was allowed for failure to guard machinery. That confusion should follow the federal statute is evident from its terms. To avoid what would often operate as a denial of justice, the courts, without confessing the motive as it seems to us, have injected a saving clause in the term "unseaworthiness." The Osceola, supra.

The federal act "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it * * * leaves open," as is said by Justice Holmes in the case of The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, "the common-law jurisdiction of the state courts over torts committed at sea." "This, we believe, always has been admitted." The question was, Congress having remained silent, whether a state could legislate so as to extend the jurisdiction of its courts over questions maritime. The court reasoned, inasmuch as the state courts had power to follow their own notions about the law in such cases, that the power of a state to speak through its other mouthpiece, the Legislature, could not be denied, and while it may be, as is said in the Schuede Case, that the case of The Hamilton does not, in its terms, go beyond a holding that the federal statute extends jurisdiction to the state courts over torts committed at sea, yet in its spirit and its logic it must be taken at a greater worth, for the power to exercise a common-law jurisdiction, without the right to give such remedy as the common law would afford if the case were between ordinary litigants, would be to grant a right and deny the very remedy named in the act, that is, a common-law remedy. To hold with the Schuede Case, that a grant of jurisdiction to the state courts means no more than a power to give the same remedies as are allowable under the maritime law, would be to deny the primer definition of jurisdiction; that is, the power to hear and determine. To determine must, of necessity, mean the power to enter a judgment consistent with the common law if the court hearing the case has common-law jurisdiction, and the case falls within the exception noted.

The right to maintain an action in personam even to the extent of aider by attachment is recognized in Rounds v. Cloverport Foundry, 237 U. S. 303, 35 Sup. Ct. 596, 59 L. Ed. 966. There the question whether a contract for repairs was a maritime contract, a breach of which could be determined only in the federal courts, was squarely put. The court considered the same saving statute which is now relied on. It was held that the exclusive jurisdiction of the federal courts extended to cases in rem, and that no controversy might arise as to the meaning of the term in rem, as it is used in our discussions of the maritime law, it was defined:

> "The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.'"

And, further, in discussing the question of concurrent jurisdiction:

> "As this court said in Johnson v. Chicago, etc., Elevator Co., supra [119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447], in reviewing Leon v. Galceran, supra [11 Wall. 185, 20 L. Ed. 74], it was held that 'the action in personam in the state court was a proper one, because it was a common-law remedy, which the common law was competent to give, although the state law gave a lien on the vessel in the case, similar to a lien under the maritime law, and it was made enforceable by a writ of sequestration in advance, to hold the vessel as a security to respond to a judgment, if recovered against her owner, as a defendant; that the suit was not a proceeding in rem, nor was the writ of sequestration; that the bond given on the release of the vessel became the substitute for her; that the common law is as competent as the admiralty to give a remedy in all cases where the suit is in personam against the owner of the property; and that these views were not inconsistent with any expressed in The Moses Taylor [4 Wall. 411, 18 L. Ed. 397], in The Hine v. Trevor [4 Wall. 555, 18 L. Ed. 451], or in The Belfast [7 Wall. 624, 19 L. Ed. 266].'"

As thus understood, we find nothing in the federal cases inconsistent with a former decision of this court (Ransberry v. North American T. & T. Co., 22 Wash. 476, 61 Pac. 154). Sanders v. Stimson Mill Co., supra, in no way trenches upon the doctrine of this case. There a recovery was properly limited for the injury was the result of an accident. There was no testimony showing or tending to show a breach of duty or of obligation on the part of the owner or the unseaworthiness of his ship. Our conclusion is that an action in personam may be maintained for a tort committed on the high seas if the accident is attributable to the "unseaworthiness" of the vessel; that the common-law courts of a state have jurisdiction concurrent with the federal courts when proceeding in personam; and that the state court will grant the relief that a common-law court would have granted had the case been originally triable in such court.

Objection is made that the accident having occurred on the high seas, and not within the territorial jurisdiction of the courts of Washington, respondent must seek his remedy in the federal courts, or take his remedy in the state court under the maritime law. It may be that the Schuede Case so holds. Counsel insists that it does. But we prefer to hold what we conceive to be the better rule. Having held that the action is one in personam, it follows that it is transitory, and appellant is subject to suit in any court having jurisdiction of the person. Jurisdiction over the person is not questioned in this case. Moreover, if actions arising out of the unseaworthiness of a ship are not within the federal statute, it follows that a want of jurisdiction cannot be urged when the action is brought in the state courts. Objection is made to one of the instructions, but, with this view of the law, we think it was not prejudicial.

[4] While the recovery in this case is sub-

stantial, and is probably more than any one of us would have been willing to return, if we were sitting as jurors, we think it is not so far out of proportion to the injuries received by the respondent as to bear inherent evidence of the passion and prejudice of the jury.

The judgment is affirmed.

ELLIS, C. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

(97 Wash. 1)

DU BOIS LUMBER CO. v. DIETDERICH et al. (No. 13852.)

(Supreme Court of Washington. June 15, 1917.)

1. Logs and Logging 🔑32 — Liens — Waiver.

Under Rem. Code 1915, § 1177, making it the duty of a purchaser of liened logs to see that the purchase money is applied to satisfaction of claims entitled to liens, lien claimants did not waive their right to the fund realized on execution sale under their judgment because before the sale they permitted the one who became such purchaser to saw the logs; no one being prejudiced thereby.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 86–88.]

2. Logs and Logging 🔑33(1)—Liens—Enforcement of Rights.

Under Rem. Code 1915, § 1177, making it the duty of a purchaser of liened logs to see that the purchase money is applied to satisfaction of claims entitled to liens, such money may in an interpleader action by the purchaser, all parties being before the court, be awarded to such lienors, though they have not previously begun a suit to foreclose their lien.

3. Garnishment 🔑13—Property Subject.

A garnishment entitled plaintiff to nothing as to a fund; the logs which produced it, sold by defendant to garnishee to be delivered to garnishee, not having come into garnishee's possession when the writ was answered.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 21–24.]

4. Logs and Logging 🔑30 — Laborers — Priority over Garnishment.

Under provision of Rem. Code 1915, § 1206, rights under logger's lien for labor are superior to rights under garnishment of same date based on a claim other than for labor.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 80–82.]

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Action in interpleader by the Du Bois Lumber Company against L. T. Dietderich and others. From the judgment, Ben J. Bell and another appeal. Affirmed.

H. W. Arnold and R. C. Sugg, both of Vancouver, for appellants. McMaster, Hall & Drowley, of Vancouver, for respondents.

MAIN, J. The plaintiff in this case, having in its possession the sum of $1,176.85, to which it made no claim, and there being a number of other parties asserting conflicting rights to the fund, brought this action in interpleader, for the purpose of having the conflicting claims to the fund determined. All parties interested were made defendants in the action. From the judgment entered, two of the defendants appeal.

The facts out of which the litigation grew are substantially these: Henry Haselhorst, one of the appellants, on the 9th day of February, 1915, being then the owner of about 160 acres of timber land, situated in Clarke county, near the town of Yacolt, sold the standing timber thereon to L. T. Dietderich and John Studer, copartners, doing business under the name of Dietderich & Studer. The purchase price was $1.50 per M. according to the scale of the Northern Pacific Railway Company, over which road the logs were to be transported from Yacolt to Vancouver. Dietderich & Studer then sold the logs to the respondent Du Bois Lumber Company, for $6.50 per M., mill scale, delivered at the company's mill in Vancouver. According to the terms of the contract between Dietderich & Studer and Haselhorst, payment was to be made to the latter on the 10th day of each month for all logs cut during the previous month. Dietderich & Studer, after making the contract to deliver the logs to the Du Bois Lumber Company, proceeded with their logging operations. The first few payments due Haselhorst were made to him direct by Dietderich & Studer. About June, 1915, or a few months after operations had been in progress under the contract, Haselhorst became dissatisfied with the manner in which Dietderich & Studer were making the stumpage payments, and went to the Du Bois Lumber Company and asked it to hold out for him the money due him for stumpage. He was told by that company that it would hold out the stumpage, but that it would not guarantee it. Dietderich & Studer subsequently assented to the arrangement made by Haselhorst with the lumber company relative to the payments. All payments due Haselhorst for stumpage under his contract up to October 1, 1915, were made either by Dietderich & Studer, or by the Du Bois Lumber Company. On or about October 26, 1915, Dietderich & Studer ceased logging operations. They were then indebted in a considerable sum for wages due their employés. On October 27, 1915, the labor claimants filed a claim of lien upon the logs then in Clarke county to secure payment of the work and labor performed by each of them, and immediately after commenced an action to foreclose the same. In this action judgment was entered in favor of the labor claimants for the amount due them, aggregating $1,660.87, and attorneys' fees in the sum of $88.15. Either before or immediately after this judgment was entered an arrangement was made with the Du Bois Lumber Company to pay the freight on the logs then in the possession of the railroad company, as well as the expense of conveying them through the booms to the mill, and the lumber company agreed to be responsible for the logs, or their value at the time they were sold under execution. Upon this judgment execution was issued, and the liened logs were sold on November 16, 1915, by the sheriff to the Du Bois Lumber Company, for $1,525.90. The proceeds of this sale were applied upon the labor claimant's judgment, leaving a balance due thereon of approximately $245.85. On the 27th day of October, the day on which the labor liens were filed, the appellant Ben J. Bell, then having a judgment against Dietderich & Studer, caused a writ of garnishment to be issued and served upon the Du Bois Lumber Company. The lumber company answered the writ, admitting the possession of $1,176.85, and alleging that it possessed no other money or property belonging to Dietderich & Studer. This answer Bell controverted. The present action was begun on November 17, 1915, and, as above stated, Haselhorst and Bell, the labor claimants, and other interested parties, were made defendants. Bell claimed under his writ of garnishment; Haselhorst that he was entitled to the fund under an equitable assignment, and that, by virtue of the arrangement which he made with the Du Bois Lumber Company in June, which was assented to by Dietderich & Studer, the lumber company became obligated to pay him for all logs which had been cut and delivered to that company subsequent to October 1, 1915. Upon the trial of the action it developed that the $1,176.85 was the sum of money which the lumber company was owing Dietderich & Studer at the close of business on October 26th for the logs scaled and sawed up to that time. The labor claimants' lien, filed on the 27th, covered logs then in possession of the Northern Pacific Railway Company and held for freight charges, as well as all logs in the booms which were branded "J. S.," this being a designating mark of the Dietderich & Studer logs. On November 16th, when the execution sale took place, all logs were sold which up to that time had been scaled and sawed by the mill company. After November 16th the mill company scaled and sawed other logs branded "J. S." to the value of $206.

From what has already been said it appears that there are three sums in controversy: (a) The $1,176.85, which was the balance owing by the lumber company for logs cut up to the close of business on the 26th day of October; (b) the value of the logs cut subsequent to October 26th and prior to the sale on November 16th, amounting to $1,525.90; and (c) the value of the logs cut subsequent to November 16th, amounting to $206. The $1,176.85 item, by the findings and judgment of the trial court, was awarded to Haselhorst. From this judgment the labor claimants did not appeal. Bell did not except to the findings, and in this court joins in Haselhorst's brief. It therefore must be assumed that, as to this fund, he is not seeking to disturb the judgment awarding it to Haselhorst. Under these circumstances no further reference need be made to this fund.

[1] As to the other two funds, the appellants claim that the court was in error in awarding them to the labor claimants, because it is contended that the labor claimants had waived their right to a lien. This claim of waiver is based on the fact that the labor claimants, not being able to advance the freight on the logs held by the Northern Pacific Railway Company and the boom charges, through their attorneys, arranged with the Du Bois Lumber Company to advance the freight and pay the expenses of booming, and consented that the logs might be sawed, provided the lumber company would hold itself responsible for the value thereof at the time of the sale. This, we think, did not amount to a waiver. In view of the statute (Rem. Code, § 1177) which makes it the duty of a purchaser of liened logs to see that the purchase money has been applied to the payment of such bona fide claims as are entitled to liens upon the property, the method adopted by the lien claimants of permitting the logs to be sawed before the execution sale took place, while irregular, should not deprive the lien claimants of the right to the fund realized upon such sale, in the absence of a showing that the appellants had been prejudiced by such procedure. So far as Haselhorst and Bell are concerned, they were in no worse position by reason of the procedure adopted than they would have been had the foreclosure of the labor liens been conducted with strict legal formality.

[2] As to the $206 item, prior to this action no suit had been begun to foreclose upon the logs which produced that fund, but in this action all the parties were before the court, and there appears to be no reason why the court could not award the fund to the labor claimants in this proceeding as well as if there had been an independent proceeding to foreclosure the liens.

As already suggested, the statute makes it the duty of one purchasing logs on which there is a lien within the 30 days in which the claimant has a right to file the lien to see that the purchase money is appropriated to the satisfaction of the liens, and, construing this statute in Livingstone v. Lovgren, 27 Wash. 102, 67 Pac. 599, it was said:

> "Under section 5945 (Rem. Code, § 1177), supra, it will be seen that if the purchaser, purchasing logs on which there is a lien within the 30 days in which the claimant has to file his lien, fails to see that the purchase money is appropriated to the satisfaction of the liens, he is liable. Under this section it was lawful for the appellant to purchase the logs for their full value and apply the proceeds to the lien claims."

In the present case the lien claimants had valid liens upon the logs which produced the fund of $1,525.90, as well as the $206. The trial court did not err in sustaining the labor claimants' superior rights to these two funds.

There is some controversy over the terms of the arrangement entered into by which the lumber company agreed to hold and pay to Haselhorst each month the money which was due Dietderich & Studer upon the logs sawed during the previous month. The appellants claim that this arrangement obligated the lumber company to pay all such sums to Haselhorst. The respondent lumber company claims that it only agreed to hold out and pay to Haselhorst all stumpage due or to become due under his agreement with Dietderich & Studer on or about the 10th day of each month for all "J. S." logs delivered and received during the previous month, but that it did not assume or guarantee such payments. The trial court found that the arrangement was as contended for by the respondent, and from our examination of the record we are convinced that the testimony amply sustains this finding.

[3] Referring more particularly to the appellant Bell, he would have no claim, under his garnishment, to the $206 item, because at the time the writ was answered the logs which produced this item had not come into the possession of the lumber company. Frieze v. Powell, 79 Wash. 483, 140 Pac. 690.

[4] He would have no right to the $1,525.90 item, even though the logs which produced this item were in possession of the lumber company at the time the writ was served, and the answer thereto made, because, under section 1206, Rem. Code, the labor claimants' rights, under their lien claims, were superior to Bell's rights under the writ of garnishment.

The judgment will be affirmed.

ELLIS, C. J., and MORRIS, CHADWICK, and WEBSTER, JJ., concur.

(96 Wash. 658)

VAN HORST v. VAN HORST. (No. 13692.)

(Supreme Court of Washington. June 15, 1917.)

DIVORCE 🔑245(2)—ALIMONY—MODIFICATION OF DECREE.

A default decree entered in an action for divorce provided that defendant should pay plaintiff $50 per month alimony and deliver to her a certificate of corporate stock in an amount equal to one-half of the community interest in the stock of a corporation, found by the court to be $4,250. On petition to modify this decree it appeared that the community did not own the stock as found, but that defendant, though having subscribed for 60 shares, for which he was paying on the installment plan, actually owned only 12 shares of $50 each; that his monthly salary was $200, of which $50 was credited on his stock subscription; that the community indebtedness was $1,815 exclusive of interest; that defendant had overdrawn his salary account in the sum of $1,412.40; that plaintiff since the date of the original decree had been paid the $50 per month alimony; that plaintiff was an able-bodied woman, 38 years of age, able to earn $15 per week, and that there were no children; and that defendant had remarried and was living with and supporting his wife. *Held*, that the court properly modified the decree so as to require defendant to deliver to plaintiff only 6 shares of stock and properly refused to increase the alimony payable monthly.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 693.]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action for divorce by Annie Van Horst against Paul Van Horst, wherein plaintiff filed a petition praying for modification of a default decree obtained by her and defendant also filed a petition seeking modification of the decree. The original decree was modified and plaintiff appeals and defendant cross-appeals. Affirmed both on original and on cross-appeals.

Frank A. Paul and Walter S. Fulton, both of Seattle, for appellant. B. S. Grosscup and W. C. Morrow, both of Tacoma, for respondent.

WEBSTER, J. On April 28, 1908, plaintiff and defendant were married at Victoria, British Columbia. On May 8, 1915, plaintiff instituted an action for divorce against defendant in the superior court of King county. On June 25, 1915, after personal service on defendant, a default decree was entered, granting to plaintiff an absolute divorce and awarding her the household furniture and alimony at the rate of $50 per month, payable weekly in advance. It was further provided in the decree that defendant should deliver to plaintiff a certificate of stock in the Standard Chemical Company, a Washington corporation, equal to one-half of the interest of the community composed of plaintiff and defendant in that corporation. It was provided in the decree that, upon proper application in the future, the decree might be modified to conform to changed circumstances of the parties. The decree was supported by findings to the effect that defendant had abandoned plaintiff, had been guilty of cruelty toward her, had inflicted upon her personal indignities which rendered her life burdensome, and had failed to make suitable provision for her support; that there was no community real property belonging to the parties, but that they were the owners of the following community personalty: (1) Household effects amounting to not to exceed $100 in value; and (2) an equitable interest to the extent of $4,250, par value, in the capital stock of the Standard Chemical Company; that defendant was an abled-bodied man, a chemist by profession, and was capable of earning from $140 to $250 per month in salary.

On January 31, 1916, plaintiff filed a petition in the original action, praying for a modification of the decree, alleging, among other things, that she was heavily burdened with debts incurred prior to the decree of divorce; that defendant's salary had been increased since the entry of the decree, and that he was at that time capable of earning not less than $250 or $300 per month; that he was in arrears in the payment of alimony, and that he had not delivered to her the certificate of stock in the Standard Chemical Company as provided in the decree. She prayed that the decree be modified so as to allow her alimony at the rate of $25 per week, and that defendant be cited to show cause why he should not be punished for contempt for failing to transfer to her the above-mentioned certificate of stock. On February 9, 1916, defendant also filed a petition seeking a modification of the decree, and set forth in substance that the finding upon which the original decree was based, to the effect that the community was the equitable owner of capital stock in the Standard Chemical Company amounting to $4,250, was erroneous and was the result of a misunderstanding between himself and the attorney for plaintiff; that at the time of the entry of the decree he was employed by the Standard Chemical Company, and had subscribed for 60 shares of the capital stock of the company of the par value of $50 each, for which he was paying in monthly installments; that since April 15, 1915, he had been earning a salary of $150 per month in cash and a credit of $50 per month upon his stock subscription contract; that he had been carrying a large amount of indebtedness, the most of which had been incurred for the benefit of the community; that he had paid to plaintiff all of the alimony awarded to her in the decree; that plaintiff was a young woman in good health; that she was an experienced and competent bookkeeper and stenographer, and was capable of earning from $65 to $100 per month. He prayed that the decree be modified by striking from it the provision relating to the transfer of stock in the Standard Chemical Company, and that alimony at the rate of $50 per month as fixed in the original decree be permitted to stand.

Both petitions were heard on March 27, 1916, resulting in a decree denying plaintiff's application for increased alimony, but providing that alimony at the rate of $50 per month, payable weekly in advance as provided in the original decree, should be paid by defendant; that as between plaintiff and defendant the unpaid community indebtedness antedating the entry of the original decree, amounting in the aggregate to $1,815 exclusive of interest, should be paid by defendant, and in the event that any of the creditors holding the claims representing that amount should enforce payment thereof against plaintiff, either by suit or otherwise, she should be entitled to judgment over against defendant for the amount for which she had been held liable. It was further provided that the original decree, directing defendant to deliver to plaintiff a certificate of stock in the Standard Chemical Company in an amount equal to one-half of the community interest therein found by the court to be $4,250, be modified, and that, it appearing to the court that at the time of the hearing defendant was the owner of 12 shares of the capital stock of the Standard Chemical Company of the par value of $50 each, that he should, within 90 days from the date of the entry of the decree, issue or cause to be issued to plaintiff a certificate for 6 shares thereof, but that the remaining 6 shares and such stock as defendant might thereafter earn should be his sole and individual property. The decree was supported by findings to the effect that the finding upon which the original decree was based—that the community composed of plaintiff and defendant was the equitable owner of capital stock in the Standard Chemical Company of the par value of $4,250—was erroneous; that the true facts were that defendant had, on March 1, 1915, subscribed for 60 shares of the capital stock of that company, and on the same day a resolution was passed by the company fixing defendant's salary at $200 per month, of which $150 was to be payable in cash and $50 per month was to be credited upon his stock subscription agreement, so that 1 full share in the stock of the company should be paid for by defendant's services at the end of each month of his employment; that his salary had not been increased since the date of the resolution, and that the total credits upon his stock subscription from March 1, 1915, to February 29, 1916, under the agreement evidenced by the resolution amounted to $600, or 12 shares of stock at the par value of $50 each; that the amount of community indebtedness was $1,815, exclusive of interest; that from April 17, 1915, to February 28, 1916, defendant had, by permission of the company, overdrawn his salary account in the sum of $1,412.40, for which he had executed his promissory notes which were then unpaid; that plaintiff had received from defendant since the date of the original decree the sum of $445, being in full of alimony as provided in the decree to the time of the hearing; that plaintiff is an able-bodied woman, 38 years of age, capable of earning $15 per week, and that there were no children of the parties to be cared for; that defendant had remarried and was living with and supporting his wife.

Plaintiff, considering herself aggrieved, has appealed from that portion of the decree refusing to increase the alimony from $50 per month to $25 per week, and also from that part thereof which adjudged her to be the owner of 6 shares only of stock in the Standard Chemical Company. The defendant, also being dissatisfied with the disposition made of the case, appeals from that portion of the decree which adjudges that, as between himself and plaintiff, he is wholly and solely liable for the unpaid community obligations, and also from that part thereof ordering him to deliver to plaintiff a certificate for 6 shares of the capital stock of the Standard Chemical Company.

The questions presented are whether the lower court erred (a) in modifying the original decree in respect to the provision requiring defendant to deliver to plaintiff capital stock of the Standard Chemical Company in an amount equal to one-half of $4.250, and adjudging that plaintiff was entitled to only 6 shares of stock of the par value of $50 each; (b) in denying plaintiff's application for an increase of alimony; and (c) in adjudging that as between plaintiff and defendant the latter should be solely liable for the community indebtedness antedating June 25, 1915.

There is very little dispute between counsel as to the law of the case, the questions presented being largely dependent for their solution upon the facts. It would serve no useful purpose to enter into a detailed discussion of the evidence relating to the life and affairs of this unhappy and unfortunate couple. That plaintiff invested substantial amounts of money in various companies with which defendant was connected there can be no doubt. That these investments proved to be disastrous is perfectly plain. But whether this result was brought about through lack of business judgment on the part of the defendant, or was due to other and more serious delinquencies on his part, or was due to causes over which he had no control, is rather incidental in a proceeding of this character. The money invested was lost and consequently is not before the court for division. If this were an action for an accounting between plaintiff and defendant, many elements might enter into the case that cannot properly be considered in a proceeding such as this. The court, in making a disposition of the property of the spouses incidental to granting a decree for divorce, is necessarily limited by the amount of property in the hands of the court for division. Palpably it cannot divide that which does not exist. In making provision for the wife in the way of alimony the court is also powerless to compel the husband to pay more than he is able to pay, no matter what his conduct may have been in wasting or dissipating property belonging to the wife.

The modification of the original decree in respect to the amount of stock owned by the community in the Standard Chemical Company was clearly right. It was conclusively established by the evidence that the community did not own stock in that company of the par value of $4,250. Plaintiff no doubt in good faith believed that the community was the equitable owner of that amount of stock in the company, but the fact remains that the parties did not own it, and consequently it was impossible for the defendant to comply with the decree with respect to it. The defendant prior to the decree claimed to have an oral agreement with one Burkheimer by the terms of which he was to share equally with Burkheimer in the profits or dividends derived from 85 shares of stock in the company, but for some reason not disclosed by the record this contract, if it ever existed, was not carried into effect. At all events the agreement to share the dividends declared upon the stock would not create an equitable title in defendant to the shares of stock themselves. The defendant subscribed for 60 shares of stock in the company for which he was paying in services at the rate of $50 per month, and the stock acquired under this agreement constituted his only holding in the company. At the time of the hearing it appeared that defendant had actually paid for or earned 12 shares of stock in the company, and he was required by the court to transfer to plaintiff 6 shares thereof as her sole and individual property. But in this connection it should be borne in mind that defendant was required to pay $1,815 with interest, representing the aggregate amount of community indebtedness antedating the decree of divorce, and it is quite plain that in order to enable him to meet these obligations the court adjudged to him the remaining 6 shares then paid for and such additional shares as he might thereafter acquire under his subscription contract.

The evidence adduced clearly established that plaintiff is a business woman of considerable experience; is a competent stenographer and bookkeeper; is 38 years of age and in robust health. The finding was well within the facts that she was easily capable of earning $65 per month. There are no children to be cared for, and it would seem that, by supplementing her own income to the extent of $50 per month in the way of alimony, she will be comfortably provided for and maintained.

A careful reading of the abstract in connection with frequent references to the statement of facts induces the conviction that the decree of the lower court, when considered from all viewpoints, is as nearly just and equitable as the nature of the case and the circumstances of the parties will permit. In disposing of questions of this character resort must necessarily be had to practical considerations, remembering always that the garment must be measured according to the cloth.

The decree will be affirmed both upon the original and upon the cross-appeal.

ELLIS, C. J., and CHADWICK, MAIN, and MORRIS, JJ., concur.

(96 Wash. 689)

ALLEN v. ALLEN (ALLEN et al., Garnishees).

(No. 13879.)

(Supreme Court of Washington. June 15, 1917.)

1. **JUDGES 🔑30 — FINDINGS AND CONCLUSIONS OF LAW—PLACE OF SIGNING.**

Under the specific provisions of Rem. Code 1915, § 42, a judge of the superior court may sign his findings and conclusions of law and judgment outside the county, and where such documents were signed without the county and immediately filed in the county of suit, the judge acted within his jurisdiction.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 143.]

2. **TRIAL 🔑395(8)—FINDINGS AND CONCLUSIONS OF LAW—NECESSITY OF NOTICE.**

As a matter of law, plaintiff is not entitled to notice of the time and place of signing the findings of fact, conclusions of law, and judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 934.]

3. **APPEAL AND ERROR 🔑1074(1)—HARMLESS ERROR—VACATING JUDGMENT.**

The irregularity in signing a vacation of judgment outside the county is no ground for reversal in the absence of showing of prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248, 4249.]

4. **JUDGMENT 🔑743(3)—RES JUDICATA—TITLE.**

A judgment confirming title in the garnishee to certain diamonds is conclusive in the garnishment proceeding which was between the same parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1277.]

5. **FRAUDULENT CONVEYANCES 🔑206(2)—NECESSITY OF RELATION OF DEBTOR AND CREDITOR.**

A gift of diamonds by an attorney to his daughter-in-law made 32 days after the attorney had withdrawn funds belonging to a client is not void or fraudulent as to the client as a creditor, the relation between attorney and client being the fiduciary one of principal and agent, and not debtor and creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 630.]

6. **JUDGMENT 🔑683—CONCLUSIVENESS—PERSONS CONCLUDED.**

Judgment for assignee of client's claim against attorney for moneys converted reciting date on which attorney became indebted to client is not binding upon a garnishee who received a gift from the attorney, as a finding of the date when the attorney became a debtor, to provide basis for claim that the gift was in fraud of the creditor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206.]

7. **GARNISHMENT 🔑193—DISCHARGE OF GARNISHEE—WAIVER OF CLAIM.**

Where the attorney at the trial admitted that the principal was not indebted to his client's assignor at the time the principal made a gift to the garnishee, a discharge of the garnishee was warranted.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 381, 382.]

8. **GARNISHMENT 🔑191—COSTS—ATTORNEY'S FEES.**

Under Rem. Code 1915, § 704, permitting taxation of attorney's fees against plaintiff in garnishment when the garnishee is discharged, there was no error in taxing attorney's fees of $100 in one garnishment or $200 in another garnishment proceeding, though no evidence was taken as to the value of the services.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 372-379.]

Department 1. Appeal from Superior Court, King County; E. C. Mills, Judge.

Action by Laura Allen against J. H. Allen, wherein Benna K. and J. Howard Allen, Jr., were garnished. From judgments discharging the garnishees, plaintiff appeals. Affirmed.

Jay C. Allen, of Seattle, for appellant. Bronson, Robinson & Jones, of Seattle, for respondent.

MAIN, J. This is an appeal from a judgment of the superior court, discharging two writs of garnishment.

The facts are these: Some time during the month of March or April, 1914, Jay C. Allen, an attorney at law, residing at Seattle, intending to be absent from the state a number of months, arranged with J. H. Allen to look after his law business during such absence. Jay C. Allen, at this time, and for some time prior thereto, was, and had been, an attorney for one John Joyce. Prior to July 6, 1914, there had been paid into the registry of the court the sum of $6,797.64 for the benefit of Joyce. On the date last mentioned, J. H. Allen, as an attorney for Joyce, withdrew this money from the registry of the court. After being absent for a number of months, Jay C. Allen returned to Seattle, and shortly after his return and early in the month of October Joyce called his attention to the fact that he had not received the money which had been withdrawn from the registry of the court by J. H. Allen. At this time J. H. Allen was insolvent and unable to pay over the money. On October 22, 1914, the respondent Laura Allen advanced the money to pay Joyce, and took an assignment of his claim against J. H. Allen. On December 7, 1914, Laura Allen brought an action upon the assigned claim against J. H. Allen. On the same date Laura Allen caused a writ of garnishment to be issued in the case which she had brought against J. H. Allen, and served upon Howard Allen. On January 11, 1915, Laura Allen brought an action against J. H., or J. Howard Allen, Jr., who, to avoid confusion, will be referred to as Howard Allen. In this action it was claimed that Howard Allen was indebted to J. H. Allen in a large sum of money, and judgment was therein sought against Howard Allen. On January 19, 1915, Laura Allen brought an action against Howard Allen and Benna K. Allen, his wife, claiming that on January 9, 1915, J. H. Allen, for a valuable consideration, had conveyed and transferred to the plaintiff therein his right, title, and interest in and to certain property. It was claimed in the complaint that Howard Allen and wife held certain of the property covered by this assignment in trust for J. H.

Allen, and judgment was sought, declaring such trust, and for an accounting. The two actions last referred to were consolidated, and were tried before the Honorable Everett Smith, one of the judges of the superior court for King county, the trial having occurred during the month of April. On May 3, 1915, Laura Allen caused a writ of garnishment to be issued out of the same action in which Howard Allen had previously been made garnishee defendant, and caused the same to be served upon Benna K. Allen. These writs of garnishment were respectively answered by Howard Allen and Benna K. Allen, each denying that they had in their possession, or under their control, money or property belonging to J. H. Allen. These answers were controverted by Laura Allen. On November 29, 1915, the issues in the two garnishment proceedings came on for trial before the Honorable Edward C. Mills, judge of the superior court for Walla Walla county, then sitting in King county. On March 9, 1916, two judgments were entered, one discharging Howard Allen as garnishee, and the other discharging Benna K. Allen as garnishee. In the garnishment proceeding against Benna K. Allen, formal findings of fact and conclusions of law were made and entered. In the proceeding against Howard Allen, no findings were made other than a recital in the judgment. On March 15, 1916, Laura Allen made a motion to vacate the findings of fact and conclusions of law, which was subsequently overruled. From the judgments discharging the garnishees, this appeal is prosecuted.

[1] It is first claimed that the judgment discharging Benna K. Allen as garnishee should be reversed, because the appellant had no notice of the time and place that the findings and conclusions of law would be presented to Judge Mills for signature. A copy of the findings and conclusions of law were served upon the attorney for the appellant on the 6th day of March, 1916. On the 8th day of March the findings and conclusions of law and judgment were signed by Judge Mills in Walla Walla county, and by him were returned to the attorneys for the respondent, who caused them to be filed in the superior court of King county. In signing the findings and conclusions of law and judgment in Walla Walla county, Judge Mills did not exceed his jurisdiction. Section 42, Rem. Code; State ex rel. Calhoun v. Superior Court, 86 Wash. 492, 150 Pac. 1168.

[2] As a matter of law, the appellant was not entitled to notice of the time and place of signing the findings of fact and conclusions of law and judgment. Upon this question, in Lindsay v. Scott, 56 Wash. 206, 105 Pac. 462, it was said:

> "The appellants were not entitled to notice of the time and place of signing the findings of fact, conclusions of law, or judgment, as a matter of law, nor were they deprived of the benefit of exceptions for want of notice. The right to except continues until the lapse of five days after notice of the filing of the findings, under the express terms of the statute, and repeated rulings of this court."

[3] It is next contended that the judge before whom the case was tried had no jurisdiction to hear and determine the motion to vacate the findings and judgment in any county other than King county. The hearing and determining of the motion to vacate was irregular and not authorized by the statute; but, unless prejudice is shown, it does not furnish a ground for reversal. The cause here is tried de novo, and since we are of the opinion that the motion to vacate was properly denied, a new trial should not be ordered. In Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383, it was said:

> "The case was heard in the court below before Judge Holcomb of Adams county. After his return to Ritzville, the judge heard and denied a motion for a new trial, interposed by the appellants, and upon this ruling the first error is assigned. After providing that superior judges may make and sign certain orders outside of their respective counties, section 1 of Laws of 1901, p. 76 (Rem. & Bal. Code, § 41), expressly provides, 'That nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties.' Under this provision, a judge of the superior court cannot properly hear a motion for a new trial outside of the county wherein the cause is pending, except by consent of the parties, and the action of the trial judge in this respect was irregular; but the case is heard here de novo, and no prejudice has resulted to any party in interest, if the new trial was properly denied."

[4] Upon the merits, we will first consider the appeal from the judgment discharging Benna K. Allen as garnishee. On August 7, 1914, J. H. Allen gave to Benna K. Allen, his daughter-in-law, certain articles of personal property, included in which were three diamond rings, which were chiefly valuable on account of the diamonds. It is these three diamonds which are the basis of the controversy upon this appeal. There are two reasons why the judgment of the trial court should not be disturbed: First, if we understand the record correctly, the title to these same diamonds was tried in the consolidated cases heard before Judge Smith, and Benna K. Allen's title thereto was sustained. The property described in the complaint in that action includes "three diamond rings (one 3⅝ carat, one 1 1/7 carat, and one small one)." Laura Allen, in her controverting affidavit, in the garnishee proceeding against Benna K. Allen, described the diamonds which the latter had in her possession, and which it is contended were given to her in fraud of creditors, as follows: "Three diamond rings, one 3⅝ carat, one 1 1/7 carat, and one small one."

[5] The other reason why the judgment in favor of Benna K. Allen should not be disturbed is that, even though the diamonds were given to her as a present, and there was no consideration other than love and affection, it was not fraudulent as to John Joyce, through whom Laura Allen claims.

because it does not appear that, at the time this present was made, John Joyce was a creditor of J. H. Allen, or that the transfer was made for the purpose of defrauding him as a subsequent creditor. As already stated, the money was withdrawn from the registry of the court by J. H. Allen on the 6th day of July, 1914. The diamonds were given to Benna K. Allen on August 7, 1914. When J. H. Allen withdrew the money, he was acting as the attorney for Joyce, and the fact that, between the two dates mentioned, the money was not turned over to Joyce does not raise a presumption that, during that time, there had been a conversion. The relation between Allen and Joyce, when the money was withdrawn, was the fiduciary one of principal and agent, and not debtor and creditor, growing out of either contract or tort. 2 R. C. L. p. 1022; 6 C. J. p. 694; Thornton on Attorneys at Law, vol. 1, § 346; Goodyear Metallic Rubber Co. v. Baker's Estate, 81 Vt. 39, 69 Atl. 160, 17 L. R. A. (N. S.) 667, 15 Ann. Cas. 1207.

[6] There is no evidence in the record from which it can be inferred that the relation of principal and agent was changed to that of debtor and creditor prior to the time when the diamonds were given to Benna K. Allen. It is true that the findings in the case of Laura Allen v. J. H. Allen, which were signed and filed on January 12, 1917, recited that J. H. Allen became indebted to Joyce on July 6, 1914, in the sum of $6,797.64, but Benna K. Allen was not a party to that action, and would not be bound by the findings and judgment therein. In Henry v. Yost, 88 Wash. 93, 152 Pac. 714, the latter had deeded, on August 30, 1912, certain property to one H. E. Schroeder in trust for Mrs. Yost. Subsequently Henry sued Yost and another for conversion of a band of sheep, and obtained judgment on February 25, 1913, and on July 10, 1913, brought an action against Yost and wife and Schroeder and wife to set aside the conveyance to Schroeder, which had been made in trust for Mrs. Yost. Upon the trial of the latter action, it was not shown that the conversion of the sheep had occurred prior to the time of the conveyance from Yost to Schoeder. It was there said:

> "Had Henry proved that his cause of action existed when the deed was given to Schroeder, he would have established a prima facie case of fraud, and the burden then would have been on the grantor and grantee to prove the validity of the conveyance. The only proof offered of this claim, however, was the record in the case of Henry v. Yost and Day. The judgment in that case is not even prima facie evidence, as against Mrs. Yost and Schroeder and wife, who were strangers to that judgment, of any indebtedness or liability of Yost to Henry prior to the time it was rendered. Eggleston v. Sheldon, 85 Wash. 422, 148 Pac. 575. To hold that, as against Mrs. Yost and Schroeder, it proves the previous existence of the alleged facts on which it was based and the time when those alleged facts occurred, would be to bind Mrs. Yost and Schroeder by the results of a litigation in which they did not appear, of which they had no notice or knowledge, and in which they had no opportunity to participate. The judgment established the indebtedness of Yost to Henry, but did not of itself prove the previous existence of the facts on which it was based. No other evidence of the indebtedness was introduced; consequently Henry did not establish that he was a creditor of Yost when the conveyance was made, and did not show a prima facie case of fraud. The judgment did prove him to be a creditor as of the date it was rendered, which was six months after the execution of the deed. Henry, having proved himself to be a subsequent creditor, could, by showing that the conveyance was made with intent to defraud him, have had it set aside and the property subjected to the lien of his judgment. The burden of such a showing was on him, and he failed to meet it. No evidence was introduced, except the judgment in the tort action, to show that the deed was given in anticipation of the judgment, and we have found that the judgment alone was ineffectual to prove the cause of action then existing against Yost. The appellant then has failed to prove either that he was a creditor when the deed was executed, which would have put upon Mrs. Yost or Schroeder the burden of vindicating the deed, or that the conveyance was made to defraud him as a subsequent creditor. Failing in both, he has not established his right to have the deed set aside and the property subjected to the lien of his judgment. The trial court properly dismissed the action."

Applying the doctrine of that case to the facts in the present case, the action must fail, because it does not appear that Joyce became a creditor of J. H. Allen prior to the time the diamonds were given to Benna K. Allen, or that the gift was made to defraud Joyce as a subsequent creditor.

We will refer now to the case against Howard Allen. When the cause came on for trial upon the issues framed in the garnishment proceeding, the statement of facts shows the following:

> "Mr. Allen: I am not asking for the car now. The car was given before this debt arose. I am not asking for the car.
>
> "Mr. Bronson: You don't contend for anything but the diamonds?
>
> "Mr. Allen: That is all, because the debt was not in existence at the time he gave the car.
>
> "The Court: Then the automobile, I take it, is eliminated?
>
> "Mr. Bronson: Yes.
>
> "The Court: Upon the statement of Mr. Allen it seems to me the court ought to dismiss the action against J. H. Allen, Jr., on your statement, Mr. Allen.
>
> "Mr. Bronson: Then, if your honor please, we ask to be allowed an attorney's fee at the proper time.
>
> "Mr. Allen: For that very reason I don't want to try it now.
>
> "The Court: I don't want you to claim your attorney's fee in that case by trying it here. I cannot hold that automobile. Do you admit they are entitled to judgment in that case?
>
> "Mr. Allen: Yes.
>
> "The Court: You may take judgment, and the court will allow attorney's fee.
>
> "Mr. Allen: We will attend to that later when I get through with this case."

[7] Upon this record, it seems to us, the court was authorized to discharge Howard Allen as garnishee. It was not error to enter a judgment to that effect.

[8] One other question is presented, and that is attorney's fees. In the proceeding against Howard Allen, a fee of $100 was allowed as costs; in that of Benna K. Allen,

$200. There was no testimony taken in either case as to what would be a reasonable judgment for attorney's fees. The statute (Rem. Code, § 704) provides that, where the garnishee is discharged, the costs of the proceeding, including a reasonable compensation to the garnishee for attorney's fee, shall be taxed against the plaintiff. In Carr v. Bonthius, 79 Wash. 282, 140 Pac. 339, it was said:

> "The court found that $250 was a reasonable attorney's fee to be allowed for the foreclosure. It is argued by the appellant that there was no evidence to support this conclusion. But we held in Warnock v. Itawis, 38 Wash. 144, 80 Pac. 297, that no evidence was necessary in such cases; that the court was as competent to judge what was a reasonable attorney's fee in such a case as the ordinary witness who might be called. There was no error in this finding."

The court did not err in awarding attorney's fees as specified in the judgments.

Affirmed.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(97 Wash. 7)

CRANE v. WASHINGTON WATER POWER CO. (No. 13773.)

(Supreme Court of Washington. June 18, 1917.)

1. ATTORNEY AND CLIENT 🔑144—RIGHT TO COMPENSATION—CONTRACTS—CONSTRUCTION.

A contract by which defendant agreed to pay plaintiff attorney $25,000 on his securing a permit from the Department of the Interior to flood certain acreage, and further to pay $25,000 if within three years he secured and caused to be vested in defendant the perpetual right to flood such acreage, did not entitle the attorney to payment of the second $25,000 upon his securing a permit under Act Cong. Feb. 15, 1901, c. 372, 31 Stat. 790 (U. S. Comp. St. 1916, § 4946) authorizing the Secretary of the Interior to permit the use of public lands, but providing that any permission so given may be revoked in his discretion.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333.]

2. ATTORNEY AND CLIENT 🔑144—RIGHT TO COMPENSATION—CONTRACTS—CONSTRUCTION—"PERPETUAL RIGHT."

The words "perpetual right" in such contract contemplated securing an irrevocable right, or some right in addition to the permit under such statute.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333.]

3. ATTORNEY AND CLIENT 🔑144—RIGHT TO COMPENSATION—CONTRACTS—CONSTRUCTION.

In such case, where the secretary revoked the permit and defendant employed another attorney to secure a reversal of the revoking order, the plaintiff attorney was not entitled to compensation on the theory that defendant had prevented his performing, since proceedings as to original permit could in no way interfere with his attempting to secure the perpetual right.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333.]

4. APPEAL AND ERROR 🔑714(2) — SCOPE OF REVIEW—FILING DOCUMENTS.

If demurrer was sustained to the fourth amended complaint, whereupon plaintiff refused to plead further and appealed, he could not file before the appellate court pleadings of the defendant in other suits in different states inconsistent with the pleadings filed in the instant case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2960.]

Department 1. Appeal from Superior Court, Spokane County; R. B. Blake, Judge.

Action by A. A. Crane against the Washington Water Power Company. Judgment dismissing the action, and plaintiff appeals. Affirmed.

Robertson & Miller, of Spokane, Fred D. Crane, of Cœur d'Alene, Idaho, and Isham N. Smith, of Wallace, Idaho, for appellant. Post, Russell, Carey & Higgins, of Spokane, for respondent.

MAIN, J. The purpose of this section was to recover an attorney's fee in the sum of $25,000, alleged to be due upon a written contract. To the fourth amended complaint, a demurrer was interposed and sustained. The plaintiff refused to plead further, and elected to stand upon this amended complaint. Thereupon judgment was entered, dismissing the action, from which the appeal is prosecuted.

The complaint is too voluminous to be here set out in full, but the controlling facts therein stated may be summarized as follows:

The appellant is an attorney at law, duly licensed under the laws of the state of Idaho, and residing in that state. The respondent is a corporation organized and existing under and by virtue of the laws of the state of Washington, and is a public service corporation, owning and operating certain electric light and power plants in the city of Spokane, and at Post Falls, Idaho. Immediately prior to the year 1908, the respondent had constructed, or had in the course of construction, a dam at Post Falls, Idaho, by which to impound the waters of the Spokane river and Lake Cœur d'Alene. Much of the land around the shore line of the lake, and along the tributaries adjacent thereto, was low, which the impounding of the water would cause to be inundated. Before the respondent would have a right to overflow a considerable portion of the land, it was necessary to secure a permit from the Secretary of the Interior, authorizing the overflow of the lands belonging to the federal government. For the purpose of securing this permit from the federal government, a contract between the parties was entered into, as follows:

> "It is hereby agreed by and between the Washington Water Power Company with A. A. Crane, that if the said Crane shall, within six months from the date hereof, to the satisfaction and approval of counsel and attorneys for said company at Spokane, Washington, procure and cause to be vested in said company, license, power and authority from the United States through its Secretary of the Interior, to back and hold water upon and flood and overflow with

> water so much of the Cœur d'Alene Indian Reservation in the state of Idaho, and also any lands in any national or government park within the exterior boundaries of said reservation as said boundaries existed January 1, 1908, as are below an elevation of two thousand one hundred and twenty-eight feet above mean sea level, including all mounds, raises, hills and elevations within the exterior boundaries of said elevation of twenty-one hundred and twenty-eight feet, which said right to flood and overflow the said lands and to have and maintain as a reservoir, shall conform to and be granted under that certain act entitled, 'An act relating to rights of way through certain parks, reservations and other public lands,' approved February 15, 1901, and contained in 31 Statutes at Large at page 790; and any other act or law of the United States which may be applicable; then, and in those events, said the Washington Water Power Company shall and will pay to said Crane the sum of twenty-five thousand dollars, or so much thereof as remains after paying any and all claims, demands and charges which said company may see fit to pay and which may have to be paid to secure said rights from the United States or Indians or any Indian, or any other person on said reservation having or claiming to have any valid or legal interest in said lands, or any part thereof; but no amount shall be paid on this contract as herein provided, by the Washington Water Power Company other than such as may be necessary to be paid to the United States and fees legally collectible by the officers of the United States, except on and with approval of said Crane.
>
> "Said sum of $25,000.00, or any part thereof, shall not be due or payable, except upon the written certificate of said Spokane attorneys of said company, which certificate shall be given and payment made to said Crane, within sixty days after full compliance with this contract by said Crane; provided said Crane shall fully comply with all the terms hereof within three years from the date of this contract.
>
> "The said Crane agrees to use his best efforts to secure the aforesaid rights as to, upon and over the whole of the lands hereinbefore mentioned and to transfer, or cause the same to be transferred to said company, its successors or assigns, as soon as secured.
>
> "If said Crane shall not secure said rights and the whole thereof, as and when herein provided, said the Washington Water Power Company shall not be liable to said Crane, or any other person, for any sum or amount whatever.
>
> "It is further agreed that if the said Crane shall, within three years from the date hereof, to the satisfaction and approval of counsel and attorneys of said company at Spokane, Washington, procure and cause to be vested in said company the perpetual right, power and authority to back and hold water upon and flood and overflow and to maintain reservoir upon and over the land hereinbefore described, then and in that event the said the Washington Water Power Company shall pay the said Crane the further sum of twenty-five thousand dollars, payable on the certificate of counsel and attorneys of the Washington Water Power Company as hereinbefore provided with reference to the other payment hereinbefore agreed to be made upon the conditions and provisions hereinbefore set forth.
>
> "Dated at Spokane, Washington, this 22d day of December, 1908."

After this contract was entered into, the appellant proceeded to the city of Washington, D. C., and there, as attorney for the respondent, made application to the Department of the Interior, and through the office of Indian Affairs, for a permit to enable the respondent to overflow the lands mentioned in the contract, under the provisions of the act of Congress of February 15, 1901, as provided in the contract. On February 2, 1909, the Secretary of the Interior, after a hearing, and proceedings had through the Office of Indian Affairs, issued a permit, authorizing the respondent to overflow the lands mentioned, but requiring, as a consideration therefor, that certain Indians, who were occupants of the lands, be paid for damages sustained by reason of the overflow waters at the rate of $1.25 per acre. More than $7,500 was paid to the United States, for the benefit of the Indians, the same being taken from the first $25,000 mentioned in the contract. After the right to overflow was granted, the Department of the Interior, in issuing patents by the United States to entrymen under the homestead laws, inserted a clause therein that such lands were subject to the rights of the Washington Water Power Company under the permit theretofore issued. It is alleged that, in securing the grant, or permit, above mentioned, from the United States, through the Secretary of the Interior, the appellant has caused to be vested in the respondent "perpetual right, power and authority" to flood and overflow the lands covered by the permit. Some time after the permit had been issued, the Department of the Interior required the Washington Water Power Company to show cause why its grant, or permit, should not be revoked. Thereafter a hearing was had by the Department of the Interior, and on July 29, 1910, an order was entered, revoking the permit. On the 22d day of April, 1912, the Secretary of the Interior entered an order, setting aside the previous revocation, holding that the same was arbitrary and unjustifiable, and there did not appear to be any sufficient reason for the revocation. While the matter was proceeding in the Department of the Interior, on an application to set aside the previous revocation of the permit, the respondent substituted other attorneys for the appellant in that proceeding.

The first question is whether the appellant had done all that he was required to do, under the written contract, in order to recover the second $25,000 mentioned therein. There is no controversy here over the first $25,000, as that has already been paid. A careful reading of the contract discloses that, by the terms thereof, the appellant was to do two things, the first being to procure and cause to be vested in the respondent, "license, power and authority" from the United States, through the Secretary of the Interior, to flood or overflow certain lands, which permit was to—

> "conform to and be granted under that certain act entitled, 'An act relating to rights of way through certain parks, reservations and other public lands,' approved February 15, 1901, and contained in 31 Statutes at Large at page 790; and any other act or law of the United States which may be applicable."

The other thing which the appellant was authorized to do under the contract is contained in the last paragraph thereof, and was that, if within three years, he should procure and cause to be vested in the respondent "the perpetual right, power and authority to back and hold water upon and flood and overflow" the land before described, he should be paid the sum of $25,000.

It is not claimed that the appellant caused any permit to be issued, other than that above mentioned, which was issued under the act of February 15, 1901, but it is claimed that this permit vested in the respondent the perpetual right, power, and authority to flood the lands mentioned. By the Act of February 15, 1901, it is provided that the Secretary of the Interior is authorized and empowered under general regulations, to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, for electrical plants, poles, and lines for the generation and distribution of electrical power, etc. This act contains the proviso:

> "That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

[1] It seems plain that a permit to flood lands, issued under this act of Congress, would not, and could not, confer a perpetual right to flood or overflow land. The proviso quoted gives the Secretary of the Interior authority to revoke in his discretion, and provides that any permit issued thereunder shall not confer any right, or easement, or interest in, to, or over any public land. A right subject to these limitations could not well be considered perpetual.

[2] It is argued, however, that the word "perpetual" must be given a meaning which the parties to the contract intended, having regard to the subject-matter thereof and the surrounding facts and circumstances, and this proposition cannot well be disputed. Looking again to the contract, it first provided for license, power, and authority from the United States to flood the land, which should be issued under the act of February 15, 1901, and fixed the compensation for that service. It will be noticed that, in this part of the contract, the word "perpetual" is not mentioned. In the second part of the contract, which is found in the last paragraph, an additional compensation in the sum of $25,000 is to be paid, provided the appellant, within three years from the date of the making of the contract, should procure and cause to be vested in the respondent the "perpetual right, power and authority" to flood the land. This would indicate that, in order to earn the second $25,000 mentioned, the appellant was to secure a greater right than could be obtained under the act of February 15, 1901. It was obviously not the intention of the parties, at the time the contract was executed, that the $25,000 mentioned in the last paragraph should become due when a permit should be issued by the Department of the Interior, under the act of February 15, 1901.

[3] Some mention is made in the briefs of section 2339, United States Revised Statutes (Comp. St. 1916, § 4647), but it was held in United States v. Utah Light & Power Co., 209 Fed. 554, 126 C. C. A. 376, and 230 Fed. 328, 144 C. C. A. 470, by the Circuit Court of Appeals for the Eighth Circuit, that that section of the Revised Statutes is not applicable where the right to burden public lands involves the generation, manufacture, or distribution of electric power. The appellant, not having caused the perpetual right to flood the land to be vested in the respondent, as mentioned in the last paragraph of the contract, is not entitled to the $25,000, which was to be paid him if he secured that right, unless he has been prevented from performing that part of the contract by the respondent. It is alleged, as above stated, that, after the permit was issued and revoked, and while the cause was pending in the Department of the Interior, seeking restoration of the permit and the setting aside of the revocation, other attorneys were substituted for the appellant in that proceeding, but this would not prevent the appellant from proceeding under the last paragraph of the contract, which involved the perpetual right.

The permit, as finally sustained by the Department of the Interior, was under the act of February 15, 1901, and, as already stated, in our opinion, did not vest in the respondent a perpetual right. Had the appellant been permitted to handle the litigation which resulted in sustaining the permit and setting aside the previous revocation, he would have been in no different position than he now is. Not having secured the perpetual right, as provided for in the concluding paragraph in the contract, and not having been prevented from performing that part of the contract by any act of the respondent, the service for which the $25,000 there mentioned was to be compensation has not been rendered, and no recovery can be had therefor.

[4] In the reply brief, two cases are referred to, which had been instituted in the District Court of the United States for the District of Idaho, Central Division, in each of which the Washington Water Power Company, the respondent here, was defendant, and request is made for permission to file and have the court consider certified copies of the pleadings in those cases, and, in the event that this request is denied, that the appellant be permitted to amend his fourth amended complaint. To sustain either of these requests would be to adopt a procedure unknown to the laws of this state. When the trial court sustained the demurrer to the fourth amended complaint, the appellant refused to plead further, and elected to stand thereon, and brought the matter to this court by appeal, for the purpose of reviewing the

ruling of the trial court. Whether the judgment of the trial court is right must be determinated from the facts alleged in the complaint, and these can neither be enlarged nor modified by any facts that may appear in the pleadings in the two cases mentioned. The request tó file will be denied, and also the request to permit, in this court, an amendment of the fourth amended complaint. While it is not material, it may be said that the apparent purpose of the request to file the papers, or to amend, was to get before this court the fact that, in the federal court, where those actions are pending, the respondent had taken a different position upon the law from that it here takes, but, if the respondent here (defendant in those cases) there took an unsound position upon the law, that would not be a good reason to deny it the right here to urge a correct view of the law.

The judgment will be affirmed.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(96 Wash. 646)

MURRAY et ux. v. CITY OF SEATTLE.
(No. 13611.)

(Supreme Court of Washington. June 15, 1917.)

1. APPEAL AND ERROR 🔑939—PRESENTATION FOR REVIEW—RECORD.

A statement, in the transcript of the record on appeal, of the grounds of a motion for a new trial, will be presumed to be correct, rather than a substantially different statement contained in the abstract of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3804–3806.]

2. APPEAL AND ERROR 🔑1078(1)—PRESENTATION FOR REVIEW—ABANDONMENT—BRIEFS.

An objection made below in an action against a city, that the claim sued on was not properly verified, will be deemed abandoned on appeal when not presented in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

3. TIME 🔑9(4)—PRESENTATION OF CLAIM.

Under a city charter provision requiring that claims against a city be filed within 30 days, a claim filed November 30th, after occurrence of an accident on October 30th, is one day late.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 19–23.]

4. EVIDENCE 🔑17 — JUDICIAL NOTICE — DATES.

The court will take judicial notice that the last Sunday of October, 1915, came on the 31st of the month, and that therefore an injury sued for could not have been received on Sunday, October 30, 1915.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 21.]

5. APPEAL AND ERROR 🔑231(3)—RECEPTION OF EVIDENCE—SUFFICIENCY OF OBJECTION.

A general objection to evidence on the ground that it is incompetent, irrelevant, and immaterial, will not save a point on appeal, where such objection is not sufficiently specific to call the court's attention to the particular point sought to be raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Trial, Cent. Dig. § 199.]

6. TRIAL 🔑84(4)—RECEPTION OF EVIDENCE—SUFFICIENCY OF OBJECTION.

An objection to the introduction in evidence of a claim filed against a city, that it was incompetent, irrelevant, immaterial, and insufficient, did not present the point that the claim had not been filed in time.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 217.]

7. MUNICIPAL CORPORATIONS 🔑812(7) — CLAIM FOR DAMAGES—DATE OF INJURY.

It is not necessarily fatal to a claim for damages filed against a city that it inaccurately stated the date on which the injuries were received, where the city charter does not specify that such date shall be stated, and the claim was in fact filed within the time fixed by the charter, and the city was not misled to its prejudice by the statement of an incorrect date.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1702.]

8. MUNICIPAL CORPORATIONS 🔑812(4) — PRESENTATION AND FILING OF CLAIMS—SUBSTANTIAL COMPLIANCE.

That charter provisions relating to the presentation and filing of claims against municipalities are mandatory does not render insufficient a substantial compliance with such provisions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1699.]

9. ELECTRICITY 🔑13—ACTION FOR INJURIES—NOTICE OF DEFECT OR OBSTRUCTION—NECESSITY.

In an action against a city for injuries due to electric light wires falling across a street in consequence of negligence of the city in permitting the wires to be supported by decayed poles, it was not necessary to show that the city had either actual or constructive notice of the existence of the obstruction in the street; it being only in cases where the negligence relied on is the city's failure to remove an obstruction and repair a defect in the street not caused by its own act or negligence that the question of notice of the obstruction or defect is an essential element.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 6.]

10. JUDGMENT 🔑199(3) — NOTWITHSTANDING VERDICT—EVIDENCE.

Where, in a personal injury case against a city, a cause of action based on negligence of the city was supported by substantial evidence, a motion for judgment notwithstanding the verdict was properly denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 367.]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Carl Murray and wife against the City of Seattle. From a judgment for plaintiffs, defendant appeals. Affirmed.

Hugh M. Caldwell and Frank S. Griffith, both of Seattle, for appellant. Walter S. Fulton, of Seattle, for respondents.

WEBSTER, J. This is an action to recover damages for personal injuries. The material allegations of the complaint are substantially these: That on October 30, 1915, at about 12:15 p. m., plaintiffs were driving their automobile south on Eighth Avenue Northwest between Seventy-Third and Seventieth Streets West, in the city of Seattle; that about 200 feet north of Seventieth Street West, on the west side of Eighth Avenue Northwest, two electric light wires maintained by the city of Seattle had through its negligence been caused to fall and be suspended across Eighth Avenue Northwest. The specific acts of negligence charged against the defendant were that at the point where the wires had fallen the defendant had them attached to a pole which was wholly insufficient in strength to support them and which was not reasonably adapted to the purpose for which it had been used; that, because of long use of the pole, it had become further weakened by rot and decay and by reason thereof fell, causing the wires to be suspended across the avenue in such manner as to constitute a menace to persons having occasion to use the same; and further that the defendant negligently and carelessly permitted the wires to remain across the avenue after they had fallen notwithstanding its officers, agents, or employés knew of their condition, or by the exercise of reasonable care and diligence ought to have known thereof; that plaintiffs, without fault on their part, while using the avenue for the purpose of travel, came in contact with the wires, causing the injuries set forth in the complaint; that on November 30, 1915, plaintiffs caused to be presented to the defendant and filed with the city clerk their duly verified claim for damages; and that more than 60 days had elapsed since the filing of the claim, and the same had neither been rejected nor allowed. Attached to and made a part of the complaint was a copy of the claim which states that the accident occurred on October 30, 1915. The defendant answered, denying all of the allegations of the complaint and affirmatively pleading contributory negligence on the part of the plaintiffs, which was denied by the reply. Upon these issues the cause was tried, resulting in a verdict and judgment in favor of plaintiffs.

The defendant appeals, setting forth five assignments of error, which present two questions for review: (a) Did the court err in admitting in evidence the notice of claim filed with the city clerk? (b) Did the court err in denying the defendant's motion for judgment notwithstanding the verdict? At the trial both of the plaintiffs testified that the accident occurred on October 30, 1915, and testimony to the same effect was given by two other witnesses testifying in behalf of plaintiffs. When counsel for plaintiffs offered in evidence the claim for damages filed with the city, the defendant objected to its admission upon the ground that it had not been verified as required by the city charter, and that it was "incompetent, irrelevant, immaterial, and insufficient." The objection was overruled and the claim was received in evidence. At the close of plaintiffs' case, the defendant announced that it also rested, and immediately moved the court for an instructed verdict in its favor upon the grounds that no notice either actual or constructive of the existence of the obstruction in the street had been brought home to the defendant, and that "the claim allowed in evidence is irrelevant, immaterial, and insufficient." The motion was denied, and the case, under instructions to which no exceptions were taken, was submitted to the jury.

After the verdict had been returned, but before it had been filed by the clerk, the defendant moved for judgment notwithstanding the verdict upon the grounds, among others:

> "9 (1) That plaintiffs failed to prove that the city had notice either actual or constructive of the wires being in the street or of the pole to which they were attached being blown down," and "(3) that the claim filed with the defendant on November 30, 1915, was not a sufficient claim on which to base an action."

At no time during the trial was the specific objection made that the claim had not been filed within the time limited by the city charter; counsel for defendant contenting himself with the objection to the verification of the claim and that same was incompetent, irrelevant, immaterial, and insufficient.

[1] The abstract of the record, in setting forth the grounds upon which the motion for judgment notwithstanding the verdict was based, states the third ground in the following language:

> "That the claim filed with defendant on November 30, 1915, was not a sufficient claim on which to base an action, not being filed in time."

But by reference to the transcript it is found that the words "not being filed in time" were not included as a part of the third ground of the motion. It must therefore be assumed that the transcript rather than the abstract is correct, and consequently it appears from the record that the point that the claim had not been filed in time was not raised in the lower court in any manner.

[2] The objection in the court below that the claim had not been properly verified seems to be abandoned on appeal, as the point is not presented in the briefs. We shall therefore not pause to discuss that question.

[3-5] If it be conceded that the accident occurred on October 30, 1915, the claim filed on November 30, 1915, was one day late. Ehrhardt v. Seattle, 40 Wash. 221, 82 Pac. 296. Counsel for plaintiffs, however, insist that the accident actually happened on October 31, 1915, but that through mistake and inadvertence the date was stated in the notice of claim and in the complaint filed pursuant to it as October 30, 1915, and that this error ran through the whole case; that date being assumed as correct in propounding questions to the witnesses. In support of this contention, it is called to our attention that, in the cross-examination of the plaintiff Carl Murray, he testified that the acci-

dent occurred on Sunday, and that the court should take judicial notice of the fact that there was no Sunday in the month of October, 1915, which fell on the 30th day of that month; the last Sunday in October, 1915, being on the 31st day of the month. It is further urged in behalf of the plaintiffs that, if counsel for the defendant had at the trial interposed an objection to the introduction of the claim in evidence upon the ground that it had not been filed in time, the mistake could easily have been explained and corrected, and that by failing to raise the question at that time the point should be deemed to have been waived. In addition to the testimony of Carl Murray that the accident happened upon Sunday, the record discloses that Walter R. North also testified that the accident occurred on Sunday, and that the defendant immediately sent men to the scene of the accident and repaired the wires. It is perfectly plain from the statement of facts that a mistake was committed either in the date of the accident or in the day of the week on which it occurred. If plaintiffs received the injuries complained of on Sunday, October 31, 1915, the notice filed on November 30, 1915, was timely. The court will take judicial knowledge of the fact that the last Sunday in October, 1915, came on the 31st day of the month, and therefore that the accident could not have occurred on Sunday October 30, 1915. It is well settled in this state that a general objection to the introduction of evidence upon the ground that it is incompetent, irrelevant, and immaterial will not be sufficient to save the point on appeal, when such objection is not sufficiently definite and specific to call to the attention of the court the particular point sought to be raised. The purpose of requiring an objection to evidence is to give the court to understand the reason or ground upon which the proffered evidence should be rejected, so as to enable the court to intelligently pass upon the question, to the end that cases may be tried upon proper evidence and that new trials and reversals on appeal may be avoided. When an objection fails to accomplish this, it falls short of its purpose and of right should be construed to be no objection whatever. Seattle v. Hewetson, 164 Pac. 234; Evergreen Farm v. Attalia Land Co., 91 Wash. 192, 157 Pac. 487; State v. Spangler, 92 Wash. 636, 159 Pac. 810; Coleman v. Montgomery, 19 Wash. 610, 53 Pac. 1102; Liebenthal v. Price, 8 Wash. 206, 35 Pac. 1078.

[6] We are of the opinion that adding the word "insufficient" to the words "incompetent, irrelevant, and immaterial," did not in this instance tend in any way toward making the objection more specific. An objection to the claim upon the ground that it is insufficient is not reasonably calculated to call to the court's attention the fact that the point relied upon is that the claim had not been filed in time. Under the charter of the city of Seattle, the notice of claim is required to be in certain form and to contain certain specific information, and an objection that it is insufficient merely challenges the form or substance of the claim itself. The point that the claim had not been filed within the time fixed by the charter is in no manner suggested by such an objection. If counsel for the defendant intended to rely upon the point that the claim had not been filed in time, common fairness demanded that he should frankly state his objection to the court. If the point was well taken and presented a situation from which plaintiffs were unable to relieve themselves, no injury could have been suffered by the city. If, upon the other hand, by interposing a veiled and misleading general objection plaintiffs were entrapped into making an involuntary sacrifice upon the alter of technicality, the wisdom and fairness of the rule requiring objections to be specific becomes at once apparent.

In Cowan v. Bucksport, 98 Me. 305, 56 Atl. 901, it was held that, where the written notice of injury received upon a highway required by statute is offered in evidence and is objected to upon the ground of insufficiency, no other ground being stated, the objection will not raise the point that the claim had not been filed within the statutory period. In that case counsel for plaintiff said:

> "We offer a copy of the 14 days' notice. I understand that, without admitting that it is a complete notice, it is admitted that the town officers received a copy like this one we offer."

Counsel for defendant replied:

> "I understand that the town officers received a copy of that notice. I object to the notice—to the sufficiency of it."

The copy was admitted in evidence and exception noted. Upon appeal it was urged by defendant that it had not been shown that the notice had been received by the town officers within the time fixed by law. The court said:

> "We think the point now made is within the category of points to be made at the trial, or to be considered as waived. It was not made at the trial, and no intimation was given that it would be made. Had it been made at the trial and sustained, the plaintiff would either have supplied the evidence or submitted to an adverse verdict. If not sustained, the defendant could have excepted, and thus regularly and seasonably brought the question here. The point, not having been made at the trial, cannot be sustained here, even if it be otherwise sustainable."

In this connection, it seems proper to consider the question of whether it would have availed plaintiffs anything had the specific objection been made in the lower court that the claim had not been filed in time. Section 29, art. 4, of the charter of the city of Seattle, provides:

> "All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any

part thereof, until such claim has been first referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damage claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

[7] It will be seen that by the terms of the charter it is not required that the claim itself shall state the time of the occurrence of the accident. It provides merely that the claim shall accurately locate and describe the defect that caused the injury, accurately describe the injury, state the items of damage claimed, give the residence for one year last past of the claimant, and be sworn to by him. It further provides that a claim containing this information shall be presented to the city and filed with the clerk within 30 days after the time when the claim for damages accrued. Under such a charter, we think it may well be said that, if the notice of claim contains the required information and is in fact filed within the time specified, it is a literal compliance with the charter. The provisions of the charter do not, either by their terms or by their intendments, require that the claim shall state the date of the accident or that it shall show upon its face that it is filed within 30 days thereafter, and to construe the charter otherwise would be to read into it a provision which the city has not seen fit to incorporate in it. Whatever the rule may be applicable to cases arising under statutes or charters requiring the time of the accident to be stated in the notice—and upon this question we express no opinion—we are convinced that under a charter such as that now before us it is not necessarily fatal to the claim if it fails to state the exact date upon which the injuries were received, providing the claim was in fact filed within the time fixed and the city is not misled to its prejudice by reason of an incorrect date being stated.

In the case of Marcotte v. Lewiston, 94 Me. 233, 47 Atl. 137, the Supreme Judicial Coure of Maine had before it a question practically identical with the one presented in this case. The statute there before the court required the claimant within 14 days after the occurrence of the injury to give written notice to the municipality, "setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury." In the notice filed the injury was stated to have occurred on February 12, 1898, and the declaration alleged the same date. At the trial the plaintiff offered evidence tending to show that the accident actually happened on February 13th, instead of the 12th. The evidence was excluded and a verdict ordered for the defendant. In considering the question on appeal, the court said:

> "Did this error in the date of the accident defeat the action? We think not. The cause of action was complete, if this was a defective way, of which defendant had 24 hours' previous notice, and an injury was received thereby while plaintiff was in the exercise of due care, and without fault on his part. The date of the accident is in no sense an element. The statute is remedial, and to be construed and applied as such. The right to the remedy accrues when the injury is received, but to protect towns against possible fraud and stale claims, where opportunity for investigation may be lost, and discovery of evidence difficult, the statute requires the party, within 14 days after its occurrence, to give written notice to the municipal officers, 'setting forth his claim for damages, and specifying the nature of his injuries, and the nature and location of the defect which caused such injury.' The manifest purpose of this requirement is to afford opportunity to the town officers to examine the place, ascertain from persons having knowledge of the facts while the recollection is fresh, all the attending circumstances, and determine as to the liability of the town, and prepare its defense if the town officers decide to defend. Blackington v. Rockland, 66 Me. 332; Wadleigh v. Inhabitants of Mt. Vernon, 75 Me. 79; Low v. Windham, 75 Me. 113.
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> "For all these purposes it is immaterial upon what day the accident occurred. Nothing in the statute requires statement of the day. The notice must be given within 14 days. If given within that limit, it will be sufficient if no specific day is named. The plaintiff is allowed that time to ascertain the precise location and character of the defect, and the nature and extent of his injury, and to state them on paper, and the investigation of the town officers should cover the same range. The court would not be justified in importing into the notice a requirement, not in the statute, which is not of the essence of the right, and is unimportant to the town.
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> "It is quite easy, in reckoning back 14 days, to make an error of one day, and it seems a hardship to deprive a party of all remedy because of such mistake. Plaintiff could have no object intentionally to misstate, and it is inconceivable that in any investigation the town might make of the occurrence it would fail to discover the facts as they were on the 13th, even if they were enquiring of the 12th. * * * Notwithstanding the date of the 12th in the notice and in the declaration, it was competent for the plaintiff to show that the accident occurred on the 13th."

We are satisfied that the reasoning in this case is sound and that the conclusion reached is in keeping with the spirit of our own holdings.

In Frasier v. Cowlitz County, 67 Wash. 312, 121 Pac. 459, this court said:

> "The purpose of these provisions, as applied to a claim arising from a tort, is to enable the municipality to investigate both the claim and the claimant while the occurrence is recent and the evidence available, to the end that it may protect itself against spurious and unjust claims. When the claim substantially complies with the legislative requirement and these ends are subserved, the claim has accomplished the purpose intended."

In Lindquist v. Seattle, 67 Wash. 230, 121 Pac. 449, in considering the sufficiency of compliance with charter provisions requiring notice of claim to be filed with the city, it was held that, where there is a bona fide effort to comply with the law and the claim filed actually accomplishes the purpose of notice as to the place and character of the defect in the street, it is sufficient, though defective if the deficiencies are not such as to be actually misleading. After citing cases in support of the rule, Judge Ellis said:

> "These, and many other decisions which might be cited, show that this court has never adopted that Draconic strictness of construction which would sacrifice the just and reasonable purpose of the law to a technical exactness of terms, making it a pitfall for the ignorant and unskillful, rather than a reasonable protection against the fraudulent and designing."

See, also, Decker v. Seattle, 80 Wash. 137, 141 Pac. 338; Hammock v. Tacoma, 40 Wash. 539, 82 Pac. 893; Bell v. Spokane, 30 Wash. 508, 71 Pac. 31.

[8] While it is true that in this jurisdiction the provisions of statutes and charters relating to the presentment and filing of claims against municipalities have been held to be mandatory, it does not follow that a substantial compliance with them is not sufficient. Even a mandatory or imperative statute may be satisfied by substantial compliance with its terms. Dillon, in his Treatise on Municipal Corporations (5th Ed. § 1613, p. 2819), states the rule in this language:

> "The provisions of the statute prescribing the terms and contents of the notice, such as the time and place of the accident, the nature of the injury, the defect in the street or highway, or the cause of the injury, must be substantially complied with; otherwise, the condition precedent to the right to maintain the action has not been performed, and the action will not lie."

In Hammock v. Tacoma, supra, this court approved the statement of Judge Thompson, in his Commentaries on the Law of Negligence, with respect to the certainty required in describing the place of the accident, saying that it voiced the almost unanimous sentiment of the courts upon the subject. And we are of the opinion that his statement in section 6328 of the same work, wherein he says that it will generally be sufficient if substantial accuracy is attained in the notice with respect to the time of the accident, is equally sound under a charter or statute which does not require the time of the accident to be stated in the notice of claim.

We conclude upon this branch of the case that, inasmuch as the charter does not require the time of the accident to be stated, and the discrepancy in the date given in the claim in this case involves a period of one day only, and there is no claim or contention that the city was in any manner deceived or misled to its prejudice, and there is enough in the record to indicate that plaintiffs could have explained the mistake and have shown that the injuries complained of in fact occurred on October 31, 1915, if the point had been raised in the lower court, and hence that the claim was actually filed in time, the city cannot be heard to say for the first time in this court that the notice of claim was not timely.

[9] This brings us to the second assignment, that there was not sufficient evidence to show that the city had notice, either actual or constructive, of the existence of the obstruction in the street. If the sole negligence relied on by plaintiffs had been that of the failure of the defendant to remove the obstruction within a reasonable time after knowledge actual or constructive of its existence, we would be inclined to hold that the evidence was not sufficient. But it must not be overlooked that it is alleged in the complaint, and there is substantial evidence in the record to sustain the allegations that the defendant was guilty of negligence which caused the obstruction to be in the street. In such case, the condition complained of is due to the act or neglect of the city itself, and no notice of any kind either actual or constructive is necessary. It is only in cases where the negligence relied on is the failure of the city to remove an obstruction or to repair a defect in the street not caused by its own act or neglect that the question of notice of the obstruction or defect is an essential element. McQuillin, Municipal Corporations, vol. 6, § 2808; Thompson, Commentaries on Negligence, vol. 5, §§ 5993 and 6016; Tewksbury v. Lincoln, 84 Neb. 571, 121 N. W. 994, 23 L. R. A. (N. S.) 282.

[10] The defendant did not move for a new trial but predicates error upon the denial of its motion for judgment notwithstanding the verdict. Inasmuch as there is a cause of action alleged, based upon the primary negligence on the part of the city which caused and brought about the obstruction in the street, and these allegations are supported by substantial evidence, there is sufficient foundation upon which the verdict of the jury can soundly rest. The motion for judgment notwithstanding the verdict was therefore properly denied.

The judgment is affirmed.

ELLIS, C. J., and MORRIS, MAIN, and CHADWICK, JJ., concur.

(97 Wash. 31)

ACKERSON v. ELLIOTT et ux. (No. 13174.)

(Supreme Court of Washington. June 19, 1917.)

1. TRUSTS 🔑101 — CONSTRUCTIVE TRUSTS — PURCHASE BY RENTING AGENT.

The constructive trust arising from secret purchase by an agent of his principal's property which he advised the principal to sell was not affected by the fact that he was a mere renting agent, where he had invited and secured the principal's trust and confidence in him; the equitable principle governing constructive trusts depending, not upon the technical nature of the agency, but on the trust and confidence actually reposed in the agent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 152.]

2. LIMITATION OF ACTIONS 🔑100(8) — CONSTRUCTIVE TRUSTS—FRAUD—DISCOVERY.

Action for recovery of land on the theory of constructive trust was not barred by defendant's adverse possession, the action being, in substance, one for relief on the ground of fraud, and less than the three years specified by Rem. Code 1915, § 159, having expired after plaintiff's discovery of the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 487.]

3. TRUSTS 🔑365(2)—CONSTRUCTIVE TRUSTS—LACHES.

In action to enforce constructive trust arising from secret purchase by agent of principal's property, defendant could not base the defense of laches upon knowledge of other agents of the principal, since the agent so purchasing should have himself informed the principal that he was purchasing for himself.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 571.]

4. RECORDS 🔑19—TRUSTS 🔑365(3) — CONSTRUCTIVE TRUSTS—RECORDING MORTGAGE—NOTICE TO BENEFICIARY.

In suit to establish a constructive trust as to land secretly purchased by agent from principal, the recording of the deed from defendant agent's straw man to defendant was not notice to the principal or her other agents; for the recording of an instrument is only constructive notice to those acquiring interests subsequent to the execution of the instrument.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 44; Trusts, Cent. Dig. § 570.]

5. LIMITATION OF ACTIONS 🔑103(3) — CONSTRUCTIVE TRUSTS—NOTICE OF REPUDIATION OF TRUST.

The mere adverse possession by the agent was not an open repudiation of the constructive trust so as to start running of statute of limitations; such possession being evidence merely of claim of title, and not evidence as to the manner of acquiring such title.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 508; Trusts, Cent. Dig. § 570.]

Fullerton, J., dissenting.

En Banc. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by S. Louise Ackerson against J. S. Elliott and wife. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

John W. Roberts, Arthur E. Nafe, and Dwight Hartman, all of Seattle, for appellant. James B. Bruen and James B. Murphy, both of Seattle, for respondents.

PARKER, J. This action was commenced in the superior court for King county by Mrs. S. Louise Ackerson against J. S. Elliott and wife, seeking recovery and reconveyance to her of a 50-acre tract of land in that county near Seattle, which she claims was acquired from her by J. S. Elliott under such circumstances as to constitute him a trustee holding the title thereto in trust for her, and also seeking an accounting for the rents and profits of the land. After the commencement of the action and the filing of the answer, verified by J. S. Elliott in person, he died, leaving his wife surviving him, who thereupon became the executrix of his estate, and thereafter, she, as executrix, being substituted as defendant, the case proceeded to trial and judgment against plaintiff denying the relief prayed for by her, from which she has appealed to this court.

In the year 1899 Mrs. Ackerson was the owner of the tract of land in question and other real property in King county. In that year she placed all of her property in King county in the hands of J. S. Elliott as her agent for the purpose of caring for and renting the same. It does not appear that he was then given authority to find purchasers for any of the property, though he did thereafter find purchasers for some of it to whom sales were made by Mrs. Ackerson, she recognizing Elliott's services in that behalf and paying him compensation therefor measured by commissions upon the selling prices. The evidence indicates quite clearly that, while Elliott was primarily employed by Mrs. Ackerson merely as her renting agent, she came to depend upon him in some measure for information and advice concerning conditions in Seattle and vicinity affecting her property there, not only as to its earnings, but as to the possibility of its sale. She even advised with him to some extent in relation to the purchase of other property in Seattle. Numerous letters passed between them in which conditions touching her property interests in Seattle and vicinity were discussed at considerable length by each of them. She has been at all times since prior to the year 1899 a nonresident of this state, and was unacquainted with the tract of land in question and its value. As showing the nature of the relation of confidence which had grown up between them, we here notice portions of some of the letters passing between them. On January 8, 1901, Elliott wrote to Mrs. Ackerson a somewhat lengthy letter advising her of conditions in and about Seattle, as the same affected her property interests there, accompanying the letter with copies of Seattle newspapers, stating that he sent her these copies to advise her of the progress the city was making. In this letter he had considerable to say as to the advisability of her selling some of her property and also improving some of it, not mentioning the property here in question, however. On February 13, 1901, she answered this letter, evidently appreciating the information it gave her, referring to it as "your good long letter of January 8th." In this answering letter she said to him:

> "I shall be glad to keep in communication with you and to be advised by you."

And further on, referring to the possibility of a sale of certain of her property, she said:

> "If you have what you consider a good offer for it, submit it to me and I will lose no time in replying. I depend upon your advice above all others."

On December 24, 1901, in a letter to Elliott Mrs. Ackerson said:

> "I am remembering old friends and sending the seasons greetings. I want to express to you my best wishes."

Then, after mentioning matters touching the value of and possibility of a sale of certain of her property, she said:

> "I have such confidence in your judgment I would value your opinion if you would favor me with it as in the past."

These expressions on the part of Mrs. Ackerson manifestly were prompted by numerous and lengthy letters written to her by Elliott relating to her property interests in King county apart from the mere renting of her property. Such was the relationship existing between them and which continued up until a short time following the occurrence of the acts complained of by Mrs. Ackerson here involved, which resulted in Elliott acquiring this land from her. His agency for her ceased a short time thereafter because of the fact that all her property there had been sold; the sale to Sanderson for Elliott of this land being among the last.

Since about the year 1901 M. F. Backus, of Seattle, has represented Mrs. Ackerson as her banker in Seattle, to whom the rents collected by Elliott were turned over by him, and to whom interest and mortgage loans due to Mrs. Ackerson were paid by those owing her in Seattle. Since prior to the year 1899 John P. Hartman has been attorney for Mrs. Ackerson in all her affairs requiring the services of an attorney in Seattle. Neither Backus nor Hartman has been her real estate agent for the purpose of finding purchasers of her property, neither of them being engaged in the real estate business, though they advised her to some extent touching the sale of her property there from time to time.

In January 1903, the land in question being still in Elliott's hands as agent for the purpose of renting the same, and the relation between him and Mrs. Ackerson touching her property interests in King county being as above noticed by us, he secretly caused one Sanderson to purchase the land for him from Mrs. Ackerson for $7,500, he furnishing to Sanderson the money therefor, a deed from Mrs. Ackerson to Sanderson being executed January 29, 1903, and a deed from Sanderson to Elliott being executed in consummation of the deal on March 2, 1903, both of these deeds being recorded in the auditor's office of King county on March 12, 1903. Sanderson at the instance of Elliott went to Hartman and offered $7,500 for the land; Hartman not knowing the relation existing between Elliott and Sanderson. Hartman was unacquainted with the land and did not know its value. He communicated this offer to Elliott, asking Elliott's advice as to whether or not he (Hartman) should advise Mrs. Ackerson to accept the offer. Eliott advised Hartman that it was a good offer and all that the land was worth, and that he thought Mrs. Ackerson should be advised to accept it. Hartman and Backus considered the matter, both being unacquainted with the value of the land and both depending upon the advice of Elliott as to its value. They concluded to advise Mrs. Ackerson to accept the offer made by Sanderson. Hartman so wrote Mrs. Ackerson, inclosing a deed for her to execute in the event she accepted the offer. She thereupon concluded to accept the offer, executed the deed, and returned the same to Hartman, who delivered it to Sanderson upon the payment of the purchase price agreed upon. This was all done without any knowledge whatever upon the part of Mrs. Ackerson, Hartman, or Backus that Elliott was in fact the purchaser of the land. A short time prior to this secret purchasing of the land by Elliott he had been offered $10,000 for the land. The evidence, we think, shows that the land was in fact then worth more than $7,500, that Elliott knew it was worth more. and that that fact prompted him to thus purchase it secretly. Except as to a small portion of the land, Elliott has been in possession of it by his tenants at all times since he acquired it through Sanderson from Mrs. Ackerson in 1903. For this small portion he received $12,606 as the result of a condemnation proceeding several years after so acquiring the land. He also received additional sums for rent collected since 1903, and also a small sum for cedar shingle bolts sold from the land. Deducting the purchase price of $7,500 paid by him through Sanderson to Mrs. Ackerson for the land in 1903 and taxes and other moneys expended by him which it is conceded he is in any event entitled to credit for as against the land and Mrs. Ackerson's claim thereto, he received $1,136.48 more than he expended up until April 6, 1915, the date of verifying his answer in this case. Neither Mrs. Ackerson, Hartman, or Backus knew that Elliott had secretly purchased the land through Sanderson in 1903 until shortly before the commencement of this action in January, 1915. There is evidence in the record indicating that both Hartman and Backus learned, possibly as early as the year 1906, that Elliott had become the owner of the land, but the evidence, we think, renders it certain that neither of them had knowledge of the manner in which Elliott became such owner until shortly before the commencement of this action. The evidence, we think, also renders it certain that Mrs. Ackerson did not learn either of Elliott's ownership of the land or of the manner of his acquiring the land until shortly before the commencement of this action.

[1] Counsel for Mrs. Ackerson contend that Elliott's agency with reference to the land in question was such that he could not lawfully secretly purchase the land through Sanderson from her, and that when he did so purchase it he acquired it and held it in trust for her, if she should timely make election to have the sale so treated. Counsel for

Elliott apparently concede that such would be the law of the case if Elliott's agency had been one to sell the land for Mrs. Ackerson, but insist that Elliott's agency was only to rent the land for her, and that, his agency being so limited, he was as free to purchase it from her in the manner he did as any stranger would be. We have not had called to our attention any decision of the courts dealing with the claimed right of a mere renting agent to secretly purchase the property of his principal which is in his charge as such agent. It seems to us, however, that the good faith and loyalty due from Elliott to Mrs. Ackerson growing out of his relation to her and existing at the time of the purchase of the land by him through Sanderson, though at the beginning of his agency he was nothing more than a mere renting agent, forbade him from secretly acquiring any interest in the land. The trust and confidence he invited her to repose in him and which she did repose in him became such that she had a right to rely upon his acting with reference to this land as well as her other property in King county wholly in her interest, uninfluenced by any interest of his own. It seems to us that the rights of Mrs. Ackerson as against Elliott and his estate are governed by the principles so well stated in 1 Story's Equity Jurisprudence (13th Ed.) § 308, as follows:

> "It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion to prevent a voluntary gift or other act of a man whereby he strips himself of his property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases as custodes morum, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests and cunning and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of equity will not therefore arrest or set aside an act or contract merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other or to abstain from all selfish projects. But, when such a relation does exist, courts of equity, acting upon this superinduced ground in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance; for it is founded in a breach of confidence. The general principle which governs in all cases of this sort is that, if a confidence is reposed and that confidence is abused, courts of equity will grant relief."

In McNutt v. Dix, 83 Mich. 328, 47 N. W. 212, 10 L. R. A. 660, we have a striking illustration of how one inviting trust and confidence in himself was held accountable to the one he volunteered to serve, though he apparently acted in the best of faith, in acquiring the property from the owner whom he was assuming to serve. Dix was the administrator of an estate. Looking to the settlement of the estate, one Hastings contemplated buying up the interests of the heirs. Mrs. McNutt, one of the heirs, was advised by Dix by letter to sell her interest for $450, apparently a fair price, sending her a deed for execution should she decide to sell. This was done by Dix as a means of prompt and economic settlement of the estate and without any notion of acquiring the interest himself or for profit to himself. The deed was executed by Mrs. McNutt leaving a blank space for the name of the grantee, specifying $450 as the consideration, and forwarded to Dix. He then tried to get Hastings to accept the conveyance and pay the $450: This Hastings did not do, claiming he was then unable to do so. Later Dix inserted his wife's name in the deed and sent $450, the agreed purchase price, to Mrs. McNutt. Later Dix sold the interest to Hastings for $600. The action was to recover the $150 excess received by Dix upon the theory that he was accountable therefor to Mrs. McNutt, as her trustee. Disposing of the contention made in behalf of Dix that he was at liberty to so acquire the interest of Mrs. McNutt under the circumstances shown, the court said:

> "There is some force in the position taken by defendant, under the particular circumstances of this case; but there are certain legal principles which stand in the way of his being permitted to keep the money received by him on the sale of this property, if he had undertaken to act for the plaintiff as her agent in making this sale. The law is very strict in scrutinizing the conduct of those who are acting in a fiduciary relation.
>
> "In Moore v. Mandlebaum, 8 Mich. 441, this court, in speaking of one who had assumed to act as the agent of another, said: 'In that confidential relation he was bound to the utmost degree of good faith, and had no right, while professing to act in that capacity, to make himself the agent of other parties for the purchase of the land he was authorized by the plaintiff to sell, nor to take any advantage of the confidence his position inspired to obtain the title himself. Nor could he make a valid purchase from his principal while that confidential relation existed without fully and fairly disclosing to his principal all the propositions he had received, and all the facts and circumstances within his knowledge, in any way calculated to enable his principal to judge of the propriety of such sale.'"

It is true it may be said that Elliott was not assuming to act for Mrs. Ackerson in the sale of this land, but we think that the trust and confidence which he had invited Mrs. Ackerson to repose in him touching all her property interests in King county became such that he could not secretly acquire an interest in any of her property there without violating that trust and confidence.

In Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192, the subject of an agent acquiring secretly an interest in the property of his principal to which the agency relates is learnedly reviewed at length, the court holding that a clerk of a broker employed to make sale of land who has access to the correspondence between his principal and the vendor stands in such a relation of confidence to the vendor that, if he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land. The following authorities lend support to our conclusion: Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; Hindle v. Holcomb, 34 Wash. 336, 75 Pac. 873; Carson v. Fogg, 34 Wash. 448, 76 Pac. 112; Landis v. Wintermute, 40 Wash. 673, 82 Pac. 1000; Easterly v. Mills, 54 Wash. 356, 103 Pac. 475, 28 L. R. A. (N. S.) 952; 31 Cyc. 1444.

We are of the opinion that in acquiring title to the land Elliott received and held it in trust for Mrs. Ackerson, which trust would continue until such time as she would learn of the circumstances under which he acquired it and such further time as she would be permitted by law to disaffirm the sale.

[2, 3] It is further contended in behalf of Mrs. Elliott that the action is barred by the statute of limitations, and that she and her husband had acquired title to the land before the commencement of this action by adverse possession. Being of the opinion that the land was acquired in trust for Mrs. Ackerson, we think it follows that the statute would not run against her so long as that trust relation existed. While this is an action on her part to recover the land, it is, in substance, an action for relief upon the ground of fraud, and, as we have already noticed, Mrs. Ackerson did not discover the fraud, to wit, Elliott's manner of acquiring title to the land, until very near the time of the commencement of this action. It seems plain, therefore, that she is not barred by the statute of limitation, since less than three years expired after her discovery of the fraud. Section 159, Rem. Code. In this connection it is further contended that Mrs. Ackerson has been guilty of laches. This seems to be rested upon the theory that, some three years following the acquisition of the land by Elliott,. Hartman and Backus, Mrs. Ackerson's attorney and banker in Seattle, knew that he had become the owner of the land. We have already noticed that their knowledge was nothing more than this, and did not go so far as to amount to knowledge of the manner in which he had acquired title to the land nor as to when he acquired title to the land. If Elliott had been under no obligation to inform Mrs. Ackerson himself that he was purchasing the land for himself, there might be some room for argument of counsel in his behalf that the knowledge acquired by Backus and Hartman should be imputed to Mrs. Ackerson, but in view of Elliott's duty in this respect we think that neither he nor his wife, as his successor in interest, can base any claim upon the knowledge so acquired by Backus or Hartman, even if we should concede that their knowledge was of the manner in which Elliott had acquired the title, instead of the mere fact that he had acquired the title.

[4] Some contention is made that the recording of the deeds from Mrs. Ackerson to Sanderson and from Sanderson to Elliott in March, 1903, was notice to Mrs. Ackerson, Hartman, and Backus. Plainly this is not so, since it seems to be well-settled law that the recording of an instrument is only constructive notice to those acquiring interests subsequent to the execution of the instrument. There was nothing prompting either Mrs. Ackerson, Hartman, or Backus to look to the public records to discover the fraud practiced upon Mrs. Ackerson of which they had no suspicion until very shortly prior to the commencing of this action. Maurer v. Reifschneider, 89 Neb. 673, 678, 132 N. W. 197, Ann. Cas. 1912C, 643. Our decision in Johnstone v. Peyton, 59 Wash. 436, 110 Pac. 7, is in harmony with this view, though that involved the placing upon record a judgment which had been fraudulently obtained by default. It was there held that the defendant, having no actual knowledge of the rendering of judgment against him, was not bound by the record thereof as notice.

[5] It is further suggested that there was an open repudiation of the trust by the adverse possession of Elliott during the 12 years following the acquiring of the title by him. We may concede that his possession was so open and plain as to advise all persons that he was claiming title to the land, but this was no evidence to any one that he had acquired the property fraudulently in violation of his duty to Mrs. Ackerson in 1903. Had she been advised of Elliott's manner of acquiring the land which gave rise to the trust in her favor and failed to make timely claim to the land after discovery thereof, this so-called repudiation of the trust by Elliott and holding of possession during these years might have defeated Mrs. Ackerson's claim here made, but any repudiation of the trust, to be available against Mrs. Ackerson, must have been such as advised her of the existence of the trust as well as of its repudiation, under the circumstances of this case.

We conclude that the judgment must be reversed, and Mrs. Ackerson awarded the land, and that the Elliott estate is bound to account to her for all sums received by Elliott from the sale of a portion of the land through condemnation proceedings, rent collected, and shingle bolts sold therefrom, less the moneys paid out by him to Mrs. Ackerson through Sanderson as the purchase price of the land and moneys paid out by him for taxes and other expenses in connection with his holding the land. This, as we have noticed, left a balance due Mrs. Ackerson at the time of the commencement of this action of $1,136.48, the amount of which is conceded to be correct by counsel for Mrs. Elliott. Indeed, this result is arrived at from Elliott's own statement of the moneys received and paid out by him attached to his answer.

The case is remanded to the superior

court, with directions to enter a decree in favor of Mrs. Ackerson quieting her title to the land and directing its reconveyance to her by a commissioner. The superior court is also directed to render a judgment in favor of Mrs. Ackerson against the estate of J. S. Elliott, deceased, to be paid in the due course of administration for the sum of $1,136.48, or in the event additional sums have been paid out by Elliott or Mrs. Elliott, as executrix, for taxes upon the land or other proper expenses in connection therewith, and additional rents and profits have been derived by them from the land since the commencement of this action, then the superior court is directed to take an accounting thereof and render judgment for the sum so found to be due Mrs. Ackerson.

MOUNT, HOLCOMB, CHADWICK, MORRIS, and WEBSTER, JJ., concur.

FULLERTON, J. I think the facts of this case justify an affirmance of the judgment below. I therefore dissent from the conclusion of the majority.

ELLIS, C. J., took no part. MAIN, J., took no part.

ST. LOUIS & S. F. R. CO. et al. v. GIDDINGS. (No. 7736.)

(Supreme Court of Oklahoma. Oct. 3, 1916. Second Petition for Rehearing Denied June 6, 1917.)

(Syllabus by the Court.)

CARRIERS ⟹397½—LOSS OF BAGGAGE—LIABILITY—STATUTE.

Under section 807, Revised Laws of 1910, the liability of a carrier of baggage of a passenger intrusted to its care is that of a common carrier, and in the event of loss, unless the same is occasioned by the act of God or unavoidable accident, the carrier is responsible therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1519–1528.]

Commissioners' Opinion, Division No. 3. Error from County Court, Oklahoma County; William H. Zwick, Judge.

Action by Della T. Giddings against the St. Louis & San Francisco Railroad Company, and James W. Lusk and others, receivers. Judgment for plaintiff, and defendants bring error. Affirmed.

R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiffs in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendant in error.

HOOKER, C. On January 16, 1915, the defendant in error telephoned the Union Ticket office at Oklahoma City and engaged a pullman reservation from Oklahoma City to Muskogee on the Frisco train which is due to leave Oklahoma City at midnight. About 6 o'clock p. m. of the same day she sent her trunk to the Frisco passenger depot by an experienced baggageman who deposited the same on the platform of the company at the depot in the place where the custom and rules of the company required baggage to be deposited, and at the time he deposited the trunk on said platform he was seen by the baggageman of the company, and the employés of the company subsequently saw the trunk of the defendant upon the platform where it had been deposited. About 10 o'clock of the same night she went to the passenger depot, procured her a ticket to Muskogee, paid for her pullman reservation, and attempted to locate her trunk, but was unable to do so.

It is admitted that the company received this baggage, but it contends that its liability, if any, is that of a warehouseman, and not of a common carrier. The company asserts that because the defendant in error had not purchased a ticket, and because it was necessary for directions to be given to the company before the transportation of said baggage could commence, that liability as a common carrier could not attach in this case, and that from the time of the delivery of said baggage to it until the purchase of the ticket, or the giving of those directions by the defendant in error, that it held the baggage only as a warehouseman. With these contentions we cannot agree. The authorities are uniform upon the proposition that one may be entitled under a certain state of case to the rights of a passenger before he purchases a ticket, and the law imposing this liability upon the company should be and is extended to the baggage of passengers likewise before a ticket is purchased.

The evidence here discloses that for years it had been the custom and practice of the company to require baggage received by it for transportation to be deposited at this particular place, so that the same might be weighed, and that was done largely for the convenience of the employés of the company. The agent of the defendant in error had been in the business of delivering trunks for years and was acquainted with this custom of the company, and upon this occasion he complied with it as he had been in the habit of doing before. The baggageman of the company saw him deliver the trunk and place the same at the customary place, and under the facts and circumstances he must have known that this trunk was delivered to the company for transportation, and not for storage. Section 807 of the Revised Laws of 1910 is as follows:

> "The liability of a carrier for luggage received by him with a passenger, is the same as that of common carrier of property."

Under the view we take of this statute if the company received this trunk as baggage, its liability as a common carrier is fixed, and it is estopped from now asserting that it received the same as a warehouseman. The object of this statute is to fix the liability of a common carrier for baggage received as that of a carrier of property, which is that of an insurer, and it can only be relieved from liability by the act of God or unavoidable accident. In the case of Kansas City, M. & O. Ry. Co. v. Fugatt, 150 Pac. 669, L. R. A. 1916A, 545, this court said:

"Though the real character of the articles intended as baggage, but which are not properly such, is not stated to the carrier when it accepts them for carriage, if from the facts and circumstances surrounding their acceptance it ought to know that they are not properly baggage, knowledge on its part of their true character will be presumed, and it will be considered as having assumed the liability of a common carrier. Hutchinson on Carriers, § 1250, and Elliott on Railroads, § 1649."

Further in this case it is said:

"The liability of a common carrier for the loss of baggage, at common law, is, in section 1651, Elliott on Railroads, defined to be: 'The general rule is that the carrier is liable for baggage as a common carrier, that is it is liable for the loss or injury to the baggage at all events, except where the loss or damage is caused by the act of God, or "unavoidable accident," in the sense in which the term is sometimes used and the act of the owner or by public enemies.' And it is thus stated in 3 A. & E. Enc. of Law, 546: 'The liability of a carrier for baggage * * * intrusted to its care is that of an insurer; and its liability unless specially restricted is the same as its common-law liability as a carrier of goods.' * * * The rule announced is the correct one where custody and control of the baggage has been surrendered into the carrier's keeping by the passenger."

In the case of Cone v. So. Ry. Co., 85 S. C. 524, 67 S. E. 779, 21 Ann. Cas. 159, it is said:

"The general rule is that the liability of a carrier does not begin until delivery and acceptance of the goods, but it is not always necessary to show actual delivery and express acceptance, for there may be an implied or constructive delivery and acceptance, or the matter may be determined by the custom of the carrier. 4 Elliott on Railroads, § 1403; Hutchinson on Carriers, § 118: 'The carrier may assent to the delivery of baggage at its station without notice to its agents; and this assent may be implied from its custom and course of business in allowing baggage to be deposited at its depots; but whether such delivery is to be regarded as binding the carrier is a question of fact for the jury to determine.' Such liability may arise before the purchase of a ticket or demand for check to one intending to become a passenger, who has his baggage placed at the proper place on the station premises within a reasonable time before the departure of the train." See authorities cited in opinion.

In 14 Ann. Cas. 912, the note attached to the case of So. Ry. Co. v. Bickley, it is said:

"The giving of a piece of baggage into the possession of the agent of a carrier and the acceptance thereof by him for transportation constitutes a sufficient delivery to render the carrier liable." See authorities cited.

"A delivery to, and acceptance by, a carrier is shown where it appears that an intending passenger sent a trunk to the depot the night before his departure, as was customary with passengers taking the morning train, and that the trunk was locked up in the carrier's baggageroom." Green v. Railway Co., 41 Iowa, 410.

"Where baggage is deposited at the place set apart for the receipt of baggage, and the agent of the carrier is notified thereof and expresses his consent thereto, there is a sufficient delivery to render the carrier liable." See authorities cited.

"And if baggage is deposited upon the platform near the baggageroom and the baggageman, upon being notified, gives directions to leave it there, a sufficient delivery is shown." [Lake Shore & Michigan So. Ry. Co. v. Foster] 104 Ind. 293 [4 N. E. 20, 54 Am. Rep. 319].

"In an action against a common carrier, to recover the value of a trunk and its contents alleged to have been lost by the negligence of defendant at its depot, it appeared that an expressman took the plaintiff's trunk, at his request, to the depot mentioned. The trunk had a card fastened on it, marked with the plaintiff's name and the place of his destination. The expressman placed the trunk by the side of a baggage crate, situated opposite a window in the ticket office, through which it might be seen. He informed the agent of the defendant in charge of the depot where the trunk was, and such agent replied 'all right,' and told two men, who were in the depot, to take care of it, whereupon the expressman left the depot. The plaintiff arrived later in the day and purchased a ticket. Upon applying for a check for his baggage, the trunk could not be found. The court, affirming a judgment for the plaintiff, said: 'It is not easy to see what further act could be required of the plaintiff in order to make the delivery complete. No further act of his could put the property more fully within defendant's control.'" See authorities cited.

"In Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143, it appeared that the plaintiff took his trunk to a station at 11 a. m. and requested that it might be checked for the next train, which started at 3 p. m.; that he was informed that it was not the custom to check baggage until about 15 minutes before the time when the train should leave, whereupon he left his trunk in the care of the agent of the company in the baggageroom of the station; and that at the customary time it was checked for him and put on the cars, and that he went on the same train. Certain articles were removed from the trunk, but when and where did not appear. The action was framed on the theory that the carrier was liable as carrier, and it was urged that if the articles were taken after it was left at the station and before it was checked, there could be no recovery. The court held, however, that the liability as carrier commenced when the trunk was given into the care of the agent."

In 4 Elliott on Railroads, § 1651, it is said:

"The liability of the company as a common carrier begins, as a rule, at the time the baggage is delivered to it for its transportation unless the time of such delivery be an unreasonable length of time before the owner's intended departure. In order that the liability as a common carrier should exist is not always necessary that the passenger should have purchased a ticket, nor that he should even make the journey which he intends to make. As persons often become entitled to the rights of passengers before the purchase of a ticket, so the liability of the carrier for baggage often begins before the purchase of a ticket or even before the company becomes liable to the owner of the baggage as a passenger. Where a person in good faith intends to take passage on a railway train or the like and delivers his baggage to the company a reasonable time in advance of the anticipated journey, it seems that the company will be liable for such baggage as a common carrier from the time of such delivery and acceptance. And in such cases the company may be liable although the person does not purchase a ticket or make the proposed journey, as for instance, where he is prevented from so doing by the loss or destruction of the baggage before the journey begins."

In Woods v. Devin, 13 Ill. 747, 56 Am. Dec. 483, it is said:

"A common carrier of passengers is responsible for the baggage of a passenger. His duty in this respect is the same as that of a common carrier of goods; and he can only excuse himself for the nondelivery of the baggage of a passenger by showing that it was lost by the act of God or of the public enemy. His responsibility commences when the baggage is delivered to him or his authorized agent. Camden and Amboy Railroad v. Belknap, 21 Wend. [N. Y.] 354. His compensation for carrying the baggage is included in the fare of the passenger. [Orange County Bank v. Brown] 9 Wend. 85 [24 Am. Dec. 129]; [Hawkins v. Hoffman] 6 Hill, 586 [41 Am. Dec. 767]. Prepayment of the fare is not necessary in order to charge the carrier for the loss of the baggage. [Citizens' Bank v. Nantucket Steamboat Co.] 2 Story, 16 [Fed. Cas. No. 2,730]."

In Logan v. Railroad Company, 11 Rob. (La). 24, 43 Am. Dec. 199, it is said:

"Liability of carrier attaches when baggage is received to be transported on any part of the road."

In the case of Ladue v. Griffith, 25 N. Y. 364, 82 Am. Dec. 361, it is said:

"When a person is both carrier and warehouseman, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if there deposited for the purpose of being carried further, the responsibility of the party having them in charge, is that of a carrier."

In Green v. Milwaukee & St. Paul Railroad Co., 38 Iowa, 100, it is said:

"It is not claimed that defendant would be liable without a delivery, either actual or constructive, of the property to its agent or servant. That a delivery may be made at the proper place of receiving such baggage under the express assent or authority of the carrier without notice to its employés will not, we presume, be disputed. It is equally clear upon principle that this assent may be presumed from the course of business or custom of the carrier. Upon evidence of this character contracts based upon business transactions are constantly established. The citation of authority is not required to support this position. See [Merriam v. Hartford & New Haven R. Co.] 20 Conn. 354 [52 Am. Dec. 344]. The instruction which is the foundation of plaintiff's objection directs the jury that there was no evidence of a delivery of the trunk to the defendant. In this we think there is error. There was evidence tending to show a course of business on the part of defendant, a custom, to receive baggage left at the station house, as in this case, without notice to plaintiff's servants. Upon evidence of this character, it was proper that the facts should have been left to the determination of the jury, whether there had been a delivery of the property within the rules above announced—whether a course of business—a custom, had been established, to the effect that a delivery of baggage at the station house without notice was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom."

Under the view we take of the record in this case, it must be held that the company accepted the trunk of the defendant in error as baggage for the purpose of transporting the same to Muskogee, Okl., where the defendant in error intended to go at the time she delivered the trunk to the company, and that the company, having accepted the same as baggage for transportation, is by the provision of section 807 of the Revised Laws of 1910 made liable as a common carrier, and is therefore responsible to the defendant in error for the loss of this baggage.

The judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

(13 Okl. Cr. 577)

TALKINGTON v. STATE. (No. A-2742.)

(Criminal Court of Appeals of Oklahoma. July 2, 1917.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION ⚿51(2) — VALIDITY—SIGNATURE OF ASSISTANT COUNTY ATTORNEY.

An information, signed in the name of the county attorney by a duly appointed and qualified assistant county attorney, is valid.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 161.]

2. INTOXICATING LIQUORS ⚿236(1)—OFFENSE —SUFFICIENCY OF EVIDENCE.

In a prosecution for unlawfully conveying intoxicating liquor, the evidence considered, and *held* sufficient to sustain the verdict and judgment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 308.]

Appeal from County Court, Carter County; Thomas W. Champion, Judge.

Steve Talkington, convicted of unlawfully conveying intoxicating liquors, appeals. Affirmed.

William Pfeiffer, of Oklahoma City, for plaintiff in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of conviction on an information charging that Steve Talkington did unlawfully convey, "10 cases of whisky, from a point on the Cornish and Wilson road on the line between Jefferson and Carter counties to a point on said road about three miles east of said county line." On the 23d day of February, 1916, judgment was entered in accordance with the verdict of the jury, and he was sentenced to be confined in the county jail for 30 days and to pay a fine of $150, and in default of the payment of said fine be further confined until the same is satisfied at the rate of $1 per day.

The following is, in substance, the testimony introduced at the trial: W. H. Ward and Jim Gaunt, deputy sheriffs, testified that on the 2d day of July, 1916, they saw the defendant about three miles east of the county line between Carter and Jefferson counties

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

on the Cornish and Wilson road; that he was going east in an automobile; that they stopped him, and found he was conveying 10 sacks, each sack containing 12 quart bottles of whisky. The defendant offered no testimony.

[1] The first assignment of error is based upon the action of the court in overruling the defendant's motion to quash the information. The ground of said motion is:

> "Because said information is not signed by the county attorney, or his authorized assistant, in the manner provided by law."

The record shows that the defendant asked to have the county attorney sworn to testify in support of his motion. Thereupon Mr. A. J. Hardy, county attorney, stated:

> "I admit I did not sign my name to the information in this case."

Mr. Hardy then called W. F. Bowman, who testified that he was assistant county attorney at the time the information was signed and filed and the signature thereto, that is, "A. J. Hardy, County Attorney," was signed by witness; that Mr. Hardy at the time was county attorney and witness the duly appointed and qualified assistant county attorney. Our Procedure Criminal provides:

> "The county attorney shall subscribe his name to informations filed in the county, superior or district court and indorse thereon the names of the witnesses known to him at the time of filing the same." Section 5694, Rev. Laws.

In McGarrah v. State, 10 Okl. Cr. 21, 133 Pac. 260, it is said:

> "An unqualified reading of the words of the statute would make it necessary for the county attorney himself to subscribe his own name to all informations; but it has been held that the county attorney need not himself subscribe his name to an information, as it is sufficient if it be done by his legally appointed assistant."

And see Fooshee v. State, 3 Okl. Cr. 666, 108 Pac. 554. Thus it appears that the name of the county attorney was signed by his duly appointed and qualified assistant, and the county attorney was himself present insisting on the validity of the signature, and he personally prosecuted the case. The motion to quash was very properly overruled.

[2] Finally it is insisted that the court erred "in refusing to advise the jury to return a verdict of not guilty." Counsel for the defendant contends that the evidence fails to show that the liquor in question was conveyed from the point on the Cornish and Wilson road on the county line to a point on said road about three miles east as alleged. There can be no doubt as to the sufficiency of the evidence in this case to warrant the verdict of the jury. After a careful examination of the record we have failed to discover anything whereof the plaintiff in error has just right to complain. The judgment appealed from is therefore affirmed. Mandate forthwith.

ARMSTRONG and MATSON, JJ., concur.

(13 Okl. Cr. 563)

FLETCHER v. STATE. (No. A-2450.)

(Criminal Court of Appeals of Oklahoma. July 2, 1917.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS 🔑226—OFFENSE—EVIDENCE—BOOKS OF EXPRESS COMPANY.

The books required to be kept by express companies, railroads, and other transportation companies under the provisions of section 6 of chapter 70, Session Laws 1911, when properly identified by the person in possession and control of the same, are admissible in evidence in a case where the defendant is charged with a violation of the prohibitory liquor laws of this state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 282-286.]

2. INTOXICATING LIQUORS 🔑238(1)—UNLAWFUL SALE—QUESTION FOR JURY.

Evidence examined, and *held* sufficient to authorize the trial court to submit the case to the jury.

3. CRIMINAL LAW 🔑1183 — REMARKS OF COUNTY ATTORNEY.

Certain remarks of the county attorney, unauthorized by the evidence and tending to appeal for the infliction of a severe penalty, condemned. On account of these remarks the judgment is modified, and the penalty reduced to the minimum.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195-3198.]

Appeal from County Court, Custer County.

Bob Fletcher was convicted of unlawfully selling intoxicating liquor, and he appeals. Modified and affirmed.

M. L. Holcombe, of Pawhuska, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. [1] It is first contended that the court erred in admitting in evidence certain records of the American Express Company kept at Custer City, Okl., the place where the alleged sale was made, showing shipments of both whisky and beer to this plaintiff in error and received by him during the period of one month previous to the date of the alleged offense. It is contended that these records were not properly identified or authenticated. These records were introduced in connection with the witness J. M. Cummings, who testified that he was the agent for the Frisco Railroad Company at Custer City, Okl., and that he had possession of the records of the office of that station showing the shipments of intoxicating liquors received by various persons of that town. The records appear to be those of the United States Express Company, and it is contended that there is no showing that the witness was the agent for the express company, et cetera. The witness, however, testified that these were a part of the records of his office, and that they were in his possession and under his control, that they were records showing the shipments of intoxicating liquors, and that he was familiar with the same. Had plaintiff desired to do so, he could have examined the witness as to whether or not the records of the express company were kept as a part of the railroad records at that station. This he did not do. It is a matter of general knowledge in this state that in towns the size of Custer City it is the policy of such companies to have but one agent who attends to both the railroad and express business. In the absence of a contrary showing, where the witness testifies that he is the custodian of such records, that they are under his possession and control, and that he is familiar with them, the proof is sufficient to admit of their introduction in evidence under the provisions of section 6 of chapter 70, Session Laws 1911, which provides as follows:

> "All express companies, railroad companies and transportation companies within this state are hereby required to keep a separate book in which shall be entered, immediately upon receipt thereof, the name of the person to whom liquors are shipped, the sale of which is prohibited by laws of this state, the amount and kind received, the date when received, the date when delivered and by whom delivered, and to whom delivered, after which record shall be a blank space in which the consignee shall be required to sign his name, before such liquors are delivered to such consignee, which book shall be open to the inspection of any officer of this state, whether such officer be a state, county, or municipal officer, at any time during business hours of the company. Such books shall constitute prima facie evidence of the facts therein stated and be admissible as evidence in any court of this state having jurisdiction or in any manner empowered with the enforcement of the prohibition laws of this state."

The record introduced was shown to be one required to be kept under the foregoing statute. After proper identification the original was admissible in evidence in this case.

[2] It is also contended that the court erred in refusing to sustain the motion of the plaintiff in error to direct a verdict of not guilty at the conclusion of the State's evidence. The evidence in this case is substantially as follows:

The prosecuting witness, Harry Koch, testified that several boosters from the town of Clinton were traveling about over Custer county and adjoining counties on the 17th day of June, 1914, scattering posters to advertise the coming Fourth of July celebration at Clinton. They were traveling in a Ford car, and when they got to Custer City, Koch, who was an old-time friend of the defendant, Fletcher, instructed the driver of the car to drive to Fletcher's house in the southwest part of that town. When they got to the house Koch went in and inquired of Fletcher if he had something to drink, to which Fletcher replied, "I have got some tin top," and Koch said, "Well, give me some tin top." He was given five or six bottles of "tin top." Koch also saw a half pint bottle of whisky sitting on the shelf in the room, and asked Fletcher what he would take for it. Fletcher said he would not sell it, but that he was not looking and that he (Koch) could steal it if he wanted to. Koch then took the whisky, and left $1.25 on a table in the room. He took the whisky and the so-called "tin top" out to the automobile, and he and the other parties with him drank it while on the trip. The charge is for selling beer and whisky to Koch. Koch testifies that he does not know what the "tin top" was; that it was in beer bottles; that he had drank beer before, but could not tell whether this was beer or not. He admitted, however, getting the whisky, but said he did not intend to leave any money for the whisky. The parties who were with Koch in the car testified that they drank some of this stuff that was in the beer bottles, and that it tasted like beer and looked like beer; that it did not have any labels on it; that they drank a small bottle of it apiece, and did not feel any intoxicating effects. They were uncertain as to whether or not it was beer. Some of them, however, drank some whisky which they testified positively to be whisky. It was also shown by the record of the express office at Custer that on the 16th day of June, 1914, the day before the boosters made this trip, the defendant, Fletcher, had received from the express office a cask of beer, and had receipted for the same. He had also about a month previous to that date received a package containing a gallon of whisky. A day or two after the booster trip the sheriff, armed with a search warrant, searched the defendant's residence and found therein a cask or barrel of empty beer bottles. The bottles were not labeled, but on the top blown in the glass they were branded "beer." The question therefore in this case is whether or not the facts were sufficient to authorize the trial court in submitting the question of whether or not there was an implied sale of both beer and whisky on the part of the defendant to the prosecuting witness, Koch. From the manner in which these witnesses testified it is clearly evident that they were very reluctant witnesses for the state. The prosecuting witness was a personal friend of the defendant, and had known him some eight or ten years. He evidently was well enough acquainted with him to know that he could obtain intoxicating liquors at his home; the prosecuting witness at one time having been a resident of Custer City and familiar with the people who lived there. It is undisputed that on the day before this transaction took place the defendant became possessed of a cask of beer. The fact that he designated it "tin top" appears, and must have been so considered by the jury, to be a subterfuge. We believe the evidence sufficient to justify the conclusion upon the jury's part. The manner in which the whisky was obtained by the prosecuting witness indicates that the giving of the whisky was also a subterfuge to avoid a sale. We cannot say that the court erred in refusing to instruct or direct a verdict of not guilty at the conclusion of the State's case.

The only evidence offered by the defendant was that of two physicians of Custer City who testified that they had never received or got any liquor from the defendant. One of these witnesses, without objection on the part of defendant's counsel, was permitted on cross-examination to testify that among certain people of Custer City the defendant had the reputation of being a booze peddler, or bootlegger. The evidence of these two physicians had no direct bearing upon the question of whether or not a sale was made in this instance. Their evidence in no way conflicted with the testimony of the State's witnesses.

[3] It is also contended that the judgment should be reversed because of certain prejudicial remarks made by the county attorney in his closing argument to the jury, which alleged remarks are contained in a recital in the case-made which shows that counsel for the defendant objected thereto and asked the court to withdraw the same from the consideration of the jury, which request was denied and exception reserved. In the argument the county attorney called the defendant "a devilish bootlegger," and this was his second offense. There is no evidence in the record that the defendant had theretofore ever been convicted of violating the prohibitory liquor laws of this state. The remarks were prejudicial, and, in our opinion, had a tendency to prejudice the jury to such an extent that a severe penalty was given the defendant.

In view of these remarks it is our opinion that the judgment should be modified by reducing the fine from $200 to $50, and the term of imprisonment from 90 days to 30 days, and that the judgment as thus modified be affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(53 Mont. 585)

BARKER et al. v. CONDON et al. (No. 3840.)

(Supreme Court of Montana. May 28, 1917.)

1. MINES AND MINERALS 🔑51(3)—APEX OF VEIN AS WITHIN CLAIM—SUFFICIENCY OF EVIDENCE.

In an action to recover the value of ore taken from a vein alleged to apex in plaintiffs' mining claim, evidence *held* insufficient to show that the apex of the vein from which the ore was taken was within plaintiffs' claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 139.]

2. MINES AND MINERALS 🔑51(3)—EXTRACTION FROM VEIN BEYOND SIDE LINES—PRESUMPTION.

If plaintiffs had been found extracting ore from a vein beyond their side lines and beneath the surface of defendants' claim, the presumption would be against them, and prima facie they would be trespassers, until they made it appear that they got there by following the lode on its dip from its apex within their lines.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 139.]

3. MINES AND MINERALS 🔑38(14)—CLAIM OWNERS—PRIMA FACIE RIGHT—ASSUMPTION OF ANGLE OF VEINS.

Owners of mining claims are prima facie entitled to all ore beneath the surface of the claims, and it is fair to assume, in the absence of contrary showing, that the vein or veins will continue to extend upward at the same angle as exhibited below.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 101.]

4. MINES AND MINERALS 🔑38(14)—PRESUMPTIVE RIGHT TO ORE—OPINION OF WITNESSES.

Ore presumptively belonging to defendants, because beneath the surface of their claims, cannot rightfully be taken from them, because the owners of an adjoining claim produce witnesses entertaining the opinion that the vein containing the ore has its apex in the adjacent claim; the presumption favoring defendants cannot be overturned by speculative conjecture or intelligent guess.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 101.]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by Leonie E. Barker and H. P. Brown against Daniel Condon and others. From a judgment for plaintiffs, and an order denying new trial, defendants appeal. Judgment reversed, and cause remanded, with directions to dismiss the complaint.

This action was brought to recover the value of ore taken by defendants from a vein alleged to apex in the Ripple lode mining claim, owned by plaintiffs. Plaintiffs demanded judgment for a perpetual injunction and for the value of the ore extracted.

Defendants in their answer denied that they had extracted ore from any vein having its apex within the Ripple lode, and denied generally the other allegations of the complaint. Further answering, the defendants alleged that the Montana Gold, Silver, Platinum & Telurium Mining Company was the owner of the Tom Hendricks and the Sixteen to One lode claims, which, at the times mentioned in the complaint, were under lease to the defendants; that the Sixteen to One lode lies between the Tom Hendricks lode and the Ripple lode; that the vein from which the defendants extracted the ore in dispute is the Sixteen to One claim and Tom Hendricks claim, and within the exterior boundaries thereof extended vertically downward; and that no ore was taken from said vein outside of vertical planes drawn through the end lines of said claims.

The case was tried to the court and a jury. At the conclusion of the evidence the case was dismissed as to T. C. Power and Louis Heitman, originally joined as defendants. Plaintiffs offered evidence in support of their contention that the vein from which the ore was taken had its apex in the Ripple claim and was disclosed in a little tunnel within the claim and near corner No. 4. The defendants offered evidence tending to show that the vein from which the ore was extracted was nearly vertical, and that, if it maintained the same dip in its course upward to the surface, would not apex within the Ripple lode. At the conclusion of all the evidence, defendants moved for a directed verdict on the ground, among others, that there was no evidence to show that the vein from which the ore was taken had its apex in the Ripple lode. This motion was overruled. The jury brought in its special findings in favor of plaintiffs. The net value of the ore extracted was found by the referee to whom the matter was referred by the court, to be $144.05. Thereafter judgment was entered in favor of plaintiffs. This appeal is from the judgment and from the order denying a new trial.

J. A. Walsh, of Helena, and W. F. O'Leary, of Great Falls, for appellants. Cooper, Stephenson & Hoover, of Great Falls, for respondents.

WORD, District Judge (after stating the facts as above). All the questions raised by the assignments of error are resolved in favor of the respondents, except one, and that is: Is there any evidence in the record showing, or tending to show, that the vein from which the ore was taken has its apex within the Ripple lode? In view of the admitted fact that the ore extracted came from beneath the surface of the Tom Hendricks and Sixteen to One claims, respondents concede that the burden is upon them to establish their right to go within the boundaries of said claims and extract ore. Have the plaintiffs and respondents discharged this burden resting upon them? Have they established by competent or any evidence the existence, within the lines of their claim, of the apex of the vein or of that portion of the vein from which the defendants extracted the ore sued for? Upon this point the evidence offered by plaintiffs is, in substance, as follows:

John W. Wade testified that he had surveyed the Ripple lode and the tunnels, shafts, and upraises made by plaintiffs in the working and development of that claim. That Exhibit C for plaintiffs was a map of the Ripple lode, showing these workings, drawn to scale, and also included the Sixteen to One and a portion of the Tom Hendricks claims; that the Ripple vein has a north and south course, and dips east into the mountain; that in a little tunnel about 20 feet long, near corner No. 4 of the Ripple lode, and within that claim, there is a well-defined vein about 18 inches or 2 feet wide; that this vein carries ore, has a dip to the east of about 20 feet in 100, and, in the opinion of the witness, is the apex of the Ripple vein and the apex of the vein from which the ore was taken beneath the surface of the Sixteen to One and Tom Hendricks lodes; that upon Exhibit C the witness has drawn a red line, marked "Apex as Developed by Surface Openings," to indicate the cropping or upper edge of the apex of the Ripple vein; that the dotted line at the south end of the claim is an extension of the south end line, marked "3" and "4," in the same direction; that the lines in red, marked "Big Snowy Tunnel" indicate the workings of the defendants beneath the surface of the Sixteen to One and Tom Hendricks claims. The witness concludes that the vein in the little tunnel near corner No. 4 is the apex of the Ripple vein, and the same vein from which the ore in dispute was taken, because it has about the same dip and the same character of ore as has the vein disclosed in the Big Snowy tunnel; because the vein in the little tunnel is on a line with the upraises from the vein to the surface farther north in the Ripple claim; for that the crosscuts on the surface, and made by the Joki tunnel for a distance of nearly 200 feet, and by the Tom Hendricks tunnel, run by the defendants, show that there is no other vein than the Ripple vein from which the disputed ore could come; that the Ripple vein always dips into the mountain, that is, to the east; that the veins below and to the west dip to the west, and that there is no other vein which could apex in the little tunnel near corner No. 4 except the Ripple vein; that most of the openings where they took the dip of the vein are necessarily short, but that the dips show a trend out of the ground that will bring the apex into the red line marked "Apex as Developed by Surface Openings"; that in the Lower tunnel, at a point marked "E–F", about 755 feet north of corner No. 4, the vein is almost vertical; that beyond the south end line of the Ripple claim the development work done by defendants shows that the vein turns southwesterly, and the dip of the vein is about 61 feet in 100, and that, keeping that dip, it would apex below where it does apex near corner No. 4 of the Ripple lode; that at the point "C–D" upon the map, about 390 feet north of corner No. 4, the Lower tunnel is about 250 feet deeper than the Pierce-Westgard tunnel; that in this distance the variation is 31 feet; that the Pierce-Westgard tunnel is 140 feet deeper than the Weidell tunnel, at the point "C–D," and that between these tunnels at this point the vein dips from 20 to 25 feet; that from the Weidell tunnel to the surface there is an upraise 80 feet in length, marked "Weidell upraise"; that the dip of the vein between the surface and the Weidell tunnel is about 30 feet.

On cross-examination the witness Wade testified, in substance, as follows: That the Weidell tunnel is about 160 feet above the Westgard tunnel; that at the point "C–D" there is no upraise from the Westgard tunnel to the Weidell tunnel; that the top of the

Linquist upraise is 141 feet above the Westgard tunnel, figured vertically; that at the point marked "E–F Upraise to Surface" the vein is vertical between the Lower tunnel and the Westgard tunnel, and between the Westgard tunnel and the surface there is a dip of 15 feet, or 20 feet in a distance of 80 feet, and below it is nearly vertical; that at the Weidell upraise it is 161 feet from the Westgard tunnel up to the Weidell tunnel, and from the Lower tunnel up to the Westgard tunnel it is 253 feet; perpendicularly it is about 30 feet shorter, the dip being about 10 feet in 100; that at the point "C–D," tne last cross-section going south, there is more variation between the tunnels than at any other point; that at the point where the Lower tunnel as projected crosses the south end line of the Ripple claim, it is 253 perpendicularly, and about 35 feet laterally below the Westgard tunnel; that at the point where the Joki tunnel cuts the vein it is about 90 feet vertically, and about 15 feet laterally, above the Westgard tunnel; that the red line marking the theoretical apex is about 65 feet from where the Joki tunnel crosses the drift on the vein; that the witness has no knowledge of the Ripple vein coming to the surface at any point between the Weidell upraise and the south end line of the Ripple claim, a distance of 387 feet; that the witness does not know where the vein exposed in the Joki tunnel—the uppermost tunnel—comes to the surface; that the vein shows in the south drift from the Joki tunnel for a distance of 112 feet; that the south end of this drift from the Joki tunnel is not directly over the Westgard tunnel, but very close to it; that it lacks 2, or 3, or 5 feet of being directly over that tunnel; that the perpendicular distance from the south end of this drift to the Westgard tunnel is about 120 feet; that the vein continues beyond the south end of the drift; that the lead may turn to the right, but the vein continues; that at the most southerly part in this drift from the Joki tunnel, as shown upon the map (plaintiffs' Exhibit C), the Westgard tunnel, the Barker winze below the Westgard tunnel, and the Joki drift, are almost in a perpendicular line, that is to say, the vein disclosed in each is nearly perpendicular; that the lead after it leaves the Ripple claim on the south makes an abrupt turn to the right of 45 degrees, and shows a slope of 61 degrees, to the end of the Ripple; that in the little tunnel near corner No. 4 of the Ripple, the vein is 18 or 20 inches wide; that the little tunnel runs across the vein; that the vein dips into the hill; that only 5 or 6 feet of this vein are exposed; that the vein has a dip of 21 or 22 feet to the 100, a very decided dip; that this little tunnel is 15 or 16 feet from corner No. 4; that the difference in elevation between the point where the apex line, the red line, crosses the south end line and the Westgard tunnel is 325 feet; that in this distance there are no developments to show where the vein is; that we have a measurement of 23 feet to the 100 between defendants' and plaintiffs' workings, which, if maintained to the surface, would bring the apex close to the vein in the little tunnel near corner No. 4.

On further cross-examination, the witness Wade testified that at the point H, about 210 feet north from corner No. 4, the pitch from the Westgard tunnel to the Joki tunnel is 8 feet in 100; that the pitch from the Joki tunnel to the theoretical apex is about 60 feet in 100; that the witness wishes the jury to understand that at the point H he has no idea or conception or belief that the apex of the vein at that point would reach the apex indicated by the red line; that to what extent the actual apex will leave the theoretical apex line between the Weidell upraise, and the end line of the claim cannot be told; that the wave of the lead as indicated below, and particularly as indicated at the point beyond the line of the Ripple ground, might do anything and still reach what is the apex right here in the little tunnel; that it is all theoretical except from—"this point to this point." "Q. When you say 'this point,' what do you mean? A. I mean the point over the Weidell upraise. It is all conjecture as to the actual position beyond the development in the Lower tunnel. Q. Does the vein in the little tunnel dip to the point marked '3' at the southerly end? A. No. It dips to the east. It is not my contention, and not that of any of our witnesses, that the little vein has the same dip of the other one. It is all conjecture as to the actual position beyond the development in the Lower tunnel, or that the other one maintains its dip until it reaches there. I am sure it will not. After it reaches this point it will rise a short distance and then will strain up and fall back as it always does. Q. Now, Mr. Wade, it being 375 (387) feet from the Weidell upraise—your last observation and this little tunnel—and approximately 400 feet from that tunnel down to the Big Snowy tunnel, and all that is undeveloped; nothing to show the trend or dip of the vein, and as you say these veins are liable to dip over and strain up, how can you base any theory upon which you can say to the jury that the apex is in any particular place? A. Well, it is impossible for any mortal man to tell to what extent that vein will wave and in what particular manner it will come to the surface and reach the point we have indicated here. In what manner it will reach there no mortal man can tell until it is developed and run through; but it is plain to my mind that it does reach there, because this apex belongs to something, and if it doesn't belong to something else in the neighborhood, it must belong to this lead."

Other witnesses called by plaintiffs gave support to the testimony of Mr. Wade upon the question here considered. Gus Weidell, a witness for plaintiffs, testified on his direct examination that at the point in the Big Snowy tunnel, referred to by both Wade and Leininger as a place where the vein had its greatest dip, there did not seem to be any walls; that there were no solid walls. Charles W. Helmick testified that there was a vein definitely disclosed on the north side of the little tunnel near corner No. 4; that the ground at that point was pretty badly shattered; that there was a more or less defined wall on the east side; that the vein was 15 or 20 inches wide, with an eastern dip.

A summary of plaintiffs' evidence discloses that, in the little tunnel near corner No. 4, the ground is pretty badly shattered; that this tunnel is about 20 feet long; that a vein is disclosed therein having a more or less defined wall on the east side; that this vein has not been developed laterally; that it dips to the east; that the nearest surface opening on the vein is the Weidell upraise, 387 feet north; that the next point where the Ripple vein comes to the surface is the Linquist upraise, 210 feet north of the Weidell upraise; and that the next and last point where the vein reaches the surface is the Pierce and Westgard upraise, 165 feet north of the Linquist raise; that at the Pierce and Westgard upraise the Lower tunnel is about 250 feet below the Westgard tunnel, and the Westgard tunnel is about 90 feet below the surface. The Weidell tunnel at the Weidell upraise is about 80 feet below the surface; the Westgard tunnel about 140 feet below the Weidell tunnel, and the Lower tunnel about 250 feet below the Westgard tunnel. At the point where the Joki tunnel cuts the vein, the distance to the surface is about 90 feet, the Westgard tunnel is about 190 feet below the Joki tunnel at this point, and the lower tunnel about 240 feet below the Westgard tunnel. At the Pierce and Westgard upraise the vein is vertical between the lower and the Westgard tunnels; and between the Westgard tunnel and the surface, a distance of about 90 feet, the vein departs 30 feet from the vertical. At the Weidell upraise the vein dips about 40 feet between the lower tunnel and the Weidell tunnel, a distance of about 390 feet; from the Weidell tunnel to the surface the dip of the vein is greater. Going south from the Weidell upraise, the vein straightens up. At a point about 40 feet north of the line of the Ripple claim between corners 4 and 5, the vein is nearly vertical, and it maintains this position for a distance of 150 feet or more, going south in and through the ground claimed by the defendants.

[1] It is to be noted that at the place in the defendants' claims from which the disputed ore was mined, east of, and a distance horizontally of about 120 feet from the vein in the little tunnel, and over 400 feet beneath the surface, the vein is nearly vertical; and that, if it maintains the same dip to the surface, it will come up within the surface boundaries of defendants' claims. From the whole evidence offered by plaintiffs, we conclude that it does not appear even probable that the apex of the vein from which the ore was taken is within the Ripple claim. Going south from the Weidell upraise towards the vein in the little tunnel, a distance of 387 feet, no one can say from the development now upon the Ripple claim where the Ripple vein will apex, much less that it will apex in the red line marked upon the map, "Apex as Developed by Surface Openings." True, as disclosed in the Pierce-Westgard and Weidell upraises, the dip of the vein is greater as it nears the surface; but at no point south of the Weidell upraise does the vein as it appears in the tunnels or the stopes have a dip which, if maintained to the surface, would bring it out on or near the theoretical apex line. At the south end of plaintiffs' claim the vein is nearly vertical. It is nearly vertical in the Big Snowy tunnel, driven by the defendants, and does not make a turn or bend to the west until beyond the point where it is cut by plaintiffs' south end line continued in its own direction. At most we have an opinion or belief declared by plaintiffs' witnesses that in some way, not made to appear by any development work now existing, the apex of the vein from which defendants took the ore sued for is in plaintiffs' claim, and is shown in the little tunnel near corner No. 4. But this vein in the little tunnel has never been developed so much as a foot beyond the tunnel walls. Whether it persists or disappears; whether it straightens up or flattens out—are all matters of conjecture.

[2] If plaintiffs had been found extracting ore from a vein beyond their side lines and beneath the surface of defendants' claims, the presumption would be against them, and, prima facie, they would be trespassers until they made it appear that they got there by following the lode on its dip from its apex within their lines. In order that a vein may be followed extralaterally, identity throughout is essential. Butte & Boston Min. Co. v. Lexington, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505.

[3] Not only are the defendants prima facie entitled to all ore beneath the surface of their claims (Maloney v. King, 25 Mont. 188, 64 Pac. 351; Parrot S. & C. Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386; Maloney v. King, 30 Mont. 161, 76 Pac. 4; Anaconda Min. Co. v. Pilot-Butte Min. Co., 52 Mont. 184, 156 Pac. 409), but as a working hypothesis it is fair to assume, in the absence of a contrary showing, that the vein or veins there found will continue to extend upward at the same angle as exhibited below. Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 311, 53 L. R. A. 793, 89 Am. St. Rep. 188.

[4] In any event, ore presumptively belonging to defendants, because beneath the surface of their claims, cannot rightfully be taken from them, for that the owners of an adjoining claim have produced witnesses who entertain the opinion that the vein containing the ore has its apex in this adjacent claim, and this presumption which attends defendants "is not overturned by speculative conjecture or intelligent guess." Heinze v.

B. & M. Co., 30 Mont. 484, 488, 77 Pac. 421, 423; Collins v. Bailey, 22 Colo. App. 149, 125 Pac. 543.

That plaintiffs might by work done upon their vein from its apex down to the disputed territory, furnish substantial evidence that their claims, as to the identity of their vein with the vein found in defendants' ground, are well founded need not be questioned here; it suffices that they have failed to present such evidence in this suit, and as it appears they have presented all the evidence at this time available to them, it follows that the judgment should be reversed, and the cause remanded, with directions to dismiss the complaint. It is so ordered.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur. Hon. R. LEE WORD, a judge of the First Judicial District, sat in place of the Chief Justice.

(54 Mont. 1)

PADDEN v. MURGITTROYD et al.

(No. 3776.)

(Supreme Court of Montana. June 12, 1917.)

1. APPEAL AND ERROR ⇨232(2)—REVIEW—EVIDENCE—OBJECTION—ARGUMENT.

Where objection to the admission of evidence went to the degree of evidence, and the argument on appeal went to its competency, the appellate court will not consider propriety of the rulings admitting the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431.]

2. APPEAL AND ERROR ⇨853 — REVIEW — MATTERS CONSIDERED—INSTRUCTIONS.

Where no criticism is made of the instructions at the time of their settlement, they become the law of the case on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1524, 3405.]

3. COVENANTS ⇨122—BREACH—EVIDENCE—SUFFICIENCY.

In an action for damages alleging the breach of covenants of warranty in a deed in that a granary which was on the land when purchased had been subsequently removed by the vendor's tenant who claimed it as his personal property, evidence *held* to show that the granary was the personal property of such tenant, and that this was known to the purchaser at the time the conveyance was made to him, both from information received by him and the manner in which it rested upon the land.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 224.]

4. FIXTURES ⇨4—ELEMENTS.

As a general rule, the manner of an attachment to realty, the adaptability of the thing attached, to the use to which the realty is applied and the intention of the one making the attachment, determine whether the thing attached is realty or personalty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 3, 6.]

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

Action by Guy E. Padden against Dora Murgittroyd and another. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Reversed and remanded.

J. H. Stevens, of Kalispell, for appellants. H. A. Paddock, of Polson, for respondent.

BRANTLY, C. J. On August 28, 1913, the defendants executed a warranty deed to 80 acres of land situate in Flathead county, and delivered it to the Flathead County State Bank at Polson, Mont., with instructions to deliver the same to the plaintiff upon his fulfilling on or before January 10, 1914, the conditions embodied in a written escrow agreement between the plaintiff and the defendants which accompanied the deed. These conditions were: That the plaintiff would pay the defendants $3,200 as the purchase price of the land, $1,000 upon the execution and deposit of the deed, $500 on or before January 10, 1914, with interest at the legal rate on $2,200 from the date of the deposit of the deed, until that time, and execute and deliver to defendants a first mortgage upon the land to secure the payment of $1,700, the balance of the purchase price, which was to become due and payable within five years. The plaintiff having fulfilled the conditions, the deed was delivered to him and he entered into possession of the land on or about January 6, 1914. Prior to the sale to the plaintiff the land had been occupied by B. F. Kashner as lessee of the defendants. When the deed was executed the term of the lease had not yet expired. In order to be able to deliver possession to the plaintiff, the defendants secured from Kashner a release of his rights. Kashner owned adjoining lands. He had theretofore constructed thereon a granary, described as 14 feet in width by 16 feet in length, with a shingle roof sloping from a height of 11 feet in front to 9 feet in the rear. It was constructed upon heavy timbers which were designed to serve as skids so that it could be moved from place to place as occasion required. During the term of his lease, Kashner had moved it from his own land to that in controversy. When the lease was surrendered, the granary was not removed, but it was understood by Kashner and the defendants that Kashner could remove it later. No mention was made of the granary either in the deed to plaintiff or the agreement accompanying it. A short time after plaintiff took possession, Kashner sought to remove the granary to his own land. The plaintiff refused to permit him to do so and proceeded to convert it into a dwelling house. Thereupon Kashner brought an action against plaintiff in a justice's court in claim and delivery to recover possession of it, with the result that he was awarded judgment for $150, the value of it, and costs taxed at $18.50. The plaintiff paid the judgment, and thereupon brought this action for damages, alleging that the covenants of warranty in the deed had been broken by defendants, in that the granary was a part of the lands, tenements, and hereditaments conveyed by it to the plaintiff. The defendants, besides denying that they had breached the covenants in the deed as alleged, averred that at the time of the execution and delivery of the deed, the granary was personal property; that plaintiff knew this fact; that it was not owned by the defendants; and that it was not conveyed, or intended to be conveyed, by the deed. There was issue by reply. At the trial, the plaintiff had verdict and judgment for $195.60 and costs, taxed at $156.60. Defendants have appealed from the judgment and an order denying their motion for a new trial.

[1] The integrity of the judgment is assailed on the grounds that the trial court erred to the prejudice of the defendants in admitting certain evidence, and that the verdict is contrary to the evidence. We shall omit consideration of the propriety of the rulings admitting the evidence, for the reason that the argument of counsel in this court presents a question wholly different from that raised by his objection at the trial. The plaintiff was permitted to testify as to what the result was in the justice's court, including the amount of the judgment recovered against him and the fact that he had paid it. The objection was that this was not the best evidence; whereas the argument of counsel goes to the competency of the evidence to show the value of the granary. In other words, the objection went to the degree of the evidence, and not to its competency. The ruling, though it may be conceded to have been erroneous as made, may not be held erroneous on a ground different from that submitted to the trial court.

[2] The vital question in the case is presented by the second contention. The theory upon which the trial proceeded, as is disclosed by the instructions submitted to the jury, was this: That when one conveys land to another, presumptively all buildings permanently resting upon it are included unless there is some reservation or exception thereof made in the instrument of conveyance, and hence that the burden was upon the defendants to show that the granary was the personal property of Kashner, and that this fact was known to the plaintiff at the time the conveyance was made to him. We shall not stop to consider whether the theory upon which the trial court proceeded was the correct one or not. Since no criticism was made of the instructions at the time of their settlement, they became the law of the case for the purpose of these appeals.

[3] The defendants, we think, fully sustained the burden cast upon them. That the granary was the personal property of Kashner there was no controversy. Neither was was there any controversy but that, as between him and the defendants, its character as such was fully understood and recognized. This was apparent both from the statements of the defendants and from the plan of its construction as well as the use for which it was intended, viz. to be moved from place to place as occasion or convenience for its use required, as was usually the case with such structures in that community, for it was erected upon skids to facilitate this mode of use. It was not attached to the surface, nor was it resting permanently thereon. Neither was there any controversy but that in August, when the plaintiff was negotiating for the purchase from the defendants, he went upon the land and observed fully the situation of the granary, the method of its construction, and the use to which it was then devoted. It was situated, not in connection with other permanent buildings or improvements, but at an isolated place in the field where the grain crop for that year had been threshed. The testimony of several of the witnesses tended strongly to show that at the time of the negotiations in August, and later, before the plaintiff made his second payment and took possession, he was fully informed of Kashner's rights. Both the defendants and the notary who prepared the deed and the agreement testified categorically that the ownership of the granary was fully discussed, and that it was understood that it was not included in the transaction. These witnesses all testified that the plaintiff was fully informed that the land was under lease to Kashner; that he owned the granary; that after the papers had been prepared and executed ready for deposit, it was noticed that they contained no mention of the granary; that it was suggested by the notary that they should be amended by incorporating the exception, but that the plaintiff insisted that this was not necessary, as the situation was fully understood. Prior to his taking possession and during the month of December, the plaintiff occupied other land of the defendants adjoining that in controversy, preparing to take possession. He was then informed that the granary belonged to Kashner. He nevertheless moved it and converted it into a dwelling. Two other witnesses testified that during the winter following the purchase, plaintiff admitted to them that while he knew that Kashner owned the granary, since it was not mentioned in the contract he could hold it and intended to do so. The statements of all these witnesses were denied by the plaintiff. If the verdict rested upon this conflicting testimony alone, there would be merit in the contention of counsel for plaintiff that it was the exclusive province of the jury to resolve the conflict, and that its resolution of it became binding on this court. When, however, we consider the undisputed evidence as to the ownership of the granary, the plan of its construction manifesting the use as well as the mode of use for which it was intended, and the manner in which it rested upon the land, we are compelled to the conclusion that the plaintiff

fully understood the character of it as personal property, that the defendants did not intend to convey it to him, and that he did not acquire title to it by his purchase. His denial of the statements of the witnesses was insufficient to overcome the inference made necessary by the physical facts, which were not controverted.

[4] In Montana Electric Co. v. Northern Valley Min. Co., 51 Mont. 266, 153 Pac. 1017, it was said:

> "As a general rule, the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the one making the attachment, determine whether the thing attached is realty or personalty."

Accepting this as the determinative rule, the conclusion must follow that the plaintiff knew from the beginning that the granary was the personal property of Kashner. True, the granary was resting upon agricultural land and was intended for the housing of grain; but the character of its construction and the manner in which it rested on the land wholly excluded the idea that it was the intention that it should become permanently affixed to it. The evidence therefore wholly fails to justify the verdict.

The judgment and order are therefore reversed, and the cause is remanded to the district court, with direction to enter judgment for the defendants.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur.

(175 Cal. 315)

CLINE v. LEWIS, County Auditor.

(L. A. 4781.)

(Supreme Court of California. June 6, 1917. Rehearing Denied July 5, 1917.)

1. OFFICERS 🔑100(2)—INCREASE OF COMPENSATION.

Charter of Los Angeles County (St. 1913, p. 1500) § 52, providing that the compensation of any elective county or township officer shall not be increased or diminished during the term for which he is elected, nor within 90 days preceding his election, makes the amount of compensation such an officer shall be entitled to during his term of office depend on the law in existence on the ninety-first day preceding his election.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 154.]

2. COUNTIES 🔑55 — ORDINANCES — TIME OF TAKING EFFECT.

Under Const. art. 11, § 7½, subjecting the provisions of county charters as to powers and duties of supervisors to the control of the general laws, Charter of Los Angeles County (St. 1913, p. 1487) art. 3, § 11, requiring the board of supervisors to provide by ordinance for the compensation of elective officers, etc., and Pol. Code, § 4058, providing for the enactment of ordinances by the initiative process and also for referendum votes upon ordinances passed by the board of supervisors, and providing that, with certain exceptions, no such ordinance shall go into effect before 30 days from its final passage, within which time it is subject to referendum, an ordinance of the board of supervisors of Los Angeles county fixing the salary of the county sheriff was not in force as an existing law until 30 days after its passage.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72.]

In Bank. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Petition for writ of mandate by John C. Cline against Walter A. Lewis, Auditor of Los Angeles County. From judgment for petitioner, respondent appeals, and the appeal is transferred from the District Court of Appeal. Reversed.

Thomas Lee Woolwine, Dist. Atty., and Geo. E. Cryer, Chief Deputy, both of Los Angeles, for appellant. Joseph L. Lewinsohn, Daniel M. Hunsaker, and Hunsaker & Britt, all of Los Angeles, for respondent.

SLOSS, J. The appeal before us was taken, in the first instance, to the District Court of Appeal for the Second Appellate District. The justices of that court differed in opinion, and the cause was accordingly transferred to this court.

While the appeal was pending in the District Court of Appeal, an opinion, of which the following is a copy, was prepared by Presiding Justice Conrey, of that court:

> "This is an appeal by the respondent in the court below from a judgment granting the petitioner's demand for a peremptory writ of mandate.
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> "At the general election held in November, 1914, the petitioner was elected to the office of sheriff of Los Angeles county for the term beginning January 4, 1915. Claiming that his salary is $5,000 per year, he presented demands computed at that annual rate for the months of January to November, 1915. Appellant, as county auditor, refused to audit these demands for any sum in excess of a salary computed at the rate of $4,000 per year.
>
> "Ordinance 326 (New Series) of the county of Los Angeles, as adopted by the board of supervisors under date of June 2, 1913, provided for a sheriff's salary which, during the term of petitioner, was to be $4,000 per annum. On the 1st day of August, 1914, the board of supervisors passed and adopted an ordinance amending said Ordinance 326, and thereby providing that the salary of the sheriff of Los Angeles county should be $5,000 per year. We are called upon to determine whether this latter provision applies to the sheriff's present term of office.
>
> [1] "Section 52 of the charter of Los Angeles county (Stats. 1913, p. 1500) states that 'the compensation of any elective county or township officer shall not be increased nor diminished during the term for which he was elected, nor within ninety days preceding his election. * * *' As applied to the sheriff, this plainly means that the amount of compensation to which the sheriff shall be entitled during his term of office shall be controlled by whatever law was in existence on the ninety-first day preceding the election, with respect to the salary of that office for and during the ensuing term. August 1, 1914, was the ninety-fourth day preceding the general election of that year. If the ordinance passed on that date was not an existing law for a full period of 90 days prior to November 3, 1914, it cannot be the law under which petitioner may claim his salary. This brings us to certain questions arising under the provisions of section 4058 of the Political Code, under which it is claimed that the ordinance could not become

a law until 30 days after its final passage by the board of supervisors.

"The authority for county charters is derived from section 7½, art. 11, of the state Constitution, and it is there declared that a county charter, when duly adopted and approved, 'shall supersede all laws inconsistent with such charter relative to the matters provided in such charter.' It is further declared, among other things, that county charters shall provide 'for the powers and duties of boards of supervisors; * * * provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws.' The charter of Los Angeles county, in article 3, § 11, thereof, declares it to be the duty of the board of supervisors to 'provide, by ordinance, for the compensation of elective officers and of its appointees, unless such compensation is otherwise fixed by this charter.' It is conceded that under this section valid ordinances may be passed establishing the salary of a sheriff. It is equally clear that there may be two existing and valid ordinances at the same time, one operative with respect to the current term, and another postponed in its operation to a subsequent term.

"The charter is silent as to the time when ordinances shall take effect and as to the subjects of initiative and referendum, and under the foregoing provisions of the Constitution these matters are subject to be controlled by the provisions of the Political Code as a part of the general law of the state. Section 4058 of the Political Code provides for the enactment of ordinances by the initiative process and also for referendum votes upon ordinances passed by the board of supervisors. As to the latter, we find therein the following provision: That no ordinance passed by the board of supervisors (with exceptions not applicable in the present case) 'shall go into effect before thirty days from its final passage; and if, during said thirty days, a petition signed by qualified electors of the county equal to ten per cent. of the entire vote cast therein for all candidates for governor of the state at the last preceding general election at which a Governor was voted for, protesting against the passage of such ordinance, be presented to the board, the same shall thereupon be suspended from going into operation, and it shall be the duty of the board to reconsider such ordinance. If said board shall thereupon not entirely repeal said ordinance, it shall submit the same to a vote of the electors either at a general election or a special election to be called for the purpose, and such ordinance shall not go into effect or become operative, unless a majority of the voters voting upon the same shall vote in favor thereof.'

"A legislative act cannot become operative until it has become a law, but the time when it becomes operative may be much later than the date when it becomes a law. This is illustrated by frequent instances where legislative acts by their own terms are not to go into effect until a certain date named. It is well illustrated by the instance to which I have referred of two laws in existence at the same time, one establishing the present salary of a public office and another establishing the future salary of that office. 'The Constitution (article 11, § 9) clearly implies that there must be a law in force, fixing the compensation of every county and township officer at the date of his election, and it imperatively forbids any increase of that compensation by a law subsequently enacted. It permits, however, an increase of compensation to the person to be elected to the ensuing term, and if such increase is provided it must be by a law for that limited purpose takes effect long before the expiration of the current term; the old law remaining in the meantime in full effect as to the incumbent. In such a case the operation of the amended law is postponed, not because it is unconstitutional, but because the courts, construing it in the light of the Constitution, hold that such was the intention of the Legislature.' Smith v. Mathews, 155 Cal. 752, 757 [103 Pac. 199, 202].

"When it is said in section 4058, supra, that no ordinance 'shall go into effect before thirty days from its final passage,' and again that, where a referendum petition has been filed, 'such ordinance shall not go into effect or become operative, unless a majority of the voters voting upon the same shall vote in favor thereof,' is it merely intended that the operation of the ordinance and its enforceability in any concrete case shall be postponed? Or do the words 'shall go into effect,' or 'shall not go into effect,' mean that it shall not be an existing ordinance in any event during the period of 30 days from its final passage by the board of supervisors, and (if referendum petition be filed) until further approved at the referendum election? In the case In re Pfahler, 150 Cal. 71, 84 [88 Pac. 270, 275, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911], the Supreme Court gave full consideration to the initiative and referendum provisions of the charter of the city of Los Angeles and expressed its view as to the effect of such provisions as follows: 'The effect of the provisions of the Los Angeles charter, as amended, is to give the legislative power vested in the city to the council and mayor, subject to such control by the electors as is given them by the initiative and referendum provisions. The reserved power of the electors to directly enact such ordinances as the council refuses to enact, as well as their power to effectually veto ordinances adopted by the council, is made paramount to the power of the council and mayor, the council being without power to repeal or amend an ordinance so enacted, and the objection that under the initiative we have "two equal co-ordinate lawmaking bodies, the one absolutely independent of the other," is therefore without foundation. This feature renders the decision in Ex parte Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236, a decision strongly relied on by petitioner, inapplicable, for the only thing decided therein was that there could not be under our system of government two equal, co-ordinate lawmaking powers, "each existing without any restrictions the one upon the other."' The analogy suggested in the foregoing quotation between the referendum and the familiar power of veto tends to support the view that an ordinance or statute, during the period when it remains subject to referendum, has no validity as a law, for it will scarcely be contended that bills which are subject to executive veto have any validity or can be considered as existing laws until the time has expired withing which such veto might be exercised.

"Section 4057 of the Political Code provides with respect to county ordinances that 'no ordinance passed by the board shall take effect within less than fifteen days after its passage,' and further provides for publication of each ordinance within said period of 15 days. If the referendum provisions of section 4058 do not have the effect to postpone for 30 days after its passage the time when an ordinance becomes a law, and if in a given case the referendum petition be filed within the 30 days, but more than 15 days after the date of the passage of the ordinance, then the effect of a subsequent unfavorable vote upon the ordinance at the referendum election will be that of a repeal of an existing law; on the other hand, a favorable vote by the electors will not be a part of the process of enactment of the law, but will be merely a refusal to veto such existing law. The language of the statute does not require that we adopt a view so far out of harmony with the theory of referendum legislation. Where the law governing the process of enactment requires something to be done before the proposed enactment shall take effect, it generally means that the enactment shall not be a law until that thing has been done. Thus, where the statute provided that a county ordinance should not take effect until it had been published in its entirety, and the entire ordinance was not published, it was treated as a nonexisting ordinance. People v. Russell, 74 Cal. 578 [16 Pac. 395.]

[2] "It is my conclusion that the ordinance passed by a vote of the board of supervisors on August 1, 1914, amending Ordinance 326, was not in any sense in force as an existing law until a time less than 90 days preceding petitioner's election as sheriff; and that his salary for the current term is not to be measured by that amendment.

"The judgment should be reversed."

The quoted opinion contains an adequate statement of the facts involved in the controversy. We think, too, that the learned presiding justice made correct disposition of the legal questions presented. We adopt his opinion as the expression of our own views, adding merely the statement that the conclusion reached is in harmony with the decision of this court in Harrison v. Colgan, 148 Cal. 69, 82 Pac. 674.

The judgment is reversed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.

ANGELLOTTI, C. J. I concur. Were the question a new one in this state, I would feel very doubtful as to the correctness of the conclusion as to the proper construction of the charter provision involved. It seems to me, however, that the construction that must be given to section 52 of the Los Angeles county charter, so far as pertinent to the case at bar, is determined by the decision of this court in Harrison v. Colgan, 148 Cal. 69, 82 Pac. 674. I do not think that what was said as to when the salaries there involved were increased can be held to be obiter dictum. That decision was rendered in the year 1908. The Los Angeles county charter was framed and submitted to and approved by the electors of the county in the year 1912. In all material respects section 52 thereof is similar to the provision of the Constitution considered in Harrison v. Colgan, supra, and I do not think we would be warranted in holding otherwise than that it was adopted in the light of that decision and with the meaning given thereby to similar language.

(175 Cal. 366)

BELL v. MOLONEY et al. (S. F. 7236.)

(Supreme Court of California. June 7, 1917.)

1. **Trusts** 🔑34(2)—**Bank Deposit.**

A trust is created where one deposits money in the bank to the credit of herself "or" her daughter, receives a passbook on which their names are written and gives directions, accepted by the bank, that the deposit shall be paid to either of them on production of the passbook.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44.]

2. **Gifts** 🔑30(4) — **"Gift Inter Vivos" — Bank Deposit.**

A valid gift inter vivos within Civ. Code, §§ 1146 and 1147, defining gifts and providing how they may be made, was made of money deposited by the donor in a bank to the credit of herself "or" daughter, where the daughter, under directions of her mother and pursuant to her mother's expressed intent to make a gift, reduced the money to possession and reported that action to her mother.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 56.

For other definitions, see Words and Phrases, First and Second Series, Gift Inter Vivos.]

3. **Witnesses** 🔑246(1)—**Examination—Interrogation by Judge.**

Where it appears to the judge that by taking part in the examination of a witness he may aid in bringing out the truth or prevent a misunderstanding, it is his right and duty to take part therein.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 852, 856.]

4. **Trial** 🔑29(3)—**Statement of Court—Interrogation of Witness.**

Where, in an administrator's action for conversion of money belonging to the estate, it appeared that a witness misunderstood the purport of a question when she replied that she had an interest as an heir in the money sought to be recovered, it was not erroneous, as a prejudgment of the principal issue, for the court to interrogate the witness and inform her that such money was not in the estate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 82.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Andrew J. Bell, administrator of the estate of Catherine McGuire, deceased, against Lillie Rose Moloney and another. From judgment for defendants and denial of new trial, plaintiff appeals. Affirmed.

F. J. Kierce, of San Francisco, for appellant. Joseph Farry, of San Francisco, for respondents.

MELVIN, J. Andrew J. Bell, as administrator of the estate of Catherine McGuire, deceased, brought suit for the alleged conversion by Lillie Rose Moloney of the sum of $2,088.46, which he alleged to have been the property of her mother, Catherine McGuire. James J. Moloney was joined as a defendant because he is the husband of said Lillie Rose Moloney. It is alleged in the complaint that Mrs. McGuire died on or about June 21, 1912; that during her lifetime the money here in dispute was deposited with a certain banking establishment to the credit of Catherine McGuire or Lillie R. Moloney; and that the latter withdrew and converted the fund on or about the 14th day of March, 1912. By the answer Mrs. Moloney admitted the withdrawal of the sum of $2,088.46 from the bank, but averred that she was at the time of such transaction the owner and entitled to the possession of said sum. Further answering defendants averred that Catherine McGuire during her lifetime created a trust of the sum deposited whereby it was to become the property of Mrs. Moloney at Mrs. McGuire's death; and it was also pleaded that during her lifetime Mrs. McGuire had made a valid gift of the money to Mrs. Moloney. The case was tried by the court without a jury, and judgment was given and entered in favor of defendants. From this judgment and from an order denying his motion for a new trial, the plaintiff appeals.

The court found that in August, 1897, Catherine McGuire and Lillie Rose Moloney deposited $160 in the bank to the credit of both of them, receiving a passbook on which their names were written: that they then and there in writing directed the banking corporation to pay and said corporation agreed to pay any sum or sums of money then or thereafter deposited to the credit of their account to either one of the depositors who should demand and receipt for the same and produce the passbook; and that on March 14, 1912, Mrs. Moloney withdrew $2,088.46, the balance then on deposit, and thereby closed the account. It was also found that at the time of the original deposit it was Catherine McGuire's intention to create and she did create a trust of said deposit in favor of her daughter, and that upon the death of said Catherine McGuire said Lillie Rose Moloney became the owner of the balance of the fund. The court further found that on or about March 14, 1912, Catherine McGuire gave and transferred to her daughter, Lillie Rose Moloney, all of the money then on deposit in the bank as evidenced by the bank book. There is abundant evidence to support these findings and the judgment based thereon. Respondent, Mrs. Moloney, lived with her mother at No. 49 Farren street, San Francisco. According to the uncontradicted testimony, on August 12, 1897, at the request of Mrs. McGuire, the respondent, her daughter, accompanied her to one bank where the mother withdrew a sum of money and then they went to another bank where at the mother's instance and request the money was deposited to the credit of "Lillie R. Maloney [an obvious clerical error] *or* Catherine McGuire." A printed form furnished by the bank was filled and executed at that time. The material part of the writing was as follows:

> "Pay all of any sum, or sums, of money that are now or may hereafter be deposited with you, by us, and entered in passbook No. 113,847 to whichever of us, the undersigned, shall demand and receipt for the same and produce said book.
>
> "[Signed] Lillie R. Maloney.
>
> her
> "Catherine X McGuire.
> mark
>
> "Witness: F. E. Wagner."

According to Mrs. Moloney's testimony her mother told her that the deposit was made in that form so that upon Mrs. McGuire's death her daughter might have all the money then on deposit because, as the mother asserted, she had confidence that the daughter would use the money as she wished to have it applied. Mrs. Moloney said that upon one occasion her mother read a will to her, and when she asked why the money in that certain bank was not mentioned the mother replied that there was no necessity for such mention as that had been fixed otherwise. Later, according to Mrs. Moloney's testimony, her mother told her to take the money from the bank and put it in a safe deposit vault so others should know nothing about it, as she (the mother) did not want any one but respondent, Mrs. Moloney, to have it. Mrs. Rock, another daughter of Catherine McGuire, corroborated Mrs. Moloney in this part of her testimony, and also stated that their mother had frequently said that this money was so deposited that Mrs. Moloney could have it upon her death. Plaintiff and another witness testified to certain alleged conversations with Mrs. Moloney and the former to certain purported declarations of Mrs. McGuire shortly before her death which tended in some degree to contradict the evidence offered on behalf of defendants, but with this conflict we are not concerned, the court below having reached its conclusions, as we have seen, upon ample evidence.

[1] It is true, as respondent's counsel say, that the entire transaction may be upheld upon the theory of a trust supported by such authorities as Booth v. Oakland Savings Bank, 122 Cal. 19, 54 Pac. 370; Drinkhouse v. German Savings & Loan Society, 17 Cal. App. 162, 118 Pac. 953; Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; Cahlan v. Bank of Lassen County, 11 Cal. App. 535, 105 Pac. 765; Thomas v. Lamb, 11 Cal. App. 717, 106 Pac. 254; Carr v. Carr, 15 Cal. App. 480, 115 Pac. 261; Culver v. Lompoc Valley Bank, 22 Cal. App. 379, 134 Pac. 355.

[2] But there was also abundant evidence to support the finding of a valid gift inter vivos as Mrs. Moloney, corroborated by her sister, told of taking the passbook and at her mother's direction reducing the money to possession, and of reporting that action to her mother. Thus actual dominion over the property, together with declarations of the donor's intent to give, were shown. These were ample circumstances to support a finding of a gift between living persons. Sections 1146, 1147, Civ. Code; Field v. Shorb, 99 Cal. 661, 34 Pac. 504; Russell v. Langford, 135 Cal. 356, 67 Pac. 331; 20 Cyc. 1204.

Counsel for appellant accuses the learned judge of the superior court, who presided at the trial, of being unfair toward plaintiff "in his attempt to make the witness" (Mrs. Rock) "testify that she had no interest in the outcome of the litigation and no interest in the estate, which, up to the point of interruption, she conclusively showed she had." (We quote from the brief.) The criticism is without merit. The witness had said upon cross-examination, "I have an interest in this money as an heir." After she had again made that declaration in the form of an affirmative answer to a leading question from the cross-examiner the court took part in the inquiry and the following occurred:

"The Court: What interest have you in it? A. An interest in the estate. Q. This money is not in the estate. Do you realize that? A. I don't mean to say that the property—no. Q. What do you mean? A. I mean that it is this way: That my sister is always interested in these things and naturally I was an heir also. Q. In what way are you an heir? A. In the interest of my sister. Q. Do you realize that according to your sister's story this money was given to her absolutely and nobody else in the world? A. Sure. Q. What right have you in it, what interest have you in it? A. The interest of my sister. Q. I don't understand what you mean. Have you any right to any part of this money? A. No, not at all. Q. Could you claim it at any time? A. No. Q. That is what Mr. Kierce wants to know when he asks you what interest you have in it. A. I misunderstood Mr. Kierce."

The quotation demonstrates the propriety of the court's interruption. The witness had testified regarding her mother's declarations that the money in question was to go to Mrs. Moloney, and that no mention was made of it in the will because it was disposed of otherwise. This testimony, followed by the statement that the witness had an "interest" in the property "as an heir," called for an explanation, and the court by a few questions developed the fact that Mrs. Rock was not using the word "interest" in its technical sense of "part ownership" or "right to participate in" the money, but with a very different meaning. Counsel criticizes the court for saying, "The money is not in the estate, do you realize that?" By the use of these words, says counsel, the court "assumed that it had already concluded the very issue in the case against the appellant." Commenting further upon this matter in his brief counsel uses the following language:

"This was a very unfair interruption of the examination of the witness for the very question involved in this proceeding was whether the money belonged to the estate of the deceased, Catherine McGuire, or belonged to the sister of the witness then on the witness stand. The court had no right whatever, either to interrupt the cross-examination of an unfair witness, or to assume in advance that the very money which was the subject of his own inquiry, did not belong to the estate at all."

[3, 4] There is nothing in the record to justify this criticism. It is the right and the bounden duty of a judge of a trial court to take part in the examination of a witness whenever he believes that he may aid in bringing out the truth or in preventing a misunderstanding. By remarking that the money was not in the estate the learned judge was not declaring a prejudgment of the principal issue in the case, but was uttering a fact about which there was no dispute among the litigants. That the money had been taken by Mrs. Moloney and used as her own was charged and not denied. That it was out of the estate was the very reason for the administrator's suit. The purpose of the action, so far as he was concerned, was to force her to return an equivalent sum to the estate. Until and unless it should be restored to the estate the witness could have no interest in the money as an heir and the judge was very properly endeavoring to discover why she declared herself so interested in a fund which, according to her testimony, her mother had disposed of some months before the latter's death.

We have carefully examined the other assignments of error, and find them without merit.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 399)

In re DE ROME'S ESTATE.

DE ROME v. GREAT WESTERN SMELTING & REFINING CO.

(S. F. 7819.)

(Supreme Court of California. June 8, 1917. Rehearing Denied July 5, 1917.)

1. EXECUTORS AND ADMINISTRATORS 🔑93(1)—MANAGEMENT OF BUSINESS — LIABILITY OF ADMINISTRATOR.

An administrator managing a business belonging to an estate is personally liable for debts which cannot be paid from the profits of such business.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

2. APPEAL AND ERROR 🔑151(2)—ACCOUNT—WHO MAY APPEAL—"PARTY AGGRIEVED."

A creditor furnishing material to an administrator conducting a manufacturing business is not a "party aggrieved" within Code Civ. Proc. § 938, regulating parties who can appeal from an order settling an administrator's final account, since the administrator personally, and not the estate, is liable for the debt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947, 948.

For other definitions, see Words and Phrases, First and Second Series, Party Aggrieved.]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of Louis De Rome, deceased. From an order settling the administrator's final account and decreeing distribution, the Great Western Smelting & Refining Company appeals. Affirmed.

Louis H. Brownstone, of San Francisco, for appellant. Dudley Kinsell, of Oakland, and Mastick & Partridge, of San Francisco, for respondent.

MELVIN, J. This is an appeal from an order settling the final account in the estate of Louis De Rome, deceased, and decreeing distribution of certain machinery and of $1,067.77 in the possession of the administrator to the widow and the four children of said Louis De Rome.

The record reveals the fact that, after his appointment as administrator of the estate of his deceased father, Louis M. De Rome conducted the affairs of the business which was the principal asset of the estate. The elder De Rome had operated a bronze and bell foundry and the business was continued by the administrator of his estate. Admittedly the debt due to appellant was incurred during the period in which the work in the foundry was thus carried on, without order or permission of the court by Louis M. De Rome. Respondent insists that, upon the authority of decisions of this court, notably In re Rose, 80 Cal. 166, 22 Pac. 86, Great Western Smelting & Refining Company is not a "party aggrieved," and therefore is not entitled to appeal from the order settling the account. Section 938, Code of Civ. Proc.

Appellant admittedly is not contending upon this appeal that the estate is liable for its debt, but only is seeking to have the administrator account for money received by him officially and (so it is contended) not properly accounted for. There were two accounts filed. In one the administrator set forth certain payments as "family allowance," but no formal order for such an expenditure had ever been made by the court. Before any proceedings looking to the settlement of this account had been taken, a second one was filed omitting all reference to family allowance and taxes. This is the account which was settled. It is argued by appellant that the unauthorized payment of these sums by the administrator amounted to an appropriation of the assets of the estate by him. But there was no showing that this money came from the profits of the business conducted by the administrator, and under the authority of Estate of Rose, supra, the estate was not interested except in the profits of that enterprise. Therefore the court held that the administrator could not be compelled in this probate proceeding to account for the money.

[1, 2] From this decision the Great Western Smelting & Refining Company is in no position to appeal. As was said in the Rose Case, the administrator who assumes the perils of the management of a business belonging to an estate does not, by so doing, subject the estate to the liabilities growing out of his conduct of the enterprise. They are his liabilities and he may pay them out of the increase of the business, but if by so doing a loss to the estate is sustained he must make that loss good. This has been the rule of law for many years, and one who, like the corporation here appealing, deals with an administrator who is conducting a manufacturing enterprise with the property of the estate, does so with full knowledge of its situation as a creditor. Since the liabilities are the administrator's, it follows that errors in his accounting with the estate, if any there be, are not the affairs of his personal creditor. Clearly Great Western Smelting & Refining Company is not a "party aggrieved" within the meaning of section 938 of the Code of Civil Procedure, and it cannot matter to that corporation what decree the court may have entered. Estate of Piper, 147 Cal. 606–608, 82 Pac. 246; Estate of Walden, 168 Cal. 759, 145 Pac. 100.

The order and decree are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 309)

FARNSWORTH et al. v. CASHIN.

(S. F. 7252.)

(Supreme Court of California. June 6, 1917.)

COMPROMISE AND SETTLEMENT ⟹5(1) — ACTION ON NOTE.

Where defendant in action on a note left in escrow an agreement that in consideration of a new note and a certain mortgage the time of payment should be extended and the suit should be dismissed, together with the note and mortgage, for signature by one of the plaintiffs, but thereafter withdrew the papers from escrow before signature, there was no compromise of the litigation.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 10, 11, 14–16.]

Department 2. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by O. G. Farnsworth and J. H. Cluck against K. S. Cashin. From a judgment for plaintiffs, and from an order denying new trial, defendant appeals. Affirmed.

C. K. Bonestell, of Fresno, for appellant. Barnard & Watters, of Fresno, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was on a promissory note for $2,000, and the judgment, which included costs and attorney's fee, was for $2,249.05. The answer admitted the execution of the note for the amount due plaintiffs from defendant in consideration of services rendered by plaintiffs in the sale of certain land. It was alleged, however, in the answer that after the commencement of the action a writing had been executed by defendant and O. G. Farnsworth, one of the plaintiffs and copartner of the other plaintiff, J. H. Cluck, whereby the time of payment was extended and it was mutually agreed that defendant should execute a new note for $2,030, secured by a mortgage on specified real property, and certain crops, and that the suit should thereupon be dismissed. It was also averred that defendant tendered the note and mortgage to plaintiffs, and that subsequently plaintiff Cluck without reason refused to sign the agreement. The purported contract was pleaded by copy as an exhibit.

It is contended that upon the showing made the trial of the case should have been continued until the date of the maturity of the note. It fully appears, however, upon the testimony of plaintiffs and of the lawyer, who drew the alleged agreement, that defendant left the contract in escrow with the note and mortgage to be delivered only upon condition that Mr. Cluck, who was absent from home during the preliminary negotiations between his coplaintiff and Mr. Cashin would, upon his return to Fresno, attach his signature to the agreement. Mr. Cluck having refused to sign the instrument, defendant took the note and mortgage and left the attorney's office. A few days later he came back and asked for the agreement. At first the lawyer refused to surrender it because the copies of the instrument had been left in escrow, but upon plaintiff's statement that the "deal was off" and his assurance that he wanted the paper in order that he might show it to another lawyer, he was permitted to take it.

Clearly the agreement never was executed. It was drawn for execution by both plaintiffs, and the defendant never intended that it should become effective upon the signing of the instrument by one of the partners only. But even if we regard it as an executed agreement (which we can only do by overlooking the fact that the minds of the parties never met), the defendant by withdrawing the note and mortgage from escrow refused to perform his part of the contract, and therefore was in no position to enforce any supposed rights under it. No defense to the action was established. All that defendant succeeded in proving was an unsuccessful attempt to compromise the litigation.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 263)

GIBSON v. McREYNOLDS et al. (L. A. 3809.)

(Supreme Court of California. June 4, 1917.)

1. CONTRACTS 🔑346(16) — PLEADING AND PROOF—VARIANCE.

There is no fatal variance between the contract alleged, which was termed a "special contract," and the one found by the court, which was an "express contract," although its terms were not precisely those of the alleged contract.

2. CONTRACTS 🔑346(1)—PLEADING — VARIANCE—STATUTORY RIGHT—RECOVERY ON EXPRESS CONTRACT.

That a party to a contract has rights founded on his status as a locator does not exclude existence of or recovery upon an express contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718.]

3. CONTRACTS 🔑346(10) — PLEADING AND PROOF—"VARIANCE."

The mere fact that the contract found by the court differed in scope from that pleaded did not constitute a "variance," the difference being merely in degree.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1737-1743, 1746, 1747, 1749.

For other definitions, see Words and Phrases, First and Second Series, Variance.]

4. APPEAL AND ERROR 🔑1039(13)—REVERSAL —IMMATERIAL ERROR—"VARIANCE."

In view of Code Civ. Proc. § 469, providing that no variance between pleading and proof is material unless the adverse party has been prejudiced thereby, a simple variance in degree of contract alleged and proved did not prejudice defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4086.]

5. APPEAL AND ERROR 🔑1052(4)—HARMLESS ERROR—EVIDENCE.

Error, if any, in admitting a copy of a document without accounting for the absence of the original, was not prejudicial, where the adverse party subsequently sufficiently accounted for the absence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4174.]

6. APPEAL AND ERROR 🔑204(1)—PRESERVATION OF EXCEPTIONS — ADMISSION OF EVIDENCE.

An objection to the admission of evidence not made or argued at the trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Trial, Cent. Dig. § 172.]

7. APPEAL AND ERROR 🔑926(5)—SCOPE OF REVIEW—PRESUMPTIONS.

In an action against two defendants, where a conversation admitted was admissible as against one defendant but not against the other, the court on appeal will not presume that it was admitted other than as against the defendant as to whom it was admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3729, 3742.]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by G. R. Gibson against O. O. McReynolds and another. From judgment for plaintiff and order denying motion for new trial, defendants appeal. Affirmed.

John W. Kemp, of Los Angeles, and Geo. E. Whitaker, of Bakersfield, for appellants. Frank H. Short, of Fresno, and E. L. Foster, of Bakersfield, for respondent.

MELVIN, J. Defendants appeal from the judgment and from an order denying their motion for a new trial.

By his pleading G. R. Gibson alleged: That he and the defendants had entered into "a special agreement whereby the plaintiff was to have a certain interest equivalent to that of defendants in certain placer mining claims to be located upon unappropriated government land, under the laws of the United States in the county of Kern." That thereafter, in pursuance of the agreement, defendants and their wives, with J. A. Stroud, G. W. Derby, and their wives and the plaintiff, made mineral locations upon certain lands designated as follows: "Sections 14, 12, 4, 8, 26 and the N. E. ¼, N. W. ¼, and the S. E. ¼ of section 2, and the N. W. ¼, S. W. ¼ and S. E. ¼ of section 24, all in township 32 south, range 24 east, M. D. M." That thereafter plaintiff conveyed to defendant O. O. McReynolds all his right, title, and interest in the said locations so that the said

McReynolds might conduct negotiations for disposing of the property. That plaintiff paid his proportion of the expenses of location, recording, and assessment work, and such other amounts as were demanded by defendants for holding the mining claims. And that all of the other locators conveyed to McReynolds their interests for the better carrying on of the selling or otherwise disposing of the properties. Then follow allegations regarding a sale of 920 acres of the land. It is alleged that McReynolds stated in writing to plaintiff that the latter's proportion of the 920 acres was 80 acres. Then follow averments that Parker Barrett offered plaintiff $550 as his share of the amount paid on account of the sale; that plaintiff refused to accept Barrett's check for that amount; that Barrett and McReynolds had received $4,000 in cash and $4,000 in notes of the vendee for plaintiff's 80 acres; and that plaintiff had sent $75 to Barrett as balance due on his proportion of the expense connected with the holding of the property, but that Barrett had refused to accept it. Judgment was demanded that defendants be declared trustees and that defendant McReynolds be required to pay plaintiff $4,000; to transfer to him $4,000 in the notes of the Lakeview Oil Company of Midway, the vendee of the 920 acres; to assign to him his proportion of the agreement involving the remainder of the purchase price; and to transfer to said Gibson his share of the lands described in the proportion of 80 acres to 920 acres.

The gist of the defenses pleaded by the defendants McReynolds and Barrett is found in the amendments to their amended answers. Barrett avers, in the amendment to the amended answer, that in October, 1908, he and his wife, together with O. O. McReynolds, J. M. Dunn, and G. W. Derby and their wives, formed an association for the purpose of making locations on oil lands in Kern county; that they proceeded to make such locations; that, while the locations were being made it was suggested that plaintiff might render assistance in the development and protection of the lands; that it was mutually agreed between Barrett and Gibson that the former would request his associates to place plaintiff's name on some of the claims being located in lieu of the name of Barrett's wife; that the request was made and granted, and, accordingly, the name of plaintiff was placed upon five of the mineral location notices; that the total expense of locating and developing the lands was $930; and that it was agreed between Barrett and his associates McReynolds, Derby, and Dunn that plaintiff should be requested to pay one-sixth of such expenditure or $155. It is not alleged in any of the pleadings that plaintiff joined in said agreement, or that he bound himself to pay one-sixth of the expenses. It is further averred that plaintiff contributed only the sum of $80 toward the payment of the sum of $155, and that Barrett was compelled to pay the other $75 to his associates. The pleading also contained the averment that:

> "The said plaintiff agreed with this defendant that his, said plaintiff's, interests in any proceeds obtained from the sale of the lands should be based upon the amount which said plaintiff had contributed toward the protection and development of the said lands and should be such percentage of 20 acres of the lands as included in the said five claims upon which the plaintiff's name appeared as a locator."

Barrett further alleged that he paid to plaintiff $500, which was more than Gibson was entitled to receive from the proceeds of the sale of the option or 20 acres of the land, which was plaintiff's proportionate share. There is also an averment of a settlement between plaintiff and Barrett. As a separate defense, Barrett pleads that Gibson had never paid any consideration except $80 for an interest in the property, and that he was equitably entitled to receive of the proceeds of the transaction with the Lakeview company only an amount proportionate to his payment towards the expenses.

The amendment to the amended answer of defendant McReynolds follows the theories of that of defendant Barrett. It does not, however, set forth any agreement between Barrett and the plaintiff to the effect that the latter's interest in the proceeds derived from the sale of the lands should be based upon the amount of Gibson's contribution to the expenses, and it does not plead the alleged settlement between Barrett and Gibson. This pleading also contains the assertion that Gibson agreed with Barrett to pay his proportion of locating and protecting the five mineral locations of which he was one of the locators.

The court found that in October, 1908, plaintiff and defendants entered into an agreement that plaintiff was to join with defendants in the location of certain placer mining claims and was to have an interest in said claims. The court found against plaintiff upon his assertion that he was interested in all of the property in the same proportion as was each of the other locators. There were findings that plaintiff's interest in the 920 acres was 20 acres net and that his original interest in the locations amounted to 80 acres and was so stated by defendant McReynolds in writing. There were findings against the claim of settlement as set up by Barrett and against Gibson's averment that he had paid $75 in addition to the $80 admittedly contributed by him. There were findings against the special defense. The court also found that the sums actually paid by plaintiff were largely in excess of his share of the expenses incurred in connection with the claims in which he actually had an interest.

[1-3] The appellants insist that there is a fatal variance between the contract alleged by plaintiff and the one found by the superior court, and that therefore the judgment should be reversed. In the plaintiff's

pleading the contract was styled a "special" agreement. They do not attach any peculiar magic to the word "special," except as that epithet emphasizes the fact that plaintiff declares upon an express contract. There is no merit in their contention. While it is true that the court did not find the exact contract pleaded by plaintiff, the defendants themselves asserted the existence of an express agreement by which Gibson was to share in the proceeds of the sale of those rights obtained in and to the lands described in the notices on which plaintiff's name appeared as a locator. The judgment is not based upon a finding of an implied contract. On the contrary, the court found that in the month of October, 1908, plaintiff and defendants entered into an agreement that plaintiff was to join with defendants in the location and was to have an interest in certain mining claims. The theory of appellants seems to be that, where a court finds that the rights of a party to an agreement are those of a locator, the existence of an express contract is absolutely negatived. But the fact that a party to a contract has rights founded upon his status as a locator does not exclude the existence of or recovery upon an express contract. For example, the law will imply that two partners will share the losses or the profits of their business, but such implication will not exclude proof of the existence of an express contract to the same effect. The enterprise outlined and proven in this case was in the nature of a partnership, and, while perhaps plaintiff's rights as against the government or against those claiming in opposition to the locations made by him or his associates would rest entirely upon implication, his rights as against his fellow locators depended, as alleged and found, upon an express contract. It is true that plaintiff claimed greater scope for his contract than the court found, but that circumstance did not produce a variance between the allegations and the proof such as requires a reversal of the judgment. Such difference as there was did not lie in kind, but in quantity and degree, and was not in contemplation of law a variance. Plate v. Vega, 31 Cal. 384.

[4] But in any view of the case defendants suffered no injury. The trial was had upon the issues arising out of the contractual relations of the parties, and whether we call the contract an express or an implied one we cannot see that defendants were injured by any variance between averment and proof. Section 469, Code Civ. Proc.; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611; Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472; Cheda v. Bodkin, 158 Pac. 1025–1029; Gordon v. Cadwalader, 172 Cal. 254–257, 156 Pac. 471.

The court did not err in denying the motion for nonsuit. The plaintiff testified to the existence of the agreement, and defendants not only set up a contract in their pleadings, but they alleged that the consideration was Gibson's promise to pay his proportion of the expenses incurred in developing and protecting the oil bearing lands. That he did pay something was admitted, the principal controversy being in regard to the amount.

Certain of the findings are attacked on the ground that they are not supported by the evidence. One objection is that the court erred in finding that plaintiff paid his share of the costs of locating the land and other amounts demanded by defendants. One of the defendants, McReynolds, testified that $930 had been spent upon the location, assessment work, protection, etc., of the lands. Plaintiff was interested in one-fourth of the total locations. He was therefore bound to pay his proportion of $232.50, which is one-fourth of $930. There were ten locators upon each of the five tracts in which he was interested. Upon the basis of one-tenth of the obligation, he would be bound to pay $23.25, and, even upon the claim of appellants that his duty was to bear one-sixth of the expense, his share of the burden would be less than half of the amount, $80, concededly paid by him.

Appellants attack the finding that the interest of Gibson was 80 acres net and was so stated by defendant McReynolds in writing. This finding is based upon a letter from McReynolds to Gibson informing him that he was associated with others in the locations made on November 16, 1908, on five quarter sections therein described. There was no declaration in terms that such interest amounted to 80 acres, but, as respondent's counsel says, that is "a mere matter of arithmetic." There were 10 locators and 800 acres. The result is obtained by a simple division of 800 by 10.

[5, 6] Appellants attack the ruling of the court in admitting a copy of a certain memorandum received by plaintiff from defendant Barrett. The document was admitted in evidence without proof of the loss of the original or accounting in any way for its nonproduction. Counsel for defendants, when the document was offered at the trial objected that it was "incompetent, irrelevant, and not shown to be a copy." As the witness Gibson had sworn that the paper was "an exact copy" of the original, there was evidence to support the ruling admitting it. The objection now urged by appellants was neither made nor argued at the trial and will not be considered here. But, if the court erred in accepting the writing, defendants were uninjured, as defendant Barrett later testified that the original was returned to him and that he had it among his papers. But when he looked for it he could not find it. Thus defendants themselves sufficiently accounted for the failure of plaintiff to produce the original memorandum.

[7] The superior court permitted a witness named Myers to testify to a conversation

had with defendant Barrett when defendant McReynolds was not present. The conversation was clearly admissible as against Barrett, and we are not to presume that the court considered it for any other purpose. We cannot see that the error, if error it was, prejudiced defendant McReynolds. The gist of the conversation was that Mr. Barrett expressed the belief that by failing to meet an assessment or call for $25 Mr. Gibson had either put himself in jeopardy of losing or had lost rights worth $8,000. We do not feel called upon to reverse the judgment or the order before us for review, merely because the court failed to declare the intention of limiting the effect of the testimony of Myers to the case against Barrett.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 311)

CITY OF BEVERLY HILLS v. CITY OF LOS ANGELES et al. (L. A. 4012.)

(Supreme Court of California. June 6, 1917.)

1. WATERS AND WATER COURSES ⟹192 — WATERWORKS — RIGHT TO MAINTAIN PIPE LINE—ACCEPTANCE OF GRANT BY CITY.

In the absence of requirement that a municipality formally accept a legislative grant of the right to maintain water pipes in any road, street, or highway, the question as to whether a municipality asserting such right to use the public highway for such purpose has in fact accepted the offer must be determined from the action taken with a view of acquiring the same.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279.]

2. WATERS AND WATER COURSES ⟹192 — WATERWORKS — ACCEPTANCE OF GRANT OF RIGHT TO USE HIGHWAYS—STATUTE.

Where the city of Los Angeles irrevocably committed itself to the work of installing a pipe line by expending hundreds of thousands of dollars therein, and, prior to the incorporation of a city of the sixth class through which the line must run, the board of supervisors of the county, at the request of the city of Los Angeles, granted the city the use of highways in question to construct the pipe line through and across them, the state's grant, offered to every city by St. 1911, p. 852, of the right to use highways, for water lines, etc., was accepted by the city of Los Angeles prior to the incorporation of the city of the sixth class, through which the pipe line must pass.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279.]

3. CONSTITUTIONAL LAW ⟹134—OBLIGATION OF CONTRACTS—GRANT BY STATE.

The state's grant, resulting from a city's acceptance of the state's offer to permit the use of highways for a water pipe line, constituted a contract, the property right in which is protected by the federal Constitution, the extent of the right being measured by the purpose for which the grant was made and accepted—i. e., for the construction of the contemplated pipe line as an entirety.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344.]

4. WATERS AND WATER COURSES ⟹192 — WATERWORKS—PIPE LINE — USE OF HIGHWAYS.

So far as the construction by a city of a water pipe line contemplated the use of intervening highways between the origin and end of the line, the right to use such highways, under the state's grant to every city, offered by St. 1911, p. 852, attached and became effective as completely as though the pipes had been actually laid when the grant was accepted.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279.]

5. CONSTITUTIONAL LAW ⟹134—OBLIGATION OF CONTRACTS.

Where one city obtained from another the right to use the latter's streets for a water pipe line, the latter could not, after a part of such line had been installed, revoke the grant or add new conditions and restrictions which might nullify and render the grant inoperative.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344.]

6. CONSTITUTIONAL LAW ⟹134—OBLIGATION OF CONTRACTS—AGENCY FOR STATE.

Where the state itself could not change or revoke its grant to a city of the right to use highways for a water pipe line on account of the constitutional prohibition against impairing the obligation of contracts, another city, to which, on its incorporation, the management of some of the highways involved was given, was equally bound to respect the grant.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344.]

In Bank. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the City of Beverly Hills, a municipal corporation, against the City of Los Angeles, a municipal corporation, the Board of Public Service Commissioners of the City of Los Angeles, and another. From a judgment for defendants, and an order dissolving a restraining order, and an order denying an injunction pendente lite, plaintiff appeals. Judgment and orders affirmed.

Emmet H. Wilson, of Los Angeles, for appellant. Albert Lee Stephens, City Atty., Wm. B. Himrod, Deputy City Atty., and W. B. Mathews, all of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff sought a decree perpetually enjoining the city of Los Angeles from laying, constructing, and maintaining a pipe line over, through, across and under certain streets of the city of Beverly Hills for the purpose of conveying water from the source of supply thereof to the city of Los Angeles. The result of the trial was a judgment in favor of defendants and denying plaintiff's right to an injunction from which, and an order dissolving a restraining order made upon filing the complaint, and an order denying an injunction pendente lite, plaintiff has appealed.

The facts, as to which there seem to be no just ground for dispute, are that for some six or seven years prior to the filing of the complaint the city of Los Angeles had been engaged in the construction of the Los Angeles aqueduct extending from a point in the Owens river in Inyo county to a point in San Fernando valley in Los Angeles county about 21 miles northwesterly from the city of Los Angeles, where defendants had, for the purpose of receiving and impounding water so conducted from Owens river through said aqueduct, constructed reservoirs.

Beverly Hills, located in Los Angeles county, was under and by virtue of the general laws incorporated as a city of the sixth class on January 26, 1914, prior to which time it was unincorporated territory. By an act of the Legislature, approved April 10, 1911 (Stats. 1911, p. 852), it was provided:

> "That there is granted to every municipal corporation of the state of California, the right to construct, operate and maintain water and gas pipes, mains or conduits, electric light and electric power lines, and telephone and telegraph lines, along or upon any road, street, alley, avenue or highway, or across any railway, canal, ditch or flume which the route of such works intersects, crosses or runs along, in such manner as to afford security for life and property; but the municipality shall restore the road, street, alley, avenue, highway, canal, ditch or flume thus intersected to its former state of usefulness, as near as may be: Provided, however, that such municipality may not use any street, alley, avenue or highway within any city and county or incorporated city or town, for such purpose, unless the right so to use the same is granted by a two-thirds vote of the governing body of such city and county, or incorporated city or town."

Prior to the incorporation of the city of Beverly Hills and while said act of the Legislature was in full force and effect, defendants, as found by the court, designed, projected and located a route from said reservoirs over and along which to construct a pipe line to conduct the water therefrom to the city of Los Angeles which route of said pipe line was surveyed, projected, and located across San Fernando valley to Franklin canyon, thence through the unincorporated territory of Beverly Hills, and in part over and across the public highways therein to the city of Los Angeles, the construction of which pipe line contemplated an expenditure of $1,500,000, two-thirds of which sum had, prior to January 26, 1914, been expended, and a large part of the material required for use in installing the pipe line from Franklin canyon to the city of Los Angeles purchased, some of which had been delivered along said route prior to the incorporation of Beverly Hills. It was also made to appear that the only practical and feasible route for such pipe line between Franklin canyon and the city of Los Angeles was through Beverly Hills.

[1] Appellant concedes that the city of Los Angeles might have acquired the right to the use of the highways by acceptance of the legislative grant, but insists that such acceptance could be manifested only by the actual use of the highway prior to the incorporation, which use thereof, to the extent occupied, must be deemed the measure of said defendant's right thereto. The legislative grant is in terms general and applies to every municipality in the state, but it contains no provision for the formal acceptance thereof by a corporation desiring to avail itself of the proffered grant of such right. Hence, in the absence of such requirement, the question as to whether a municipality asserting such right to use the public highway for the purpose named has in fact accepted the offer must be determined from the action taken with a view of acquiring the same.

[2] The intention of the city of Los Angeles to construct the pipe line from Franklin canyon through the territory known as Beverly Hills and over the public highways of which it had, prior to the incorporation of plaintiff, surveyed and located the route for the said pipe line, was clearly indicated by the extent and nature of the work prosecuted by defendants with the purpose of conducting water to the city, in which undertaking the city of Los Angeles had, in reliance upon the grant so made by the state, irrevocably committed itself by the expenditure of hundreds of thousands of dollars in the prosecution of the work of installing the same. Moreover, the record discloses that on January 6, 1914, prior to the incorporation of Beverly Hills, the board of supervisors of Los Angeles county, assuming authority so to do, and at the request of defendants, adopted an ordinance whereby it, in express terms, granted to the city of Los Angeles the use of the highways in question for the purpose of constructing the pipe line through and across the same. That the offered grant so made by the state was accepted by said defendant prior to the incorporation of the city of Beverly Hills, in our opinion, admits of no doubt. City Ry. Co. v. Citizens', etc., R. R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, Ann. Cas. 1914C, 1282; Grand Trunk Ry. Co. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405.

[3, 4] The grant resulting from defendant's acceptance of the state's offer constituted a contract, the property right in which is protected by the federal Constitution (Russell v. Sebastian, supra, and the cases therein cited), and the extent of which right is measured by the purpose for which the grant was made and accepted. This, as we have seen, was for the construction of a pipe line as an entirety from Franklin canyon to the city of Los Angeles, and, in so far as the construction thereof contemplated the use of the intervening highways between said termini, the right to use the same attached and became effective as completely as though the pipe had been actually laid.

[5, 6] Assuming, in the absence of the accepted legislative grant, that defendant had obtained from the city of Beverly Hills the right to use its streets for a pipe line, clearly it could not, after a part of such line had been installed, revoke the grant or add there-

to new conditions and restrictions the effect of which might nullify and render the grant made wholly inoperative. Dillon's Municipal Corporations (5th Ed.) § 1242. And yet that is the effect of appellant's contention. No doubt exists as to the power of the state to make the grant, which, when accepted as we have seen, constituted an inviolable contract the extent of which is measured by the purpose for which it was intended, and in the exercise of which right defendant was limited alone by the language used in the grant. And since the state itself could not change or revoke it, the city of Beverly Hills, to which, upon its incorporation as a city of the sixth class, the management of the highways therein was given (Stats. 1915, p. 828, § 862, subd. 4; General Laws, Act 2348), is equally and likewise bound.

The power to control such highways, by general laws as to such cities given their boards of trustees, must as to appellant be deemed to have vested subject to the right of defendant, acquired by the legislative grant approved April 10, 1911, to use the highways in question over, across, in, and along which to construct and maintain its pipe line for the purpose specified in the grant. This view renders it unnecessary to discuss other grounds upon which respondent bases its claim to the use of the highways.

The judgment and orders appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 305)

LOS MOLINOS LAND CO. v. MacKAY.

(Sac. 2320.)

(Supreme Court of California. June 6, 1917.)

1. VENDOR AND PURCHASER 🔑101—TERMINATION OF CONTRACT FOR VENDEE'S DEFAULT—NOTICE—SUFFICIENCY.

Where a contract for the sale of land provided that if any installment of the price, or interest, should be in default for 60 days, the vendor might terminate the contract by notice in writing, served personally or by mail to the holder's last known post office address, and the vendor, on default for more than 60 days in payment of interest, notified the holder in writing by mail at his post office address that his rights under the contract were terminated, the contract canceled, and that all payments made were forfeited, there was a compliance with the terms of the contract on the part of the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170–174.]

2. VENDOR AND PURCHASER 🔑117—RESCISSION OF CONTRACT—SURRENDER OF POSSESSION.

A purchaser of land, payment to be made in installments, who wishes to rescind the contract, may do so only by surrendering the land to the vendor, whereupon he is in position to sue for the portion of the price paid; if he chooses to retain possession under the contract, he may do so only by paying the purchase price and interest according to his agreement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 209.]

3. VENDOR AND PURCHASER 🔑299(4) — DEFENSE—FRAUD IN SALE OF LAND.

In a vendor's action to quiet title and to have the contract declared terminated for the purchaser's default in payment, and to remove vendee from the land, etc., where defendant failed to deny any of the essential averments of the complaint, he could not defend on the theory that plaintiff had been guilty of fraud; the action being in ejectment, and an independent tort not being available against such pleading.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 842.]

4. VENDOR AND PURCHASER 🔑299(4)—COUNTERCLAIM—DAMAGES—FRAUD.

In vendor's action to quiet title, and for repossession after breach of contract, a counterclaim, alleging fraud and asking for money judgment by way of damages, does not arise in the same transaction.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 842.]

Department 2. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Suit by the Los Molinos Land Company, a corporation, against T. C. MacKay. From a judgment for plaintiff, defendant appeals. Affirmed.

P. H. Coffman and A. H. Ludeman, both of Red Bluff, for appellant. W. P. Johnson, of Red Bluff, for respondent.

MELVIN, J. Plaintiff sued to have a certain contract for the sale by it of land to the defendant declared at an end by reason of defendant's breach thereof, to obtain a decree for the removal of defendant from the land involved in the contract, and to quiet title to said real property. Defendant demurred to the complaint, and, the demurrer being overruled, answered, and also pleaded a counterclaim. Demurrers of plaintiff to defendant's pleadings were sustained without leave to amend, and after the taking of testimony judgment was entered in favor of plaintiff as prayed. From this judgment, defendant appeals.

[1] The only objection to the sufficiency of the complaint which is urged by appellant's counsel in their briefs is that the pleading does not indicate whether or not the defendant was served with notice to quit the premises prior to the commencement of the action. This objection is without merit. The contract, which was fully set forth in the complaint, provided that if any installment of the purchase price, interest, or taxes should become due and be in default for 60 days Los Molinos Land Company might terminate all of the rights of the holder of the contract by notice in writing served personally or by mail to the last known post office address of said holder. The complaint, after setting forth the default of defendant for more than 60

days in the payment of an installment of interest, avers that he was notified, on a day specified, in writing by mail at his post office address at Los Molinos, Cal., that his rights under the contract were terminated, the contract canceled, and that all payments theretofore made were forfeited. This was a sufficient compliance with the terms of the agreement, and the court properly overruled the demurrer to the complaint.

The complaint contains allegations to the effect that plaintiff and defendant executed the pleaded agreement; that defendant went into possession of the land under said contract; that he was then occupying the premises; that certain interest had become due for a period of more than 60 days; that said interest was still unpaid; that plaintiff, exercising its option given by the terms of the contract, had declared the said agreement at an end, and the payment previously made on account of the purchase price forfeited. None of these allegations was denied by the answer, but defendant pleaded certain alleged fraudulent representations operating to induce defendant to purchase the land; the offer of defendant, on discovery of the fraud, to rescind the contract and restore the land, on repayment of the amount paid on the purchase price, and plaintiff's refusal to accept the terms so offered. The counterclaim sets up the alleged fraudulent acts of plaintiff in inducing defendant to enter into the contract, and prays recovery of $350, the initial payment on the purchase price, $350 alleged to have been expended by defendant in efforts to produce crops on the property, and $100 counsel fees.

[2-4] The demurrers to the answer and counterclaim were properly sustained. A purchaser, wishing to rescind a contract of this sort, may only do so by surrendering the land to the vendor. He is then in a position to sue for the portion of the purchase price previously paid; or, if he chooses to retain possession under the contract, he may only do so by paying the purchase money and the interest according to the terms of the agreement. Gervaise v. Brookins, 156 Cal. 103-108, 103 Pac. 329; Empire Investment Co. v. Mort, 169 Cal. 732-737, 147 Pac. 960; Empire Investment Co. v. Mort, 171 Cal. 336-339, 153 Pac. 236. Having failed to deny any of the essential averments contained in the complaint, MacKay could not defend upon the theory that plaintiff had been guilty of fraud. This is an action in ejectment, and an independent tort is not available against such a pleading. There was nothing in the contract by which the vendor guaranteed the quality of the land or its productiveness, and all of the allegations of fraud in the answer and counterclaim relate to misrepresentations and concealments regarding such matters. There was nothing in the fraud which prevented the defendant from carrying out the stipulations contained in the writing and then suing for the damages suffered because of plaintiff's misrepresentations and concealments, if any there were; or he might have surrendered the land and sued while the contract was still of full vitality, praying for its rescission on account of the vendor's fraud and for damages. Having chosen to permit the vendor to rescind on account of his (the vendee's) own failure to comply with the terms of the contract, he is in no position to set up plaintiff's fraud, either as an answer or by way of counterclaim, as against the action in ejectment, because such purported counterclaim may not be said to arise out of the same transaction. The counterclaim does not tend to defeat plaintiff's recovery, which was for the repossession of the land after admitted breach of the contract of sale by the vendee. Defendant's demand was for a money judgment by way of damages, and cannot be said to arise out of the same transaction. See Empire Investment Co. v. Mort, 169 Cal. at page 738, 147 Pac. 960, and cases there cited.

Our conclusion upon this subject makes it unnecessary to discuss the sufficiency of defendant's allegations of fraud as matters of pleading.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 293)

J. FRANK & CO. v. NEW AMSTERDAM CASUALTY CO. (S. F. 7302.)

(Supreme Court of California. June 6, 1917.)

1. Insurance 🔑371—Rights of Insurer—Waiver.

While an insurer may stand upon the letter of its contract, it may waive its provisions when placed in the policy for the insurer's benefit, and may by its conduct be estopped from asserting defenses otherwise available.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 943-946.]

2. Insurance 🔑388(5)—Rights of Insurer—Waiver.

Where the insurer, under an indemnity policy issued to J. & Co. as an individual, defended a suit brought against J. & Co. as a corporation, it waived the defense of misrepresentation in the policy as to the status of the insured.

3. Insurance 🔑388(5)—Rights of Insurer—Waiver.

In such case, where the insurer permitted a judgment against the insured to become final, it could not afterwards deny the binding force of the policy.

4. Insurance 🔑390—Rights of Insurer—Waiver.

When an insurance company, with full knowledge of all the facts, enters into negotiations and relations with the assured, recognizing the continued validity of the policy, the right to a forfeiture for any previous default which may be asserted is waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038.]

5. INSURANCE 🔑665(8)—RIGHTS OF INSURER—WAIVER.

Evidence *held* to show that the insurer had full charge of a suit against the insured, so that it was bound by the judgment in such suit.

[Ed. Note.—For other **cases, see** Insurance, Cent. Dig. § 1725.]

6. EVIDENCE 🔑78—PRODUCTION OF EVIDENCE—CORPORATE RECORDS—PRESUMPTIONS.

The mere fact that the corporate books and papers were not brought into court, though such action was suggested, but not ordered by the judge, does not raise the presumption that there was no corporate action regarding the matter involved when such action was prerequisite to maintaining a suit.

[Ed. Note.—For other **cases, see** Evidence, Cent. Dig. §§ 98, 100.]

7. INSURANCE 🔑665(4)—LIABILITY OF INSURER—INDEMNITY POLICY.

Evidence *held* to show that the insured against whom a judgment was recovered had paid the judgment, so as to render the insurer liable therefor.

[Ed. Note.—For other **cases, see** Insurance, Cent. Dig. § 1722.]

8. INSURANCE 🔑558(1)—RIGHTS OF INSURER—WAIVER.

While requirement in indemnity policy that notice of probable liability be given to the home office of the insurer is reasonable and just, it is waived when the insurer actually assumes control of the litigation involved.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382, 1383, 1389, 1390.]

9. INSURANCE 🔑514—LIABILITY OF INSURER—INDEMNITY POLICY.

In suit under an indemnity policy binding the insurer to pay any judgment recovered against the insured, the insurer may inquire whether the judgment has been paid, but not where the funds with which to pay it were obtained.

[Ed. Note.—For other **cases, see** Insurance, Cent. Dig. § 1298.]

10. APPEAL AND ERROR 🔑1058(2)—HARMLESS ERROR.

Error, if any, in excluding testimony was harmless where the same witness was subsequently permitted to testify to all the matters as to which his testimony was previously excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201.]

11. INSURANCE 🔑555—INDEMNITY POLICIES—CONSTRUCTION.

A prohibition in an indemnity policy against waiver of its conditions except in writing does not apply to stipulations to be performed after loss, such as giving notice and furnishing preliminary proof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1367–1373, 1382–1390.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by J. Frank & Co. against the New Amsterdam Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The facts are simple. Cousins, an employé of plaintiff, was injured and brought suit for a large sum of money in damages. Defendant, a surety company, which had issued a policy in favor of plaintiff, took charge through its counsel of the defense in that action. Cousins obtained a judgment for $2,500 against J. Frank & Co., and the attorney for the New Amsterdam Casualty Company, although promising that an appeal would be taken, allowed the judgment to become final. The judgment was paid and this suit was by J. Frank & Co. (a corporation) to compel repayment of the amount of said judgment from its insurance carrier, New Amsterdam Casualty Company (a corporation). The defense was highly technical, and was based for the most part upon alleged rights of the insurer under its policy, which were waived by its assumption of liability evidenced by its undertaking the defense in the suit of Cousins against his employer.

[1-3] Appellant's first point is that it was not bound by the terms of the policy to indemnify plaintiff for any loss because it did not, as found by the court, enter into a contract of insurance with "the plaintiff" (a corporation), but with J. Frank & Co., an individual. Undoubtedly an insurance corporation may usually stand upon the letter of its contract, and where the policy is based upon a warrant of status by the person, firm, or corporation seeking insurance, the insurer may in certain cases be relieved of liability by misrepresentations of the applicant, even when there is an absence of fraud. But an insurance company, like any other contracting party, may waive provisions placed in the policy solely for its own benefit and may by its conduct be estopped from asserting defenses which might otherwise be available. We do not mean to say that the mere statement by the assured of individual rather than corporate status would avoid the policy if timely objection were made, but it is certain that whatever the rights of the casualty company may have been by reason of the false statement in the policy, it is now prevented by its own conduct from taking any advantage of that representation because it undertook the defense of its assured, under the recognized duty imposed by the contract, when J. Frank & Co. was sued as a corporation. The same able counsel who represented the interests of the defendant on behalf of the surety company in Cousins v. Frank & Co. (a corporation) conducted the defense in this action. The complaint in the action for damages described J. Frank & Co. as "a corporation duly organized and existing under and by virtue of the laws of the state of California." This was admitted by lack of denial in the answer, and that pleading was

verified by Mr. Frank as president of the corporation. Thus the misnomer as well as any similar infirmity was waived by the conduct of the surety company. Moreover, the surety company, by failing to appeal on behalf of J. Frank & Co. from the judgment in the suit for damages, deprived the latter of important and valuable rights. The president of J. Frank & Co. was told that counsel for the surety company had the matter of a settlement in hand, that an effort to settle was being made, but that no agreement would be made which would involve the payment of more than $200. Having permitted the insured thus to alter its position, the surety company may not now seek to deny the binding force of the policy.

[4] When an insurance company, with full knowledge of all the facts, enters into negotiations and relations with the assured, recognizing the continued validity of the policy, the right to a forfeiture for any previous default which may be asserted is waived. Murray v. Home Benefit Association, 90 Cal. 402–407, 27 Pac. 309, 25 Am. St. Rep. 133; Knarston v. Manhattan Life Insurance Co., 124 Cal. 74–78, 56 Pac. 773; Knarston v. Manhattan Life Insurance Co., 140 Cal. 57–62, 73 Pac. 740.

Appellant attacks as not sustained by the proof the finding to the effect that the insurer erroneously inserted in the policy a designation of the assured as an individual. In view of our decision with reference to waiver of conditions, this finding is immaterial, and we are relieved from the necessity of discussing the alleged lack of evidence applicable to it.

[5] Another finding which, according to appellant, is unsupported is the one by which the court declared that "defendant through its attorneys had entire charge of the defense of said action" (meaning the suit of Cousins against J. Frank & Co.) It is asserted that because there was a claim by Cousins for an amount in excess of the maximum liability under the policy, the surety company deemed itself bound to invite Mr. Brownstone, who had acted in other matters for J. Frank & Co., to become associated with its counsel. Unquestionably he was asked to participate in the preparation and trial of that case, but he refused to accept the invitation. Mr. Raymond, one of the attorneys for defendant in this action, while on the witness stand, speaking of Cousins v. Frank, said: "I had absolute charge and control of the case." The finding is therefore fully supported, because it appears clearly from the testimony that Mr. Raymond was acting in behalf of the surety company when appearing for the insured.

[6] The court found that plaintiff paid in full the judgment in favor of Cousins on the 24th of February, 1913, together with interest and costs, amounting in the aggregate to $2,635. In attacking this finding appellant again lays great stress upon the personal as distinguished from the corporate entity. The evidence tends to show, as appellant admits, that M. M. Morris loaned to the corporation $2,000, to be applied to the payment of the judgment, but appellant insists that the remainder, $635, was paid by Mr. Frank personally. Appellant calls attention to the provision in the policy to the effect that no action by the assured against the surety company will lie to recover for any amount except a loss "actually sustained and paid in money by the assured." After the recovery of judgment and before its payment J. Frank & Co. made an assignment for the benefit of creditors. Subsequently the sum of $2,000 was borrowed from Morris on the security of a purported assignment by the corporation, J. Frank & Co., of its rights under the policy and the satisfaction of judgment was obtained on the same day. Yet there is no proof, according to appellant, of any corporate act, either in the execution of the note to Morris, the making of the assignment or the payment of the judgment; and, further, it is argued in appellant's behalf that by failure to produce the corporation's records (although ordered to do so by the court), respondent established the presumption against it that there was no corporate act touching the matter of the settlement of the judgment. This last contention is without merit. It is true that the court suggested to counsel for J. Frank & Co. that he would better get the minutes and other books of the corporation during an adjournment, but there was no order to produce them, and if there had been the surety company easily might have requested its enforcement. This was not done. The mere fact that the books and papers were not brought into court did not create the presumption for which appellant contends.

[7] There is no pretense that the proof does not show the payment of the judgment in actual money on behalf of J. Frank & Co. It is therefore immaterial to the insurance carrier how or when that corporation obtained the money or the credit which enabled it to pay Cousins the amount due. However, it does appear from the testimony of Mr. Frank that the assignment to Mr. Morris of the proceeds of any judgment against the surety company, given as security for the loan, was made after a meeting of the directors of the corporation, and as the president signed the assignment for the company, presumably he did so in the fulfillment of the formal action and instruction of the board of directors. Mr. Frank was the alter ego of the corporation owning all the stock except that necessary to qualify other directors. He had been sued on his liability as a stockholder after the judgment was obtained by Cousins against the corporation, and for that reason he arranged, as he testified, to get the loan for J. Frank & Co. We are of the opinion that the evidence supports the finding of payment of

the judgment against it by J. Frank & Co., the corporation.

[8] There was a motion for nonsuit based upon alleged failures on the part of the assured to obey certain requirements of the policy, namely, to send to the home office of the insurer written notice of the accident to Cousins, and after the commencement of the action by said Cousins to forward to the home office the summons served upon J. Frank & Co. in that suit. Of course the conditions of the policy requiring notice to the home office of probable liability are intended primarily to afford opportunity to the insurer promptly to take charge of a defense. Such requirements are reasonable and just, but they are waived when, as in this case, the insurer actually does assume control of the litigation growing out of the accident. Knarston v. Manhattan Life Insurance Co., supra. There was no error in the denial of the motion for nonsuit.

[9] Certain rulings relative to the admission of evidence are specified as erroneous. The admission of the policy issued to J. Frank & Co., an individual, and the acceptance in evidence of the judgment roll in Cousins v. J. Frank & Co. (a corporation) were justified upon principles discussed above. Certain questions were propounded to Mr. Faull, a representative of appellant, by which it was sought to bring out the details of a certain conversation between him and Mr. Frank. These interrogatories were evidently designed to elicit testimony about Mr. Frank's declarations regarding the sources from which he expected to obtain funds for the payment of the judgment in favor of Cousins. The court, in sustaining objections to these questions, ruled that counsel had a right to discover whether or not the loss had been actually sustained and paid in money, but the learned judge said he did not see that the examination was addressed to such a purpose. Whereupon one of the counsel for defendant said: "I think your honor is right." We agree with the court and with counsel's opinion expressed at that time.

[10] Another exception was based upon the ruling sustaining the objection of plaintiff to a question directed to Mr. Morris in which it was sought to have him say with whom he had a conversation about the loan to plaintiff. If the ruling was erroneous it was not harmful to appellant, because later in the examination Mr. Morris testified very fully concerning the conversations and all of the circumstances connected with the making of the loan.

An expert insurance broker, Mr. MacMeans, was asked if the rates of insurance for individuals were different from those charged to corporations. Over defendant's objection he was permitted to answer. In view of that which we have decided with reference to the waiver in the matter of the incorrect designation of plaintiff in the policy, this error, if it was error, is entirely immaterial.

[11] The waiver evidenced by the conduct of the insurer is also a sufficient answer to the specification of error based upon the admission in evidence of certain conversations between Mr. Frank and Mr. Raymond, attorney for the surety company, and others between Mr. Frank and Mr. Vella, that corporation's adjuster. These conversations did not, as appellant insists, relate to prohibited waivers of the terms of the policy on the part of agents. They merely referred to the action of the company through its agents after it had waived all informalities and all possible objections by assuming control of the litigation. The prohibition in a policy against waiver, except in writing, does not apply to those stipulations which are to be performed after loss such as giving notice and furnishing preliminary proof. Carroll v. Girard Fire Insurance Co., 72 Cal. 297–300, 13 Pac. 863; Wheaton v. North British & Mercantile Insurance Co., 76 Cal. 415–426, 18 Pac. 758, 9 Am. St. Rep. 216. In the case at bar the conduct of the insurer, without reference to the statements of its agents, was sufficient to show its assumption of full liability under the policy.

Appellant's final point admittedly is not supported by the record, but in the brief of appellant it was announced that a motion in diminution of the record would be made, to the end that the argument might become relevant. No such motion has been made. Therefore we may not consider the argument on that point.

Judgment and order affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 292)

McCORMACK v. McCORMACK. (S. F. 7144.)

(Supreme Court of California. June 6, 1917.)

1. DIVORCE 🔑39—SUFFICIENCY OF FINDINGS.

Findings that the parties' marriage had been declared null and void in another state sufficiently supported decree denying divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 160.]

2. DIVORCE 🔑183—APPEAL—RECORD—QUESTION PRESENTED—FINDINGS.

Where the evidence is not incorporated in the record on appeal in divorce case, no question arises as to its sufficiency to support findings.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 569.]

3. EVIDENCE 🔑80(1)—PRESUMPTIONS—LAW OF ANOTHER STATE.

In the absence of contrary evidence, the law of another state touching the subject in question will be deemed to be the same as that of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101.]

4. JUDGMENT 🔑815—FOREIGN—CONSIDERATION—CONSTITUTION.

The final judgment of another state, whether erroneous or not, is, under Const. U. S. art. 4, § 1, requiring full faith and credit to be given to judicial proceedings of other states, entitled to same weight and consideration as though rendered by the court of this state where want of jurisdiction is not shown.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1445–1448.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Suit for divorce by Henrietta Elizabeth McCormack against Robert Hughson McCormack. Decree denying divorce, and plaintiff appeals. Affirmed.

West & de Journel, of San Francisco (T. C. West, of San Francisco, of counsel), for appellant. Frank J. Hennessy, of San Francisco, for respondent.

VICTOR E. SHAW, J. pro tem. This is an appeal prosecuted by plaintiff upon the judgment roll alone from a decree denying her a divorce from the defendant.

It appears from the findings that on March 11, 1907, the parties were married in the province of British Columbia, Canada; that thereafter on March 12, 1908, in an action therefor brought by defendant herein against plaintiff herein, the superior court of Kings county, state of Washington, after due and regular proceedings had therein, made and entered a judgment whereby it declared the marriage so contracted by the parties null and void, which judgment is in full force and effect; and that at the time of the commencement of the action the parties were not husband and wife.

[1, 2] That these findings support the judgment admit of no possible question, and, since the evidence upon which they were made is not incorporated in the record, no question arises as to the sufficiency thereof to support the findings. Redlands, etc., W. Co. v. Redlands, 121 Cal. 365, 53 Pac. 843; Estate of Brown, 143 Cal. 450, 77 Pac. 160.

[3, 4] Appellant insists that, since the marriage contracted in Canada was valid, the superior court of Washington, though concededly having jurisdiction of the parties, could not legally declare it void. The Supreme Court of that state has held otherwise. See Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179. There is nothing in the record showing the grounds upon which the court acted in annulling the contract of marriage. Presumably, since the contrary is not made to appear, and as the law of Washington touching the subject in the absence of evidence to the contrary is deemed to be the same as that of this state (O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; Fox v. Mick, 20 Cal. App. 599, 129 Pac. 972), the action for annulment was based upon some one of the grounds specified in section 82 of the Civil Code as cause for annulling the marriage. With this, however, we are not concerned, since, whether erroneous or not, the final judgment of the superior court of Washington declaring the marriage null and void—there being nothing to show want of jurisdiction—is under section 1, art. 4, of the federal Constitution, entitled to the same consideration and weight as though rendered by a court of this state. Philbrook v. Newman, 148 Cal. 174, 82 Pac. 772. The appeal is without a semblance of merit.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

(175 Cal. 345)

In re CAMPBELL'S ESTATE. (L. A. 4854.)

(Supreme Court of California. June 6, 1917.)

1. WILLS 🔑81—INVALID GIFT TO CHARITY—SEPARABLE PROVISIONS.

Where a will left an estate in trust during life of testatrix's son, on whose death the trust was to "cease and determine," and on such termination the estate was to go to the son's lawful issue and another, and in default of such issue three-fourths thereof to a hospital and one-fourth to certain others, the will further providing that "the invalidity of any use or trust herein shall not vitiate such as are valid," the validity of no other provisions of the will than the disposition to the hospital would be affected by Civ. Code, § 1313, invalidating devises or bequests to charities exceeding one-third of the estate; such disposition to the hospital not being part of a single and indivisible scheme.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202.]

2. WILLS 🔑15 — VALIDITY OF CHARITABLE DEVISE.

In such case, where the present value of the distributable assets was about $15,000, and the trustee was directed to use, for the purposes of the trust, such portion of the principal, in addition to the income, as he might deem necessary, the determination whether the hospital would receive, under the will, of the distributable assets of the estate, more than the third allowed by Civ. Code, § 1313, could not be had until the termination of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 36.]

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Maria Campbell, deceased. Appeal by Isidore B. Dockweiler, trustee, and another, from decree of partial distribution. Reversed.

Isidore B. Dockweiler, Thomas A. J. Dockweiler, and W. D. Finch, all of Los Angeles, for appellants. Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by Isidore B. Dockweiler, as trustee under the will of Maria Campbell, deceased, and by the Los Angeles Infirmary, a corporation, as legatee under said will, from a decree of partial distribution whereby there was distributed to Jose Boniface Arzaga substantially an undivided two-thirds of the property of the estate of said deceased. The theory upon which this distribution was made was that as to such property the attempted disposition made by the will of deceased was ineffectual and void under our law, with the result that as to the same the deceased died intestate, and that said property passed to said Jose Boniface Arzaga, the sole surviving child and sole heir of said deceased.

Deceased died August 14, 1913. Her will executed April 23, 1913, gave all her property to Isidore B. Dockweiler in trust for certain purposes specified therein. Substantially stated, the material provisions as to the trust were as follows: The trust was to continue until the death of her son, Jose, on the happening of which event it was expressly declared that "the trust hereby created shall cease and determine." The trustee was fully authorized during the continuance of the trust to care for, preserve, and manage the property, and in the event that the net income was at any time insufficient for the proper care and support of the son, to use such portion of the principal as he deemed necessary for that purpose. During the existence of the trust he was required to distribute and pay out the net rents, issues, profits, interest, and dividends of the estate, as follows: $10 per month to her housekeeper, Eulalia Marquez, as long as her son, Jose shall live, and the remainder to or for the use and support of her said son. If said Eulalia Marquez died before her son, then the monthly $10 theretofore paid her was thenceforth to be paid to or for the use and support of said son. This constituted the whole of the trust upon which the property was bequeathed to the trustee. It was then provided in apt terms what should become of the property upon the termination of the trust, and to whom it should belong. These provisions were substantially as follows: If the son, Jose, left lawful issue surviving him, all of the property "shall immediately vest" in said lawful issue, provided said Eulalia Marquez be not then alive, and if the latter did survive the son, then $1,000 shall vest in her, and the remainder in the son's lawful issue. If said son died without lawful issue, but leaving a surviving wife, then $1,000 shall vest in said Eulalia Marquez, and one-fourth of the remainder in said surviving wife and the other three-fourths in the Los Angeles Infirmary, a corporation conducting a hospital in Los Angeles, for the purpose of founding, endowing, and maintaining free beds for deserving sick poor. If said son died without leaving lawful issue or surviving wife, one-fourth shall vest in said Eulalia Marquez, and the remaining three-fourths in said Los Angeles Infirmary for the purpose above stated, provided that, if said Eulalia Marquez did not survive the son, her share shall vest in said Los Angeles Infirmary. The will further provides:

> "The invalidity of any use or trust herein declared, if ever decreed by a court of competent jurisdiction, shall not vitiate such as are valid."

According to the agreed statement of facts dated January 20, 1916, found true by the lower court, the following facts appear: Deceased died, as has been said, August 14, 1913. Her estate consisted entirely of personal property. The son, Jose, sole heir at law, attained the age of 31 years on June 5, 1915. He is married, his wife, Margaret L. Arzaga, being 32 years of age. There is as yet no lawful issue of such marriage. Said Eulalia Marquez is alive, and is in her forty-seventh year of age. The present value of the estate is, according to the findings of the court, $15,379.48, out of which $250 for a monument is to be paid. The present value of the bequest to the Los Angeles Infirmary, according to the American Experience Table of Mortality, with interest at 5 per cent. is, under the conditions most favorable to it, viz. the death of the son without leaving either lawful issue, a wife, or Eulalia Marquez surviving him, less than $4,000.

Section 1313, Civil Code, after prohibiting bequests or devises to any charitable or benevolent society or corporation, or to any person in trust for charitable uses, except by will "duly executed at least thirty days before the decease of the testator," declares:

> "And if so made, at least thirty days prior to such death such devise or legacy, and each of them shall be valid: Provided, that no such devises or bequests shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

It was upon the theory that the provisions as to the vesting of all the property in the Los Angeles Infirmary upon certain contingencies, and three-fourths thereof upon certain other contingencies, were void as to two-thirds of the property, as being in violation of this section, and that as a result thereof the son, as sole heir, there being no residuary legatee, was entitled at once to take such two-thirds, that the distribution complained of was made to him.

[1] 1. It seems clear to us that, even if it be conceded that the disposition in favor of the Los Angeles Infirmary is invalid to the extent stated, nevertheless the son was not entitled to have the property distributed to him free of the trust. Such disposition in favor of the infirmary was no part of the trust, but a thing entirely apart from and independent thereof. As in Hornung v. Sedgwick, 164 Cal. 629, 130 Pac. 212, the provisions as to the disposition of the corpus upon the death of the son constituted no part of the trust and were solely by way of prescrib-

ing to whom the property to which the trust related should belong upon the termination of the trust, and of a bequest of the property subject to the execution of the trust. The trust for the benefit of the son and Eulalia Marquez for the life of said son was in all respects valid, and by its terms the trustee was to hold all of the property until the happening of the event which would terminate the trust, viz. the death of the son. The attempted bequest was subject to this trust. If such bequest was to any extent invalid by reason of the provisions of section 1313, Civil Code, it may be conceded that the heirs of the deceased would succeed to the interest as to which the invalidity existed, but manifestly they could take no other or different interest than the Los Angeles Infirmary was given by the will. All the property of deceased other than such interest was otherwise effectually disposed of by the will, and it was only as to this interest that any invalidity can be fairly claimed. The bequest to the Los Angeles Infirmary was also entirely contingent upon the death of the son without lawful issue surviving him, and in part contingent upon his death without leaving a wife surviving, and it was wholly subject to the complete execution of the trust. An heir succeeding by reason of the invalidity in part of this bequest under section 1313, Civil Code, could take nothing different or greater. There is no failure to dispose by will as to anything else. The paramount trust would necessarily exclude such heir from enjoyment of any of the property until its termination, i. e., until the death of the son; and by virtue of other provisions of the will he would then take only in the event of the death of the son without leaving lawful issue surviving.

The decree as made destroys the valid paramount trust to the extent of two-thirds of the property of deceased, and cuts out the valid bequest to possible surviving lawful issue of the son to the same extent, as well as the bequest to the possible surviving wife of the son, who may or may not be the present wife. It cannot be sustained upon any principle or rule of law of which we have knowledge.

The contention of respondent is that by the scheme embodied within the terms of the will more than one-third of the estate is devised to a charitable corporation, and that as a necessary consequence the devise of the entire estate to Dockweiler, trustee, to effectuate and carry out the purpose thereof, is void as to two-thirds of the estate so devised in trust, and that consequently, there being no residuary legatee, the testatrix died intestate as to this portion. As we have seen, the disposition to the Infirmary is no part whatever of the trust, and the devise to Dockweiler is in no sense one "to effectuate and carry out" the same. It was entirely competent under our law for the deceased to create this trust for the benefit of Eulalia Marquez and her son, for the life of the latter, and it, being a valid trust as to all the property, must stand regardless of any question of the invalidity in part of a bequest of what remains after the termination of the trust. So far as this particular question is concerned, respondent's case can be no stronger than it would have been had the will failed to contain any provision whatever as to the succession to the property upon the termination of the trust. In that case his succession as sole heir on the theory that deceased died intestate in part would necessarily have been subject to the trust for his life in favor of himself and Eulalia Marquez as to all the property.

There is no decision in this state contrary to the views we have expressed, and in none of the cases cited by learned counsel for respondent does any such question appear to have been discussed. Under our statutes the only disposition rendered void by the statute is the disposition made to charitable purposes, and if that attempted disposition be subject to other effectual disposition of the same property, its invalidity cannot affect such other disposition; that is at least, unless it constitutes part of a single and indivisible scheme, which, in our judgment, is not the situation here.

[2] 2. It is further claimed by appellant that it is not shown that more than one-third of the estate of testatrix is left by the will to the Los Angeles Infirmary. This court has held that, under section 1313, Civil Code, the one-third which may lawfully be given to charitable purposes is one-third of what remains after payment of debts and charges of administration; the value being ascertained as of the date of distribution. Estate of Hinckley, 58 Cal. 457, 516. The statute thus prohibits the giving to the Los Angeles Infirmary of more than one-third in value of the distributable assets of deceased. We have seen that the present value of the distributable assets is slightly over $15,000. We do not see how it is possible for a court to determine at this time that the will gives to the Infirmary more than one-third of this. It is true that under the will it does take, in a certain contingency, all that remains after the execution of the trust, and in another contingency three-fourths of all that remains. But what portion of the estate may so remain no one can foretell, and there is no basis for any ascertainment of that fact. All of the income of the property is to be devoted for the whole life of the son to the use and support of himself and Eulalia Marquez, and, as already stated, the trustee was directed to use, in addition to the income, such portion of the principal as he might deem necessary for the proper care, maintenance, and support of the son. The son had an expectancy of life of over 30 years. In view of the comparative smallness of the estate, two-thirds thereof might well be consumed for this purpose. There is no way of even approximately de-

termining. It is all in the realm of conjecture. It is in this respect a similar case to that presented in Rich v. Tiffany, 2 App. Div. 25, 37 N. Y. Supp. 330, in which it was held that a computation must necessarily be deferred until the death of the life tenant, because no possible basis could be furnished therefor at any previous time. And even as to what may remain, no one can foretell whether the Infirmary will ever take anything at all, in so far as the beneficial enjoyment of the property is concerned; for, if the son die leaving lawful issue him surviving, a condition certainly quite within the possibilities, it will receive nothing. It would seem that, in view of these conditions, the proportionate value of the interest given to the Infirmary cannot be ascertained, and the only way in which the rights of all parties can be fully protected is at this time to distribute all the property to the trustee, for the purposes of the trust, reserving the matter of further distribution until the termination of the trust, at least in so far as the charitable bequest is concerned. In view of what we have already said as to the paramount character of the trust in so far as any succession by the son is concerned, this result is in no degree unfair to him. It is the valid and paramount trust that excludes him as such successor during his life, and if he has in fact any interest in that capacity, as may hereinafter be determined, it is an interest that he can convey or dispose of by will, and that, if he dies intestate, will pass to his heirs. Any such interest that he might now properly obtain by decree of distribution would be no different in this respect, as we have already seen. The valid trust precludes all else.

The statute simply precludes gifts to charity in excess of one-third of the value of the entire distributable assets. Surely it must be that a showing of bequests excessive under this statute is essential to an adjudication of invalidity and consequent succession by another. In view of the character of the bequest here it is impossible to make any such showing at this time. Unless there be such excess there can be no intestacy. We cannot bring ourselves to the conclusion that the mere fact that attempted charitable bequests may in the future be ascertained to be excessive under the statute is sufficient to warrant a present conclusion that they are excessive, and therefore invalid in fact, and that consequently the residuary legatee or heir succeeds to a portion thereof.

3. Even if there were no right in the trustee to use the principal for the purposes of the trust, and if the right of the Infirmary to receive all of the property on the death of the son was fixed and certain, and not contingent upon the absence of lawful issue, its interest would be subject to the life estate or interest for the life of the son, vested in the trustee, for the sole benefit and enjoyment of Eulalia Marquez and the son. This life interest and the remainder constitute the whole of the property. In no contingency does the Infirmary take it all, but at best only the whole remainder after the determination of the life interest. Can it be fairly held that such a remainder exceeds in value one-third of the distributable assets? According to the decision of the Court of Appeals of New York in Hollis v. Drew Theological Seminary et al., 95 N. Y. 166, the only way in which this can be ascertained in such a case as we have mentioned is by ascertaining the present value of the life interest and the present value of the remainder, which together should be the precise value of the distributable assets, and if the total value of the remainder does not exceed one-third of the total value, there is no violation of the statute. In this case there was no such showing of excess over one-third. In fact, as we have seen, the showing, so far as made, was to the contrary. But in view of the possibility of consumption of portions of the principal for the purposes of the trust, we have here no such case as the one suggested, and it is unnecessary to determine whether the rule declared in Hollis v. Drew, etc., supra, is the correct rule, under our statute, for determining the question of excess where the right of the legatee to succeed to certain specified property upon the determination of a prior life estate or interest therein is fixed and certain.

The decree appealed from is reversed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge, pro tem.; SHAW, J.; MELVIN, J.

HENSHAW, J. I concur. The Chief Justice clearly points out that the bequest to charity forms no part of the trust scheme and can take effect only on the termination of the trust. So also he shows the impossibility of any court declaring at this day the value of the property which on the happening of certain future contingencies the testatrix designed should go to charity. In addition to this is the perfectly plain proposition that our statute against charitable devises and bequests is and can be violated under these circumstances only when the devise or bequest does take effect and at that time is shown to be illegal for excess. When the contemplated contingency has arisen, then, and then only, may the living parties in interest contest the bequest for them, and then only can it be determined whether or not the law has been violated.

(175 Cal. 322)

CURTIS et al. v. UPTON et al.

UPTON v. EASKOOT et al.

(S. F. 7095, 7096.)

(Supreme Court of California. June 6, 1917.)

1. EJECTMENT ⇐111(9)—FINDINGS—CONFINING TO PLEADINGS.

In an action of ejectment, where the land described in the complaint, title to which was put in issue by the answer, was not bounded by the Dodge survey, it was error for the court to make findings upon the theory that the land within such survey was the only land in controversy, as it was bound by the issues as framed by the pleadings.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 342, 343.]

2. EJECTMENT ⇐111(9)—FINDINGS—OUSTER—EVIDENCE.

In an action of ejectment, where defendants denied title of plaintiffs to all or any part of the land described in the complaint, a finding that there was no ouster *held* not sustained by the evidence, where it did not appear that the land in possession of defendants was no part of land described in the complaint.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 342, 343.]

3. JUDGMENT ⇐660—CONCLUSIVENESS—SUBSEQUENT ACTIONS.

A former judgment, although erroneous, is conclusive between the parties or their successors in interest in all subsequent actions involving the same questions and properly within the scope of the issues which might have been raised and determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171.]

4. BOUNDARIES ⇐37(3) — EVIDENCE—SUFFICIENCY.

Where the position of the southerly corner of the ranch could only be ascertained by resort to other calls, a survey retracing the lines and distances given in the original survey was legal and sufficient evidence of the true site of the corner, in the absence of countervailing evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186–191.]

5. BOUNDARIES ⇐7—GOVERNMENT SURVEY—ESTABLISHMENT—EVIDENCE.

Where the post set to mark the southerly corner of the survey had been lost, it was the duty of the court to ascertain, if possible, the true corner, or, if that was impossible, the approximate position, where there was evidence thereof.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 58–65.]

6. BOUNDARIES ⇐3(3) — SURVEYS—NATURAL OBJECTS.

In determining the position of a tract of land from a description or survey, natural objects referred to as bounds prevail over the measurement of lines and angles, in view of Code Civ. Proc. § 2077, providing that, where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite or unknown does not frustrate the conveyance, which is to be construed by the first-mentioned particulars.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 6–19.]

7. NAVIGABLE WATERS ⇐36(3)—LANDS UNDER WATER—BOUNDARIES.

Where a meander line is run for the purpose of calculating the area of land granted, the shore line constitutes the real boundary.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 186.]

8. EJECTMENT ⇐120(1)—WRIT OF RESTITUTION—EVIDENCE—SUFFICIENCY.

Where successors of defendant in whom title was quieted against plaintiffs showed that plaintiffs were in possession of at least a part of the land, their motion for a writ of restitution should have been granted in view of Code Civ. Proc. § 380, authorizing such writ against defeated parties in possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 380, 384–387.]

In Bank. Appeals from Superior Court, Marin County; Edgar T. Zook, Judge.

Actions by J. F. D. Curtis and another against A. H. Upton and another, and by A. H. Upton against A. D. Easkoot and others. From an adverse judgment in the first suit and from a motion denying a new trial, and from an order denying their motion as successors of defendants in the second suit for a writ of restitution upon the judgment entered therein, plaintiffs in the first suit and as successors to defendant Easkoot appeal. Judgment and orders appealed from reversed.

Robert Harrison, of San Francisco, Thomas P. Boyd, of San Rafael, and Morrison, Dunne & Brobeck and Edward Lynch, all of San Francisco, for appellants. George H. Harlan, of San Rafael, and R. H. Countryman, of San Francisco, for respondents.

SHAW, J. The above-entitled actions involve the same controversy. Case No. 7095 is an action in ejectment, and the plaintiffs J. F. D. Curtis and H. L. Curtis appeal from the judgment and from an order denying their motion for a new trial. In case No. 7096, the same persons appeal from an order denying their application, as successors of A. D. Easkoot, for the issuance of a writ of restitution upon a judgment entered in said action in favor of said Easkoot against the plaintiff and intervener. We will consider the cases in the order of their number on our calendar.

1. No. 7095. Curtis v. Upton.

The complaint in this case alleges that plaintiffs, "by themselves and by their predecessors in interest," were, on November 9, 1905, the owners, seised in fee and possessed of the parcel of land described as follows:

"Beginning at the post placed by the United States surveyor at the southerly corner of that portion of the Baulinas rancho, which lies on the east side of Baulinas (also spelled Bolinas) Bay, said post being south, 28½° east, fifteen and $^{80}/_{100}$ (15.80) chains from the northwest corner of the northeast quarter of section No. 33, in township No. 1 north, range No. 7 west, M. D. M., said post also being south 51½° west, six chains 30 links, and thence south 38½° east fourteen (14) chains from the house of Captain Easkoot as it stood in the month of October, 1858, thence following the line of said rancho, as described in the patent therefor executed by the United States of America to Gregorio Briones, and recorded in the office of the recorder of said county of Marin, in Liber A of Patents, at page 146, and along the line of ordinary high-water mark on the northeasterly shore of said Baulinas Bay as it existed in A. D. 1858, north 38½° west twenty (20) chains, thence crossing the tide lands in said Baulinas Bay and the sand bar and beach adjoining same on the southwest, south 51½° west fourteen (14) chains more or less to the line of low water of the Pacific Ocean on said beach, thence along the line of said low water of the Pacific Ocean south 60¼° east twenty-three (23) chains, and thence north 55¼° east five (5) chains more or less to the point of beginning. Being portions of Marin county tideland surveys Nos. 10 and 34."

It further alleges that the defendants without right entered upon said land, ejected the plaintiffs therefrom, and have ever since wrongfully withheld possession thereof. It is further alleged that on November 9, 1905, in a certain action in the superior court of Marin county, being the action involved in the above-entitled case No. 7096, a judgment was duly given and made that said A. D. Easkoot was the owner in fee and possessed of the two tracts of land referred to in the above description as "tideland surveys Nos. 10 and 34," and that neither the said A. H. Upton nor said Nathan H. Stinson had any right, title, or interest in or to said parcels or either of them; that afterwards the plaintiffs succeeded to the title of said Easkoot to said lands; and that said Nathan H. Stinson thereafter died and Amos H. Stinson has been appointed executor of his estate.

The complaint sets forth the descriptions of said tideland surveys Nos. 10 and 34 as given in the judgment in Upton v. Easkoot. They are as follows:

"Survey No. 10 state tidelands, Marin county, township No. 1 north, range No. 7 west, M. D. M., sections Nos. 28, 29 and 33, fractional portions of said sections more particularly described in the field notes of said surveys as follows: Beginning at the post placed by the United States surveyor at the southerly corner of that portion of the Baulinas rancho which lies on the east side of Baulinas Bay, said point being S. 28½° E. 15.80 chains from the northwest corner of the northeast quarter of section 33, township No. 1 north, range No. 7 west, M. D. M., thence following the line of said rancho N. 38½° W. 72.20 chains, thence crossing the tidelands S. 42½° W. 20. chains to sand bank, thence S. 54° E. 71.70 chains to the place of beginning. Containing 70.17 acres."

"Survey No. 34 state tidelands, Marin county, township No. 1 north, range No. 7 west, M. D. M., section No. 33, fractional portions of said section being more particularly described in the field notes of said survey as follows: Beginning S. 28½° east 15.50 chains from the northwest corner of the northeast quarter of section 33, township No. 1 north, range 7 west, M. D. M., thence north 60¼° W. 16.36 chains, thence crossing the beach of the Pacific Ocean to low water 5. chains, thence along the Pacific Ocean at low water S. 60¼° east 16.36 chains, south 47½° east 35. chains, thence crossing the beach to high water mark 5. chains, thence north 47½° west 35. chains to the place of beginning. Containing 16.45 acres."

Issue was joined upon the allegations that the plaintiffs were the owners of the land first described in the complaint, that the same or any part thereof was a portion of said tideland surveys or either of them, that the defendants or either of them had ousted the plaintiffs without right from said land or any part thereof, and that the plaintiffs are or ever have been the owners in fee or otherwise of any part of said surveys. With respect to the judgment pleaded in the complaint, the answer alleges that it is void because of the uncertainty of the description therein given of the land adjudged to belong to Easkoot.

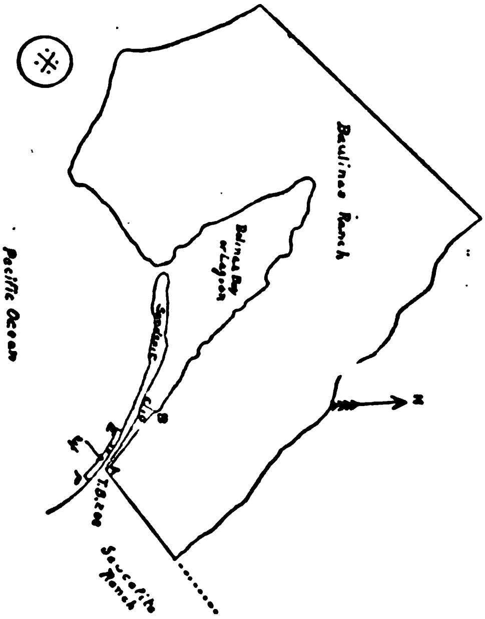
The court found that the allegations of the complaint to the effect that the plaintiffs or their predecessor in interest, Easkoot, are or were the owners of the land sought to be recovered, and that the defendants had wrongfully ousted plaintiffs therefrom, and each of said allegations, were untrue. With respect to the judgment, it found that it was true that it was therein adjudged that Easkoot was the owner in fee of the lands described (being tideland surveys 10 and 34, aforesaid), but that it was not true that said judgment declared anything as to the position of said land. There is also a finding to the effect that a surveyor named Dodge, some two months before the action was begun, had set an iron bolt in the ground as the beginning point of the parcel of land sought to be recovered, and that the tract of land attempted to be described in the complaint was the tract beginning at said iron bolt and running thence according to the courses given in the description in the complaint, that said iron bolt was not set at the southerly corner of the Bolinas ranch, that the tract of land so marked out from said bolt did not include any portion of tideland surveys Nos. 10 and 34, and that the beginning point of the lands described in tideland survey No. 10, aforesaid, is not at the bolt set by Dodge as such beginning point.

As conclusions of law upon the findings the court stated that the plaintiffs were not the owners of, nor entitled to the possession of, nor in possession of, the tract of land attempted to be described in the complaint, and that the defendants were entitled to a judgment that the plaintiffs take nothing by their said action.

Judgment was thereupon given that the plaintiffs take nothing by their action herein, and that they were not the owners of, nor seised in fee of, nor possessed of, nor entitled to the possession of, the tract of land described in their complaint, "which said tract of land," it proceeds to declare, "is located in Bolinas township in the county of Marin, state of California, and bounded and particularly described as follows:

"Beginning at an iron bolt, or pipe, described in the findings in this case as the 'second iron bolt,' which was driven in the ground on the 25th day of August, 1910, by George M. Dodge, a civil engineer and surveyor acting for and on behalf of the plaintiffs in the above-entitled action, which said iron bolt, or pipe, is located as follows: Commencing at an iron bolt which was, on said 25th day of August, 1910, set by the said George M. Dodge at a point upon the site of the house of Captain Easkoot as it stood in the month of October, 1858, as the site of said house was established by the testimony of Benjamin G. Morse, Peter Crane and Stephen A. Richardson, which testimony was taken at the trial of the above-entitled cause, said iron bolt, marking the site of Captain Easkoot's house, being located upon the hill at the north and northeast of the 'arenal' or 'sandpit' dividing Baulinas Inner Bay from the Pacific Ocean and running thence from said iron bolt marking the site of Captain Easkoot's house, south 51½° west 6.30 chains and thence south 38½° east 14 chains to said second iron bolt or pipe and the point of beginning of the lands herein described; running thence from said second iron bolt, or pipe, north 38½° west 20 chains to a point; thence south 51½° west 14 chains to a point and thence south 60¼° east 23 chains to a point and thence north 55¼° east 5 chains more or less to said second iron bolt or pipe above referred to, the point of beginning."

The following map shows approximately the relative positions of the Bolinas ranch, the Bolinas Bay or Lagoon, and the sandspit, as they appear on the map accompanying the patent from the United States to Briones for said ranch. It also shows the positions of the two tideland surveys:



The words "or lagoon" are not in the patent or survey or on the map.

The westerly and easterly boundaries of survey No. 10, according to the legal effect of the description, coincided with the lines of ordinary high tide, as they existed in 1863 when the survey was made. Survey No. 34 purports to cover a strip of tideland 5 chains wide, beginning on the outer shore of the sandspit some 16.36 chains from its junction with the main shore and extending along the sandspit to its said junction and thence about 35 chains southerly along the main shore. The land sought to be recovered does not include all of either of these surveys. It embraces a tract in the form of a trapezium, one side of which extends 20 chains northwesterly from the southerly apex of survey No. 10, and the opposite side whereof extends 23 chains along the line of ordinary low tide on the outer shore of the sandspit, whereas survey No. 10 extends to a distance of 72.20 chains along the line of the Bolinas ranch, and survey No. 34 runs along said outer shore a total distance of 51.36 chains. The center of the sandspit lies above high-water mark, and the land sought to be recovered includes a part of this portion of the sandspit within its boundaries.

The patent of the Baulinas ranch, now usually spelled Bolinas, was introduced in evidence, including the map and field notes of the survey thereof, to which the patent refers. These documents show that the southerly corner of the part of the Bolinas ranch lying on the east side of Bolinas Bay was established on the shore of Bolinas Bay "opposite a long sand bar or 'arenal' whose general course is N. 60° W. slightly curving to the left," and that the surveyor there set a post marked "T. B. 208." This corner is the point of beginning of tideland survey No. 10. It therefore fixes the position of that survey. The field notes state that survey No. 10 includes "that tract of tideland at the southeastern extremity of Bolinas Bay lying between the Baulinas rancho and the sand bank which divides Bolinas Bay from the ocean." The title to tideland vests in the state. State ownership is also shown of survey No. 34, since its beginning point, according to the calls, is situated N. 28½° W. 30 links from the corner of the ranch, and its lines cross the beach and cover the land between the high and low tide lines of the beach fronting on the Pacific Ocean. The state patents were introduced in evidence showing that in 1871 the state granted to A. D. Easkoot the lands included in these two tideland surveys. Easkoot's ownership of the two tracts on November 9, 1905, is also established by the judgment in Upton v. Easkoot, as set forth in the complaint, as aforesaid. The fact that this judgment was given, and its terms as well, are admitted by the pleadings. It is also admitted that Easkoot's title subsequently passed to the plaintiffs, at least as early as the decree of distribution of Easkoot's estate. Therefore it follows that at the time this action was begun the title to these two tideland surveys was vested in the plaintiffs.

The description of the land sought to be recovered, as set forth in the complaint, shows that parts of it are included in the two surveys, the title whereof was, as above shown, vested in plaintiffs. With respect to the parts so included, the findings and judgment that plaintiffs are not the owners thereof are, on the face of the pleadings and by the terms of the patents introduced in evidence, clearly erroneous.

The state patents purport to convey state tidelands only, and they could convey none of the upland of the sandspit, for, as it was neither school land nor swamp land, the state had no title to that upland. The terms of the descriptions of the surveys imply that no upland was intended to be included therein and they should be construed to embrace only tidelands, to which the state held title. The plaintiffs therefore failed to establish a record title to this upland along the center of the sandspit.

[1, 2] This action was begun on October 28, 1910. The survey made by Dodge on August 25, 1910, referred to in the judgment, purporting to establish and mark on the ground the precise position of the southerly corner of the Bolinas ranch, was made for the plaintiffs, apparently in preparation for beginning this action. Plaintiffs' attorneys in drawing the complaint may have supposed that the description set forth therein bounded the tract included in the Dodge survey. But the complaint makes no reference to that survey or to the iron bolt set by Dodge to mark the corner. The description in the complaint fixes the southerly corner of the portion of the Bolinas ranch lying on the east side of Bolinas Bay as the beginning point and ending point of the boundaries of the tract of which recovery is asked. The answer denies that the defendants have ousted plaintiffs of the possession of the parcel described or any part thereof. This put in issue the true position on the ground of the parcel described, it being necessary to fix the position in order to determine whether or not the possession of Upton or Stinson extended over any part of it. The survey of Dodge was evidence to prove that position. But it was not conclusive; not even upon the plaintiffs. It could not change the allegations of the complaint, nor change the issue raised thereby from an inquiry as to the true position on the ground of the southerly corner of that portion of the Bolinas ranch, to an inquiry confined to the question whether or not the iron bolt was set upon the right spot. It was the duty of the court to consider all the evidence on the subject and therefrom to find the fact of the true position of the corner and determine whether or not the defendants had taken possession of any part of the tract claimed by the plaintiffs, when measured from such true position. The findings first declare that the description set forth in the complaint does not include the tract surveyed by Dodge and actually claimed by the plaintiffs, and thereupon, proceeding upon the theory that the land included in the Dodge survey was the only land in controversy, declare that the allegation that the defendants ousted the plaintiffs of a part thereof is untrue. The court was not authorized to do this. It was bound by the issues as framed by the pleadings. The finding that the defendants had not ousted the plaintiffs cannot be considered as sustained by the evidence, unless it appears therefrom that the land in possession of the defendants did not include any part of the land described in the complaint measured from the true location of the ranch corner. The evidence shows that they had taken possession of a part of the tract described in the complaint, if it is located, as it must be, by reference to that corner. The finding that there was no ouster is therefore contrary to the evidence, and the part of the judgment relating to the Dodge survey was unwarranted by the pleadings.

The judgment roll in Upton v. Easkoot was introduced in evidence. The complaint of Upton alleged that he was the owner of the land included in the sandspit, describing it by metes and bounds. Stinson's complaint in intervention alleged that Stinson was the owner of the sandspit. Each asked to have his title thereto quieted against all the other parties to the action. Easkoot answered alleging that he owned tideland surveys Nos. 10 and 34, above described; that he had been, continuously for more than 30 years next before the beginning of the action, in the exclusive and actual and uninterrupted possession thereof under claim of title thereto by virtue of said state patents to him, and asking judgment quieting his title thereto against the claims of Upton and Stinson. The findings were that neither Upton nor Stinson was the owner, or entitled to the possession, of the sandspit, or any part thereof, and were in favor of Easkoot on all the allegations of his answer as aforesaid. It was also found that the patent of the United States to Briones, under which both Upton and Stinson claimed their alleged titles, did not include, or convey to Briones, any portion of the sandspit, that it extended only to the line of ordinary high tide of the bay, as it existed in October, 1858, and that Stinson was not the owner of, nor entitled to the possession of, any of the land described in his complaint in intervention which is situated south or southwesterly of the northeasterly shore of Bolinas Bay, sometimes called Bolinas Lagoon, at the line of ordinary high tide thereon as the same existed in the month of October, 1858.

The judgment declared that Upton take nothing by his action, that Stinson should take nothing by his complaint in intervention, that Easkoot was the owner of said tracts of land designated as tideland surveys Nos. 10 and 34, particularly describing them, and of the other tidelands claimed in his answer, that neither Upton nor Stinson had any right, title, or interest in the same, or any part thereof, and that they each be enjoined from asserting any claim thereto

[3] This judgment is conclusive in favor of Easkoot and in favor of plaintiffs herein as his successors in interest and privies in estate, and against both Upton and Stinson upon all the points decided thereby.

"A former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined." Southern P. Co. v. Edmunds, 168 Cal. 418, 143 Pac. 598; Koehler v. Holt Mfg. Co., 146 Cal. 337, 80 Pac. 73.

The former judgment operates in favor of or against privies in estate of the original parties, and it "is none the less a bar for the reason that it is erroneous." Lamb v. Wahlenmaier, 144 Cal. 95, 77 Pac. 766, 103 Am. St. Rep. 66.

It follows therefore that the judgment in Upton v. Easkoot determines, not only that the plaintiffs in case No. 7095 are the owners of all of the land described in the complaint that is embraced within the two tideland surveys, but also that the northeasterly line of survey No. 10 is the line of ordinary high tide of Bolinas Bay, or Lagoon, as it existed in October, 1858, regardless of its present position. This will be important upon a new trial of the action, if, as the evidence indicates, the winds or waves have made accretions to the shore which have raised the surface of all or a part of tideland survey No. 10 above the line of ordinary high tide of the bay. In that event, the tideline of 1858 will determine the boundary between the lands of plaintiffs and Stinson.

[4-6] It appears from the evidence that the post set in 1858 to mark the southerly corner of the Bolinas ranch and all monuments of the tideland surveys and all traces thereof have long since disappeared. The position of the southerly corner of the ranch can only be ascertained by resort to other calls of the patent and survey. Dodge attempted to locate it by retracing the line from the collateral call to Easkoot's house, the position of which he determined from statements of persons once familiar with it. The court below found that Dodge did not locate the true corner. Proceeding apparently upon the theory that the plaintiffs were bound to prove the true position of said corner and that, if they failed to do so, their patents and the judgment in Upton v. Easkoot were all ineffectual to establish any right to the land claimed, the court gave judgment against them. This theory might possibly be correct, upon the question of an ouster, if the plaintiffs had produced no evidence of the position of the corner and none had been given on behalf of the defendants. But the testimony of Dodge of his survey retracing the line, according to the courses and distances given in the original survey, back from the site of the Easkoot house to its beginning point, was legal evidence of the true site of the corner. In the absence of countervailing evidence, it would have been sufficient proof thereof. Weaver v. Howatt, 171 Cal. 308, 152 Pac. 925. It was rejected as proof because the resurvey by Richardson, starting from a known natural monument of the original survey on the northeasterly side of the ranch and verified by other monuments mentioned in the calls of the survey found by him between that point and the southerly corner, together with evidence of other inconsistent facts, satisfied the court that the Dodge location was wrong. But it was the duty of the court to ascertain, if possible, the true position of the corner, accurately, if it could be done, or approximately within reasonable limits if the exact position could not be ascertained with absolute certainty. Weaver v. Howatt, supra, 171 Cal. 307, 152 Pac. 925; Weaver v. Howatt, 161 Cal. 86, 118 Pac. 519. The Richardson survey was, of itself, evidence of the actual position of the true corner; obviously, it was more convincing to the court below than that of Dodge. It was the duty of the court to decide the question of fact in accordance with its own views of the preponderance of the evidence. The difference in the position of the corner in the two surveys was about 300 feet. If the Richardson location had been taken as the true one and the lines of the tideland surveys run accordingly, it would have shown that survey No. 10 included some tidelands of the bay, and that if the tideline as it existed in 1858 were considered as the boundary of that survey it would probably have included a part of the land described in the complaint. It would certainly have shown that survey No. 34 was partly within the boundaries of the land sued for. It is a strip 5 chains wide and 51.36 chains long lying between the lines of the ordinary high and low tides on the beach of the southwesterly side of the sandspit fronting directly on the Pacific Ocean, and the place called for as its point of beginning is on its high-tide line 35 chains from one end, 16.36 chains from the other, and, according to its calls in connection with those of survey No. 10, this beginning point is situated north 28½° west 30 links from the southerly corner of the Bolinas ranch aforesaid. In determining the position of a tract of land from a description or survey, natural objects referred to as bounds prevail over the measurement of lines and angles. Code Civ. Proc. § 2077. The distance, 30 links, must yield to the calls for the tide lines. Hence, wherever the point of beginning of survey 34 may be, its southwesterly line is the low-tide line of the Pacific Ocean, and it extends landward to ordinary high-tide line. The lines of the tract sought to be recovered, as described in the complaint, include a part of this survey.

[7] The terminus of the southeasterly line of the Bolinas ranch, it being the common boundary of that and the Saucelito ranch, is at the line of ordinary high tide of the Pacific Ocean, or of Bolinas Bay, as the case may

be. The determining factor as to its location is the position of the common boundary. If it should be determined that its true terminus is on the shore of the ocean southerly of the sandspit, that point must be the southerly corner of the Bolinas ranch, regardless of the other calls of the survey and patent to Briones. But, it is necessary to add, the judgment in Upton v. Easkoot definitely determines that, in that event, the call of the patent in the course next following in the survey, "thence along the shore of Baulinas Bay at ordinary high-water mark north 38½° west," must be ignored for the distance between the true corner and the nearest point in the southeasterly extremity of the bay as it existed in 1858. It is to be noted further that the course above given, "north 38½° west," is not the exact course of the shore line, but is the course of a meander line run to approximately locate the shore line and to afford the means for calculating the area of the land granted. Where a meander line is run for this purpose, the shore line constitutes the real boundary. Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294; Hardin v. Jordan, 140 U. S. 384, 11 Sup. Ct. 808, 838, 35 L. Ed. 428.

The question of the effect of gradual accretions may become important with regard to the lines of surveys Nos. 10 and 34 bordering upon the sandspit. Recently, in Strand Imp. Co. v. Long Beach, 174 Cal. ——, 161 Pac. 975, the court decided that the common law that gradual accretions from natural causes to land abutting upon water belong to the owner of the upland applied to lands fronting upon tidal waters and to the shores of the ocean. It may be that accretions to the inner side of the upland of the sand bar have covered a large part of survey No. 10 and have raised it above the high-tide line. The effect of the judgment in Upton v. Easkoot is that neither Upton nor Stinson can claim any title to the sandspit, as against plaintiffs here. Having no right to the sandspit, they could not claim accretions thereto.

We now proceed to the consideration of case No. 7096.

2. No. 7096. Upton v. Easkoot.

This is the case in which, as stated in the previous discussion, judgment was given in favor of Easkoot against the plaintiff, Upton, and the intervener, Stinson.

Easkoot, in his so-called answer therein, alleged his ownership in fee, and his possession, of four parcels of land, particularly described, among them being the tracts hereinbefore referred to as tideland survey No. 10 and tideland survey No. 34, and prayed judgment that Upton and Stinson be adjudged to have no right, title, or interest therein, and that they each be enjoined from asserting any claim thereto, and for general relief. The judgment was that Easkoot was the owner in fee of the parcels described, that neither Upton nor Stinson had any right, title, or interest therein, and that they each be forever enjoined from making or asserting any claim to the same, or any part thereof, as against Easkoot.

In October, 1910, after the death of Easkoot and after his estate in the lands was distributed to J. F. D. Curtis and H. L. Curtis, they filed a notice of motion for the issuance of a writ of restitution upon said judgment against said Upton and the executor of Stinson, who had died in the meantime. The ground of the motion was that after the entry of said judgment said parties had, contrary to its terms, entered into possession of portions of the land therein adjudged to Easkoot and were holding possession thereof and claiming title thereto. The portion which they were so claiming is the tract sought to be recovered in Curtis v. Upton, No. 7095. The description thereof is set forth at the beginning of part No. 1 of this opinion. The court below denied the motion and refused to order the writ. From this order the said moving parties appeal.

Before the hearing of the motion, the moving parties, Curtis and Curtis, began the action, the subject of the first part of this opinion, for the recovery of said parcel in dispute. The motion and the action were heard and tried together upon the same evidence. The court denied the motion upon the same grounds upon which it refused to give judgment for the plaintiffs in the aforesaid action, that is to say, because it was, as it believed, unable to identify upon the ground the exact position of the southerly corner of the Baulinas ranch. What we have said in the discussion of that case is applicable here, and we need not repeat it in full. There was evidence from which the position of the corner, and therefrom the position of the land in dispute, could have been ascertained with reasonable certainty, and it was the duty of the court to determine the same and make its order accordingly.

[8] Upon the evidence before it, the result would have been a determination that the moving parties were entitled by the judgment to the possession of a part, at least, of the land claimed by them. If Upton or Stinson were in possession of any of those portions, the writ should have been issued. The answer of Easkoot, though denominated by him an answer, contained all the allegations necessary to a cause of action to quiet title or determine conflicting claims to real property, and it prayed for affirmative relief of that character. The judgment in his favor was, in effect, a judgment declaring and quieting his title. It was as effectual for that purpose as if it had been made in a formal action of that nature. In such a case, a writ of possession may be issued at the instance of the prevail-

ing party to place him in possession, if he is out of possession, or to restore him thereto if the losing party re-enters. Code Civ. Proc. § 380; Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771.

In case No. 7095, the judgment and the order denying a new trial are reversed.

In case No. 7096, the order denying the motion for a writ of restitution is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; MELVIN, J; HENSHAW, J.

(175 Cal. 417)

In re DREYFUS' ESTATE.

Appeal of HERBOLD et al.

(L. A. 4975.)

(Supreme Court of California. June 9, 1917. Rehearing Denied July 5, 1917.)

WILLS 🔑132—OLOGRAPHIC WILL—"WRITTEN."

Under Civ. Code, § 1277, requiring an olographic will to be "entirely written, dated, and signed by the hand of the testator himself," a will written and dated by testator on a typewriter and signed by him with pen and ink is not entitled to probate as an olographic will; the word "written," as used in the statute in the year 1872 when enacted, not including the process of making letters on paper with a typewriter, which is essentially a process of printing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 341.

For other definitions, see Words and Phrases, First and Second Series, Write—Writing.]

Department 1. Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

In the matter of the estate of Gustav Dreyfus, deceased. Petition by Philip Herbold to probate a document as decedent's last will. From order refusing to admit the document to probate as a will, petitioner and another appeal. Affirmed.

Neighbours, Hoag & Burke, of Los Angeles, for appellants.

SHAW, J. Philip Herbold filed a petition for the admission to probate of a document, as the last will of the decedent, Gustav Dreyfus. The petition alleges that this paper was not attested by any witness, that it was wholly in typewriting, except the signature of the decedent thereto, that said signature was written by the decedent with pen and ink, and that the remainder of the document, including the proper date, was written by the decedent himself by the manipulation of a typewriting machine. The evidence was to the same effect. Thereupon the court below made its order refusing to admit the document to probate as a will. From this order the petitioner and said Maurice Blumlein, the latter being the sole beneficiary under the purported will, have appealed.

Our Code requires that an olographic will shall be "entirely written, dated, and signed by the hand of the testator himself." Civ. Code, § 1277.

To ascertain the meaning of this requirement, we must look to the reasons which led to its enactment, the conditions then existing, and the object sought to be attained thereby. Originally in England, by the ecclesiastical law and the common law, wills could be made by oral declaration. Gould v. Safford, 39 Vt. 505; Ex parte Thompson, 4 Bradf. Sur. (N. Y.) 154; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 294; 30 Am. & Eng. Encyc. of Law, 560. This was found to be so fruitful of fraud and perjury that the statute of frauds was enacted providing that nuncupative wills could be made only by persons in their last sickness, to be proved by three witnesses, or by soldiers in service or mariners at sea, and that in all other cases a will must be a signed writing, attested, and subscribed by at least three credible witnesses. Statutes prescribing the manner of executing wills of all kinds and the degree of proof necessary to establish them have for their prime object the prevention of frauds and perjuries, or as the supreme court of Louisiana puts it, "to prevent imposition and abuse." Knight v. Smith, 3 Mart. O. S. (La.) 162. Our Code provision allowing olographic wills was first enacted in 1872. The commissioners who drafted the Civil Code, in their note, recommend it on the ground that it "may not, and indeed, it is confidently claimed in those countries where olographic wills are recognized, does not give rise to as many attempts at fraudulent will-making and disposition of property as where it does not exist."

From time immemorial, letters and words have been written with the hand by means of pen and ink or pencil of some description, and it has been a well-known fact that each individual who writes in this manner acquires a style of forming, placing, and spacing the letters and words which is peculiar to himself and which in most cases renders his writing easily distinguishable from that of others by those familiar with it or by experts in chirography who make a study of the subject and who are afforded an opportunity of comparing a disputed specimen with those admitted to be genuine. The provision that a will should be valid if entirely "written, dated, and signed by the hand of the testator," is the ancient rule on the subject. There can be no doubt that it owes its origin to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that therefore the requirement that it should be in the testator's handwriting would afford protection against a forgery of this character. In 1872 the only mode of writing in use was by pen and ink or pencil. There were then in existence some crude machines for imprinting letters on paper by means of small levers similar to those now used in typewriters; but the practical modern typewriter, now in almost universal use, was unknown. It was not perfected until 1875 and did not come into general use until several years thereafter. The language of section 1277, by the common usage of the language in 1872, or even at the present time, would mean that the entire will must be in the "handwriting" of the testator. This would not include any sort of printing by the use of type, whether on a printing press or placed at the end of a rod manipulated by keys.

While it is true that a will made wholly by the testator and by means of a typewriter may be said to have been made "by the hand of the testator himself," it would not be true, accurately speaking, that such a will had been "written" by him. The process of making letters on paper with a typewriter is essentially a process of printing. The type fixed on a bar is stained with ink and then pressed against the paper, leaving its imprint precisely as in a printing press. The word "written," as used in section 1277, in the year 1872, had no such signification. There are cases where a word in a statute aptly describing a thing then well known has been extended so as to include some other thing afterwards invented or used to accomplish the same or a similar purpose and within the general statutory intent and object. For example, "carriage," meaning a wheeled vehicle, has been held to include the subsequently invented bicycle. But the reasons for these extensions of meaning have no application here. They were made to carry out the spirit and object of the statutory provision. The meaning here contended for would greatly enlarge the opporunities for successful forgeries by taking away the means of detection which the Legislature had in mind and would defeat the purpose of the statute by destroying the safeguards which its requirements were designed to secure.

The order is affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

(175 Cal. 363)

EWALD v. KIERULFF et al. (S. F. 7227.)

(Supreme Court of California. June 7, 1917.)

1. TRUSTS ⟹371(6½)—PLEADING—DEMURRER—LACHES.

The defense of laches in neglecting to enforce an express trust for a long time may be raised by demurrer in action based on such a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 596.]

2. TRUSTS ⟹365(2)—ENFORCEMENT—LACHES.

Where plaintiff had known for 43 years that a trustee, taking title from him to an undivided interest in lots for partition, had repudiated the trust by divesting himself of title to the lots, and had been aware for at least 33 years that the trustee or his representatives had been in a position to carry out the terms of the trust, he was barred by laches from enforcing the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 571.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Edward Ewald against T. C. Kierulff and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Thomas V. Cator, of San Francisco, for appellant. Mastick & Partridge, T. C. Kierulff, and H. F. Chadbourne, all of San Francisco, for respondents.

MELVIN, J. This action was brought against the executors of the will of John Nightingale, deceased. The heirs of said Nightingale were also made parties defendant. The original complaint was filed March 12, 1913. In due course an amended complaint was filed. Defendants demurred to this pleading, and their demurrer was sustained, and plaintiff refusing to amend within the time allowed by the court, judgment was accordingly entered in favor of defendants. The appeal is from this judgment.

By the amended complaint it is alleged that John Nightingale died about March 20, 1912, and the usual formal matters relating to the probate of the will and the proceedings thereunder are set forth. It is alleged that prior to 1870 plaintiff was the owner of certain lands in the city and county of San Francisco, among which were the parcels designated as "blocks Nos. 991 and 992 of outside lands"; that for certain reasons title to plaintiff's property was held for him by a trustee who was one of his kinsmen; that Nightingale and others owned similar outside lands separately and as tenants in common; and that prior to the year 1870, such owners, including plaintiff and Mr. Nightingale, agreed to a partition of their properties by lot so that segregated title in fee might be placed by proper conveyances in the names of the respective owners according to their interests. There are further allegations to the effect that John Nightingale, knowing that plaintiff was entitled to receive a conveyance on demand, in fee, of an undivided half interest in blocks Nos. 991 and 992, requested plaintiff to convey said interest to said Nightingale; that on December 17, 1870, plaintiff made, executed, and delivered his deed of conveyance as requested; and that said conveyance was made pursuant to an agreement which was later reduced to writing as follows:

> "San Francisco, Dec. 19, 1872.
>
> "Mr. Edward Ewald: The deed received by me from you dated 17 December, 1870, to the one undivided half of blocks Nos. 991 and 992 of outside lands is given in trust to hold for me and for the object of partition, and when such partition is had you will be entitled to receive from me in an equal amount of land segregated and of equal value.
>
> "John Nightingale."

The amended complaint contains further averments that plaintiff, fully relying upon the agreement, permitted the title in said blocks to become permanently vested in other persons; and that Nightingale, up to the time of his death, owned ample outside lands with which to satisfy plaintiff's claims under the trust, the partition of outside lands having been completed before the year A. D. 1880, and Nightingale having received thereby segregated title to large quantities of such outside lands similar to the two blocks in which he had acquired plaintiff's interest. The prayer is that the executor and heirs of John Nightingale be required to make conveyance of a suitable part of such lands belonging to the estate in execution of the trust.

[1, 2] The only question argued in the briefs and the only one necessary for consideration by this court is whether or not the superior court was justified in sustaining the demurrer to the complaint on the ground of laches. Plaintiff contends that the basis of his action is an express trust in writing; and that while laches may operate as evidence to defeat the plaintiff's demand upon an issue of fact, lapse of time alone will not upon demurrer avail in an action based upon an express trust admitted by the demurrer to exist. In support of this doctrine counsel for plaintiff cites certain authorities from the state of New York; but whatever the rule may be in any other jurisdiction it is well settled in California that the defense of laches may be raised by demurrer. In the case before us it appears by the affirmative averments of the complaint that the trustee was in a position to carry out the terms of his trust agreement at least as early as the year 1880, and that a decade earlier he had conveyed away all interest in the two blocks of outside lands numbered 991 and 992. There is no statement that plaintiff was ignorant of either of these facts, and under an elementary rule of pleading we must assume that he had knowledge of them. Plaintiff having known for 43 years that Mr. Nightingale had divested himself of all title to the two lots and by so doing had violated and repudiated the trust, and having been aware for at least 33 years that the said Nightingale or his representatives had been in a position to carry out the terms of the trust, was bound to plead, if he could, on seeking relief in a court of equity, circumstances showing good faith and reasonable diligence on his part. The burden was upon plaintiff to explain, if he could, his long-continued acquiescence in acts hostile to his claim. This he did not do, and it was therefore perfectly proper to sustain the demurrer on the ground of laches, a defense which, under an unbroken line of authority in California, may be raised by demurrer. Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; Elliott v. Clark, 5 Cal. App. 8, 89 Pac. 455; Elliott v. Bunce, 10 Cal. App. 741, 103 Pac. 897; Emerson v. Kennedy Mining & Milling Co., 169 Cal. 718, 147 Pac. 939.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 270)

WINBIGLER v. SHERMAN. (L. A. 4449.)

(Supreme Court of California. June 4, 1917. Rehearing Denied July 2, 1917.)

1. Mortgages 🔑354—Sale—Notice.

If a trust deed specified the kind and manner of notice of sale, a sale without giving the notice as required would be invalid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1051–1058, 1068, 1069.]

2. Appeal and Error 🔑1008(1)—Review—Findings.

In an action to require the purchaser at a sale under a trust deed to convey the property to the mortgagor on the ground that the sale was void, where neither the pleadings nor the findings of fact show the provisions of the trust deed relative to notice of sale, the finding to the effect that notice was not published as required by the trust deed is conclusive in so far as the motion to vacate the conclusions of law and the judgment and to enter another and different judgment are concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955.]

3. Mortgages 🔑356—Deed of Trust—Notice of Sale.

Where a trust deed provided that the trustee should first publish notice of the time and place of sale with a description of the property to be sold at least twice a week for four successive weeks in some newspaper in a city and county named, a notice of sale of which the last publication was on January 22d, and in which the day noted for sale was February 6th, was publication of notice in accordance with the requirements of the trust deed, since it was not necessary that the four weeks be next preceding the date and the date fixed was not unreasonably remote from the period of publication.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1063–1067.]

4. Appeal and Error 🔑1008(1)—Review—Findings.

The findings of fact are conclusive upon the appellate court except as to the provisions of the trust deed and a letter admitted in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955.]

5. Mortgages 🔑369(3) — Sale — Setting Aside—Inadequacy of Purchase Price.

Where land is sold under a deed of trust, mere inadequacy of the purchase price is not sufficient ground for refusing to give full effect to such sale, although where the inadequacy is gross very slight additional evidence of unfairness or irregularity is sufficient to warrant setting it aside.

6. Mortgages 🔑369(3) — Sale — Setting Aside—Inadequacy of Purchase Price in Connection with Other Objections.

Where property worth at least $5,000 was sold under a deed of trust for $500, the purchaser being a nominal creditor and assignee for collection, the facts that there was a known dispute between the original mortgagor and mortgagee as to the adequacy of the consideration for the secured notes, and that the mortgagee wrote the mortgagor after notice by publication for sale under the deed of trust had been commenced, a letter, couched in such terms as to lead the mortgagor to believe that foreclosure proceedings had not been commenced, and that without actual notice before that time the mortgagor learned of the sale one-half hour before the time fixed, and requested a postponement for a reasonable time to enable him to procure the money to pay the amount due, *held* to constitute such an irregularity in the proceedings, together with the gross inadequacy of consideration, as to warrant setting aside the sale and ordering the property to be conveyed by the purchaser to the mortgagor.

In Bank. Appeal from Superior Court of Orange County; Z. B. West, Judge.

Action by Theo. A. Winbigler, as special administrator of the estate of Karl Wenzel, deceased, against W. H. A. Sherman. From a judgment for plaintiff and from an order denying a motion to set aside the conclusions of law and judgment and to amend the same and enter another and different judgment, and from an order denying a motion for new trial, defendant appealed to the District Court of Appeal, where an appplication for hearing in the Supreme Court was granted. Affirmed.

E. W. Forgy and John T. Jones, both of Los Angeles (Jones & Weller, of Los Angeles, of counsel), for appellant. H. C. Head, of Santa Ana (R. T. Walters and Ernest C. Griffith, both of Los Angeles, of counsel), for respondent.

ANGELLOTTI, C. J. This appeal was originally heard and decided by the District Court of Appeal of the Second Appellate District, and an application for a hearing in this court was subsequently granted. The following statement as to the nature of the case, the action of the trial court, and the appeals, is taken from the opinion of the district court of appeal:

> "Karl Wenzel executed to Charles A. Meyer, Jr., as trustee, a trust deed to secure the payment of certain promissory notes made by Wenzel to Fairbanks-Morse & Co., a corporation. Default having been made by nonpayment of one of the notes when it fell due, defendant W. H. A. Sherman, to whom the notes had been transferred, demanded that the real property described in the trust deed be sold by the trustee in accordance with the provisions of the trust deed. Sale was made by the trustee in conformity with that demand, and a deed of conveyance was executed to Sherman as purchaser at the sale. Karl Wenzel died on the 27th day of February, 1915, and the plaintiff was appointed special administrator of his estate. As such administrator the plaintiff instituted this action to obtain a decree, requiring that the defendants convey the property to the plaintiff upon payment by him of the amounts due under said notes and deed of trust. The defendants having filed their answer, the case went to trial, and the court made its findings and a decree ascertaining the amount of said indebtedness, and requiring that upon payment of that amount with interest as ascertained in the decree, the defendant Sherman should convey the described premises to plaintiff; and it was provided that upon failure to make such conveyance the deed be made by a commissioner appointed for that purpose. Within ten days after the entry of judgment the defendant Sherman gave notice of motion, and thereafter in due course made his motion for an order to set aside and vacate the conclusions of law and the judgment and to amend the same and enter another and a different judgment, to wit, a judgment that the plaintiff take nothing against the defendant and for costs in favor of the defendant. This motion was made as permitted by section 663 and 663a, Code of Civil Procedure, upon the grounds that the findings of fact do not support the conclusions of law or the judgment and that such findings of fact do require conclusions of law and judgment in favor of the defendant. The court having made its order denying that motion, the defendant Sherman has appealed from the order, and also from the judgment and from an order denying his motion for a new trial."

It may be added that the amount of indebtedness found by the trial court included all expenses of sale.

[1, 2] It cannot be held that the findings of fact do not support the conclusions of law or the judgment. Regardless of all questions in connection with the matter of the inadequacy of price, it is explicitly found that the trustee's sale of the land was not in compliance with the terms of the trust deed and the law, in that the notices of sale "were not published twice a week for four weeks next preceding the date of said sale, and in that more than one week elapsed after the last publication of said notices before the date of the said sale." Of course if the trust deed required the kind and manner of notice so specified in the finding, a sale had without giving the same would be invalid. Neither pleadings nor findings of fact show the provisions of the trust deed relative to notice of sale, and the finding to the effect that notice was not published as required by that instrument is conclusive in so far as the motion to vacate the conclusions of law and the judgment and to enter another and different judgment is concerned. The motion, therefore, was properly denied.

[3] The finding just referred to is, however, assailed on the appeal from the judgment and order denying a new trial as being without sufficient support in the evidence. The deed of trust is set out in the statement on appeal, and a reading thereof in connection with the findings of the trial court as to the publication had shows that notice of the sale was published in all respects as required thereby. So far as material this instrument provided:

> "Said trustee * * * shall first publish notice of the time and place of such sale, with a description of the property to be sold, at least twice a week for four successive weeks in some newspaper published in the city of Los Angeles, county of Los Angeles, state of California."

The trial court found "that notices of said sale were published by said trustee in the Los Angeles Daily Journal, a daily newspaper published in Los Angeles county, Cal., twice a week for four weeks," specifying the date of first and last publication. The last publication was on January 22, 1915, and the day noted for the sale was February 6, 1915. Publication of notice in accord with the requirements of the trust deed is thus shown. The point appears to be that the publication was not sufficient because not made for the four weeks "next preceding the date" of sale, and this appears to have been the view of the learned trial judge. But the trust deed, as we have seen, contains no such requirement, calling simply for publication "at least twice a week for four successive weeks." Upon this point the District Court of Appeal said:

> "Counsel for respondent have not referred to any decision holding that under a trust deed in the form here presented the publications of the notice of sale must be continued down to the very time of the sale; therefore, we may be justified in assuming that there is no such decision. In addition to that, however, we have examined some of the principal text-books and digests, and we fail to find any declaration of law in support of respondent's contention. The rule, of course, is that in executing a power of sale the trustee must act in good faith and strictly follow the requirements prescribed by the trust deed with respect to the manner of sale. The date fixed for the sale in the present instance was not unreasonably remote from the period of publication of the notices. The fact that it was a few days later than it might have been after the beginning of publication of the notice was a fact rather favorable than otherwise to the interests of the debtor."

The finding referred to is without support in the evidence.

[4] This result does not require a reversal, however, if the other findings sufficiently support the judgment. The claim of respondent is substantially that the gross inadequacy of price for which the land was sold by the trustee, in connection with the circumstances found, sufficiently supports the conclusion of the trial court that the sale was inequitable and fraudulent, and that the purchaser should not be allowed to retain the property. The findings of fact, which are conclusive upon us except as to the provisions of the trust deed and a certain letter hereinafter referred to which are the only matters of evidence contained in the statement on appeal, show the following facts: The notes of deceased secured by the trust deed were given to Fairbanks-Morse & Co. for the aggregate amount of $536.65 in consideration of the agreement of the latter to furnish and install certain pumping machinery on the land of deceased, a parcel of 15 acres in Orange county. The deed of trust covered all of said land. The trustee under the deed, Meyer, was at all times an employé of Fairbanks-Morse & Co. The pumping machinery was installed, and after the first note, one for $100, became due (October 1, 1914), deceased made complaint that the same was defective, and certain alterations were made therein by the vendor. Apparently the machinery was still unsatisfactory, complaint being made as late as the very day of sale. In the meantime, Fairbanks-Morse & Co. transferred the notes to defendant Sherman, who was a bill collector who had theretofore collected bills and accounts for it. The inference is that they were transferred solely for purposes of collection. On or about December 21, 1914, Sherman caused the trustee to advertise the land for sale under the trust deed. The first publication of notice was on December 31, 1914, the sale being noticed for February 6, 1915, "at the west door of the courthouse in the city of Los Angeles." On January 6, 1915, Sherman wrote deceased as follows, the letter being taken from the statement on appeal:

> "I have your letter of December 29th, and will say that I do not know anything about troubles you speak of, regarding the pumping plant. That is a matter that is between yourself and Fairbanks-Morse & Co. As to the trust deed, I have instructed the trustee to start foreclosure proceedings, so unless you care to pay the matter off at once, the same will be foreclosed in due course of time."

Deceased had no actual notice of the intended sale until about one-half hour before the time fixed, when he went to the place of business of Fairbanks-Morse & Co. for the purpose of negotiating with the latter about the alleged defects in the machinery, and then and there for the first time learned of the intended sale. He at once went to Sherman and the trustee, and talked with them about the matter, and requested a postponement of the sale for a reasonable time to enable him to procure the money and pay the amount due. The amount due, including expenses of sale, was only $680.58, and the actual value of the property was not less than $6,500, subject to a prior mortgage for $1,500. The trust deed fully provided for and authorized postponements of sale by the trustee. The request for a postponement was denied, and the sale was made to Sherman, the only bidder, for $500, the amount of his bid. Promptly after the sale deceased procured the necessary money and offered to Sherman a sum sufficient to pay all amounts due, including principal, interest, costs of sale and expenses, on condition that Sherman reconvey the property to him, and his offer was rejected. The trustee executed his deed to Sherman. The price paid was not more than one-tenth the actual value of the land, and was grossly inadequate. Another similar offer was made by this plaintiff to Sherman before the commencement of this action, and the same was refused. It is further found upon these facts "that the sale was inequitable and fraudulent."

[5] Although another rule prevails in some jurisdictions, it is the settled rule in this state that mere inadequacy of price is not a sufficient ground for refusing to give full effect to such a sale as this. This rule was recognized, and many authorities cited, in Odell v. Cox, 151 Cal. 73, 90 Pac. 194, where an execution sale was involved. In that case, however, a judgment vacating an execution sale was affirmed on the theory that there were circumstances which, considered in connection with the grossly inadequate price paid, were sufficient to support the conclusion of the trial court that there was such unfairness and undue advantage resulting in gross inadequacy of price as warranted the vacating of the sale. It was said in the

opinion that, notwithstanding the rule that mere inadequacy of price is insufficient to warrant setting aside the sale:

> "Where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought."

Several authorities were cited in support of this statement, including the case of Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721, in which the court, after saying that courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause of vacating it, especially if the inadequacy be so gross as to shock the conscience, said:

> "If the sale has been attended by any irregularity, * * * if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner permitted to redeem."

This court said:

> "We think there can be no doubt under the authorities that where, in addition to gross inadequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage,' resulting in such gross inadequacy and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner who is himself without fault."

[6] In the case at bar, there can be no doubt that there was gross inadequacy of price. Property worth at least $5,000 was purchased for $500. The purchaser was the nominal creditor, having a claim, including all expenses, of only $680.58, secured many times over by this trust deed. Moreover, he was apparently only an assignee of Fairbanks-Morse & Co. for purposes of collection, its employé and representative. The trustee was an employé of the same corporation. All parties knew that a dispute existed between deceased and Fairbanks-Morse & Co. as to the adequacy of the pumping machinery furnished in consideration of the giving of the notes, and that deceased was endeavoring to obtain from the company some remedying of the alleged defects. On the very day noted for the sale, without any actual notice that notice of sale was being published, or that a time had been fixed therefor, he visited the office of the company for that purpose. It was only then that he learned of the proposed sale, only one-half hour before the time fixed. The letter written to him on January 6, 1915, by Sherman was couched in such terms as to convey to the mind of deceased that "foreclosure proceedings," as they were termed therein, had not as yet been commenced, and, as substantially found by the trial court, such proceedings would actually be commenced only "in due course of time," and this, although a time for the sale had actually been fixed and notice by publication actually commenced nearly a week before. Whether by design or otherwise it was well calculated to lead deceased to believe that no proceeding for a sale, which would leave in him no right of redemption and would effectually cut off all his rights in regard to his property, had as yet been begun. It certainly tended to lull him into a false security to this extent, if indeed the use of the term "foreclosure proceedings" did not convey to his mind the idea of proceedings of which actual notice would be given him. Learning that such a sale was in fact noticed only one-half hour before the time fixed therefor, he requested of both the purchaser and the trustee a postponement for a reasonable time to enable him to procure the proportionately small amount of money to pay the amount due. This request, perfectly reasonable under the circumstances and one that could be granted without in the slightest degree prejudicing the creditor in so far as the collection of the full amount due was concerned, was refused, with the result that the whole property was sold to the creditor for one-tenth of its actual value. We are of the opinion that under all the circumstances the refusal of the creditor to consent to a postponement and of the trustee to grant the same so savored of oppression and unfairness and an apparent desire to acquire the property of deceased for a mere pittance that, taken in connection with the gross inadequacy of price, it constitutes such an irregularity in the proceedings as to sufficiently support the conclusion and action of the trial court.

The judgment and the order denying a new trial and the order denying the motion to vacate the conclusions of law and judgment and to enter another and different judgment are affirmed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 278)

RAUER v. HERTWECK et al. (S. F. 7081.)

(Supreme Court of California. June 4, 1917.)

1. **Trial** 🔑165 — **Motion for Nonsuit** — **Hearing.**

On motion for nonsuit, the evidence and every inference that may fairly be drawn from it must be viewed in the light most favorable to plaintiff's claim.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374.]

2. **Execution** 🔑256(2) — **Sale** — **Action to Set Aside—Evidence.**

In an action to set aside an execution sale of real estate, evidence *held* to show that the sale was fairly conducted, and that plaintiff's loss can be more properly attributed to the neglect of his own interest than to any unfairness on the part of the judgment creditor or the purchasers.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 730, 731.]

3. Execution 🔑251(1) — Sale — Setting Aside—Inadequacy of Price.

Mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside an execution sale legally made, but there must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage, although where the price is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of relief.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 708.]

4. Attorney and Client 🔑104 — Knowledge of Client—Setting Aside—Grounds.

Where an attorney had actual knowledge of the entry of judgment against his client, such knowledge is in law the knowledge of the client himself.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 92, 93.]

5. Execution 🔑222(1) — Sale — Notice to Judgment Debtor.

As Code Civ. Proc. § 692, regarding notice of sale under execution, does not require notice to be given to the judgment debtor, neither the judgment creditor, the sheriff, nor the purchasers are under any obligation to give the judgment debtor such notice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 629, 630.]

6. Execution 🔑230 — Sale — Soliciting Bids.

No inference of impropriety is to be drawn from the fact that attorneys for the judgment creditor informed one of the purchasers at an execution sale that a sale was to be had, and suggested that he bid, since the judgment debtor is benefited, rather than harmed, by any action which tends to increase the number of bidders.

[Ed. Note.—For. other cases, see Execution, Cent. Dig. §§ 648–652, 698.]

7. Execution 🔑256(2) — Sale — Action to Set Aside—Answer—Construction.

In an action to set aside an execution sale of real estate, an answer, alleging that defendants had no part in or concern with the issuance of the execution, or the levy upon or the sale of the premises other than attend the sale and become purchasers thereat, and that if, in said proceedings, there was any intent to prevent plaintiff from having knowledge thereof, or if such knowledge was intentionally concealed from plaintiff the defendants had no part therein, and were in no way responsible therefor, was clearly designed to dissociate the defendants from any connection with the purpose to take any unfair advantage of the plaintiff, and was a sufficient denial of any knowledge on their part of such purpose.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 730, 731.]

8. Execution 🔑224—Sale by Lots or Parcels—Statute.

In view of Code Civ. Proc. § 694, regarding the conduct of sales of property under execution, in an action against the purchasers to set aside an execution sale of real estate, where there was nothing to indicate that the real estate consisted of more than one lot or parcel, a sale in parcels was not required.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 636–639, 705.]

9. Judgment 🔑237(3) — Default against One Defendant.

Under Code Civ. Proc. § 579, providing that in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper, in an action to set aside an execution sale of real estate brought against two defendants, who did not have any unity of interest or claim, and in which plaintiff took a default judgment against one defendant, a subsequent judgment against the other defendant was not void, and hence execution for costs could issue thereunder.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 419.]

10. Judgment 🔑504(3) — Collateral Attack—Presumption.

Where it does not appear that two defendants, in an action to set aside an execution sale of real estate, had any unity of interest or claim making it improper to render several judgments against them, it will be presumed on collateral attack that they did not.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 946.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. J. Rauer against Edward Hertweck and another. Judgment for defendants, and plaintiff appeals. Affirmed.

H. M. Anthony, of San Francisco, for appellant. S. L. Strother and G. L. Aynesworth, both of Fresno, for respondents.

SLOSS, J. This action was brought to set aside an execution sale of real estate. The court below granted the motion of the defendants for a nonsuit, and thereupon entered judgment in their favor. The plaintiff appeals from the judgment.

In October, 1910, one Webb brought an action against Rauer and others to quiet his title to certain lands in Fresno county, and, in June, 1912, obtained judgment against Rauer quieting his title, and for costs amounting to $15.90. On December 19, 1912, an execution was issued on said judgment for costs. The sheriff levied the writ upon a tract of real estate in Fresno county, described as "Lot No. 7, Linda Vista Tract," belonging to Rauer, and sold said tract on the 18th day of January, 1913, to Hertweck and Sparkman, the defendants in this action, for the sum of $46. The sheriff duly made his return on said sale, and, on the 20th day of January, 1914, issued his deed to Hertweck and Sparkman, the purchasers at the execution sale. The complaint alleges that on the day of the execution of the sheriff's deed, and long prior thereto, the plaintiff was the owner of the land so sold, and that the same was worth between $100 and $150 per acre. He further alleges that he was ignorant of the judgment against him, of the issuance of the writ of execution, of the sale of the property, and of the issuance of the sheriff's deed, until about the 4th day of February, 1914; that no one ever notified him of the proposed sale of his property, although the defendants in this action, the attorneys for the judgment creditor, and the sheriff knew that plaintiff's residence was at the city of San Francisco. It is alleged that the writ of execution was issued and levied, and the sale made, with the intent to prevent all knowledge thereof on the part of plaintiff until after the sale and the issuance of the deed thereon, and that all said acts were intentionally concealed from the plaintiff for the purpose of depriving him of the whole of his land for a mere nominal sum. In addition, it is alleged that the sheriff did not offer the land for sale in any smaller parcel than the 20 acres. The plaintiff brought this action on February 13, 1914, offering by his complaint to refund to the defendants the amount paid by them to the sheriff.

By their answer, the defendants, Hertweck and Sparkman, allege that since the execution of the deed they have been the owners of the land. They deny that the land was worth any more than $35 per acre, and deny that plaintiff was ignorant of the judgment, of the execution, of the sale, or of the issuance of the deed by the sheriff, as alleged in the complaint. They further allege that they had no part in or concern with the issuance of the execution, or the levy upon or the sale of said premises, other than to attend at said sale, and become purchasers thereat, and that if, in said proceedings, there was any intent to prevent plaintiff from having knowledge thereof, or if such knowledge was intentionally concealed from plaintiff, they, said defendants, had no part therein, and were in no way responsible therefor. They also deny the allegation that the land was not offered for sale in subdivisions.

[1, 2] Upon a motion for nonsuit, the evidence, and every inference that may fairly be drawn from it, must be viewed in the light most favorable to the plaintiff's claim. Goldstone v. Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776; Hanley v. California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; Estate of Ricks, 160 Cal. 450, 117 Pac. 532. But, giving to the plaintiff every benefit to which he is entitled under this rule, we think it must still be held that he failed to establish a case entitling him to relief.

[3] There was testimony in support of the allegation of the complaint relative to the value of the land. The 20 acres must therefore be taken to have been worth between $2,000 and $3,000. The sum bid at the execution sale was only $46. Clearly, therefore, the purchase price was but a small fraction of the value of the property. It is, however, well settled in this state that mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage. Where, however, the price obtained is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of the relief. These rules are clearly stated, and the authorities cited, in Odell v. Cox, 151 Cal. 70, 90 Pac. 194. The same principles are declared and applied in Winbigler v. Sherman (L. A. No. 4440) 165 Pac. 943, recently decided in this court.

[4] What, then, does the proof in this case show with respect to the unfairness of the sale? The plaintiff, Rauer, testified that he had no knowledge of the judgment, or of the proceedings on execution. But it appears without dispute that on June 21, 1912, 11 days after the entry of the judgment, Mr. H. M. Anthony, the attorney representing him in the action of Webb v. Rauer (and who also represents him here), filed, on behalf of Rauer, a notice of appeal from said judgment, and an undertaking to support such appeal. These facts furnish conclusive evidence that Rauer's attorney had actual knowledge of the entry of the judgment against his client, and such knowledge is, in law, the knowledge of Rauer himself. 6 C. J. 638; Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073. Besides this, there is uncontradicted evidence that on June 17, 1912, the attorneys for Webb wrote to Rauer's attorney, requesting payment of the judgment for the costs; that they mailed him a copy of the bill of costs, and received a letter of acknowledgment; and that, in October, 1912, they again wrote him asking that his client pay the costs. Both requests for payment were ignored. The execution was not taken out until two months after the sending of the second letter.

The notice of sale was published and posted in strict conformity with the requirements of section 692 of the Code of Civil Procedure, but no one gave Rauer or his attorney personal notice that the sale was to take place. The sheriff and the undersheriff testified that they knew who Rauer was, and could have found his address. Hertweck, one of the defendants, had done business with Rauer. He knew that Rauer's place of business was in San Francisco, and that he was reputed to be a man of means. Sparkman, the other defendant, had never heard of Rauer. He testified that he first heard of the proposed sale of the land when one of the attorneys for Webb told him that there was to be an execution sale, and asked him if he did not want to bid.

[5] The evidence which we have summarized constitutes plaintiff's entire showing on the question of the fairness of the sale. We are unable to find in it anything going to show fraud, unfairness, or oppression. The main stress of the appellant's argument is put upon the point that neither the judgment creditor, the sheriff, nor the purchasers notified the judgment debtor of the proposed sale. But there was no obligation upon them to give him any such notice. The statute defines how notice of an execu-

tion sale must be given. To say that a sale may be set aside because some other notice was not given would be to amend the statute, and this we cannot, of course, do. When the officer conducting the sale has done the acts prescribed by the Code, he has done his full duty. He is not required to search for the debtor and give him any further notice than that which the law exacts. Nor is any such duty imposed upon the judgment creditor. Much less is one who may contemplate bidding at an execution sale called upon to concern himself with the question whether the debtor has actual knowledge of the proceeding.

[6] No inference of impropriety is to be drawn from the fact that the attorneys for the creditor informed one of the defendants that a sale was to be had, and suggested that he bid. The judgment debtor is benefited, rather than harmed, by any action which tends to increase the number of bidders.

[7] It is argued that the complaint alleges, and the answer fails to deny, that the defendants knew that the writ was issued, and the sale made, with the intent to prevent knowledge thereof by the plaintiff, and to deprive him of his land. We think the complaint, properly construed, does not charge that the defendants knew of the alleged intent. But, in any event, the answer was clearly designed to dissociate the defendants from any connection with the purpose, which, so far as they could know, may have been entertained by others, to take an unfair advantage of the plaintiff. This may fairly be interpreted as a denial of any knowledge on their part of such purpose, and it was apparently so treated at the trial.

The attempt to show unfairness in the sale comes down simply to this: That the execution sale was regularly made upon due statutory notice, but that the judgment debtor did not, in fact, know of the sale, and no one gave him notice of it. He did, however, know that a judgment had been entered against him, and must be deemed to have known that his property might be levied on at any time. He failed to pay the judgment, and took no steps to protect his property until many months after the entry of judgment. He then found that a sale had been had, and that the time for redemption had expired. The resulting loss can more properly be attributed to his neglect of his own interests than to any unfairness on the part of the judgment creditor of the purchasers. The case presents none of the peculiar circumstances of oppression or inequitable conduct which were held, in Odell v. Cox and in Winbigler v. Sherman, to justify relief from a sale made for an inadequate price.

[8] It is claimed that the sale was irregular because the land was not offered in subdivisions. Assuming that the evidence shows that the sale was made as claimed by the appellant, there is no evidence that the situation was such as to require the sheriff to sell the land otherwise than as a whole. Section 694 of the Code of Civil Procedure provides that:

> "When the sale is of real property, consisting of several known lots or parcels, they must be sold separately."

The land is described in the record as "Lot No. 7 of the Linda Vista tract." There is nothing to indicate that it consisted of other known lots or parcels. A sale in parcels was not therefore required. Gleason v. Hill, 65 Cal. 17, 2 Pac. 413; Connick v. Hill, 127 Cal. 165, 59 Pac. 832; Meux v. Trezevant, 132 Cal. 487, 64 Pac. 848.

Finally, the appellant makes the point, raised by an amendment to his complaint, that the judgment upon which the execution was issued was void. It appears that the original action of Webb was brought against two defendants, Dewey Navigation & Trading Company and Rauer, for the purpose of quieting Webb's title to certain lands. Dewey Navigation & Trading Company defaulted, and Webb took judgment against it on March 28, 1912. This judgment, it is alleged in the amendment, is still in force. Rauer answered, and thereafter Webb took against him the judgment which formed the basis of the execution. The appellant's contention is that since, as this court has often stated, there can be but one final judgment in a case, the action was disposed of by the judgment against Dewey Navigation & Trading Company, and that the later judgment against Rauer was void.

[9] Without regard to other possible answers to the contention, the rule relied upon has no application to actions in which separate and independent relief is sought against several defendants. The court may, under the express provision of section 579 of the Code of Civil Procedure, render judgment against one or more of the defendants, "leaving the action to proceed against the others, whenever a several judgment is proper." Cole v. Roebling Construction Co., 156 Cal. 443, 105 Pac. 255; Bell v. Staacke, 159 Cal. 193, 115 Pac. 221.

[10] It does not appear that the two defendants in the suit brought by Webb had any unity of interest or claim making it improper to render several judgments against them. On this collateral attack on the judgment, it will be presumed that they did not.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 300)

HOLDEN et al. v. MENSINGER et al.

(Sac. 2314.)

(Supreme Court of California. June 6, 1917.)

1. Appeal and Error 🔑909(1)—Presumption in Favor of Judgment.

In the absence of a showing that an action was not timely commenced, the presumption on appeal will be in favor of the judgment rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675.]

2. Appeal and Error 🔑680(1)—Transcript—Contents—Order Overruling Demurrer.

An objection that transcript failed to show order sustaining or overuling demurrer was frivolous, where the record showed appellant's recognition of the fact that it had been overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2880.]

3. Mechanics' Liens 🔑281(1)—Description of Property—Sufficiency of Evidence.

In suit to foreclose mechanic's lien, it was immaterial that witnesses colloquially spoke of the building as the "M. theater," where there was evidence of correct description, ownership, and knowledge of work done.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-567.]

4. Mechanics' Liens 🔑290(3)—Findings—Conformity to Pleadings.

Where mechanic's lien claimants sued in individual capacity and as copartners, and lien claim was filed in firm name, findings declaring that such individuals comprised the named firm did not create a fatal variance.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 594.]

5. Pleading 🔑398 — Variance Between Allegations and Proof.

The variance between pleading and proof is fatal only where it has misled or may serve to mislead the adverse party, as where proof is addressed to issues different than the specific issues which the defendant was brought into court to meet, in which case it will be presumed that he was misled to his injury; he not being sufficiently advised, so as to be prepared to meet such allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1338.]

6. Mechanics' Liens 🔑277(5) — Variance Between Claim and Complaint.

There was no variance between mechanic's lien claim, filed in name of a partnership with which contract was alleged to have been made, and the complaint, naming plaintiffs in their individual capacity and as copartners.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 552.]

7. Mechanics' Liens 🔑135 — Sufficiency of Claim — Necessity of Stating Plaintiff's Firm Name.

The law does not require that members of a copartnership shall be specifically named in filing a copartnership lien claim.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 209.]

8. Partnership 🔑197—Pleading—Use of Firm Name.

A complaint in a partnership's mechanic's lien foreclosure will be demurrable, where it charges in the name of the copartnership alone.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360.]

9. Partnership 🔑197 — Action by Partners—Use of Firm Name.

Although a copartnership may be sued under its fictitious name, under Code Civ. Proc. § 388, in action brought by the partnership, the full names of all partners must be stated, since that was the rule at common law.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360.]

10. Partnership 🔑212—Action by Partners—Failure to File Certificate.

It was not a fatal defect that a complaint by partnership using a fictitious name did not show filing of certificate required by Civ. Code, §§ 2466, 2468, and the omission merely subjected the complaint to a plea in abatement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 404-407, 410, 414.]

11. Appeal and Error 🔑1039(2)—Harmless Error—Action by Partner—Failure to File Certificate.

A partnership's failure to show filing of certificate regarding its fictitious name, as required by Civ. Code, §§ 2466, 2468, was immaterial, where that issue was fully tried, and compliance therewith shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4075.]

12. Mechanics' Liens 🔑263(10)—Dismissal of Principal Debtor—Effect on Property Owner's Liability.

The dismissal of primary debtors, personally liable, in mechanic's lien foreclosure, did not release the property from the lien, since the action was not analogous to that of a mortgage foreclosure, and in a mechanic's lien foreclosure the real property is an independent fund, to which the lien claimant may resort without regard to the personal liability of him with whom he has contracted, and is an action in rem.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 481.]

13. Mechanics' Liens 🔑263(9)—Joinder of Primary Debtor and Property Owner.

In mechanic's lien foreclosure, the primary debtor and the owner of property impressed with a lien may be joined as defendants; but they are not both necessary parties defendant to the same action.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 479.]

14. Mechanics' Liens 🔑291(1)—Judgment—Deduction of Other "Claims."

Code Civ. Proc. § 1193, requiring deduction of all other claims from the judgment, in contractor's suit to foreclose mechanic's lien, refers to valid lien claims filed for work done for the contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 599.

For other definitions, see Words and Phrases, First and Second Series, Claim.]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Thomas Holden and another against W. R. Mensinger and others. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Griffin & Carlson and J. M. Walthall, all of Modesto, and John L. McVey, of Oakland, for appellant. Austin Lewis and R. M. Royce, both of Oakland, for respondents.

HENSHAW, J. This is an appeal from a judgment given in favor of plaintiffs in their action as contractors to foreclose their mechanic's lien upon the property of appellant, Mensinger. Plaintiffs sued in their individual capacity and as copartners doing business under the firm name and style of the Thomas Holden Decorating Company, a copartnership. Their lien claim was filed in the name and on behalf of the Thomas Holden Decorating Company, a copartnership. The material which they furnished and the labor which they performed were in and about the decoration of a theater erected on the appellant's land.

[1] Appellant advances against the judgment certain untenable and highly technical propositions. Thus, he declares that the transcript does not show that the action was commenced within 90 days after the filing of the lien claim. This manifestly arises from the fact that the original complaint was superseded by an amended complaint, which appears in the transcript. He raised no plea of the statute of limitations, and does not even now contend that the action was not commenced in time, as manifestly it was, or he would have been at pains to show the contrary. Suffice it to say that, in the absence of a showing of the fact, the presumption will favor the judgment.

[2] He next contends that he interposed a general demurrer, and that "the transcript fails to show that any order was made by the court sustaining or overruling this demurrer." Again it may be said that the objection is wholly frivolous, in view of the fact that in more than one place in the record it is shown that appellant's counsel knew and recognized the fact that the demurrer had been overruled. Thus:

> "Mr. Royce. Well, may it please the court, we had a demurrer interposed upon the ground the complaint did not state facts sufficient to constitute a cause of action, and the demurrer was overruled."

[3] Still further, it is argued that there is no testimony in the record showing that any materials were furnished or labor performed upon the property, or any part of it, against which the lien is sought. This contention is based upon the fact that in their evidence many of the witnesses colloquially spoke of the building as the "Modesto Theater." But the property was described as being "on Tenth street, and located on lots 9, 10 and 11, block 56, and is known as the Mensinger Block." It is further abundantly established that Mensinger owned the land, and not only knew of the erection of the theater, but knew personally the work that was being done by these plaintiffs.

[4] Appellant next contends that there is a fatal variance between the lien claim and the complaint, which are as above indicated, and the findings, which declare that "Thomas Holden and Charles Frederick Holden comprise the firm of Thomas Holden Decorating Company, a copartnership," etc. Upon broad grounds the contention is without merit.

[5] A variance is fatal only when it has misled, or by its nature may serve to mislead, an adverse party; as, where he is brought into court to meet specific issues of fact, and the proof is addressed to quite different issues, it will be presumed that he has been misled to his injury in not being sufficiently advised of the nature of the action, so as to be prepared to meet it with evidence. But where this reasoning fails of applicability the variance itself ceases to be fatal, and such manifestly is the situation here presented.

[6, 7] But more specifically there is no variance whatsoever between the lien claim and the complaint; the lien claim properly declaring that the contract was with the copartnership, since in fact it was. Nor is there any requirement in the law that in filing a copartnership lien claim the members of the copartnership shall be specifically named.

[8, 9] Coming, next, to the complaint, it would have been demurrable if it had charged in the name of the copartnership alone. Gilman v. Cosgrove, 22 Cal. 356. While a copartnership acting under a fictitious name may be sued in that name (Code Civ. Proc. § 388), the rule governing its prosecution of an action is that the full names of all the partners must be stated. "Partners cannot, at common law, sue or be sued by their partnership names; but by statute in some of the states, as in Ohio, Iowa, etc., this is allowed, and so far partnerships are treated as corporations. Elsewhere their demands are joint and personal, and must be enforced by them as individuals." Bliss, Code Pleading, § 145; Williams v. S. P. Railroad Co., 110 Cal. 457, 42 Pac. 974; Clement v. British American Assurance Co., 141 Mass. 303, 5 N. E. 847.

[10] It is next urged by appellant that there is a fatal defect in the complaint, in that it appears upon the face of it that the copartners were doing business under a fictitious name, and the complaint itself does not aver a compliance with sections 2466 and 2468 of the Civil Code, which averment is asserted to be necessary when upon the face of the pleading the fictitious name of the copartnership appears. Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 577, 112 Pac. 454. But neither of these cases decides, nor does any other case decide, as appellant contends, that this omission is a "fatal defect." The omission merely subjects the complaint to the special defense of a plea in abatement, which plea was not here interposed.

[11] Upon the trial satisfactory evidence was offered of the timely filing of an adequate certificate. The fact, therefore, was established against appellant's contention, and while, had the complaint been more carefully drawn, it would have pleaded this compliance with the sections of the Civil Code,

the omission becomes immaterial, in view of the fact that the issue was fully tried and determined against the contention of appellant.

[12] Plaintiffs dismissed their action against Poland, the original contractor, and against the Coast Theater Company, who, it may be conceded, were primarily liable for plaintiffs' claim. It is contended that this dismissal of the primary debtors personally liable relieved the property of appellant, Mensinger, from the lien. To plaintiffs' argument that no personal or deficiency judgment could be entered against the landowner, Mensinger, the complete answer is that no such judgment was entered. To the argument that the property should be released from the burden of the lien by virtue of the dismissal against the primary debtor, an analogy is sought to be drawn between actions such as this and actions to foreclose mortgages resting on private contract and the rights of sureties and guarantors. The analogy is fallacious. In a mortgage or in a suretyship the liabilities are based upon an agreement of the parties, and by operation of law the release or discharge of the debtor releases the sureties for the debt. In the case of a mechanic's lien the real property is in its nature an independent fund, to which the lien claimant may resort without regard to the personal liability of him with whom he has contracted. It is an action in rem. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

[3] Our cases hold (Giant Powder Co. v. Flume Co., 78 Cal. 193, 20 Pac. 419) that the primary debtor and the owner of the property impressed with the lien may be joined as defendants in a single action. But it is not declared that they are necessary parties defendant, and the ground of the ruling is simply that of convenience in avoiding a multiplicity of suits.

[14] It is contended, because the copartners employed an artist to do a part of the decorative work and he testified to the value of the labor and material furnished by him, that this artist had an independent claim for the value of these services, and consequently that it was error to include this amount in the judgment given in favor of plaintiff. The evidence was abundant to support the court's finding of the value of the work done and material furnished. However, the testimony of the artist, a son of one of the copartners, but not a member of the copartnership, was that the value of his services was $1,250, that he had received no part of it, and had filed no lien claim for it. Section 1193 of the Code of Civil Procedure, at the time of the trial of this action, provided that:

> "Any contractor shall be entitled to recover upon a lien filed by him only such amounts as may be due him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished as aforesaid and embraced within his contract."

This contention also is without merit. Manifestly the "claims" for which deductions are to be made are claims based upon valid lien claims filed for work done or material furnished to the claimant contractor, and therefore to be deducted from the amount of his recovery, for the plain and principal purpose of this provision is to protect the owner against the possibility of being forced to make double payments. Such laborers, artisans, or materialmen could only have a recovery against the owner by filing their lien claims and prosecuting their actions, and therefore, we repeat, it is only in such cases that section 1193 contemplates a deduction. It would not only do violence to the statute, but would work a grave injustice upon these plaintiffs, if they were not allowed to recover from the owner the value of these services, for the payment of which they are legally bound to the man who performed them.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J; LORIGAN, J.

(175 Cal. 336)

RYSTINKI v. CENTRAL CALIFORNIA TRACTION CO. (Sac. 2331.)

(Supreme Court of California. June 6, 1917.)

1. Carriers 🔑314(1, 2)—Injury to Passenger—Complaint.

In action by passenger against street railroad, a complaint, setting forth the defective state of the track and roadbed and that near where plaintiff was injured the car, by reason of such condition, was caused to swing violently, etc., whereby plaintiff was violently thrown, etc., *held* to sufficiently set forth the manner of the injury and defendant's negligence as its cause.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1273, 1275½.]

2. Pleading 🔑365(1)—Motion—Waiver.

Where the court failed to rule on defendant's motion to dismiss a count of the complaint, the motion was waived by failure to renew it before the close of the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1163-1165, 1167, 1170-1172.]

3. Carriers 🔑318(4) — Negligence as to Passengers.

That at some time before a passenger's injury the conductor on the car was conversing with a passenger did not indicate breach of duty towards the injured passenger, where he was available to give the signal when she decided to have the car stopped, and it did not appear that he was in a position where he could not see the alighting passenger and give the signal to resume the trip after she might alight.

[Ed. Note.—For, other cases, see Carriers, Cent. Dig. §§ 1307, 1308.]

4. Appeal and Error 🔑1053(1)—Evidence Tentatively Admitted — Cure by Subsequent Instruction.

Where cross-examining testimony of a witness as to a certain point was stricken out by a plenary ruling as not being proper impeachment.

any ill effect of such testimony as to the adverse party was removed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178, 4184; Trial, Cent. Dig. § 977.]

5. Witnesses ⇨323—One's Own Witness—Impeachment.

In action by passenger against street railroad for injuries by being thrown from the car because of rough track, where a witness for plaintiff failed to testify as expected that the track was rough and the movements of the car erratic, but denied those very things, it was permissible for plaintiff to impeach such testimony, under Code Civ. Proc. § 2049, as to impeaching one's own witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1096.]

6. Trial ⇨253(4) — Duty to Passengers — Instruction.

In action for injuries to street railroad passenger, an instruction that "common carriers of passengers bind themselves to carry safely those whom they take into their cars, so far as human care and foresight will do so, that is, with the utmost care and vigilance of a very cautious person, and such carriers are responsible for any, even the slightest, negligence," preceded by an instruction that common carriers are required to do all that human care, vigilance, and foresight "reasonably can do under all the circumstances" to prevent accidents to passengers, correctly stated the law, and did not impute to the carrier the duties of an insurer nor cut off the carrier from the benefits of the law with reference either to contributory negligence or inevitable casualty.

7. Carriers ⇨321(23) — Injury to Passengers—Instructions.

In action by passenger for injuries, where, although plaintiff had abandoned a count of negligence in starting the car, the gist of the negligence relied on was defendant's operation of the car over a track so rough that plaintiff was thrown from the car, instructions covering defendant's duty in the operation of its cars were properly given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1335, 1336.]

8. Trial ⇨253(4) — Instructions Ignoring Issues.

In action by a passenger for injuries, an instruction on the care required by a passenger, stating that "it is no defense to this action that the plaintiff by her own act has contributed to her injury; it must appear that by her own fault she has so contributed"—was not objectionable as entirely excluding the defense of contributory negligence, but properly left for the jury's determination the question whether plaintiff's acts were negligent or not.

9. Carriers ⇨316(1)—Injury to Passenger—Burden of Proof.

Mere injury to a passenger does not place upon the carrier the duty of explanation, but the establishment of such injury, coupled with proof of coincident and unusual happening to the car, does cast upon defendant the burden of exculpation by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285, 1294.]

10. Trial ⇨253(4)—Instructions—Damages—Ignoring Statute.

In action for personal injuries, an instruction that "the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the common sense and unbiased judgment of the jurors," was not objectionable as ignoring Civ. Code, § 3283, allowing damages for detriment resulting after the commencement of an action in tort or certain to result in the future, since the statute does not more definitely prescribe the manner of assessment of such damages than does such instruction.

Department 2. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Hilda Rystinki against the Central California Traction Company. From judgment for plaintiff, defendant appeals. Affirmed.

Butler & Swisler, of Sacramento, for appellant. Welsh & Henry, of Sacramento, for respondent.

MELVIN, J. Plaintiff sued for damages for personal injuries received as alleged by being thrown from one of the electric street cars of defendant upon which she was traveling as a passenger. Judgment for $5,000 was awarded, and defendant has taken this appeal therefrom.

[1] The plaintiff sought to plead her cause of action in two counts of the second amended complaint, by the first of which her fall from the car and the consequent bodily injury were ascribed to the sudden starting and putting in violent motion the car from which plaintiff was about to alight, without giving her sufficient time to reach the ground safely. By the second count it was alleged, in substance, that plaintiff was thrown from the car and injured by reason of the operation of said car over a defective track and roadbed which caused it to "jerk and swing and sway back and forth." This part of the pleading was unsuccessfully attacked by general and special demurrers and the court's rulings thereon are assigned as errors by appellant upon the ground that it does not appear that plaintiff was thrown from the car by reason of the negligence set forth; that there is no announcement of any causal connection between defendant's negligent maintenance of a defective track and roadbed and the violent throwing of plaintiff to the ground. While the pleading might be made clearer, we think it does sufficiently set forth the manner of the injury and the negligence of defendant as the causative element thereof. The defective state of the track and roadbed is set forth quite in detail, and the complaint contains an averment that at and near the point where plaintiff was injured, the car, by reason of such condition, was caused to swing violently, etc. The pleading also contains the averments that:

> "By reason of the said insufficient, unsuitable, and unsafe and defective condition of said roadbed and track, as aforesaid, and the negligent excavation of gravel and dirt under and about the same, as aforesaid, thereby greatly weakening the same, * * * and causing the said car upon which plaintiff was as such passenger to violently jerk and swing and sway back and forth, all as aforesaid, * * * the said plaintiff, without any fault or negligence

on her part, was violently thrown from said car to the ground headfirst and thereby rendered unconscious, and sustaining great damage and injury."

This is followed by a somewhat minute description of the injuries.

[2, 3] At the trial plaintiff elected to rely upon the cause of action pleaded in the second count, whereupon defendant moved to dismiss the first count. The court did not at that time grant the motion, but said:

> "I prefer to let the matter be retained and not dismissed at this time. We will pass on that later on."

The motion was not renewed. We do not see that the plaintiff was prejudiced by the court's action, even though the ruling was made in the presence of the jury. Moreover, the motion was waived by failure to renew it before the close of the trial. It is argued, however, that the court erred in admitting evidence properly relative only to the first cause of action and in giving instructions suitably applicable only to matters pertaining to that count. The testimony which, as appellant asserts, was erroneously considered, related to the conduct of the motorman and conductor. Plaintiff herself testified that, after she indicated to the conductor her desire to leave the car at Rose avenue, he pulled the strap attached to the bell and walked into the car; and that she did not know what he did there. Questions were propounded to the motorman (who was called as a witness by plaintiff) tending to show that some time before the car reached the place where plaintiff was injured the said motorman looked into the car and observed the conductor in conversation with a woman. The instructions to which appellant objects as prejudicial contain certain references to the responsibility of a corporation for the management of its cars, and it is argued that the testimony regarding the conduct of appellant's servants, coupled with these instructions, misled the jury into the belief that plaintiff was depending upon the first cause of action which had been abandoned. The trouble with this argument is that the indicated conduct of the motorman and the conductor was not negligent. Surely the motorman's glance into the car at a time prior to the accident was not negligence, or, if negligence, was not and could not have had any relation to plaintiff's injuries. Nor did the fact that at that remote period the conductor was conversing with a passenger indicate breach of duty toward plaintiff on his part because he was available to give the signal when she decided to have the car stopped. Entering the car after ringing the bell was not a negligent act on his part because it does not appear that he was in a position after going inside the car from which he could not see the passenger and give the signal to resume the trip after she might alight. Nor did the instructions relative to the duty of a corporation in operating its cars tend to mislead the jurors, because the case was clearly tried upon the theory not that defendant's servants caused plaintiff's fall from the car by their negligent starting of the car but that she was precipitated to the ground by its movement from side to side in consequence of the imperfect condition of the track and roadbed.

Plaintiff called as a witness Mr. Thum, who had been motorman on the car from which she was thrown. Some questions were asked of him relative to the conductor's conversation with a lady in the car as it was passing the race track some time before the accident. His answers did not satisfy plaintiff's counsel, and they were permitted to cross-examine their witness with reference to alleged statements made to them regarding that matter. This was improper, as was the introduction of impeaching testimony upon the same subject, to the effect that Thum had said to counsel in a conversation at his own home on a date designated that he had seen Johnson, the conductor, leaning over and talking to a blonde woman. The only real difference between the actual testimony of the witness and his purported statement to counsel was that on the stand he said he saw Johnson speaking to the lady, while in his statement, as quoted by the impeaching witnesses, he said Johnson was holding a conversation with her. The impeachment was quite as immaterial as was the testimony itself. But Thum was asked questions about the condition of the roadbed and track at the point where plaintiff was injured, and he was interrogated with reference to the jolting or jarring of the car just before the accident occurred. He replied, in substance, that the roadbed and track were all right at that place and that the car did not sway, jump, or jerk. Counsel were permitted to cross-examine him and to lay the foundation for impeachment by asking if he did not say to them at a time and place indicated and in the presence of persons named that just before plaintiff left the car it jerked, lurched, and wobbled and that on numerous occasions at that part of the road the roughness of the track had caused the trolley to be thrown off the wire. Witness denied making such statements. Subsequently a motion was made to strike out all of Mr. Thum's testimony on the ground that it was elicited in the course of a cross-examination which plaintiff's counsel were not properly permitted to conduct as the witness (so defendant's counsel argued) had stated nothing to the detriment of the plaintiff's case. In ruling on the motion the learned judge who presided at the trial called attention to the fact that witness testified in a damaging way to plaintiff's case when he said the car did not swing nor sway and that therefore impeachment regarding that matter was perfectly proper if witness had made different statements before the trial. Regarding the cross-examination of the witness upon the subject of the presence of one woman in the car, the court said:

> "In reference to the other point, he testified first rather vaguely about whether there were one or two women on the car. I examined him then myself and the witness stated there was one woman on the car. I asked him, do you state that is a fact that there was one woman on the car, and he said, 'Yes.' * * * I assume that, before they get through, they will prove that there were two women there in connection with their case. If they do not prove that, that part of their evidence, that part of the impeachment, contradictory statements will be stricken out."

[4, 5] Afterwards when Mr. Welsh, of plaintiff's counsel, took the stand to testify with reference to the interview which he and Mr. Henry, his colleague, had with Mr. Thum, the court said:

> "In view of the testimony appearing that counsel for plaintiff has not attempted to prove that there were two women on the car at the time of the accident, and it developing that was not part of their case, nor the theory upon which they base their right to recover, the testimony of the witness Thum that there was only one woman on the car at the time of the accident was not contrary to their theory and was not adverse testimony, and the impeachment to that extent will not be permitted. The testimony on that behalf will be stricken out; the remaining portion of the testimony, however, may stand, as to the condition of the track and so forth, remains in the case; so any testimony by yourself, Mr. Welsh, will be limited to that."

The argument made by appellant is that this ruling did not strike out nor limit the ill effect of that part of the testimony which tended to show that the conductor was talking to a woman and neglecting his business. There is no force in this contention. The ruling was plenary and removed from the consideration of the jurors all of the testimony regarding the presence of a woman other than the plaintiff in the car, and consequently it also took from the jury all statements referring to a supposed conversation between her and the conductor. Impeachment of the witness upon his testimony that there was no jar nor unusual motion of the car at the time of plaintiff's injury was perfectly proper. Undoubtedly it is the rule, sustained by such authorities as People v. Jacobs, 49 Cal. 384, People v. Creeks, 141 Cal. 529, 75 Pac. 101, and a score of others, that where a witness called by a party to an action has simply failed to testify as expected it is not permissible for the party calling him to prove that he had previously made statements which if sworn to at the trial would tend to support the case of the proponent of the witness. In order to justify such impeachment, the witness must give testimony against the party calling him. But that is just what Thum did. Called, and therefore indorsed by plaintiff, he not only failed to meet the expectation that he would say the track was rough and the movements of the car erratic, but he denied those very things, thereby entitling plaintiff to remove if possible, the impression that such testimony must have made. Section 2049, Code Civ. Proc.; Zipperlen v. Southern Pacific Co., 7 Cal. App. 206-214, 93 Pac. 1049.

[6] Appellant specifies as prejudicial error the giving of certain of the instructions. The court told the jury that:

> "Common carriers of passengers bind themselves to carry safely those whom they take into their cars, so far as human care and foresight will do so, that is, with the utmost care and vigilance of a very cautious person; and such carriers are responsible for any, even the slightest negligence."

By the instruction immediately preceding this one the jurors were informed that common carriers are required to do all that human care, vigilance, and foresight "reasonably can do under all the circumstances" to prevent accidents to passengers. Taken together, these instructions correctly state the law. They do not impute to the carrier the duties of an insurer, as appellant contends that they do, nor does the expression "responsible for any, even the slightest negligence," cut off appellant from the benefits of the law with reference either to contributory negligence or inevitable casualty. The degree of caution and care imposed upon a carrier of passengers is properly defined by the instruction. Treadwell v. Whittier, 80 Cal. 574-585, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Bosqui v. Sutro R. Co., 131 Cal. 390-401, 63 Pac. 682; Roberts v. Sierra Ry. Co., 14 Cal. App. 180-195, 111 Pac. 519, 527.

[7] Two other instructions are criticized, not because wrong in principle, but because they related in part to the duty of defendant in the management of the car—an issue which, according to appellant, had been abandoned. It is true that plaintiff had abandoned that count which related to defendant's alleged negligence in starting the car in such manner as to project plaintiff from the platform to the street, but the negligence averred in the other count did not exclude all questions regarding the operation of the car. The gist of the averred negligence was, indeed, the defendant's operation of its car over a track so rough and unsuitable that plaintiff a passenger, was thrown and injured. Therefore the instructions covering the duty of a common carrier in the operation of its cars were properly given.

[8] Another instruction contained the following as its opening sentence:

> "It is no defense to this action that the plaintiff by her own act has contributed to her injury; it must appear that by her own fault she has so contributed."

This language is followed by a statement of the rule requiring of a passenger only ordinary prudence, not very great care. Appellant's objection goes to the first sentence, which, as its counsel assert, informed the jury, in effect, that the defense of "contributory negligence" should be disregarded by them altogether. We discover no such vice in the quoted sentence. Indeed, it was very appropriate to the facts of this case as disclosed by the undisputed evidence. It was shown that plaintiff arose from her seat and prepared to alight from the car before reaching her destination. Assuming that she was thrown from the car by its unusual motion, it may be truly said that her acts of arising to her feet and leaving the part of the car in which she had been seated contributed in a sense to her injury, but it was for the jury to determine whether such acts were negligent or not, under all of the circumstances revealed by the evidence.

[9] The court gave the following instruction:

> "You are instructed that contributory negligence on the part of the plaintiff cannot be presumed from the mere fact of injury but must be proved. On the other hand, proof of the injury, *coupled with proof that it proceeded from a sudden, unusual or violent jerking, or swinging, or swaying of the car, while the plaintiff was preparing to alight*, casts upon the defendant, the burden of proving that the injury, was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff." (The italics are ours.)

With the exception of the italicized portion, this is the same instruction condemned by this department in Steele v. Pacific Electric Ry. Co., 168 Cal. 375-377, 143 Pac. 718; but the addition of the words in italics rescues the instruction from the vice of the court's direction to the jury which we there reviewed. It is true that the mere injury to the passenger does not place upon the carrier the duty of explanation but the establishment of such injury, coupled with proof of coincident and causal collision, derailment, or other unusual happening to the car does cast upon defendant the burden of exculpation as indicated by the instruction.

[10] The giving of two other instructions is assigned as error. By one of these the jurors were told that:

> "The law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the common sense and unbiased judgment of the jurors."

The other instruction was in the form approved in Ryan v. Oakland Gaslight & Heat Co., 21 Cal. App. 14-22, 130 Pac. 693—a case in which this court denied a petition for transfer. This court has frequently approved the statement in Aldrich v. Palmer, 24 Cal. 513-516, that:

> "In actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury."

It is argued, however, that the instruction was erroneous because it ignored section 3283 of the Civil Code, which does, as appellant insists, prescribe a fixed and definite rule for the assessment of damages for detriment resulting after the commencement of an action in tort or certain to result in the future. It is true that the cited section does enumerate certain injuries for which compensation may be awarded, but the manner of assessment of such damages is no more definitely prescribed than in the instruction criticized. That instruction merely assigned to the unbiased judgment of the jury the assessment of the amount of damages, if any, to be awarded.

Error is predicated upon the modification by the court of proposed instructions and refusal to give certain proposed charges. We have examined these assignments and are satisfied that they are without merit. The charge to the jury was full, clear, and fair, and defendant was not injured by any of the rulings regarding which complaint was made.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 371)

LEONARD v. JAFFRAY. (L. A. 3606.)

(Supreme Court of California. June 7, 1917.)

1. MUNICIPAL CORPORATIONS 🔑972(5)—TAXATION—AFFIDAVITS TO ASSESSMENT ROLL.

Under an ordinance requiring the assessor to "take and subscribe an affidavit in the assessment roll," and that the city clerk must deliver the corrected assessment roll to the council with "an affidavit thereto affixed, subscribed and sworn to by him," where such affidavits, although signed, were not properly sworn to, the city had no jurisdiction to sell property so assessed for nonpayment of the tax; the proper authentication of the equalized assessment roll being made prerequisite to all future proceedings.

2. MUNICIPAL CORPORATIONS 🔑972(5)—AFFIDAVIT TO ASSESSMENT ROLL.

Where an ordinance provided that the clerk's affidavit must be subscribed and sworn to and affixed to the corrected assessment roll, neither the prima facie evidence of the regularity of antecedent proceedings furnished by deed to the city nor the curative clause of the ordinance relating to informalities was available against a clear showing that the clerk failed to properly authenticate the corrected roll.

3. MUNICIPAL CORPORATIONS 🔑980(4)—SALE FOR TAXES—ORDINANCE—"SUBSTANTIAL."

In view of Los Angeles City Charter, § 46, requiring collection and enforcement of municipal taxes to be in substantially the same mode as in case of state and county taxes, and Pol. Code, § 3897, requiring notice of sale for state and county taxes for three successive weeks, an ordinance providing for sale for municipal taxes upon only ten days' notice was invalid; such ten days' notice not being a "substantial" compliance with the charter and Political Code, for the length of time during which a notice must be given is quite as substantial as the requirement that notice must be given at all.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2127.

For other definitions, see Words and Phrases, First and Second Series, Substantial.]

In Bank. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by R. W. Leonard against J. R. Jaffray. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

B. P. Welch and J. R. Jaffray, both of Los Angeles, for appellant. Crouch & Crouch and Chas. S. Conner, all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued to quiet title to the following described real property in the city of Los Angeles:

> "Lot 4, in Block 'H,' of Glassell's subdivision of part of lots 3, 6 and 7, in block 39, Hancock's survey as per map thereof on file in Book 6, page 138, of Miscellaneous Records, in the office of the county recorder of said county."

It was alleged that plaintiff was "the owner in fee and entitled to the possession of" the land. Defendant, Jaffray, answered, setting up his own possession and title, and also filed a cross-complaint to which plaintiff made answer. By his cross-complaint J. R. Jaffray asked to have his title to the property quieted as against Leonard's claims. The cause was tried partly upon stipulation and partly upon testimony and documentary proof. Judgment was in favor of plaintiff. From said judgment and from an order denying his motion for a new trial defendant and cross-complainant appeals. Some of the facts stipulated were that "R. N. Withnell was formerly the owner of said lot, and he transferred the title to his daughter, Grace E. Leonard, who died a widow, leaving no will, and leaving Richard W. Leonard her son and only heir at law, who is now the administrator of her estate"; that the city taxes upon the said lot for the year 1903 have never been paid except by way of sale of the lot; and that "certain proceedings were had in 1904 for the purpose of selling said lot to said city for nonpayment of said taxes of 1903, and in 1909 a deed was made to the city under such proceedings, there having been no redemption or repurchase of said lot from said city by any one." The purported deeds to the city and from the city to James R. Jaffray were stipulated into the record by copies, plaintiff admitting their execution, but reserving the right to make all legal objections to them. The final paragraph of the stipulation is as follows:

> "The right, title and interest of said James R. Jaffray in and to said lot is derived and deraigned through the several proceedings above mentioned and should it be made to appear that an essential element of such proceedings is wanting, and that the defect is incurable, then and in that case his title fails and he has no other interest in the lot than the amount he paid, provided such payment is found to be a legal claim against the same, and in case there has been a compliance with law in such proceedings, then and in that case all the right, title and interest of Richard W. Leonard or those through whom he claims, as administrator or in person, has been wholly divested and terminated, including all rights of redemption or repurchase from the city."

[1, 2] The most important question to be determined therefore is this: Did the city ever acquire title to the property through the tax proceedings? The court found the assessment for the year 1903 deficient and defective in this, that the assessor's affidavit as required by law was not attached to the assessment book. It was found that the assessment book contains what purports to be such affidavit in the form required by law and subscribed by the assessor, but it is not sworn to as in the statute required, before any officer entitled to administer an oath. The requirement of the ordinance under which the purported assessment of plaintiff's land was made is that on or before the first Monday of July in each year the assessor must "take and subscribe an affidavit in the assessment roll" in substantially a prescribed form. The ordinance further provides that the city clerk, who is ex officio clerk of the board of equalization, must record all changes, corrections, and orders made by the board, and on or before the last Monday of August must deliver the assessment roll so corrected to the council with "an affidavit thereto affixed, subscribed and sworn to by him" in a prescribed form. The required form was made out and signed by the clerk, but no jurat was attached to it. These omissions of the officers charged with the duty of authenticating the assessment were fatal to the acquiring of jurisdiction to sell the property to the city. Respondent depends upon the rule announced in Miller v. Kern County, 137 Cal. 516, 70 Pac. 549, and we can see no escape from the conclusion supported by that case that at least the proceedings following the clerk's omission properly to certify the equalized roll were invalid. It was said in that case that without the affidavit of the clerk affixed to the assessment book the auditor had no power to compute the taxes. True, the requirements of the ordinance were not exactly the same as those of the law considered in the Miller Case in that the roll was not passed to the auditor or other officer for extension of the levy after equalization, but the proper authentication of the equalized roll is none the less made prerequisite to all future proceedings. Neither the prima facie evidence of the regularity of the antecedent proceedings furnished by the deed to the city nor the curative clause of the ordinance relating to informalities is available against the clear showing that the clerk failed to authenticate the corrected roll as required by the ordinance. If the ordinance merely commanded that an affidavit should be taken and sworn to when the equalization of the taxes was completed, perhaps the appearance of the affidavit without a jurat might be cured by the presumption of regularity; but the ordinance requires that the affidavit must be subscribed and sworn to and affixed to the assessment roll. Without a proper jurat the writing in the record is not an affidavit at all, but amounts merely to a certificate. It is not even a statement on oath, and it entirely fails to measure up to the requirements of the statute. Metcalf v. Prescott, 10 Mont. 283–294, 25 Pac. 1037;

Cosner's Administrator v. Smith, 36 W. Va. 788, 15 S. E. 977; Gordon v. State, 29 Tex. App. 410, 16 S. W. 337.

It is to be noted that section 63 of the ordinance, which is called by counsel the "curative clause," is essentially the same as section 3885 of the Political Code, which was in effect when Miller v. Kern County, supra, was decided; yet a compliance with the terms of the statute requiring the subscription and attachment to the roll of an affidavit was held necessary in that case. Speaking of the affidavit of the clerk and that of the tax collector the learned commissioner who wrote the opinion in the Miller Case said:

> "These affidavits are in effect the certificate or authentication of the assessment as it leaves the county board of equalization and as made to conform to the requirements of the state board, and, we think, are essential to its validity."

[3] This court is also in accord with the contention of respondent that the ordinance, under which the attempt to sell the property for taxes was made, was in contravention of the charter of the city of Los Angeles. By this ordinance it was provided that before sale by the city of property which had been sold to it for municipal taxes the clerk should fix a date for such sale and give notice thereof by publication for at least ten days in a daily paper. The deed upon which appellant relies recites a publication for a period of only ten days. It also recites a posting for ten days, which is likewise in consonance with the ordinance. But the charter provides that the mode and manner of collecting delinquent municipal taxes and enforcing the tax lien shall "substantially be the same as the mode and manner at the time prescribed by law for the collection of state and county taxes." The same section of the charter (No. 46) contains the further provision that:

> "All such proceedings, sales, certificates and conveyances had, made and executed by them in pursuance thereof, shall be of like force, effect and validity as is or may hereafter be given by law to like proceedings and acts in the manner of the collection of state and county taxes in said county."

But by section 3897 of the Political Code the analogous notice concerning state and county taxes must be published in a newspaper for at least three successive weeks, and must be posted for at least the same period. The ordinance fails to measure up to the requirements of the charter provision. It is no answer to this point to say that when a taxing power has acquired private property by due process of law it may resell without notice to the former owner or may give such notice as in its discretion may seem proper. Appellant's position on this subject is met by the simple fact that the state has provided for notice and the manner of giving it. As Mr. Justice Lorigan said in delivering the opinion of this court in Smith v. Furlong, 160 Cal. 522–529, 117 Pac. 527, 530:

> "It is true, as said in Fox v. Wright, 152 Cal. 61, 91 Pac. 1005, that it is not necessary for the state after it has acquired the title to property under delinquent tax sales to provide for any notice to the delinquent owner that the state intends to sell the property; that it could provide for disposing of it at private sale. But the state has not pursued this course. It has provided that a sale shall be made by it after notice to the delinquent owner and provided how that notice shall be given."

Nor may it be justly said that the publication of the notice for ten days is a "substantial" compliance with the charter and the incorporated sections of the Political Code. The length of the time during which a notice must be given is quite as substantial as the requirement that notice must be given at all.

Appellant's counsel contend that without reference to the findings against the validity of the various proceedings through which he asserts title, nevertheless respondent should have no relief because he has traced title to the city through a deed resulting from delinquency in payment of valid taxes and has not proven any tender to the city of the amount for which he is delinquent. The title, as say counsel, stands in the city (unless conveyed by the city to defendant which plaintiff denies). Therefore, they argue, plaintiff under his own proof has no concern with defendant or his claims. As the proceedings leading up to the deed to the city were invalid there is no room for this contention.

Other findings of the court against the validity of the sale are analyzed in the briefs, but we need not discuss them because the errors to which we have adverted above were sufficient to prevent the acquirement of title by the city, appellant's alleged predecessor in interest, or in any view to make the attempted transfer to him of no effect.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

(175 Cal. 387)

In re CARR'S ESTATE.

In re FUHRMAN et al.

(S. F. 8084.)

(Supreme Court of California. June 7, 1917.)

1. **Appeal and Error** 🔑173(6)—**Objection Below.**

On appeal from decree of final distribution based on compromise of contest of testator's will, it could not be contended that the stipulation of compromise was invalid because no power of attorney was introduced to prove the authority of one who signed as attorney in fact and at law for contestees, where the decree affirmatively showed that the attorney was in court at the hearing, and there was no objection at that time to the manner or sufficiency of proof of the compromise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1088.]

2. **Appeal and Error** 🔑877(2)—**Appeal by Executor.**

An executor could not, on appeal from decree of distribution, contend that the court was without jurisdiction to distribute the assets of the estate except as directed in the will, since, as such executor, he had no interest in the manner of such distribution, being a mere stakeholder and not a party interested except in the appeal from that part of the judgment which denied him compensation for extraordinary services.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3563, 3564.]

3. **Executors and Administrators** 🔑497—**Extra Compensation.**

The trial court could not be said to have abused its discretion in denying an executor extra compensation for drawing an answer to contest of the will and in appearing at certain continuances of the hearing.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2117–2124.]

4. **Appeal and Error** 🔑151(6)—**Parties Aggrieved.**

Creditors of an estate of deceased beneficiary of a will of C., whose claims were not presented or litigated in the hearing on final distribution of C.'s estate under such will and a compromise of contest thereof, cannot appeal from the final distribution decree in C.'s estate, not being "parties aggrieved" within Code Civ. Proc. § 938.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 951, 952.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of William Joseph Carr, deceased. From judgment, order, and decree of distribution, Alfred Fuhrman, as executor, and others, appeal. Appeals of Alfred Fuhrman, as executor of the estate of Victory, of Alfred Fuhrman, as creditor of said estate, and the appeal of the city and county of San Francisco, dismissed. On appeal of Alfred Fuhrman as executor of the estate of Carr, judgment affirmed.

Alfred Fuhrman, Carl W. Mueller, Percy V. Long, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., all of San Francisco, for appellants. Adolphus E. Graupner, of San Francisco, for respondents. Alexander D. Keyes, of San Francisco, amicus curiæ. Walter Perry Johnson, of San Francisco, for devisees of Alice Victory.

MELVIN, J. These appeals are from a judgment, order, and decree of distribution in the estate of William Joseph Carr, deceased. Alfred Fuhrman appeals as executor of the last will of said Carr, as executor of the last will of Alice Victory, deceased, and individually as a creditor of the estate of Victory. The city and county of San Francisco appeals as a creditor of the latter estate.

William Joseph Carr died testate on December 5, 1914. After proceedings duly had in that behalf Alfred Fuhrman, Esq., an attorney of this court, was appointed executor and qualified. By the terms of the will the three sons of the testator, John J., William T., and Walter R. Carr, were bequeathed each $1; to Maud R. Carr there was a bequest of $250; and the residue was left to Alice Victory, aunt of the testator, who at the time of William Joseph Carr's death was residing at the City and County Relief Home in San Francisco. On May 14, 1915, the three sons of the testator filed their petition for contest of the will after probate, alleging that at the time of making the purported will William Joseph Carr was mentally incompetent to make testamentary disposition of his property. The executor filed an answer to this contest, and after the matter was at issue trial was postponed from time to time until the last day of February, 1916, when Mr. Fuhrman, as executor, filed his first and final account with an accompanying report and a petition for settlement of said account and for distribution. In the petition, after referring to the pending contest, he used the following language:

> "The said executor has now been informed that said contestants desire to withdraw and dismiss said petition and contest—and desire this estate to be closed, because they have effected a compromise with the heirs of Alice Victory, deceased, the residuary legatee of the above-named deceased."

It appeared, further, from the petition that Alice Victory had died on the 5th day of June, 1915, and that Mr. Fuhrman had been appointed and had qualified as executor of her estate. Hearing of the petition was duly had. At said hearing it appeared that the sons of William Joseph Carr had entered into an agreement with the two legatees of the estate of Alice Victory deceased, who were James Caldwell, a nephew, and Edward Finley, a friend. By the terms of this writing it was stipulated that for and in consideration of the dismissal of the contest, the court was asked to distribute one-half of the assets of the Carr estate to John J. and Walter R. Carr, from which was to be deducted $100 to be paid in settlement of an unallowed portion of an undertaker's claim and $250, the legacy to Maud R. Carr. The contest having been dismissed, the court made its decree distributing one half of the assets of the estate of William Joseph Carr to the estate of Alice Victory, deceased, and the other half to the former contestants, subject to the agreed deductions. The court also denied Mr. Fuhrman's request for extra compensation for extraordinary services.

[1] Appellant Fuhrman, in his various capacities, contends that the stipulation between the contestants in the estate of Carr and the legatees in the estate of Victory is worthless because no power of attorney was introduced to prove the authority of Mr. Johnson, who signed as attorney in fact and at law for Alice Victory's beneficiaries. This

contention is without merit. If any informality appears Mr. Fuhrman is not injured as he does not represent the persons apparently bound by Mr. Johnson's action. But the decree affirmatively shows that Mr. Johnson was present in court representing his clients and principals at the hearing, and there was no objection at that time on the part of any one to the manner or the sufficiency of the proof of the compromise.

[2, 3] It is next contended that the court was without jurisdiction to distribute the assets of the estate except as directed in the will. This objection is without merit. Alfred Fuhrman, as executor of the estate of Carr, has no interest in the manner of distribution of the assets of that estate. He is, as such executor, a party indifferent, and it is his duty to deliver the residue of the estate to the persons designated by the court. He is a mere stakeholder of the estate. Estate of Healy, 137 Cal. 474–478, 70 Pac. 455; McCabe v. Healy, 138 Cal. 81–90, 70 Pac. 1008; Estate of Murphy, 145 Cal. 464, 78 Pac. 960; Jones v. Lamont, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; Estate of Williams, 122 Cal. 76, 54 Pac. 386. There is an exception to this rule in a case where the assets would be depleted by the ordered distribution to such an extent that the executor could not pay the debts of the estate or where a personal liability would be imposed upon him by reason of his obedience to the court's orders (Estate of Murphy, supra), but the exception does not cover the case before us. The executor of the Estate of Carr, therefore, is not a "party interested" except in the appeal from that part of the judgment which denies him compensation for extraordinary services. The personal services of the executor which were outside of the usual ones rendered in the administration of an estate consisted in the drawing of an answer to the contest and in appearing at certain continuances of the hearing. We cannot say that the court abused its discretion in holding that the executor was entitled to no extra compensation for this work.

[4] As executor of the estate of Victory or as creditor of that estate Mr. Fuhrman has no standing as an appellant from the decree in the Carr estate, nor has the city and county the right to appeal therein for the reason that their claims were not presented nor litigated in the hearing. Estate of McDermott, 127 Cal. 450–452, 59 Pac. 783; Estate of Crooks, 125 Cal. 459, 58 Pac. 89. They had no claims against that estate, and their appearance here is based upon the assumption that under no conditions could the court distribute any part of the assets of the Carr estate except literally, as provided by the will. This, as we have seen, is erroneous. The court had jurisdiction to make the decree and the appellants connected with the estate of Victory have no place in the record of the Carr estate. It does not even appear by any record which we are authorized to accept that claims were allowed against the estate of Victory, nor that said estate is insolvent. There is printed in the transcript a certificate by the clerk of the city and county of San Francisco that two claims had been allowed and approved by the judge in that estate, one in favor of Alfred Fuhrman for $32, and the other in favor of the city and county for $1,195; but there is nothing to show that by pleading or otherwise either the indebtedness or the alleged insolvency of Alice Victory's estate was ever called to the attention of the judge at the hearing of the petition for distribution in the matter of the estate of Carr. Therefore, under the authorities last above cited, we must hold that the executor and creditors of the Victory estate are not "parties aggrieved" within the meaning of section 938 of the Code of Civil Procedure.

Therefore the appeals of Alfred Fuhrman, as executor of the estate of Victory, of Alfred Fuhrman, as creditor of said estate, and the appeal of the city and county of San Francisco, are dismissed. As to Alfred Fuhrman, in his capacity as executor of the estate of Carr, the judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 361)

In re BROWNE'S ESTATE. (S. F. 7857.)

(Supreme Court of California. June 7, 1917.)

1. WILLS ⟹675—PRECATORY TRUST.

A will leaving the residue of testator's property to his son, "save and except I desire that he pay out of said property" certain sums to certain persons, did not create a precatory trust in favor of such persons.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589.]

2. WILLS ⟹675—PRECATORY TRUST.

Precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589.]

3. WILLS ⟹675—PRECATORY TRUST.

Where testator's desire that certain sums be given to certain persons is expressed, not to his executor, but to one of the beneficiaries under his will, it may be regarded only as a mere request, and not as partaking of the nature of a command.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas H. Browne, deceased. From a portion of decree of distribution, Cora McGarvey and another appeal. Affirmed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

R. F. Mogan and M. M. Getz, both of San Francisco, for appellants. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

MELVIN, J. Cora McGarvey and Edith Johns appeal from that portion of the decree of distribution by which the entire residue of the estate, consisting of about $32,200, was distributed absolutely to Clarence W. Browne, a son of the testator; the theory and contention of appellants being that the will of Thomas H. Browne created a precatory trust in their favor.

In the will, after making in direct and positive language eight certain specific bequests to his collateral relatives, the testator used the following language:

> "All the rest and residue of my property of every kind, character and nature whatsoever, whether real or personal, I give and bequeath unto my beloved son, Clarence W. Browne, save and except I desire that he pay out of said property to Miss Cora McGarvey, the sum of two hundred dollars ($200.00), and to Miss Edith Johns the sum of two hundred dollars ($200.00)."

[1-3] Clearly the words above quoted are not sufficient to create a precatory trust in favor of the appellants. Whatever may be the rule elsewhere, "it is the settled law in California that precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed." Estate of Purcell, 167 Cal. 176-179, 138 Pac. 704, 705. This rule is derived from and supported by numerous authorities, including Estate of Mitchell, 160 Cal. 618, 117 Pac. 774; Estate of Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; and Kauffman v. Gries, 141 Cal. 295, 74 Pac. 846. It is to be observed that the testator's desire is expressed not to his executor, but to one of the beneficiaries under his will. Under such circumstances it may only be regarded as a mere request, and not as partaking of the nature of a command. Estate of Marti, supra; Estate of Pforr, 144 Cal. 121, 77 Pac. 825.

The judgment of final distribution from which the appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 377)

CAMERON v. AH QUONG et al. (S. F. 7292.)

(Supreme Court of California. June 7, 1917.)

1. Pleading 🔑369(1) — Intervention — Election Between Causes of Action.

Under Code Civ. Proc. § 441, as to pleading several defenses, which applies as well to different counts in a complaint, and section 427, subd. 8, permitting joining causes of action growing out of the same transaction, intervener in ejectment need not elect between two causes of action in his intervention complaint, both asserting adverse possession, the second detailing the manner in which intervener entered and occupied, and, in addition to prayer for decree of the fee, asking for alternative relief by payment of intervener's mortgage thereon and taxes paid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199, 1200, 1203, 1204.]

2. Executors and Administrators 🔑444(1) —Intervention—Complaint.

In ejectment by executor, where the complaint fully avers plaintiff's status as executor, such status need not be averred in intervention complaint; the latter complaint being essentially defensive to plaintiff's claim of title.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1813, 1814, 1837-1841.]

3. Ejectment 🔑50—Intervention—Pleading.

In ejectment by an executor, an intervener alleging adverse possession under mortgage need not plead compliance with Code Civ. Proc. §§ 1493, 1500, as to presenting claims against estates, he not suing the executor's estate upon the mortgage notes, although asking for alternative relief that they be paid as a condition of his surrender of possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 139, 145.]

4. Appeal and Error 🔑867(3)—Scope of Review—Insufficiency of Complaint.

The alleged insufficiency of complaint in intervention may not be considered on appeal from order denying new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3479.]

5. Appeal and Error 🔑1050(1)—Harmless Error—Admission of Evidence.

The admission in evidence of an assignment of mortgage executed by one purporting to act as attorney in fact, without proof of his power of attorney, was not prejudicial where no sufficient objection was made to failure formally to prove such authority, and it appeared that the assignment had been executed and acknowledged in due form before a notary public.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

6. Evidence 🔑577—Testimony at Former Trial—Absence of Witness.

Under Code Civ. Proc. § 1870, subd. 8, allowing proof of the testimony in former action between the parties, of a witness out of the state, it was not abuse of discretion to admit transcript of testimony at such former trial of a Chinaman, where another Chinaman testified that such witness had departed for China nine years before, although the latter admitted that he was merely told of the former's departure.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2406.]

7. Mortgages 🔑214 — Consent of Mortgagor to Mortgagee's Possession.

That assignee of mortgages was put in possession of the mortgaged land by the assigning second mortgagee in 1895, and, as owner and holder of the two mortgages, which, together with the assignment, were of record, openly held it personally or by tenants until commencement of ejectment in 1903, sufficiently showed the mortgagor's consent to such possession.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 492-496.]

8. Mortgages 🔑214—Consent of Mortgagor to Mortgagee's Possession.

Consent of the mortgagor to possession of the mortgaged premises by the mortgagee may be shown by circumstances as well as by direct evidence of formal and declared acquiescence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 492-496.]

9. Mortgages 🔑188—Possession by Mortgagee.

If a mortgagee obtain possession in any peaceful mode, he may retain it against the mortgagor or the latter's assignee until the mortgage debt is paid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 469, 471–475, 479–481.]

10. Mortgages 🔑213 — Ejectment by Mortgagor Against Mortgagee.

Unless the mortgage debt is paid, a mortgagor may not maintain ejectment against his mortgagee who has obtained possession of the mortgaged premises in a peaceful mode.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 482–491, 1576.]

11. Pleading 🔑236(2)—Amendment.

Under Code Civ. Proc. § 472, as to amendments of course, it was not abuse of discretion to refuse to plaintiff in ejectment permission to amend his answer to complaint in intervention to plead limitations and that there had been no accounting by intervener for rents and profits of the property; the motion coming after the cause had been in litigation many years and had once been considered on appeal.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601.]

12. Appeal and Error 🔑1010(1)—Sufficiency of Support by Findings.

Where there are clear and sustained findings to uphold the judgment, this is sufficient, notwithstanding insufficiency of evidence to sustain immaterial findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

13. Appeal and Error 🔑231(8)—Specific Objection.

Plaintiff in ejectment, in appealing from judgment making certain mortgages a lien on his property, could not for the first time urge lack of formal evidence of their nonpayment, where his specifications of error failed to recite in what particulars the findings of nonpayment were insufficient, and the cause had evidently been tried on the theory the mortgages had not been paid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1439; Trial, Cent. Dig. § 194.]

14. Appeal and Error 🔑867(4)—Findings.

The objection that a finding is not one of fact, but a conclusion of law, cannot be raised on appeal from an order denying motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3481.]

15. Appeal and Error 🔑867(4)—Scope of Review—Conclusions of Law Not Supported by Findings.

Contentions that certain conclusions of law are not supported by the findings are not available to one appealing from denial of motion for new trial; he not having proceeded under Code Civ. Proc. §§ 663, 663½, as to motions to vacate judgment because conclusions of law are not supported by findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3481.]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Ashley D. Cameron, executor, against Ah Quong; Chin Shin intervening. From denial of plaintiff's motion for new trial, he appeals. Affirmed.

Welles Whitmore, of San Francisco, for appellant. F. H. Short and F. E. Cook, both of Fresno (Carl E. Lindsay, of Fresno, of counsel), for respondents.

MELVIN, J. Plaintiff appeals from an order denying his motion for a new trial.

This is the second appeal in this case, the first having been decided by the District Court of Appeal of the Second District (Cameron v. Ah Quong, 8 Cal. App. 310, 96 Pac. 1025). The issues as originally framed and the judgment given are thus set out in the opinion of the District Court of Appeal:

> "Action in ejectment. The plaintiff alleges ownership of the lands in dispute and ouster by the defendant, and prays for restitution of said premises, for damages for withholding the same, and for the sum of $1,750 as the value of the rents and profits from January, 1898, to and including a portion of the year 1903.
>
> "The defendant, Ah Quong, answering the complaint, specifically denies the material averments thereof, and then pleads the bar of the statute of limitations.
>
> "Chin Shin intervened, and as a first cause of action sets up title to the lands in dispute by adverse possession, and alleges that the defendant, Ah Quong, holds possession of the same as his tenant; and as a second cause of action intervener alleges that he is the owner of two certain mortgages subsisting against the premises, and of which he acquired ownership by purchase from, and assignment by, the respective mortgagees, and that by reason of his said ownership of said mortgages the 'plaintiff is not entitled to the judgment in this action prayed for by him, or to any relief whatever.'
>
> "The plaintiff interposed an answer to the first cause of action set out in intervener's complaint, denying in detail the material allegations thereof, and moved to strike out the second count in said complaint on the ground, among others, that it 'does not allege possession or right of possession.' The court refused to grant the motion to strike out the alleged second cause of action, and the plaintiff made no answer thereto.
>
> "Upon the issues thus made up, a trial was had, and a judgment rendered that the plaintiff is the owner and entitled to the possession of the lands in controversy, and that he be given possession thereof, 'provided that before he shall be entitled to have actual possession or occupation of said lands and premises, or any part thereof, or any right to any writ or process out of this court to place him in possession thereof, he, said plaintiff, shall first pay to said intervener, said Chin Shin, the full amount of the principal sums and accrued interest due to said intervener under the terms and provisions of said two mortgages owned by said intervener and as set forth in the findings of the court herein,' etc."

The original judgment was reversed solely because the intervener failed to allege possession of the property which was the subject of the litigation.

When the cause went to the superior court for another trial the intervener filed his third amended complaint in intervention in which it was alleged that, with the consent of the mortgagors, the intervener more than five years prior to the commencement of this action entered into and continuously has since held possession of the land in dispute, that he has cultivated it, and that he has paid, satisfied, and discharged all taxes upon it. His pleading contains the further averment that he held the property under an agreement with the mortgagors that his possession should remain undisturbed until the payment and satisfaction of the mortgages, and that, if the said mortgages should not be paid and satisfied, the intervener should have, hold, and possess for himself the fee simple to the property.

Like its predecessors, this amended complaint included a plea of title by adverse possession in the second cause of action, and in the setting forth of both causes it was averred that defendant Ah Quong occupied the premises as the intervener's tenant.

The plaintiff answered the third amended complaint in intervention, denying the allegations therein contained with respect to possession, and making other denials which, as respondent insists, were so ambiguous as not to be real traverses of the averments which they were designed to meet—a contention which we will have occasion to discuss further.

The second trial resulted in a judgment that plaintiff was not entitled to recover any sum whatever against defendant or intervener by way of rents, profits, or damages, that the intervener was entitled to have paid to him the sums of $1,000 and $2,500, with interest on two certain notes secured by two described mortgages, and that he be maintained in full possession of the property until such payment and all of it be made. It was further adjudged that plaintiff should have and recover possession of the land in controversy provided he should first pay to the intervener the sums of money and interest thereon due under the terms of said mortgages.

[1] Appellant says that the two causes of action pleaded in the third amended complaint in intervention are antagonistic, and that intervener should have been compelled to elect upon which of them he intended to depend. Two motions seeking to have the court require such election were made by appellant. Both were denied by the court, and these rulings were correct. The two causes of action which were pleaded were not so antagonistic as to require the intervener to reject one of them before trial or previous to judgment. In the statement of each cause of action the intervener asserted that he had acquired title by adverse possession, but in the second he set forth in detail the manner in which he obtained entrance to the property and maintained his occupancy thereof. He asked for judgment decreeing that he was the owner in fee, but there was an alternative prayer that, if plaintiff's right to recovery of the land should be found to exist, the court should impose as a condition to intervener's surrender of the property, the payment by the plaintiff of the amounts due on the notes, secured by the mortgages, and the repayment of the taxes which the intervener had paid. Clearly the two causes of action arose out of the same transaction, and, even if they were antagonistic, the pleading would be governed by the provisions of section 441, Code of Civil Procedure. It is true that the cited section treats of the setting forth of inconsistent defenses, but the same rule has been held to apply to different counts in a complaint. Stockton Combined Harvester & Agricultural Works v. Glens Falls Insurance Co., 121 Cal. 167–171, 53 Pac. 565; The Code also expressly permits the joining of causes of action growing out of the same transaction (section 427, subd. 8, Code Civ. Proc.), and election will not be ordered by the court in such cases. Remy v. Olds, 4 Cal. Unrep. Cas. 240, 34 Pac. 216, 21 L. R. A. 645; Estrella Vineyard Co. v. Butler, 125 Cal. 232–234, 57 Pac. 980; Tanforan v. Tanforan, 159 Pac. 709–711.

[2-4] Appellant asserts that the pleading of intervener's second cause of action is of no validity because said complaint in intervention does not aver the presentation for allowance to Cameron's executor of a claim, based upon the two mortgages nor the rejection of such a claim, and because there is no allegation of Annie L. Cameron's death and the qualification of Ashley D. Cameron as executor of her will. The second contention is unsound because the appellant fully averred his status as an executor in his own pleading by which this action was inaugurated, and is scarcely becomes him to complain of the absence of a similar allegation from the complaint in intervention which in its essence is defensive to appellant's assertion of title in and right to possession of the land. There is no merit in the argument that respondent had no standing as a litigant in such an action as this until and unless he had complied with the provisions of sections 1493 and 1500 of the Code of Civil Procedure. The intervener has not sued for nor has he obtained judgment against the estate of Annie L. Cameron, deceased, upon the promissory notes set forth in his pleadings, nor has he asked or obtained a decree foreclosing the mortgages. On the contrary, the executor of that estate has a judgment against intervener, entitling said executor to possession of the land in controversy when he shall do equity by paying the amounts due on the mortgages. There was no demurrer to the complaint in intervention, and the cause was evidently conducted upon the same theories of the respective litigants as those which appeared in the original trial. Besides, the alleged insufficiency of the complaint may not be considered on an appeal from an order denying a motion for a new trial. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Swift v. Occidental Mining & Petroleum Co., 141 Cal. 161, 74 Pac. 700; Coburn v. California Portland Cement Co., 144 Cal. 81, 77 Pac. 771; Sharp

v. Bowie, 142 Cal. 462, 76 Pac. 62; Bell v. Southern Pacific Railroad Co., 144 Cal. 560-562, 77 Pac. 1124.

[5] Appellant calls special attention to the alleged error in admitting in evidence the purported assignment of the mortgage for $1,000 given by M. J. and J. W. Laymance to William Frisbie Lewis. The assignment of this mortgage to Chin Shin bears the name of "William Frisbie Lewis, by Irving C. Lewis, his attorney in fact." Appellant insists that the assignment was not admissible until after proof of the existence of Irving C. Lewis' power of attorney from William Frisbie Lewis. When the instrument with the assignment was offered this objection was not made. Appellant did object on the ground of irrelevance, etc., and on the further ground "that it does not appear to be an assignment by William Frisbie Lewis. It appears," said counsel, "to be an assignment by William Frisbie Lewis by Irving C. Lewis, his attorney in fact." That is just what it appeared to be, and counsel's objection did not amount to anything more than the statement of an obvious fact. He made no objection based upon failure formally to prove Irving C. Lewis' authority to act as attorney in fact. It did appear, however, that the assignment had been executed and acknowledged in due form before a notary public. Under these circumstances we cannot see that appellant was injured by the court's ruling.

Appellant's counsel discusses in his brief certain alleged errors in connection with the trial of the first cause of action, but, as the court found against respondent upon his alleged title by prescription, these matters have become immaterial to the discussion of the pending apeal.

Nor was the appellant injured by the admission in evidence of the power of attorney from respondent to Chin Bock Guy and Chin Kin Yow. After calling attention to the fact that this power of attorney was not used by Chin Bock Guy in leasing the premises to the defendant, Ah Quong, counsel asserts that its admission in evidence was prejudicial error without explaining why. There was no serious error in its admission.

[6] The court permitted the intervener to read in evidence the transcript of the testimony given at the former trial by Ah Quong. Appellant specifies this as error upon the ground that the proper foundation for the introduction of this testimony was not laid. The only witness upon the subject of Ah Quong's departure was Joe Dun, who upon direct examination testified positively that Ah Quong was in China. On cross-examination he said that Ah Quong had departed for China nine years before. Witness admitted that he neither accompanied Ah Quong nor saw him go on board the boat, but was told of his departure. While the proof of the absence of the witness from the state was not very strong, we cannot say that it was entirely insufficient to justify the ruling admitting the testimony. No absolute rule may be stated with reference to the sufficiency of the showing required to justify the introduction of a deposition or of testimony given at a former trial. 13 Cyc. 990. We cannot say that the court abused its discretion in admitting the testimony upon the proof of absence offered under the authority given by the eighth subdivision of section 1870 of the Code of Civil Procedure.

[7-10] The substance of appellant's motion for nonsuit, which was denied by the court, was the asserted failure of intervener to show that he was in possession of the property with the consent, approval, and knowledge of plaintiff. The motion was properly denied because the evidence was amply sufficient to show such possession. Intervener was put in possession by Mr. Chapman, one of the mortgagees, in 1895. He took the land as owner and holder of the two mortgages, which, together with the assignment were of record, and personally or by tenants he held the land openly until the commencement of this action in 1903. Consent of the mortgagor may be shown by circumstances as well as by direct evidence of formal and declared acquiescence, and it was fully proven here. If a mortgagee obtain possession in any peaceful mode, he may retain it against the mortgagor or the latter's assignee until the mortgage debt is paid. Cooke v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709. And in California it is settled that a mortgagor may not maintain ejectment against his mortgagee unless the debt is paid. Spect v. Spect, 88 Cal. 437-443, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Faxon v. All Persons, 166 Cal. 707-720, 137 Pac. 919, L. R. A. 1916B, 1209; Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312. These and other authorities to the same effect were discussed in the opinion in Cameron v. Quong, supra (the former appeal in this case decided by the District Court of Appeal), and the court stated that the evidence appeared clearly to disclose that the equities of the case were decidedly with the intervener. Our examination of this record brings us to the same conclusion.

[11] Appellant's counsel applied during the trial for permission to amend his answer pleading the statute of limitations and setting up the fact that there had been no accounting for the rents and profits of the property. The motion was taken under advisement and was never the subject of a formal ruling by the court. But, even if we should regard the court's failure to act as tantamount to a denial of the motion, we cannot say that the court abused its discretion by such denial, because the motion came after the cause had been in litigation for many years and had once been considered on appeal. Section 472, Code of Civil Procedure, did not give appellant a right to file such an amendment as of course. Manha v. Union Fertilizer Company, 151 Cal.

581, 91 Pac. 393. There being no pleading by which an accounting of rents and profits by intervener was demanded, it follows that the court did not err by failing to decree such an accounting.

[12] Insufficiency of the evidence to sustain certain of the findings is specified by appellant. Most of them are immaterial findings upon which the judgment does not rest. For example, let us take the findings that the amount of rents and profits from 1898 is not the sum alleged or any other sum, and that the taxes were paid by the intervener. These were not material to the judgment as rendered. While some of the criticized findings may be characterized as "lame and inconclusive," there are clear and sustained finding to uphold the judgment. Such support is sufficient. American National Bank v. Donnellan, 170 Cal. 9-15, 148 Pac. 188.

[13] For the first time on appeal the argument is made that no evidence was offered at the trial regarding the nonpayment of the two mortgages. The complaint in intervention positively alleges nonpayment, and the denial is only upon information and belief. The cause was evidently tried upon the theory that the mortgages had not been paid. But appellant may not take advantage of any alleged lack of formal evidence of nonpayment because his specifications of error fail utterly to recite in what particulars the findings of nonpayment are insufficient. Heilbron v. Kings River, etc., Co., 76 Cal. 11, 17 Pac. 933; Green v. Green, 103 Cal. 108, 37 Pac. 188; Parker v. Reay, 76 Cal. 103, 18 Pac. 124; Anthony v. Jillson, 83 Cal. 296-299, 23 Pac. 419; Wise v. Wakefield, 118 Cal. 107-109, 50 Pac. 310; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825.

[14] There was a finding that in 1899 Chin Shin began an action to foreclose the mortgage for $2,500, that in 1902 a judgment of dismissal was made and entered therein, but that said judgment was not a final adjudication of the rights of the parties. That there was such an action and that it was dismissed for failure to prosecute and because summons was not served within three years from the commencement thereof were facts appearing in evidence. The finding is attacked, however, as being not one of fact, but a conclusion of law. Even if it be conceded that this is a conclusion of law which is improperly labeled a finding, it is not for that reason vulnerable to attack on appeal from an order denying a motion for a new trial.

[15] The contentions that certain conclusions of law are not supported by the findings are not available to plaintiff on this appeal; for he did not proceed under the provisions of sections 663 and 663½ of the Code of Civil Procedure. Shafer v. Lacy, 121 Cal. 574, 54 Pac. 72; Patch v. Miller, 125 Cal. 240, 57 Pac. 986; Swift v. Occidental Mining and Petroleum Company, 141 Cal. 161, 74 Pac. 700.

The order denying appellant's motion for a new trial is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 391)

WINCHESTER v. WINCHESTER.

(Sac. 2262.)

(Supreme Court of California. June 8, 1917. Rehearing Denied July 5, 1917.)

1. HUSBAND AND WIFE 🔑267(1)—COMMUNITY PROPERTY — CONVEYANCE WITHOUT WIFE'S CONSENT.

Under the direct provisions of Civ. Code, § 172, a husband's deed of community property, made without consideration, is not binding upon his wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929, 930, 936.]

2. EVIDENCE 🔑390(5) — PAROL EVIDENCE — DEED.

While parol evidence is admissible under Code Civ. Proc. § 1962, subd. 2, to prove a deed's real consideration, yet it is inadmissible to show that a deed passing the fee title on its face was intended to reserve certain rents to the grantor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1726.]

3. HUSBAND AND WIFE 🔑254 — COMMUNITY PROPERTY—WHAT CONSTITUTES.

Property deeded to a husband upon his agreement to pay the grantor or his wife a specified annual sum, *held* a purchase, and not a gift, and the land becomes community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 897-899.]

Department 1. Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Sarah A. Winchester against George E. Winchester. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

W. M. Boardman, of Susanville, and Louis P. Boardman, of San Francisco, for appellant. R. M. Rankin and Grover C. Julian, both of Susanville, for respondent.

SHAW, J. This is an action by the plaintiff Sarah A. Winchester, in her own behalf and as administratrix of the estate of L. E. Winchester, her husband, against the defendant to cancel a deed executed by her said husband during the marriage, purporting to convey to the defendant George E. Winchester a certain tract of land acquired by L. E. Winchester during the said marriage, and to declare that the plaintiff is the owner of said land. Judgment was given for the defendant. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

[1] The plaintiff and L. E. Winchester were married in 1884, and thereafter they lived together as husband and wife until the death of L. E. Winchester, on March 1, 1912.

L. E. Winchester acquired the land on November 21, 1906, by deed from his father, Elliot Winchester. The deed recited a consideration of $300. The conveyance by L. E. Winchester to George E. Winchester was made on February 29, 1912, without a valuable consideration, as a gift to George, and without the written consent of the plaintiff. It is the claim of the plaintiff that the land was community property, and that the deed of the husband thereof having been made without consideration, was not binding upon the wife, but may be avoided by her. This would be the effect of such a deed, under section 172 of the Civil Code. This action was brought to assert this claim.

[2] The defendant admitted the making of the deed of gift by L. E. Winchester to George E. Winchester without the consent in writing or otherwise of the wife, but asserted that the deed from Elliot Winchester to L. E. Winchester whereby the latter acquired title to the land was a gift from the grantor to the grantee, in consequence whereof said land became the separate property of L. E. Winchester instead of community property, wherefore, he says, the deed of gift by L. E. Winchester to him, being of the separate property of the husband, was valid and free from interference by the plaintiff as the surviving wife of L. E. Winchester. The question whether it was community property, or the separate property of L. E. Winchester, is the point at issue upon this appeal.

On November 21, 1906, Elliot Winchester and L. E. Winchester executed a contract in writing whereby L. E. Winchester agreed to pay to Elliot Winchester annually as long as the latter should live, the sum of $300, and in case the wife of said Elliot survived him, to pay said wife an additional sum of $300 after his death; in consideration whereof the said Elliot Winchester agreed to convey to L. E. Winchester the tract of land in controversy, in fee simple. Contemporaneously with the execution of this contract, and as a part of the same transaction, the deed was executed by Elliot Winchester to L. E. Winchester. Evidence was offered and admitted over the objection of the plaintiff to the effect that in the conversation between the parties leading up to and immediately preceding the execution of said contract and deed, the parol understanding was that Elliot Winchester should make a gift of the property to L. E. Winchester, but should reserve the rents and profits thereof, so long as Elliot lived, and that the contract and deed were executed to carry out this intention to make a gift and reserve the rents and profits. It was upon this evidence that the defendant based his claim that the conveyance from Elliot Winchester to the plaintiff's husband was a deed of gift, the effect whereof would be that the property became the separate estate of said husband, and not the community property of the marriage.

The defendant's theory is that, although the evidence was not admissible to vary the terms of the deed so as to change or defeat its effect as a conveyance of the title to the land, nevertheless it was properly admissible to contradict the recital of the deed as to the consideration thereof and to show the real consideration. If this were the only effect of the evidence it might have been competent. But it was not the only effect. Parol evidence is admissible to show that the true consideration of a contract was not that which the contract recites, that it was something different, either a different valuable consideration, or a good consideration such as love and affection, instead of the valuable consideration recited. Code of Civil Procedure, § 1962, subd. 2. But evidence of this character cannot be allowed, in the case of a deed, "when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated." Hendrick v. Crowley, 31 Cal. 475; Mowry v. Heney, 86 Cal. 475, 25 Pac. 17. The conveyance from Elliot Winchester to L. E. Winchester, being in form a grant, bargain, and sale deed, its legal effect, according to its terms, was to immediately pass from Elliot Winchester to L. E. Winchester the entire title in fee simple to the land described, the present absolute ownership thereof. Civil Code, §§ 1105, 762, 679. The fee-simple estate thus passed included the present absolute right to all the rents and profits, free from any and every claim of the grantor thereto. The effect of the evidence introduced, if it could have the effect intended by the respondent, would be that instead of the deed being a conveyance of the entire fee, it would be a conveyance with a reservation to the grantor, during his lifetime, of the rents and profits of the land conveyed, to the amount of $300 a year. To the extent of the reservation of the rents during the life of the grantor, which constituted a substantial part of the fee-simple estate which the deed by its terms purported to convey, the agreement shown by parol evidence would have defeated the conveyance. Under the rule above stated it was incompetent and inadmissible for that purpose. The court below erred in so far as its decision was based on this parol evidence. The rights depend on the effect of the deed and the agreement aforesaid.

[3] This writing was not a contract for the execution of a deed to L. E. Winchester as a gift with a reservation of rents during the lifetime of the grantor, or otherwise. It was a contract of purchase whereby L. E. Winchester agreed to pay to Elliot Winchester each year of the latter's life the sum of $300, and to the wife of Elliot, if she survived, an additional sum of $300, in consideration whereof Elliot Winchester agreed to convey the land in controversy to L. E. Winchester in fee simple. By the terms of the writings, therefore, and they are binding

upon the parties, it was not a deed of gift, but a purchase of land, for a valuable consideration, made during the existence of the marriage relation, and it was to be paid for and was paid for out of the earnings of the husband and wife during the marriage. It would therefore be community property. The fact that the payments may have been made out of the profits of the land would not alter the effect of the transaction in this respect. The profits derived from land so purchased would constitute earnings of the community, and would be community property.

The court should have concluded that the property was the community property of the spouses, and that the plaintiff was entitled to have the deed canceled in so far as her interests were concerned, and to have adjudged to her the interest to which she was entitled under the law by reason of the fact that the community real estate had been given away by the husband, during the marriage, without her written consent. Whether her right extends to the whole estate, or only to the share which she would take of the community property by inheritance, is a question not discussed, and which we cannot now consider.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

(175 Cal. 284)

CITY OF SAN JOSE v. RAILROAD COMMISSION OF CALIFORNIA et al.

(S. F. 7961.)

(Supreme Court of California. June 4, 1917.)

1. RAILROADS 🔑99(5)—GRADE CROSSINGS — SEPARATION OF GRADES—POWER OF RAILROAD COMMISSION.

A city which had elected, in accordance with Const. art. 12, § 23, as to the Railroad Commission, and St. Ex. Sess. 1911, p. 168, as to such election, to transfer to the Railroad Commission the city's control over public utilities, could not claim that Public Utilities Act (St. Ex. Sess. 1911, p. 18) § 43, authorizing the Commission to prescribe the proportions in which the expense of grade separation at a railroad crossing shall be divided between the railroad and municipality, was unconstitutional as giving the Commission power to impose upon the city an obligation to pay money from its treasury, contrary to Const. art. 11, § 13, prohibiting the delegation to any commission of power to interfere with any municipal improvement, money or property, or Const. art. 11, § 6, as to state control of municipal affairs, since Const. art. 12, §§ 22, 23, by their plenary provisions, exclude all consideration of other parts of the Constitution conflicting with the Public Utilities Act, where the matters treated by that statute are cognate and germane to the subject of the regulation of public utilities, as is the matter of apportionment of the expense of a railroad crossing grade separation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 298, 300–303.]

2. CONSTITUTIONAL LAW 🔑309(1) — RAILROADS 🔑99(5)—DUE PROCESS—HEARING BEFORE RAILROAD COMMISSION.

Nor could such a city, where it had actually appeared and had a hearing before the Commission and opportunity for review, object that the omission of the statute in terms to provide for service of process or notice upon the city, being an omission to provide for due process, deprived the Commission of power to acquire jurisdiction over the city, since not only is such power to summon and hear parties interested necessarily involved in the judicial authority enjoyed by the Commission, but, by section 53 of the statute, power to prescribe rules of practice and procedure is conferred on the Commission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Railroads, Cent. Dig. §§ 298, 300–303.]

3. RAILROADS 🔑99(5)—GRADE CROSSINGS—SEPARATION OF GRADES — ORDER OF RAILROAD COMMISSION.

The Railroad Commission's order of apportionment between city and railroad of grade separation expense was not invalid as failing to require the railroad to obtain a franchise from the city for such crossing as a prerequisite to grant of authority to cross such street, where the order did not assume to enumerate all the conditions with which the railroad must comply.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 298, 300–303.]

In Bank. Original application by the city of San Jose for writ of review against the Railroad Commission of the State of California and another. Writ of certiorari dismissed.

Earl Lamb, of San Jose, for petitioner. Douglas Brookman, of San Francisco, for respondent Railroad Commission. Henley C. Booth and George D. Squires, both of San Francisco, for respondent Southern Pac. Co.

MELVIN, J. Certiorari to review the order of the Railroad Commission in the matter of the Southern Pacific Company's application for permission to construct and maintain certain crossings in the city of San Jose. The Southern Pacific Company proposed to cross 35 streets and highways intersecting its contemplated route which it intends to construct for the greater part on its private right of way. The order of the Railroad Commission grants the railroad corporation permission to cross 34 of the streets and highways at grade. Regarding the thirty-fifth crossing at West Santa Clara street commonly known as "The Alameda" an order was made that the Southern Pacific Company might have permission to construct its tracks only upon condition that there should be a separation of grades. The city of San Jose seems to concede that if a crossing is proper at this point, the grades should be separated, but vigorous attack is made upon that part of the decision of the Railroad Commission, which is as follows:

"The expense of caring for its tracks during the course of construction and laying its tracks in the subway after its completion, together

> with all expenses incident thereto, shall be borne by San Jose Railroads. All other expense except that in connection with the track work of the Southern Pacific Company, shall be borne fifty (50) per cent. by Southern Pacific Company, thirty-five (35) per cent. by City of San Jose and fifteen (15) per cent. by Santa Clara County or the State Highway Commission, as the legal rights in the premises of the two latter parties may hereafter appear."

This order is attacked upon the grounds (1) that the Railroad Commission exceeded its authority and jurisdiction in determining that the city of San Jose should bear a proportion of the cost of this crossing; and (2) that the order is unlawful because it does not require, as a prerequisite to the granting of the permission to cross "The Alameda," that the railway corporation should obtain a franchise from the city of San Jose.

In accordance with the provisions of section 23, art. 12, of the Constitution and by the procedure furnished by the act of 1911 (Statutes Extra Session 1911, p. 168), San Jose has elected to transfer and has passed to the Railroad Commission the city's control over public utilities. Therefore, as counsel for the Railroad Commission reminds us, this proceeding does not present the issue of a conflict between state and municipal powers by which we were confronted in City of Los Angeles v. Central Trust Company of New York, 159 Pac. 1169. In his concurring opinion in that case, Mr. Justice Henshaw said:

> "Touching a public utility operating wholly within the corporate limits of a municipality, no reason can be perceived why its regulation and control might not, with propriety, be intrusted to the municipal authorities; but the condition is very different where the operations of the utility extend beyond the boundaries of a city and where its services are rendered to several, or to many other communities and cities. In such cases it is manifest that the welfare of all concerned (of the utility, of the public and of the state) is best conserved by placing the whole control under a single board or commission (in this state, the Railroad Commission) empowered to adjust all questions which may arise, in the light of all interests entitled to consideration."

[1] We have here, therefore, a surrender by the city of San Jose, under the Constitution and the appropriate statute of the control over public utilities which was formerly exercised by that municipality. In the exercise of that authority, so conferred, the Commission finds ample warrant for its order in section 43 of the Public Utilities Act:

> "(a) No public road, highway or street shall hereafter be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the Commission; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.
>
> "(b) The Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa, subject to the provisions of section 2694 of the Political Code, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality, or other public authority in interest."

But petitioner contends that this provision is unconstitutional in that it gives to the Railroad Commission power to impose upon the city of San Jose an obligation to pay money from its treasury. It is argued that section 13, art. 11 which prohibits the Legislature from delegating to any commission power to interfere in any way with any municipal improvement, money, or property, is a distinct limitation upon the Legislature which prohibits it from allowing the Railroad Commission to appropriate, in effect, money from the treasury of the city of San Jose. Section 6 of the same article is invoked as an inhibition against state control of municipal affairs. To the latter objection the obvious answer is that the people of the city by solemn and orderly election have surrendered their right to control in this sort of municipal affairs. That right has not been taken away by the Legislature, but by legislative permission has been vested by the people of San Jose in the Railroad Commission. Having thus abdicated their police powers with respect to the regulation of public utilities, the people of that city have lost such protection as might, under other circumstances, be afforded by the parts of the Constitution cited in their behalf because sections 22 and 23 of article 12, by their plenary provisions, exclude all considerations of other parts of the Constitution, if any there be, conflicting with or contradictory to the Public Utilities Act, if only the matters of which that statute treats are cognate and germane to the subject of regulation of public utilities. Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. In the opinion in that case, which was prepared by Mr Justice Henshaw, the following language was used at page 658 of 166 Cal., at page 1125 of 137 Pac. (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822):

> "We regard the conclusion as irresistible that the Constitution of this state has in unmistakable language created a Commission having control of the public utilities of the state, and has author-

ized the Legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the Constitution to all other kinds of property and its owners."

Upon the same subject, Mr. Justice Sloss, delivering the concurring opinion, said (166 Cal. 702, 137 Pac. 1143, 50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822):

> "If the Railroad Commission has acted in conformity with the powers granted to it by the Legislature, the validity of its order cannot be questioned in this court or elsewhere under a claim of violation of any provision of the state Constitution other than the provisions relating to the Railroad Commission. This statement is, however, to be taken subject to the qualification that the powers conferred by the Legislature on the Railroad Commission must be such as are cognate and germane to the purposes for which the Railroad Commission was created; i. e., the regulation and control of public utilities."

That the control of the manner of constructing railroad crossings is a vital and material part of the regulation of railroads and is germane to that subject is too evident to need supporting argument. The right of apportionment of the cost by the Commission to the parties benefited by the crossing is a proper element of this cognate power. That a city receives benefit from a safety device such as that here contemplated may not be doubted. In Town of Polk v. Railroad Commission, 154 Wis. 523, 143 N. W. 191, the court was considering a question very like the one presented to us here. The Railroad Commission had made an order for the construction of an overhead crossing to span the tracks of a railroad. By the order the town was required to bear 10 per cent. of the cost of construction. This part of the order was attacked by the town on the ground that the duty of making crossings of highways safe rested upon the railroad corporation. The attack was unsuccessful, the court holding that "the Legislature in the exercise of its police power had a perfect right to enact the law," and, further, that it was "neither inequitable nor illegal to require the owners of the three public highways involved to contribute to the expense of the overhead crossing."

In a later case, Milwaukee v. Railroad Commission, 162 Wis. 127, 155 N. W. 948, the city of Milwaukee sought to have vacated and declared of no force an order of the Railroad Commission apportioning to the municipality a certain percentage of the cost of establishing separation of grades at designated crossings. The order was upheld, and in the opinion written by Mr. Chief Justice Winslow we find an answer to the argument advanced by the representative of San Jose in this proceeding that the railroad company creates the dangerous condition at street crossings, and that it should therefore bear the entire expense of removing the peril to the users of the highways by the establishment of separated grades. We quote from the opinion as follows:

> "The law seems to be the fruit of an honest and enlightened attempt on the part of the Legislature to deal equitably and fairly with a great municipal problem. Milwaukee has during the last half century become a great and prosperous city. Its greatness and prosperity have come because of its commerce, and its commerce has come largely because of its railroads. Without them Milwaukee as we know it today would not exist. The growth of the city and of the railroads has been coincident, interdependent, inseparable, and from this growth has arisen the great danger of the grade crossing. Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about?"

The Court of Appeals of New York took occasion to express similar views. In re Erie Railroad Co., 208 N. Y. 486, 102 N. E. 562, was a proceeding in which the court was reviewing the action of the Public Service Commission in making an order which failed to recognize that part of the statute by which the Commission was directed to apportion the cost of crossings not at grade between the railroad, the municipality and the state. Upon this matter the court spoke, in part as follows:

> "We see no reason why equitably and properly the expense of a construction for avoiding a grade crossing by a new track, which is necessarily connected with and results in the elimination of an existing grade crossing, should not be divided between the two purposes thus accomplished, and properly apportioned so far as the latter feature is concerned."

See, also, People ex rel. Town of Scarsdale v. Public Service Commission, 173 App. Div. 164, 159 N. Y. Supp. 48.

[2] Petitioner insists that as the statute does not in terms provide for service of process or notice of any sort upon the city, or that the city's rights be examined at any hearing, the Railroad Commission might well take the property of the municipal corporation without due or any process of law. It is said that the statutory omission deprives the Commission of the power to acquire jurisdiction of the city for the purpose of imposing liability for the cost of the improvement, and that as jurisdiction may not be imposed by consent, the argument of petitioner is not met by the fact that the city actually did have notice and was heard by the Commission before the judgment and award were made. We do not regard the omission to provide definite process to bring the city before the Commission at a hearing on the necessity for a safe crossing as being fatal to the acquirement of jurisdiction over the municipality by the Commission. The latter is both a court and an administrative tribunal. As a judicial body it has by implication all the powers necessary for the exercise of its duty. The city of San Jose does not complain that it had no day in court. It had notice to appear; actually did appear and was heard upon issue joined and evidence produced; and it had opportunity for review of the judgment. But aside from the power to summon and hear parties in interest, one which is necessarily involved in the

judicial authority enjoyed by the Commission, section 53 of the Public Utilities Act confers upon it power to prescribe rules of practice and procedure. Action has been taken under this authorization, and it is shown that in the controversy between the city and the public service corporation these rules were followed.

[3] Petitioner's remaining point is that the Commission acted in excess of its jurisdiction in failing as a prerequisite to the grant of any authority to the Southern Pacific Company to cross certain specified streets in the city of San Jose, to require the said company to obtain a franchise from the municipality for such crossing. There is no merit in this point. The order of the commission did not assume to enumerate all of the conditions with which the public service corporation must comply before being permitted to cross the streets in question. Whether or not a franchise to be granted by the city was requisite for the extension of the tracks across the streets, the Commission was not called upon, and we are not now called upon, in this proceeding, to determine. In the exercise of the police power conferred upon it, the Commission was merely deciding how the safety of the public should be best preserved when the crossings should be made, if the contemplated extension should be consummated. The order was prospective both in its terms and its scope.

The writ of certiorari is dismissed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

HAMILTON v. WARNEKE. (No. 9099.)

(Supreme Court of Colorado. May 7, 1917.)

Error to County Court, City and County of Denver; William C. Hood, Jr., Judge.

Attachment by Robert Hamilton against the Commerce State & Savings Bank, in which E. A. Warneke intervened, claiming the attached fund. From a judgment for the intervener, discharging the garnishee, plaintiff brings error. Application for supersedeas denied, and judgment affirmed.

E. L. Clover, of Denver, for plaintiff in error. Henry Howard, Jr., of Denver, for defendant in error.

WHITE, C. J. Warneke sold a threshing machine to one Wheeler, receiving in payment therefor notes secured by a chattel mortgage. These notes were made payable to the order of one Rohder, to whom Warneke was indebted. As between Rohder and Warneke it was agreed that the former should hold the notes as security for the debt of the latter; and thereafter, Warneke having paid the debt, Rohder indorsed the notes and redelivered them. Subsequently Warneke made arrangements with one Clayton to assist him in securing a small loan of the Commerce State & Savings Bank; Clayton being acquainted with the officers thereof, which was not the case with Warneke. Thereupon the two called at the bank and executed their joint note for a loan, and Clayton, who had possession of the Rohder notes, indorsed the same and they were handed to the bank as collateral security to the aforesaid note for the loan; Warneke at the time telling the cashier that the Rohder notes were his, though his name did not appear thereon. Clayton, with the consent of Warneke, negotiated with the maker of the notes for payment of the same, offering a substantial discount, but had no negotiations in that regard with the plaintiff. The plaintiff, learning of the effort of Clayton to sell the notes at the price designated, which had been communicated to the bank, and the bank authorized to deliver the notes upon receipt of a designated sum, paid the purchase price thereof to the bank, received the notes, and instantly garnished the money in the hands of the bank as the property of Clayton. The notes were at all times the property of Warneke, and, he having intervened in the attachment suit, the court so found, discharged the garnishee, and rendered judgment accordingly. It is this judgment that is involved here, and which the plaintiff in error seeks to have reversed.

We think the findings of the court, which are in substance as above stated, were amply supported by the evidence. Hamilton acquired title to the notes, but the money which he paid therefor, less the lien held thereon by the bank, belonged to Warneke, and at the time of the levy Clayton had no interest therein. The proceedings were in all respects regular, and the findings of the court proper.

The application for supersedeas will therefore be denied, and the judgment affirmed.

HILL and TELLER, JJ., concur.

(96 Wash. 698)

STATE v. MOUNTAIN TIMBER CO.

(No. 12560½.)

(Supreme Court of Washington. July 16, 1917.)

Department 2. Appeal from Superior Court, Cowlitz County; Wm. T. Darch, Judge.

Action by the State of Washington against the Mountain Timber Company. From a judgment for plaintiff, defendants appeals. Affirmed.

Edmund C. Strode, of Lincoln, Neb., Imus & Gore, of Kalama, and Coy Burnett, of Portland, Or., for appellant. W. V. Tanner, Atty. Gen., and John M. Wilson, of Olympia, for the State.

PER CURIAM. This case involves the same issues as those presented in State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, which was taken to the Supreme Court of the United States upon writ of error. In a recent decision by that court (Mountain Timber Co. v. State of Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. —) the decision of this court was affirmed.

For the reasons stated in both cases above referred to, the judgment herein is affirmed.

(97 Wash. 698)

In re SEWARD PARKE AVE. IN CITY OF SEATTLE. (No. 13814.)

(Supreme Court of Washington. May 22, 1917.)

Department 2. Appeal from Superior Court, King County.

In the matter of the petition of the City of Seattle for laying off of a public street to be known as Seward Parke Avenue, as provided by Ordinance No. 32174. Judgment affirmed.

Winfield R. Smith, of Seattle, for appellant. Alfred H. Lundin and Edwin C. Ewing, both of Seattle, for respondent.

PER CURIAM. Counsel have filed a stipulation herein whereby it is agreed that, as identical questions are involved, the disposition of this case shall be controlled by our decision in In re Northlake Avenue, 165 Pac. 113.

For this reason, the judgment herein is affirmed.

(97 Wash. 700)

WEAVER v. ROHRER. (No. 13763.)

(Supreme Court of Washington. June 11, 1917.)

Department 1. Appeal from Superior Court, Spokane County.

Action by Henrietta Weaver against G. A. Rohrer. Judgment for plaintiff, and defendant appeals. Affirmed.

Danson, Williams & Danson, of Spokane (Geo. D. Lantz, of Spokane, of counsel), for appellant. Harry L. Cohn, of Spokane, for respondent.

PER CURIAM. Action for malpractice in the treatment of a Colle's fracture. The only assignments of error are based upon the insufficiency of the evidence to justify the verdict. Having read the record, we are unable to say that there is no evidence to justify a recovery. It would serve no good purpose to recite the evidence which sustains the verdict. It is enough to find that while, as in most cases of this character, the evidence is conflicting, there is competent evidence to the effect that appellant's treatment of respondent's arm was improper, and that as a result respondent suffered damage.

The case having been fairly submitted to the jury upon a plain question of fact, the judgment must stand.

(33 Cal. App. 545)

SHOENHAIR v. JONES. (Civ. 2228.)

(District Court of Appeal, Second District, California. April 27, 1917. Rehearing Denied by Supreme Court June 26, 1917.)

1. BILLS AND NOTES 🔑523 — ACTION BY HOLDER—SUFFICIENCY OF EVIDENCE.

In action by holder of a note, evidence *held* sufficient to justify inference that title was regularly acquired by plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822–1825.]

2. BILLS AND NOTES 🔑209—TRANSFER WITHOUT INDORSEMENT.

Where heirs of assignee of a note sent the note to plaintiff, it was not necessary that a formal indorsement or assignment in writing be executed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423, 425–427, 497, 498, 501.]

3. BILLS AND NOTES 🔑139(3)—CONSIDERATION—SURRENDER OF PRIOR NOTE.

The surrender of a prior unpaid note is sufficient consideration for the making of a renewal note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 340, 350–354.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by George J. Shoenhair against S. A. T. Jones. Judgment for plaintiff, and defendant appeals. Affirmed.

Shepard & Alm, of Los Angeles, for appellant. Hanson, Hackler & Heath, of Los Angeles, for respondent.

JAMES, J. The suit was on a promissory note executed by the defendant to the plaintiff. The appeal is from the judgment entered in favor of the plaintiff, and is presented on the judgment roll and a brief bill of exceptions.

[1] The only point argued in the briefs is that raised by the appellant, who insists that the evidence was insufficient to support the finding of the superior court as to any consideration having been rendered to the de-

fendant in exchange for the making of the instrument sued upon. This defendant originally made her note payable to two persons named Gardner and Cowan, who assigned the same to Clara Wherry without recourse. Clara Wherry died, and this first note appeared in the hands of plaintiff who, after negotiation with the defendant, accepted the note here sued upon in lieu of the note made at the prior time, and surrendered the former note. The point in appellant's argument arises wholly upon the construction to be given to testimony furnished by the plaintiff. The plaintiff first testified that he was "the owner and holder of the note" and as to the amount which had been paid thereon, and that the note was made in consideration of the surrender of the prior note as before mentioned. He then, identifying that prior note which was shown to him, testified as follows:

> "That is the note which I surrendered to the defendant in this action in consideration of the execution and delivery of the note set forth in the complaint. At the time of the execution and delivery of the note set forth in the complaint Mrs. Clara Wherry was dead. * * * The estate of Clara Wherry was never probated and no executor or administrator of her estate was ever appointed. Mrs. Wherry gave me the note for $400 before she died, but she never indorsed or assigned the same to me. As a matter of fact the note had been in my possession during all the time that Mrs. Wherry owned the same and I was her agent, and held it as such. When Mrs. Wherry died I sent the note for $400 and the mortgage given to secure it to her relatives in the East; they sent it back to me."

[2, 3] We think the court was justified in inferring from this testimony that title to the note was regularly acquired by the plaintiff from Mrs. Wherry. It was not necessary that there should have been a formal indorsement or assignment executed in writing. Daniel on Negotiable Instruments, vol. 1, § 28 (last paragraph); Ogden on Negotiable Instruments, p. 98; Humboldt M. Co. v. N. W. Pac. Ry. Co., 166 Cal. 181, 135 Pac. 503. Assuming, as we think was properly decided, that the plaintiff was the legal owner and holder of the first note, it will not be necessary to cite authority to such an elementary proposition that the surrender of that note, which had not been paid, furnished full consideration for the making of the obligation here sued upon.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 550)

WHITE v. HAYWARD. (Civ. 2223.)

(District Court of Appeal, Second District, California. April 28, 1917.)

1. Exchange of Property 🔑8(4)—Misrepresentations — Reliance — Evidence — Sufficiency.

Evidence *held* to sustain finding that one party to an exchange of real property did not rely upon the representations made to her by the other party, but made an independent investigation for herself.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 17.]

2. Trial 🔑397(2)—Findings of Fact—Unnecessary Findings.

Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 941.]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Mary L. White against Homer T. Hayward. From an order denying motion for new trial after judgment for defendant, plaintiff appeals. Affirmed.

R. E. Bledsoe, of San Bernardino, for appellant. I. W. Bull and J. E. Burnham, both of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from an order denying a motion for a new trial. The only questions presented are as to whether certain of the findings are in accord with the evidence and as to whether certain issues are found upon at all.

The action was brought to rescind an executed contract of exchange and for damages, the subjects of the exchange being certain real property of the appellant, situated in California, and certain notes held by the respondent and which were secured by mortgages on real property near Ft. Morgan, Colo. Judgment went for the respondent. The negotiations leading up to the trade were held at Pomona, Cal., and the rescission was asked because of certain misrepresentations claimed to have been made by respondent concerning the Colorado property, in his endeavor to bring about the exchange. The nature of these representations it is not necessary to mention, as the trial court found with appellant that they were not true. It was further found, however, that "plaintiff did not rely on each, all, or any of the representations made by the defendant," and it is to the question of the propriety of this finding that we must first give attention, as it is one of the findings assailed by appellant.

The appellant herself, speaking of her first interview with respondent on the subject of the proposed trade testified as follows:

> "He gave me the address of a bank at Ft. Morgan, and some real estate agents' names, but I do not remember the names. The bank, I think, was the First National. This was about the last of December, 1910, or the first of January, 1911, and I told Mr. Hayward I would investigate, and if I found the land and mortgages as represented, we would come to some agreement, and we agreed to meet at Mr. Burnham's office. * * * A short time after that, a week or two later, in answer to a telephone message, I went to Mr. Burnham's office, in Pomona, * * * and met Mr. Hayward again. In the meantime I had spoken to Mr. Kennedy, an officer in the bank at Pomona, where I do business, the First National, and had him write

> to the Ft. Morgan bank as to the value of these securities. I do not remember whether I got any report from him about it before I agreed to the trade or not, but I never saw any letter he received. I remember getting some information some time that had come to Mr. Kennedy, but I don't remember just what it was, because before I had obtained it, either the trade was made or I had decided to make it. * * * When I went to Mr. Burnham's office, Mr. Hayward was there, or else he soon came in. I told him I had decided to make the trade, and we signed up an agreement."

On her cross-examination the appellant testified further:

> "At the time of our first meeting and just before he left Mr. Hayward told me to investigate the values of the mortgages and the lands described in them, and gave me the name of the First National Bank of Ft. Morgan, Colo., to write to, to ascertain the character of the lands and the values of the mortgages, and some weeks later it was agreed that 15 days more to investigate the character of the lands and the values of the mortgages should be given me."

The agreement signed at Mr. Burnham's office set forth the terms of the trade, and contained this provision:

> "Mary L. White to have 15 days to investigate values of property covered by said mortgages."

One of appellant's witnesses, who was present at her first interview with respondent, testified that Mrs. White "said that if she found the property was as he represented that she would make the trade."

The testimony produced on the part of the respondent amplifies what is above quoted from appellant's case, and but a small part of it need be mentioned, considering the extent to which appellant's own case gives support to the finding in question. Respondent says that his first interview with Mrs. White occurred in the early part of December. He then says, inter alia:

> "She asked for references, and on the back of another of my business cards I gave her the name of the First National Bank of Ft. Morgan, the Morgan County National Bank, the Home Savings Bank, Mr. Dunn and Mr. Layton, who were real estate men, and Mr. Farnsworth, who was the county treasurer."

He further says that their next meeting was about ten days later, and that appellant then said to him:

> "I have considered this proposition, and it looks reasonably favorable to me."

The parties met again, according to respondent, in the first week in January, at Mr. Burnham's office, the conference evidently being the same one which appellant says was held at that place. Mr. Hayward states what there occurred:

> "She said 'I am ready to trade with you.' I said to her, 'Mrs. White, have you made a thorough investigation of the Colorado property?' and she said, 'I have not received an answer to the last inquiry yet.' Then I said, 'I will put my property in escrow, leaving you the privilege of withdrawing this at any day or moment that you see fit, without even the thought of calling me up; if you find that the Colorado property is not as you expect, you may withdraw from this without any preliminaries at all. We will draw up the contract, and I will put my stuff in escrow that will bind me and not you.'"

It was then that the contract was drawn allowing appellant 15 days for further investigation as to the value of the Colorado property.

The record also shows that Mr. Kennedy, who is mentioned in the testimony of appellant, wrote to the First National Bank at Ft. Morgan concerning the Colorado property, and the letter is reproduced in the transcript. Mr. Kennedy testified:

> "We got an answer, and showed it to her. I think we gave her the letter. We asked as to the value of the lands, and the answer seemed satisfactory as to values and to Mrs. White."

[1] We have been at some pains to quote from the record, as the finding upon this particular question controls the case; but we need not go further, although there is other evidence in support of the finding. It is plain that Mrs. White desired to make an independent investigation in the premises, that, after a considerable time spent in negotiation and apparent investigation, she contracted for a further delay for the purpose of making additional inquiry, and that she expended that time in such inquiry. Under such circumstances, a finding that she did not rely upon the representations of respondent was amply justified, even though her testimony, as shown in the record, contains the statement that she did rely on them.

[2] There are five other findings of the trial court to which appellant takes exception, but what is found in them upon the issues which they purport to cover is of no moment, as such issues were upon matters subordinate to and which are controlled by the very proper finding that the appellant did not rely upon the representations made by respondent. "Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become entirely immaterial." Smith v. Dubost, 148 Cal. 622, 84 Pac. 38.

The order is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 554)

CONKLIN v. WOODY. (Civ. 1839.)

(District Court of Appeal, Second District, California. April 28, 1917.)

1. COUNTIES 🔑54—POWERS OF BOARD OF SUPERVISORS—EMPLOYMENT OF COUNSEL—STATUTE.

Under Pol. Code, § 4041, subd. 16, authorizing boards of supervisors "to direct and control the prosecution" of suit "to which the county is a party, and, by a two-thirds vote of all the members, [to] employ counsel to assist the district attorney in conducting the same," such board may not delegate authority to the district attorney or any other person to make the employment, but must pass a resolution declaring its determination so to do and specifying the name of the person employed and the terms of the employment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72.]

2. COUNTIES 🔑113(5)—POWERS OF BOARD OF SUPERVISORS — EMPLOYMENT OF COUNSEL — STATUTE.

Under Pol. Code, § 4041, subd. 16, it is beyond the power of a board of county supervisors to subject a county to any expense for the employment of counsel to act in criminal cases.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 179.]

3. OFFICERS 🔑100(1)—INCREASE OF COMPENSATION—CONSTITUTIONAL PROVISIONS.

The employment by a county board of supervisors of counsel to assist the district attorney in the prosecution of criminal cases would increase the compensation of the district attorney in violation of the Constitution.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155–157.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Mandamus by N. E. Conklin against S. A. Woody. From a judgment directing the issuance of a mandate against the defendant, he appeals. Reversed.

Matthew S. Platz, of Bakersfield, for appellant. N. E. Conklin, of Bakersfield, in pro. per.

JAMES, J. Appeal from a judgment directing the issuance of a mandate against the defendant requiring him as auditor of the county of Kern to draw a warrant in favor of the petitioner in payment for services and certain expenses incurred as described in the demand of petitioner filed and approved by the board of supervisors of said Kern county.

On the 2d day of March, 1915, the board of supervisors of Kern county, by more than a two-thirds vote, adopted the following resolution:

"It appearing to the satisfaction of the board that the communication delivered to this board on the 10th day of February, 1915, from the district attorney, discloses the situation supported by facts that make it necessary, in order to have the cases now pending in our superior court and which were pending at the time the present district attorney entered upon his duties, promptly and diligently prosecuted, as the law requires, in connection with the handling of the current business of the county, that it will be necessary for the district attorney to incur expense in the employment of special prosecutors or counsel, and it further appearing from said communication and from facts within the knowledge of this board that action should be instituted for the recovery of penalty upon bonds given to the county on bail for present fugitives from justice and under liquor licenses revoked, and the board being of the opinion that it would be in the interest of the county to have this work done forthwith, and such expense incurred therefor, be it therefore resolved that the necessity for incurring of said expense exists, and that the district attorney be, and he is hereby, authorized to incur for the purpose of employing not exceeding three special prosecuting attorneys or counsel for a term or terms not to exceed three months, not to exceed $125 per month for each of such prosecutors or counsel, such services to be rendered in the prosecution of criminal cases and prosecuting of suits upon said bonds."

Pursuant to the authority alleged to have been conferred under this resolution, the district attorney employed petitioner, and he later filed his demand with the board of supervisors. The demand was itemized as required by law, the first item of which was for rental of an automobile in traveling from Bakersfield to Taft:

"In investigation and searching for evidence in criminal case of People v. Aden, $10.00."

The second was of a like kind for automobile use to certain points in Kern county and itemized as being:

"In case of People v. Reigan, expense of district attorney's office $15.00."

The last item was stated as follows:

"To services as special prosecutor and counsel in prosecution of criminal cases and in prosecution of suits upon bonds, being bail bonds and liquor bonds, said claim being for services rendered for and during March, 1915, per resolution of the board of supervisors, $125.00."

By this appeal two questions are made as against the judgment: (1) That the board of supervisors was without power to delegate to the district attorney the right to employ special counsel for any purpose in either civil or criminal cases; (2) that the board of supervisors was without power to make any employment of special counsel, except for the purposes of suits to which the county was a party.

[1] Among the enumerated powers of boards of supervisors as contained in section 4041, subd. 16, Political Code, such boards are authorized "to direct and control the prosecution * * * of all suits to which the county is a party, and, by a two-thirds vote of all the members, may employ counsel to assist the district attorney in conducting the same." A provision in like terms has been contained in the various county government acts in force for many years. By this provision a board of supervisors is authorized to contract with outside counsel and employ such counsel for the purpose of assisting the district attorney in conducting "suits to which the county is a party." The authority is not given to the board to authorize some other person to make the employment. We apprehend that it would be essential, where such employment is made, that the board of supervisors pass a resolution declaring its determination so to do and specifying the name of the person employed and the terms of the employment. The resolution first recited herein does not purport to make an employment with any person for any of the purposes specified. Therefore we think that the claim as presented by petitioner was not one which the board was authorized to allow.

[2] For the purpose of considering the second point made, we may assume (our conclu-

sion being to the contrary, however) that the employment of petitioner by the district attorney was regular, and that the board of supervisors could in the manner attempted delegate its authority. There is the further limit placed upon the power of the board to be exercised in that direction, to wit, that it may only employ counsel to assist the district attorney in "suits to which the county is a party." County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483. From the resolution as adopted by the board it appears that the employment intended to be authorized was a general one, and that it was intended to give the district attorney the right to have assistance at the cost of the county for the prosecution of criminal cases, as well as in suits to recover the penalty upon various bonds. It was beyond the power of the board of supervisors to subject the county to any expense for the employment of counsel to act in criminal cases.

[3] Moreover, by so doing the compensation of the district attorney would be increased, which is forbidden by the Constitution. The itemized claim filed by petitioner shows that the services for which he claimed compensation of $125 were services rendered in both criminal cases and in the prosecution of suits upon bail and "liquor" bonds. It may have been that the expense incurred for auto hire could have been properly allowed as contingent expense of the district attorney authorized to be paid by section 4307 of the Political Code, but the board of supervisors was not advised by the statements contained in the demand of petitioner as to how much of the $125 claimed was for services in criminal cases for the allowance of which no authority of law existed.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 566)

STEPHENS et al. v. WEYL-ZUCKERMAN & CO. (Civ. 1559.)

(District Court of Appeal, Third District, California. May 2, 1917.)

1. Sales 🔑179(3)—Delay in Delivery—Waiver of Right to Claim Damages.

By insisting upon delivery of goods, after seller's delay, failing to demand penalty, and accepting goods, the buyer did not waive right to recover damages for the delay, although by such action he might waive the right to rescind the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 458.]

2. Sales 🔑81(1)—Construction of Contract—Time of Delivery.

Where the seller expressly stipulated to complete construction of a boat "two weeks after arrival of the engine, but in no event later than June 1, 1914," time of delivery was of the essence of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 217.]

3. Sales 🔑150(3)—Recovery of Damages for Delay in Delivery—Time of Essence of Contract.

A buyer's right to recover just compensation for delay in delivery after accepting goods is not affected by the fact that time was not of the essence of the contract in view of Civ. Code, § 1492, providing that where time is not of the essence of the contract, and where delay in performance is capable of exact compensation, an offer of performance accompanied by an offer of compensation, may be made at any time after it is due, but without prejudice to creditor's rights.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 356.]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Theodore J. Stephens and another against Weyl-Zuckerman & Co. Judgment for plaintiffs, and defendant appeals. Reversed.

J. C. Campbell, Weaver, Shelton & Levy, of San Francisco, for appellant. Daniel V. Marceau, of Stockton, for respondents.

BURNETT, J. [1] The action is for the balance due for the construction by plaintiffs of a gasoline launch under an express contract requiring the payment by defendant of the sum of $1,550, and providing that the launch should be completed on June 1, 1914. The boat was not ready on time, but was accepted by defendant, which claimed, however, that it was entitled to a rebate or recoupment in consequence of the damage caused by the delay. It was, though, found by the court that there was a waiver of any such claim and the real controversy revolves around this consideration. The basis for the court's conclusion is found in these facts:

> "Defendant, with knowledge of the fact that said launch would not be completed in the time specified by said contract, did not insist upon any penalty from plaintiffs but urged them to rush said launch to completion. That plaintiffs did rush said launch to completion. During the period prior to August 8, 1914, in which payments were made as hereinafter set forth, defendant did not at any time threaten plaintiffs for any penalty for their failure to deliver the boat on time but rather urged plaintiffs to complete the boat as soon as possible; that plaintiffs did complete the boat as soon as possible; that prior to August 8, 1914, defendant raised no objection as to the failure of plaintiffs to complete the same on June 1, 1914."

We think, however, that the learned trial judge failed to distinguish between the right to rescind or abandon the contract and the right to insist upon compensation for the damage caused by the delay. The former was undoubtedly waived, but the other legal privilege was unaffected by the acts detailed in said finding. The distinction between the two methods of redress as to waiver is quite clearly shown by the authorities. In Crocker-Wheeler Co. v. Varick Co., 43 Misc. Rep. 645, 88 N. Y. Supp. 412, the subject of litigation was a contract to furnish and install two elevators. The trial judge held that the conduct of defendant "in urging plaintiff to continue and hurry completion of the work and finally accepting the same when performed and paying therefor a large part of the stipulated price thereof" was a waiver of damages for the failure to complete the work within the prescribed time. It was determined, however, by the appellate division that the defendant waived simply any right it might have asserted to plead the delay as a defense to an action for the agreed price, the court saying as to the other question:

> "It did not, however, thereby waive its right to counterclaim for any actual damage it might have suffered by reason of the delay. * * * The error into which the court below fell was in treating defendants' acquiescence in the completion of the contract as a waiver of damages for nonfulfillment, instead of only a waiver of any defense to a claim for the contract price."

In Howard et al. v. Thompson Lumber Co., 106 Ky. 566, 50 S. W. 1092, appellant agreed to build a tramway and haul logs for appellee. Compensation was to be paid as the work progressed, but a certain percentage thereof was to be retained and appellants' rights thereto forfeited if they did not perform as agreed. In an action by appellants, the defense of tardy performance was pleaded and appellee responded by alleging a waiver. In the course of the opinion it was stated that after the failure to furnish the logs within the time agreed upon, appellee "continued to receive and pay for the logs delivered and urged defendants to go on with their contract." The court, after quoting from Lawson on Contracts, declared:

> "Appellee, in accepting the logs actually delivered, and paying therefor, and in urging and encouraging appellants to go ahead with the work, waived its right to claim the forfeiture of the 10 per cent. on monthly settlements and the 75 cents per thousand feet for failure to complete the tramway, and appellants are entitled to maintain this action to recover the amount due them under the contract for logs actually delivered; but appellee is entitled to recoup by way of set-off or counterclaim damages sustained on account of the failure of appellants to keep their contract, unless such failure was occasioned by the fault of appellee."

The Supreme Court of this state declared the same principle in Bryson v. McCone, 121 Cal. 153, 53 Pac. 637, as follows:

> "But consent on the part of plaintiff that defendants might continue the work after the stipulated time was not a waiver of damages or of the breach. Upon the breach plaintiff, not being himself in default, had the right to rescind or permit the defendants to complete the work and sue for damages occasioned by the default."

It was similarly held by the Supreme Court of Michigan in Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591, wherein the defendant urgently insisted upon the delivery of the goods contracted for after the stipulated time had expired; by the Supreme Court of the United States in Phillips & Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341, wherein it was stated that upon a contract for the sale of personal property to be delivered upon a certain day it might be received afterward and the vendor could recover for it, but that the vendee might recoup by setting up a cross-demand for damages for the delay; by the Supreme Court of Michigan in Pittsburgh Co. v. Scully, 145 Mich. 229, 108 N. W. 503, wherein it was held that defendant, by receiving and paying for coal that was not promptly shipped, did not waive the claim for damages because the coal was not promptly delivered. Many other cases to the same effect are cited by appellant, and they seem to recognize the rule as of general acceptance. The justice of this view is affirmed in Page on Contracts, vol. 3, p. 2320, upon the ground that:

> "The party not in default is often constrained by his necessities to take what he can get under his contract when he can get it. Such conduct does not and should not operate as a waiver of the right of action for damages."

We can perceive no just ground for holding that any of the facts recited by the court, or all combined, should operate as a waiver of the right to claim whatever damages accrued to appellant by reason of the failure on the part of respondents to keep their engagement. Assuredly, the failure to demand a penalty or to use threatening or acrimonious language is no evidence of a relinquishment of this right. The effort to induce respondents to complete the work as speedily as possible and the payment of the several installments as they were due were entirely consistent with the purpose of claiming whatever might be due defendant under the contract. It was the duty of appellant to make the payments as called for, and its urgency as to the completion was evidence of good faith and a desire to save respondents as well as appellant from unnecessary loss.

Some cases are cited by respondents which, it is claimed, support the view of the lower court, but upon examination they appear disappointing and inadequate for the purpose. In Eyster v. Parrott, 83 Ill. 517, it seems the only waiver related to "the right to demand a forfeiture of the work already done" and the court allowed the defendant the damages which he had suffered by reason of the delay in completing the building. The question of the right to recover damages for delay did not arise in Paddock v. Stout, 121 Ill. 571, 13 N. E. 182, Tidwell v. Southern Engine Works, 87 Ark. 52, 112 S. W. 154, or Stiewel v. Lally, 89 Ark. 195, 115 S. W. 1134. The right to recover damages for delay was recognized in Davis v. Fish, 1 G. Greene (Iowa) 406, 48 Am. Dec. 387, but it was held that certain considerations were too remote and speculative to be regarded in determining the loss. Therein it was stated:

> "But the rule is settled beyond question, that if a job of work is of some use and value to the employer, or vendee, though improperly done, or not within the stipulated time, still the workman or vendor is entitled to recover as much as the work is reasonably worth, making such reasonable allowance as the cir-

> cumstances may require. * * * In connection with this point it may be appropriately observed that in case of a breach of such specific contract, if the injured party can protect himself from damage, he is bound to do so if practicable, at a moderate expense, or by ordinary efforts; and he can charge the delinquent party for such expense and efforts only, and for the damages which could not be prevented by the exercise of such diligence."

The decision in Medart, etc., Co. v. Dubuque, etc., Co., 121 Iowa, 244, 96 N. W. 770, turned upon an agreed settlement of the claim for damages evidenced by a complete payment, but it was held that partial payment and acceptance alone did not constitute a waiver of the claim. Baldwain v. Foss, 71 Iowa, 389, 32 N. W. 389, decided that:

> "If a note that has been obtained by fraud is voluntarily paid by the maker with full knowledge of all the facts, he cannot recover the amount so paid."

The soundness of that decision could hardly be questioned. In Reid v. Field, 83 Va. 26, 1 S. E. 395, it was held that defendant by executing his note for the full amount due had waived his claim for an equitable set-off for damages caused by the delay in delivering the merchandise. The gist of the decision in Sirch E. & T. Laboratories v. Garbutt, 13 Cal. App. 435, 110 Pac. 140, was to the effect that having accepted the work, knowing it was defective, and having paid for it, the defendant could not recover the money paid. The point involved herein was not considered in that case. A question similar to the one before us arose, however, in the subsequent case of Machinery & Electrical Co. v. Y. M. C. A., 22 Cal. App. 416, 134 Pac. 724, and the same court declared:

> "It is well settled that an owner may receive and use a structure built for him by a contractor without necessarily waiving his right to offset damages occasioned by defects or imperfect completion against the contract price."

It will be noticed that none of the cases cited by respondents is directly in point. As to those holding that full payment constitutes a waiver of damages for delay, it may be said, also, that the weight of authority seems to be the other way. We content ourselves as to this with a citation of the cases appearing in appellant's brief: Johnson v. Baltimore Glass Co., 74 Kan. 762, 88 Pac. 52, 7 L. R. A. (N. S.) 1114, 11 Ann. Cas. 505; Industrial Works v. Mitchell, 114 Mich. 29, 72 N. W. 25; Clydebang, etc., Co. v. Castenada, A. C. 1905, 6 (decided by the House of Lords); North Alaska, etc., Co. v. Hobbs, Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501; Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976. There is, indeed, a sentence in the opinion of this court in Mannix v. Wilson, 18 Cal. App. 601, 123 Pac. 981, that seems encouraging to respondents, but if read with the context it will not be so understood.

[2, 3] As to whether time was of the essence of the contract there would seem to be little doubt in view of the positive agreement that the boat was to be completed "two weeks after arrival of engine, but in no event later than June 1, 1914." But, as pointed out by appellant, this does not affect the question involved herein, but only the consideration whether one party can regard the contract as broken or forfeited by the failure of the other to perform on the specific day. Even if time is not of the essence, the aggrieved party is entitled to just compensation for the delay. Civ. Code, § 1492. We do not mean to hold that it may not be shown that appellant waived its claim for any damage in consequence of the delay, but we are satisfied that the facts found by the court below are not sufficient to justify such conclusion.

In the event of another trial if respondents claim a waiver they should set it up with due formality by permission of the court, that the issue may be unquestionably presented for determination.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(33 Cal. App. 561)

MILLOGLAV v. ZACHARIAS. (Civ. 2035.)

(District Court of Appeal, First District, California. May 2, 1917. Rehearing Denied by Supreme Court June 30, 1917.)

1. Trusts 🔑74 — Resulting — Repugnant Provisions—Statute.

Where the plaintiff furnishes the purchase price of land on which a trust is sought to be impressed, taking title in the name of defendant in trust for himself, a condition of the agreement that the defendant shall not sell or incumber the property is not repugnant to the trust, since the trust which is presumed to result under these circumstances by the terms of Civ. Code, § 853, is necessarily one by which the grantee is bound not to sell or incumber the property to the injury of the person for whose benefit the trust was presumed to arise, and such a condition is not invalid because the parties had expressly agreed that such should be the effect of the trust relation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 105, 106.]

2. Trusts 🔑81(1) — Constructive—Breach of Oral Agreement to Support.

Where plaintiff, relying on the confidential relation between himself and defendant, buys land and causes it to be conveyed to defendant relying on her promise to support him in her home to be established therein for the balance of his natural life, if she violates her promise the property is impressed with a trust arising out of her actual or constructive fraud.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 115.]

3. Trusts 🔑374—Decree—Adjustment of Equities.

Where defendant, contrary to an agreement to support plaintiff in a home erected on land which she held in trust for him, incumbered the property and appropriated the proceeds, the court may, in an action to enforce such trust, provide that defendant pay plaintiff such proceeds less the amount contributed by her to the equipment of the home.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607-612.]

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by N. P. Milloglav against Lydia Zacharias. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stoney, Rouleau, Stoney & Armstrong, of San Francisco, for appellant. Rose & Silverstein, of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action to have declared a trust in his favor arising out of the facts set forth in his complaint. The appeal is taken upon the judgment roll without a bill of exceptions, and hence the appellant's contentions are limited to two: First, that the judgment is not supported by the pleadings; and, second, that it is not justified by the findings of fact and conclusions of law in the case.

The complaint is in two counts, in the first of which it is alleged in substance that the plaintiff, who is the father of the defendant, furnished the purchase price of the lands upon which a trust is sought to be impressed, and that the title was taken in the name of the defendant in trust for and for the benefit of the plaintiff and with the understanding that she was not to incumber or sell the property; that in violation of said understanding the defendant has already incumbered said property by a deed of trust to secure her promissory note in the sum of $2,000 borrowed money, which she has wrongfully appropriated to her own use; and it is further averred that she threatens to convey and dispose of the property to some person or persons unknown to the plaintiff for the purpose of cheating and defrauding the plaintiff out of his right, title, and interest in the said property.

It is contended by the appellant that the first count of the plaintiff's complaint does not state a cause of action for the reason, as she urges, that the trust alleged therein to have been created is an express trust; and, since the condition of the trust agreement was that the grantee of the title would not sell or incumber the property, this condition, being hostile to the grant, is void. In support of this contention, the appellant strongly relies upon the cases of Prey v. Stanley, 110 Cal. 423, 42 Pac. 908, and Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276.

[1] We cannot give our support to the appellant's contention, nor to the application to this cause of the foregoing cases upon which she relies. The averments of the first count of plaintiff's complaint as above summarized bring this case clearly within the terms of section 853 of the Civil Code, which provides that:

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

The trust which would be presumed to so result would of necessity be one by which the grantee would be bound not to sell or incumber the property to the injury of the person for whose benefit the trust was presumed to arise; and the mere fact that the parties had understood or agreed that such should be the effect and terms of the trust relation would not in any way militate against the creation or validity of the trust which came into being under the terms of the foregoing section of the Civil Code. The cases above referred to and relied upon by the appellant have no application to such a state of facts as is presented by the first count of the complaint in this case. They refer to cases where a fee-simple title has by the act and intent of the parties passed to the grantee, and where an attempt was made in restraint of alienation to impose a condition repugnant to the interest created by the conveyance of the property. But no such situation is presented by the case at bar according to the averments of the first count of plaintiff's complaint. We think therefore that the appellant's objection to the sufficiency of the first count of the complaint herein is not well taken.

The appellant makes a similar objection to the second count of the complaint. The averments of this count are in substance that prior to the 22d day of September, 1913, the plaintiff was approached by the defendant with the proposition that if he would purchase the property in question herein and cause the same to be conveyed to the defendant, she would care for, support, and maintain him in her home to be established thereon for the balance of his natural life, and would not sell or incumber or otherwise dispose of said property or any portion thereof; and that, relying upon these promises of the defendant, the plaintiff did supply the sum of $4,500 as the purchase price of said property and caused the same to be conveyed to said defendant; but that, notwithstanding her promise and agreement, she refuses to prepare his meals or otherwise care for him as she had agreed to do, and has incumbered the property for a debt of her own in the sum of $2,000, and has further threatened to convey or dispose of the same for the purpose of defrauding the plaintiff out of his right, title, and interest therein.

At the time of the trial of the action, the court permitted both counts of the plaintiff's complaint to be amended so as to conform with the proofs by the insertion in each of an averment to the effect that the plaintiff had great confidence and trust in the defendant arising out of the relation between them, and relying upon said confidence, and fully believing that the defendant would hold said property in trust for plaintiff as agreed, the plaintiff had directed said conveyance to be made to the defendant.

[2] We are able to perceive no material difference in these two counts of the plaintiff's complaint in so far as they each aver facts from which a resulting trust would arise in favor of plaintiff. It is true that the second count in the complaint amplifies somewhat the terms and requirements of such trust by the addition of the provisions calling for the care and maintenance of the plaintiff in the home of the defendant upon the purchased property. These added conditions are quite common in trusts of this character and are not hostile to them; and we are of the opinion that the averments of this second count in plaintiff's complaint, taken in connection with the later amendment thereto, averring the existence of a confidential relation between the parties, upon which the plaintiff relied, in investing the defendant with the apparent title to the property in question, bring this case within the range of those authorities in this state which deal with the subject of trusts arising out of actual or constructive fraud on the part of those persons who are invested with apparent but not real ownership of the property. Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Id., 90 Cal. 323, 27 Pac. 186; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Jones v. Jones, 140 Cal. 587, 74 Pac. 143; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430. Under these authorities we are satisfied that the complaint herein in both its counts, and especially as amended at the trial, states a cause of action.

[3] The final contention of the appellant is that the findings do not support the judgment. The findings reveal a somewhat different state of facts from those averred in the complaint, and they are also somewhat prolix and detailed in an apparent effort on the part of the trial court to make them responsive to the averments and denials of the defendant's cross-complaint and to the averments of the answer thereto. Without rehearsing these matters in detail, it may be said that the main divergence of the findings of the trial court from the averments of plaintiff's complaint springs from a finding to the effect that the defendant had contributed the sum of $850, which she had placed in the hands of the plaintiff to be used in the establishment of the home of the parties, and which may have been used in buying the furniture therefor, since the court expressly finds that the purchase price of the real estate did not consist of moneys belonging to the defendant. The court undertook to equalize these matters in its judgment by providing therein that the defendant should pay over to the plaintiff the sum received by the incumbrance of the property less whatever credit she would be entitled to by reason of her contribution to the equipment of the home. We think this sort of adjustment of the monetary affairs of the parties was fully within the discretion of a court of equity. While the court does not make an express finding upon the subject of fraud on the part of the defendant, it does find the facts from which the implication of fraud would necessarily arise; and we are otherwise of the opinion that the findings of the court, taken as a whole, are responsive to the issues in the case, and that they support the conclusions of law and the judgment based thereon.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

(33 Cal. App. 536)

ROBINSON v. RISPIN et al. (Civ. 1618.)

(District Court of Appeal, Third District, California. April 26, 1917.)

1. MINES AND MINERALS ⚿109—CONTRACTS—WELL-DIGGING CONTRACT.

In contractor's damage suit for landowner's breach of contract to drill not less than 2,000 feet and not less than two nor more than four wells, a 400-foot well accepted by the landowner need not be credited with 1,000 feet.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 214.]

2. DAMAGES ⚿40(2)—PROFITS — WELL-DIGGING CONTRACT.

Profits to be earned from digging oil wells are not too speculative and remote to be a basis for damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 74–78.]

3. MINES AND MINERALS ⚿109—CONTRACTS—BREACH—SUFFICIENCY OF EVIDENCE.

Plaintiff contractor's testimony that defendant landowners did not supply him with casing, fuel, and water to be used in digging oil wells sustains a finding that defendants' default prevented plaintiff from completing the work.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 214.]

4. CORPORATIONS ⚿243(3) — LIABILITY ON STOCK—TRUSTEE.

Under the direct provisions of Civ. Code, § 322, a minor's trustee holding corporate stock is personally liable on such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 947.]

5. CORPORATIONS ⚿171 — STOCKHOLDERS—EVIDENCE.

Plaintiff may prove that defendants were corporate stockholders by their testimony, especially where plaintiff's efforts to have the corporation's books produced pursuant to Code Civ. Proc. § 1000, met persistent opposition.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 633–636.]

6. ASSIGNMENTS ⚿107 — CONTRACTS — ASSIGNEE'S LIABILITY.

While the mere assignment of an executory contract does not make the assignee liable to the other party, yet, where the contract is fully performed, the benefit inures solely to the assignee, and he recognizes the contract as binding, he is liable to the other party equally with his assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 186, 187.]

7. NOVATION 🔑12 — SUFFICIENCY OF EVIDENCE.

A defendant's testimony that a corporation agreed to assume the obligations of his contract, etc., *held* sufficient to sustain a finding of novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12.]

8. NOVATION 🔑12—EVIDENCE.

Under the direct provisions of Civ. Code, § 1531, subd. 2, a novation may be established by showing the substitution of a new debtor in place of the old one.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12.]

9. NOVATION 🔑12—PAROL EVIDENCE.

Parol evidence is admissible to establish a novation in a written contract.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12.]

Appeal from Superior Court, City and County of San Francisco; William D. Dehy, Judge.

Action by E. W. Robinson against H. A. Rispin and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed, and new trial ordered as to defendant Rispin, and affirmed in other respects.

Boutwell Dunlap and John E. Alexander, both of San Francisco, for appellants. R. H. Cross, of San Francisco, for respondent.

BURNETT, J. On November 10, 1910, plaintiff and defendant Rispin entered into a written agreement for the drilling of certain oil wells in Kern county. Robinson agreed to furnish the tools and labor and drill two or more wells for which Rispin agreed to pay him $4.50 for each vertical foot drilled. Rispin was "to furnish all necessary fuel, water, tubing, and casing at the well being drilled," and Robinson agreed to do the work according to certain specifications "in a thoroughly workmanlike manner under the instructions of said Rispin," and it was further provided that Robinson should not be compelled to drill to a depth exceeding 1,000 feet in any one hole, and "that this contract shall cover a total of not less than 2,000 feet of drilling and not less than two nor more than four wells, and that there shall be no unnecessary delays by either party, either in the drilling of the wells or the furnishing of casing, fuel and water." On December 23, 1910, after Robinson had moved his crew and appliances to the land where the work was to be done, but before he had actually begun drilling, Rispin assigned all his right, title, and interest in said land (which he held under option agreements) and all his interest under said agreement with Robinson to the defendant corporation, Lost Hills Central Oil Company. The court found that the defendant corporation accepted the assignment and the benefits and obligations arising from the agreement with Robinson, with full knowledge of all the facts relating thereto, and the work thereafter proceeded under its directions and instructions. The work was begun on December 28th, and after innumerable delays, which the court found were caused by the failure of the corporation to furnish the necessary casing, fuel, and water, he succeeded, on or about the 23d day of February, 1911, in reaching a depth of 400 feet and it was mutually agreed that the well known as "well No. 1" should be abandoned as an oil well and should be converted into and used as a water well for further operations on the property. Plaintiff was thereupon paid $1,800 for the said 400 feet, and he moved his drilling appliances to another point on the land, and he proceeded to drill well No. 2 until at the end of June, 1911, he had reached a depth of 907 feet. It was found that he could proceed no further by reason of the failure of appellants to furnish the necessary casing, and hence he ceased the drilling operations. After waiting until November 25, 1911, for defendants to furnish the casing to enable him to proceed with the work he brought suit to recover the amount due him for the work actually done, for the damages which he had sustained by reason of defendants' breach of their agreement to furnish him with the requisite fuel, water, and casing, and damages for their refusal to permit him to go on and complete the drilling to the extent of the 2,000 minimum feet provided in the contract. The court's judgment was in favor of plaintiff in the aggregate sum of $6,421.25 against the defendants Rispin and Lost Hills Central Oil Company and a several judgment against Benjamin Goodwin, A. B. Smith, H. A. Rispin, and J. S. Ourish as stockholders of said corporation, for the sum of $1,589.41 each.

At the trial appellants made common cause, and they were represented by the same attorney. On the appeal another attorney appears for Rispin, and he and the other appellants assume a somewhat antagonistic attitude as to the proper theory of the case. However, they are in accord in urging several grounds for a reversal of the judgment and order denying the motion for a new trial, and these will first receive attention.

Plaintiff was awarded the sum of $1,529.25 for the loss of the profits which he would have made if permitted to complete the contract. As to the various objections to the particular finding some brief suggestions may be submitted.

[1] The court was not bound to consider the 400-foot well as though it had been drilled to the depth of 1,000 feet. There was no agreement to that effect, according to the testimony of plaintiff, and in the original contract the number of feet actually drilled was the important consideration. The parties did not even contemplate that any well should be of definite depth, but there was a limit to the number that should be developed. There was no greater reason for crediting this particular well with 1,000 feet than for so con-

sidering the other one of 907 feet. In view of the testimony of plaintiff that well "No. 1" was accepted as complete to be used for supplying water, and that it was not through any fault of his that it was drilled no deeper, the court was justified in the number of feet it allowed for said work.

[2] As to damages, the rule is, no doubt, that those of a special nature must be pleaded. General damages are said to be the natural and necessary result of the act complained of, while special are the natural, but not the necessary, consequence of such act. It has been held, however, that the loss of profits on a contract of this kind is the necessary consequence of a breach, and therefore it is not required to be specially pleaded. Tahoe Ice Co. v. Union Ice Co., 109 Cal. 249, 41 Pac. 1020; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319. Nor are such profits too speculative and remote to be a basis for damages. This consideration is thoroughly discussed in Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62, and it is sufficient to quote therefrom the following sentence:

> "But where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages."

[3] Appellants are equally at fault in the contention that plaintiff failed to show that he was prevented by the defendants from completing the work. We need not quote from the record, but we deem it sufficient to say that plaintiff testified positively that defendants failed to supply him with the casing, fuel, and water as they agreed, and therefore it was impossible for him to continue the work. Furthermore, he testified that they abandoned the enterprise and requested him to come to San Francisco to assist them in disposing of defendants' interest in the land. Plaintiff's case did not rest upon the theory that he was prevented by the failure of defendants to pay him what was due, and therefore the doctrine of the case of Cox v. McLaughlin, 54 Cal. 605, has no application. It is rather an instance of the failure to furnish material which was to be used in the work and which was made a condition precedent to the performance by plaintiff, and it is governed by the principle expounded and applied in Alderson v. Houston, 154 Cal. 3, 96 Pac. 884.

As to the damages caused by delay, it may be said also that support for the finding is contained in the record. It is pointed out in respondent's brief, and it is not controverted in the final brief for appellants.

[4, 5] There was a dispute as to the number of shares of stock in defendant corporation held by some of the other defendants. However, the finding of the court in that respect seems abundantly supported. There was no controversy as to the number of shares outstanding and that said defendants were stockholders. It was admitted by the answer that Ourish owned 25,000 shares. Rispin and Goodwin admitted on the stand that each owned the same number. Smith's testimony showed also that he was liable for 25,000 shares, as he admitted that this number stood in his name as trustee for his son, a minor of the age of 16 years. Section 322, Civ. Code. We can see no valid objection to the method adopted for the proof of these facts. They were matters peculiarly within the knowledge of defendants, and they were competent witnesses to testify as to the number of shares owned by each. Indeed, plaintiff endeavored to have the books of the corporation produced, that the matter might be set at rest, but he encountered serious and persistent opposition. Steps were taken for this purpose as provided by section 1000 of the Code of Civil Procedure, but we need not follow them in detail. Appellants may have acted in good faith, but they seemed strongly averse to a complete inspection by respondent of the records involved in the controversy. We think, under the circumstances, that the court was justified in holding that its order in reference to an inspection of the books had not been complied with and in assuming the facts to be as claimed by plaintiff. However, aside from this, the evidence was sufficient to support the finding.

We have thus noticed the foregoing contentions, although we would probably be justified in concluding that they had been abandoned by appellants; as no reference is made to any of them in the closing briefs.

We come now to the points where appellants diverge and to which the closing arguments are addressed.

The contention of the corporation defendant, the Lost Hills Central Oil Company, is that it never assumed any liability under the contract made by Robinson and Rispin. There can be no doubt, however, that the record supports the finding of the court to the effect that Rispin transferred, set over, and assigned all his right, title, and interest, under the agreement made by him with Robinson, to the defendant corporation, this transfer having been made on December 23, 1910, while the contract was wholly executory; that the defendant corporation voluntarily accepted the assignment and the benefits and obligations arising from the transaction and the agreement with Robinson, with full knowledge of all the facts relating thereto, and thereafter requested Robinson to perform the work stipulated under and pursuant to the terms of that agreement. The evidence is epitomized in the brief of respondent, but it is not necessary to repeat it here.

[6, 7] The case seems to fall clearly within the principle of Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Freze

v. Moore, 1 Cal. App. 587, 82 Pac. 542; and section 1589 of the Civil Code. Of course, as suggested by respondent, the mere assignment of the rights under an executory contract would not make the assignee liable to the other contracting party. Such was the case of Lisenby v. Newton, 120 Cal. 521, 52 Pac. 813, 65 Am. St. Rep. 203. But where, after the assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee, and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor. Such is this case, as was Jones v. Allert, 161 Cal. 234, 118 Pac. 794. Indeed, there is much evidence in the record that the corporation was the real party in interest, Rispin being a mere intermediary. Furthermore, we may say that, if the court had found that there was a novation, the substitution of the corporation for Rispin with the intention of releasing the latter from liability, the finding would be supported. There is much in the record tending to this view. It will be sufficient to refer to a portion of the testimony of Rispin. He said: That he presented to the directors of Lost Hills Central Oil Company the contract between him and Robinson, and that they directed him what to do under the contract; that the corporation paid Robinson what was due under the agreement; that there was an understanding that the corporation was to assume the obligations of the contract; "that it would take my place in the contract with Mr. Robinson; that the contract would be practically between Mr. Robinson and the corporation, and not with myself;" and that he notified Mr. Robinson that the corporation had assumed the contract. In fact, appellants attempted to go further and show that at the time of the execution of the said contract between Robinson and Rispin it was understood and agreed that the corporation, when formed, should be substituted for Rispin. That attempt involves what appellant Rispin claims was a prejudicially erroneous ruling of the court. The purpose of the questions addressed to the witness was stated by counsel as follows:

> "I wish to show by Mr. Rispin and to follow that testimony up that at and subsequent to the time when this contract was executed, on November 10, 1910, there was a distinct agreement between Mr. Rispin and Mr. Robinson, an agreement incidental to the agreement of November 10, 1910, to the effect that that agreement as signed was to be assumed by a corporation which Mr. Rispin was at that time organizing, and that the corporation would take over and assume the liability under that contract; that there was an agreement between them to that effect. And following that I wish to show that that agreement was fully and completely executed and carried out, and that the liability was assumed by the corporation; that the liability of the corporation was assented to by Mr. Robinson, and that Mr. Robinson looked to the corporation as the party liable and released Mr. Rispin from all obligations because of the writing which was introduced by plaintiff here as the contract; further that all the facts and circumstances surrounding the case are proper to be shown in order that the judge may properly construe the instrument in question; and further that the evidence of what transpired at that time would be admissible upon the ground of showing lack of consideration as far as Mr. Rispin was concerned. Those matters, I believe, are fully set forth in the allegations of the answer, sufficient to have them admitted as evidence. If there is any question in the mind of the court that these matters are not fully set forth in the answer of Mr. Rispin so that this evidence should be admitted, I then ask for leave to amend so that those matters can be fully shown."

[8, 9] The court, however, regarded it as an effort to vary the terms of the written instrument, and would not permit the questions to be answered. In this we think the court erred. The purpose was not to vary the terms of the contract, but to show a collateral agreement that the contract should be assumed by another. There is no doubt a novation could be shown by proving the substitution of another party for Rispin in the contract. Section 1531, Civ. Code, subd. 2. In order to prove this, there must be, of course, evidence of an agreement to that effect. Plaintiff must have consented to it in order to constitute a novation. That he so agreed at the time of the execution of the original contract would naturally be a significant circumstance in the chain of proof relied upon to establish the novation. Proof of the substitution is not required to be in writing, but may consist of parol evidence. If it was not permissible to show such an agreement at the time the written contract was executed, it could not be shown at all. The same objection could be made as to a question addressed to any subsequent agreement between the parties as at the time the written contract was executed. Upon respondent's theory the novation could not be proven unless it was embodied in a written instrument. This, however, is not the law, and the contention of respondent is based upon an erroneous conception of the rule as to varying the terms of a written instrument. In Farmers' Nat. Gold Bank v. Stover, 60 Cal. 389, defendant attempted to prove that plaintiff had agreed that a certain note and mortgage was taken by plaintiff as substitution for and in full payment of the note sued on. The evidence was admitted and thereafter excluded. The Supreme Court said:

> "This was error. The evidence which was admitted and afterwards excluded tended to prove that the bank had accepted the individual note and mortgage of Stover as a substitute for the note in suit, for the purpose of extinguishing the obligation arising from it, or of releasing the parties to it who had become insolvent. If the note and mortgage were, in fact, taken as a substitute for the note in dispute, with the intent of extinguishing the obligation of it, or releasing the parties to it, the transaction constituted a defense by way of novation, under sections 1530, 1531, 1532, of the Civil Code; and the defendants were entitled to have it presented to the consideration of the jury upon the evidence adduced to sustain it."

As to the sufficiency of the pleadings to present the issue, the Supreme Court therein approved Kirstein v. Madden, 38 Cal. 158, and Stringer v. Davis, 30 Cal. 318, wherein it was held that the trial court, if application should be made therefor, should allow such amendments to be made as will enable the court to try and determine the cause on the merits.

In Guidery v. Green, 95 Cal. 630, it was held that parol evidence offered for the purpose of showing that a subsequent written contract, which it is claimed superseded and annulled a prior written contract upon which the other is based, had been executed upon the consideration and agreement that the prior contract should be canceled and all claims of the plaintiff against the defendant thereunder waived, is not incompetent as having the effect to vary or contradict the terms of either of the written instruments or to add any terms thereto. Said the court:

> "Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action."

So here the purpose was to show that said agreement no longer had any existence as between the original parties, but that it had been superseded by a contract between plaintiff and the corporation. That the terms and conditions of the contract remained the same, that practically the only change was the substitution of another obligor, manifestly presents no different legal aspect from the case where an entirely different contract has been substituted.

If the rule is to be applied as claimed by respondent, then no effect could be given to that portion of section 1698 of the Civil Code which provides that:

> "A contract in writing may be altered * * * by an executed oral agreement."

Such executed agreement could not be shown for the reason that it would be in effect to permit parol evidence to vary the terms of a written instrument. That a novation had been effected was one of the important defenses relied upon by appellant Rispin, and we think he should have been afforded the fullest opportunity to establish it.

As to the appellant corporation we may suggest that its attitude here appears quite inconsistent with its position at the trial. Therein all of the defendants, as we have stated, were represented by the same attorney, who insisted, as we have seen, that there was a complete novation, that the corporation had been substituted in the original contract for Rispin, and it complained somewhat bitterly because it was denied the privilege of making that clear to the court. It is true also that the motion for a new trial was joint and not several, and there is a joint appeal from the judgment. However, no point is made as to this, and we think justice requires that the judgment against Rispin for the sum of $6,421.25 should be reversed, and a new trial had upon the issue whether he was released from liability upon the contract by virtue of said alleged novation, and that the judgment and order should be affirmed in all other respects. It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(33 Cal. App. 557)

MANOR v. DUNFIELD. (Civ. 1638.)

(District Court of Appeal, Third District, California. April 30, 1917.)

1. TROVER AND CONVERSION ⚷40(1) — POSSESSION OF PLAINTIFF—ILLEGAL TAKING—KNOWLEDGE OF DEFENDANT — SUFFICIENCY OF EVIDENCE.

In suit for conversion of an automobile, evidence *held* to justify findings that plaintiff was in the possession and entitled to the possession of the machine when it was delivered to defendant by plaintiff's employé, that it was illegally taken from plaintiff, and that defendant had knowledge or the means of acquiring knowledge of plaintiff's claim to its possession.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232, 240, 244.]

2. PLEDGES ⚷11 — POSSESSION — CLAIMS OF CREDITORS—STATUTE.

Where plaintiff was in possession of an automobile through his employé, the driver of his auto-stage line, he had such possession as to protect himself against the claims of creditors, as contemplated by Civ. Code, § 3440, providing what transfers are presumed to be fraudulent, though the possession came to plaintiff by his employé's pledging the car with him.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28–35.]

3. PLEDGES ⚷43—PLEDGOR'S TRANSFER OF INTEREST—EFFECT ON PLEDGEE.

Where plaintiff's employé, driver of an auto-stage line, pledged an automobile with plaintiff, and thereafter had control over the car entirely by virtue of his employment and under plaintiff's direction, the employé had no right to deprive plaintiff of the possession of the machine, and his attempted transfer of his interest to a third person had no effect on plaintiff's claim to the car.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 102.]

4. NOVATION ⚷5—CONTRACT OF SALE.

Where plaintiff assumed the obligation of his employé under the latter's contract to buy an automobile, and the substitution was recognized by the seller of the car, there was a complete novation, and plaintiff was entitled to the rights and subject to the liabilities of the sale, which was conditional.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5.]

5. SALES ⚷467—CONDITIONAL SALE—RIGHT TO POSSESSION.

The vendee of personalty under a conditional sale contract is entitled to possession until he loses the right by virtue of his violation of some provision of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354, 1358–1364.]

6. SALES 🔑480(4)—CONTRACT—PERFORMANCE —PRESUMPTION.

It is presumed that the successor by novation of the buyer of an automobile by conditional sale contract will make the final payment on the car.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1444, 1445.]

7. SALES 🔑480(1) — CONDITIONAL SALE — FAILURE TO COMPLETE CONTRACT—PENALTY.

If the successor by novation of the buyer of an automobile by conditional sale contract does not complete his contract by paying for the car, he is liable to the penalty of forfeiture.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1440, 1442, 1446.]

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by J. A. Manor against J. D. Dunfield. From a judgment for plaintiff, defendant appeals. Affirmed.

Millington & Millington, of Colusa, for appellant. U. W. Brown and Harmon M. Albery, both of Colusa, for respondent.

BURNETT, J. One F. E. Partain entered into a contract with one G. L. Sanders for the purchase of a Ford automobile. Afterward by agreement a Rambler machine was substituted for the Ford. There is no doubt that the said Sanders was the owner of the Ford, and there is sufficient circumstantial evidence that he was also the owner of the Rambler, although the direct evidence is to the effect that the latter belonged to Sanders Bros. This is of no importance, however, as it is indisputable that both G. L. Sanders and Sanders Bros. agreed to the substitution of one machine for the other. The Ford machine was delivered to Partain, but, on account of his failure to meet the payments called for by the contract of sale, G. L. Sanders again took possession of it. Partain and plaintiff then entered into an agreement, whereby the latter was to pay Sanders what was due, and the machine was to be turned over to plaintiff and used by him on his auto-stage line. It was further agreed that the machine was to be restored to Partain whenever he repaid plaintiff the amount of money so advanced to Sanders. Plaintiff then made arrangements with G. L. Sanders to pay him the amount due, the sum of $108.40; Sanders understanding that the machine was to be turned over to plaintiff. There was some question as to the form of the receipt offered by Sanders, so he was informed that the money was in the bank and he could get it when he gave a proper receipt. Before the payment was made, plaintiff was injured and was thereafter in a sanatorium for some time. While there he had his brother pay Sanders $133.40, the amount due at that time on the machine. This payment was made on September 11th. On September 15th, Partain, who was working for plaintiff, driving his automobiles on his stage line, traded said Ford machine for the Rambler. Plaintiff knew nothing of this until the 1st of October, when Partain brought it to plaintiff's house and turned it over to him. From the time of the trade or substitution of one machine for the other, the Rambler was used on plaintiff's auto-stage line, driven by plaintiff's drivers, and had on it his stage sign and license number. Furthermore, it was stored in a garage in Colusa in the name of and by plaintiff, and bills against the same were charged to him, and he had possession of the machine until November 13, 1916. On November 1st, Partain quit working for plaintiff, and the Rambler remained in possession of the latter. On November 11th, plaintiff met G. L. Sanders and said to him that he had the money for the November payment on the machine, but that he had some money coming in the following week and he could make the whole payment on Wednesday, to which Sanders consented, telling plaintiff that the Rambler was his and for him to take it; the car standing near at that time. However, before the following Wednesday, namely, on November 13th, Partain went to the garage, took possession of the machine, drove it away, and thereafter assigned all his interest under the contract with Sanders to Dunfield and directed the bill of sale to be made to him. The bill of sale was so executed by Sanders Bros. and G. L. Sanders; but, before its execution, one Jake Whalen, manager of plaintiff's stage line, in the presence of defendant, his attorney, and Partain, demanded possession of the machine, showing the attorney an order for its possession he had from G. L. Sanders. Defendant heard the order read over the phone to Sanders. Whalen stated the reason he obtained the order was on account of the fact that Partain had run off with the car to Arbuckle. Said order was dated November 5th and prior to the said agreement between plaintiff and G. L. Sanders as to the final payment, and defendant knew that Whalen was in the employ of plaintiff. Partain did not repay to plaintiff any portion of the money the latter had paid to Sanders, nor did he offer to do so. On November 15th, plaintiff demanded of defendant the possession of the machine, but it was refused and the suit followed.

[1] The foregoing statement embodies a fair inference from the evidence, and the facts thus appearing justified the findings of the court that plaintiff was in the possession and entitled to the possession of the machine at the time it was delivered to defendant, that it was illegally taken from him, and that defendant had knowledge or the means of acquiring knowledge of plaintiff's claim to the possession of it.

[2-5] No extended consideration of the situation seems necessary. The facts are not complicated, and the legal principles involved are rudimentary and familiar. As between plaintiff and Partain there was a pledge of the machine which was to continue until

plaintiff was repaid the amount of money that he advanced to Sanders. In that respect the case falls within the provisions of section 2986 of the Civil Code. There was the necessary agreement between the parties, an actual delivery of the property, and a visible, unequivocal, and continued change of possession. By nothing said or done had plaintiff forfeited or yielded his right to said possession. Plaintiff's possession was such as to satisfy the requirement even of absolute ownership and to protect against the claims of creditors as contemplated by section 3440 of the Civil Code. That Partain had some degree of control over the machine is of no moment, since it was entirely by virtue of his employment and under the direction of plaintiff that he was authorized to use the machine. Any other use or assumption of control by him was a violation of his agreement with plaintiff. As a legal proposition, therefore, it is altogether clear that Partain had no right to deprive plaintiff of the possession of the machine, and his attempted transfer of his interest to defendant had no effect whatever upon plaintiff's claim. As to the relation of plaintiff and G. L. Sanders, there was a complete novation. Plaintiff assumed the obligation of Partain under the contract of sale, and his substitution was recognized by Sanders. The agreement between plaintiff and Partain was ratified by Sanders, who accepted plaintiff as the debtor instead of Partain. Hence plaintiff was entitled to the rights and subject to the liabilities of the conditional sale. He was not in default, and there had been no declared forfeiture at the time he was deprived of the possession of the machine. It follows that even the owner could not take the property away from him, for it will not be disputed that the vendee is entitled to the possession until he loses the right by virtue of his violation of some provision of the contract. Indeed, as far as G. L. Sanders is concerned it could probably be held that by reason of his express agreement with plaintiff he could not question the latter's ownership of the property. Sanders Bros., for reasons already stated, are equally bound with the father.

The only theory upon which defendant could hold the property would, manifestly, be that he was an innocent purchaser for value without notice. We think it not unreasonable to conclude, however, that he had knowledge of the contract with plaintiff and that the arrangement with him was for the purpose of defeating plaintiff's claim. At any rate, there was sufficient evidence that defendant was put upon inquiry, and he ought to have found out, if he did not, that the machine was wrongfully taken from the possession of plaintiff.

[6, 7] It may be suggested that, under the view taken by the court, complete justice may be done to all the parties. It was found, not that plaintiff was the owner of the machine, but entitled to the possession of it by reason of the pledge. To become the owner he must make the final payment. It is presumed he will do this, and thus may appellant be reimbursed for his payment. It is no violent presumption to assume that the machine is not as valuable as it was; but if plaintiff does not complete his contract he is liable, of course, to the penalty of forfeiture. Even Partain, no doubt, will be accorded ample opportunity to redeem the machine so that he may become the proud owner, not of the somewhat lowly Ford, but of the more pretentious Rambler.

We have not quoted from the decisions cited; but, if interesting suggestions concerning the legal questions more or less involved herein are desired, we may refer to Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; Goldstein v. Hart, 30 Cal. 372; George v. Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; and Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART. J.

SYMES INVESTING CO. v. DE SOLLAR.

(No. 8591.)

(Supreme Court of Colorado. May 7, 1917.)

1. BROKERS 🔑88(12)—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

In broker's action against an owner for commissions, a requested instruction that a broker serving both parties could not recover, etc., *held* not required by evidence that plaintiff referred to the prospective tenant as his client and thought he should be paid for negotiating a sale of fixtures between such tenant and a former occupant, where no commission was paid by, or demanded from, such tenant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 125, 127.]

2. BROKERS 🔑88(9) — ACTION FOR COMMISSIONS—INSTRUCTIONS.

In a broker's action for commissions against an owner, an instruction that plaintiff must prove his employment, and mere fact that he asked defendant at what price he was willing to lease his property did not establish relation of principal and agent, *held* sufficiently favorable to defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 127.]

Teller, J., dissenting.

En Banc. Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Herbert S. De Sollar against the Symes Investing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred Farrar, J. Foster Symes, and Ivor O. Wingren, all of Denver, for plaintiff in error. William H. Dickson, of Denver, for defendant in error.

HILL, J This action is to recover a commission by a real estate agent for securing a tenant for a store building. Verdict and judgment were for plaintiff. It is claimed that the evidence is insufficient to sustain the verdict. The testimony is conflicting. It is unnecessary to set forth its contents, but is sufficient to say that an examination of it discloses that there is sufficient competent testimony upon which the verdict can be sustained.

[1] It is claimed the testimony discloses that the defendant in error was working for both parties, and therefore could not recover a commission from either, without an express contract and full knowledge of this fact, and that the court erred in refusing to give defendant's instruction No. 13 on this question. It reads:

> "The court instructs the jury that an agent or broker cannot at the same time act for two parties whose interests are adverse, and in order to entitle such an agent or broker to a commission from either party, where the circumstances are such, the broker or agent must prove that the party from whom he claims a commission knew all the facts and circumstances and expressly agreed to pay the agent or broker a commission for his services."

We agree with the trial court that there was no testimony sufficient to warrant the giving of this instruction. We cannot agree that there is any testimony tending to disclose that the defendant in error was representing both parties. It is true that in one of his conversations with the manager of plaintiff in error he admits referring to Mr. Bloom as his client, but when asked what he meant by that he said:

> "When I referred to Mr. Bloom, of the Bloom Jewelry Company, in my cross-examination, as my client, I meant that Mr. Bloom was simply a tenant that I had in mind, who was looking for a location. Mr. Bloom never paid me any commission in this matter, he never agreed to pay me any commission, and I did not expect any commission from him."

The facts contained in this statement stand uncontradicted, and when the testimony is considered as a whole, it discloses that the defendant in error simply had an acquaintance with Mr. Bloom; that he knew it was necessary for him to secure a new location; that in his business as a real estate agent he solicited from the owners of storerooms the privilege of renting them, etc.: that in securing tenants he took advantage of his knowledge pertaining to the needs of his acquaintances in this respect, just the same as an agent would of his knowledge concerning prospective buyers. The record also discloses that a Mr. Behen had a lease from plaintiff in error for this room, which had some time to run; that he had advised the manager of the plaintiff in error that he would consider giving up the room, and the latter had stated to him it would allow him to do so, provided another tenant was secured, who would take a lease on the same terms; that, in order for defendant in error to get his deal through between the plaintiff in error and Mr. Bloom, it was necessary that Bloom and Behen arrive at an understanding concerning the sale and purchase of the Behen fixtures, etc.; and that the defendant in error devoted considerable time looking to this end, which was ultimately accomplished.

We cannot agree that these facts altered the condition between the parties. According to the jury's finding, the defendant in error was employed to and found a customer for the plaintiff in error, who took a lease on its room for a term of years. In order to bring this about, it was necessary to negotiate with another tenant and arrive at some agreement between him and the prospective tenant. This the agent did, not for the purpose alone of consummating the deal between them concerning the fixtures, but for the ultimate purpose of being able to consummate the deal for the long-term lease between the landlord and the prospective tenant. By assisting in the negotiations between the two tenants, the agent was successful in accomplishing what he started out to do, namely, securing the execution of the term lease; when this was accomplished, if employed for this purpose, he was entitled to his commission. It is true Mr. Behen testified that the defendant in error said to him, during the negotiations between him and Bloom, that he thought he should be compensated for all the work he had done; but the witness further said, "He really did not ask me for it." The record discloses that he spent a great deal of time in the negotiations between Bloom and Behen, and he may have thought that he should have been compensated for this work; but there is nothing to show that he contracted with or made claim against either Mr. Bloom or Mr. Behen for any compensation concerning the lease, or even for his work between Bloom and Behen. Whether he should be paid a commission by Mr. Behen for the sale of his fixtures is not before us, but we cannot agree that his labor in this respect should defeat his recovery in this action, or was evidence tending to show that he was to be paid his commission for the lease by other than the plaintiff in error. The record discloses that the defendant in error showed Mr. Bloom other locations. We cannot agree that this tends, as claimed, to establish that he was the agent of Mr. Bloom in this transaction; but, to the contrary, we see no difference in this act than in any real estate agent showing a prospective purchaser sundry homes of different owners with a view of making a sale of one.

[2] Instruction No. 5, complained of, reads:

> "The court instructs the jury that to entitle the plaintiff to recover a commission from the defendant the plaintiff must prove a contract of employment, either express or implied, and the mere fact that the plaintiff asked the manager of the defendant at what price he was willing to make a lease on the storeroom known as No. 824 Sixteenth street does not of itself establish the relation of principal and agent between defendant and plaintiff."

This instruction was as favorable to the plaintiff in error concerning the question therein referred to as it could ask.

The judgment is affirmed.

Affirmed.

TELLER, J., dissents. ALLEN, J., not participating.

HOME STATE BANK v. HUNKEY.

(No. 8354.)

(Supreme Court of Colorado. June 4, 1917.)

1. Mortgages 🔑163(2)—Unrecorded Mortgage—Priority of Subsequent Mortgage.

Where, to buy a farm, a brother borrowed from his sister money for which he executed his note to her, and thereafter he executed a deed of trust to a bank, with the agreement that the deed was not to be recorded, and still later, on his failure to make payment of principal and interest on his note to his sister, the brother proposed to another sister to give the lending sister a new note, and asked that the lending sister send him the amount due, which she did, and he, acting for himself, and not as agent for the lending sister, executed a note and mortgage for the amount, caused the mortgage to be recorded, and afterwards forwarded it to the sister, in the absence of knowledge on her part of the unrecorded mortgage to the bank, the first recorded mortgage to the sister was a prior lien, since, by the recording act, a second mortgage, if first recorded, is in law given preference over a prior unrecorded mortgage; the law raises the presumption that the second, if first recorded, was given in good faith for valuable consideration and without notice of prior equities.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 371–379.]

2. Mortgages 🔑186(3) — Foreclosure — Fraud—Burden of Proof.

In suit by a bank holding a prior unrecorded mortgage to foreclose against the holder of a subsequent recorded mortgage, the burden to prove fraud, in that the second mortgage was given and taken with knowledge of the unrecorded mortgage to the bank, rested on the bank.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 454.]

3. Fraudulent Conveyances 🔑102—Dealings Between Brother and Sister—Presumption.

Though the law scrutinizes carefully transactions between brother and sister, there is no conclusive presumption that such transactions are fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 330–332.]

4. Fraudulent Conveyances 🔑118(1) — Right to Prefer Creditors.

A brother has a right to prefer a sister, just as he has the right to prefer other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 379.]

5. Principal and Agent 🔑180—Notice to Principal.

The rule that notice to the agent is notice to the principal fails when the circumstances are such as to raise a clear presumption that the agent will not perform his duty to transmit his knowledge to his principal, as where the agent is engaged in a transaction in which he is interested adversely to his principal, etc.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 689.]

Error to District Court, Montrose County; Thomas J. Black, Judge.

Suit to foreclose a trust deed by the Home State Bank, a corporation, against Helen E. Hunkey. To review a judgment for defendant, plaintiff brings error. Affirmed.

Catlin & Blake, of Montrose, for plaintiff in error. Sherman & Sherman, of Montrose, and Charles H. Redmond, of Denver, for defendant in error.

SCOTT, J. In 1908, Jacob F. Hunkey purchased a farm in Montrose county from one Main. The purchase price was $6,363, which was made in cash, excepting a mortgage to Main in the sum of $2,675. In order to make this cash payment, Hunkey borrowed from his sister Helen E. Hunkey, defendant in error, then living at Atchison, Kan., the sum of $2,400, for which he executed and delivered to her at the time his promissory note bearing interest at 6 per cent. per annum. He made two interest payments on the note of $150 and $140, respectively. Failing to make payment of the principal and interest on this note, Hunkey, at or about the time of its maturity, wrote a letter to another sister, proposing to give to Helen a new note for the principal and accrued interest, payable two years from date, to bear interest at 8 per cent. per annum and to be secured by mortgage on his farm, subject to the Main mortgage, and asked that Helen send him the amount due. This she did without writing a letter, but upon a slip of paper, and gave the amount due as $2,860. Upon receiving this statement of amount, and on the 30th day of August, 1913, Hunkey executed the note and mortgage as proposed, and on the same day caused the mortgage to be recorded and afterwards forwarded to the defendant in error, who accepted it. On the 29th day of March, 1913, the said Jacob F. Hunkey executed and delivered to the plaintiff in error, the Home State Bank of Montrose, his promissory note in the sum of $3,600, and to secure the same executed and delivered to the said bank a trust deed covering said premises, but with the agreement that said trust deed was not to be recorded. This trust deed was not recorded until October 1, 1913. The bank brought this suit in foreclosure claiming a prior and superior lien to that of the defendant, Helen E. Hunkey, alleging that said defendant had knowledge of the bank's unrecorded trust deed at the time of the execution and delivery of the mortgage to her, and that Jacob F. Hunkey was acting in the capacity of agent for Helen E. Hunkey, and that the transaction between Helen E. Hunkey and Jacob F. Hunkey was in fraud of the plaintiff's rights. The court found the lien of Helen E. Hunkey to be prior and superior to that of the bank and rendered judgment of foreclosure and sale accordingly.

[1-4] The court made the following findings of fact and conclusions of law:

> "Prima facie, the mortgage to the sister is valid, for consideration, in good faith, and without knowledge of the prior but unrecorded mortgage to the bank. In other words, by reason of the recording acts, a second mortgage, if first recorded, is in law given preference over a prior unrecorded mortgage; the law raises the presumption that the second, if first recorded, was given in good faith, for valuable consideration, and without notice of prior equities.
>
> "Here the State Bank, to overcome the legal presumption in favor of the second mortgage, asserts that it was given with knowledge of the unrecorded mortgage to the bank, and is therefore fraudulent.
>
> "The burden of proving fraud rests upon the bank. To sustain the charge of fraud, the bank says that the grantee of the second mortgage was the sister of the grantor, that she knew he was in debt, that he acted as her agent in the transaction, and that she was therefore bound by any knowledge he possessed as to the existence of the first mortgage.
>
> "While the law scrutinizes carefully transactions between brother and sister, there is no conclusive presumption that such transactions are fraudulent. At most, the law only requires of parties so situated proof that the transaction is what it purports to be, namely, for valuable consideration and without notice of the equities of others.
>
> "A brother has a right to prefer a sister just as he generally has the right to prefer other creditors. That the brother was in debt, that the sister knew it, and that to secure a debt to her he executed the second mortgage, standing alone, would be nothing more than a suspicious circumstance. Circumstances of suspicion are not enough to warrant the court in declaring a mortgage fraudulent. There must be satisfactory proof. Taking the evidence as a whole, it does not satisfactorily or at all establish fraud.
>
> "The undisputed evidence is that the sister advanced the brother the money, to secure which the mortgage was given. That this is so was conceded by counsel for the bank in the argument. Unless, in the transaction involved, the brother must be regarded as having acted as the agent of the sister, and for that reason the sister held to have knowledge of all the brother knew concerning the first mortgage, the action of the bank must fail.
>
> "In the mind of the court the facts do not justify the theory of agency. In the beginning, the brother wrote to another sister asking that the defendant sister figure up what the amount of the indebtedness with interest was, and stating that he would secure it by mortgage. The defendant sister did so. The brother was acting for himself in the proposition as well as in the preparation of the mortgage; the sister was likewise acting for herself. It was nothing more than a transaction between two principals. No third person was involved. The sister by sending a statement of the amount of the indebtedness, by the strongest implication, agreed to accept the mortgage. Under such circumstances, she having knowledge of the intended execution of the mortgage and having agreed to accept it, delivery to the recorder was delivery to her."

This correctly states the law and is approved. There is no contention as to the correctness of the findings of fact.

It will be noted that Jacob F. Hunkey had proposed the execution of the mortgage, and that in compliance with his request Helen E. Hunkey had forwarded to him the amount to be secured thereby, and that the note and mortgage, for the exact amount, and for the time it was to run, and at the rate of interest so proposed, were executed; the mortgage was recorded, and both note and mortgage forwarded to and received and accepted by her before the bank's trust deed was recorded, and before she had knowledge of such trust deed.

The cases of Reynolds v. Black, 91 Iowa, 1, 58 N. W. 922, and In re Assignment of Guyer, 69 Iowa, 585, 29 N. W. 826, are in point and are authority for the judgment of the court. Knox v. Clark, 15 Colo. App. 356, 62 Pac. 334, well sustains the principle. Upon the question of delivery and acceptance it was there said:

> "The question, what constitutes an acceptance by the grantee, is not in all cases free from difficulty. It cannot arise where the execution and delivery of the deed is the conclusion of a transaction conducted by the immediate parties. Nor is it involved where the deed is executed in performance of the grantor's contract with the grantee to convey the land to the latter. In such case, the deed is the consummation of the contract, and the contract contains the assent of the grantee to its execution, so that it is immaterial whether he had personal knowledge of the deed at the time it was made or not."

[5] The rule as to agency properly to be applied to the facts in this case is stated to be:

> "The rule that notice to an agent is notice to the principal being based upon the presumption that the agent will transmit his knowledge to his principal, the rule fails when the circumstances are such as to raise a clear presumption that the agent will not perform this duty; and, accordingly, where the agent is engaged in a transaction in which he is interested adversely to his principal, or is engaged in a scheme to defraud the latter, the principal will not be charged with the knowledge of the agent acquired therein." 31 Cyc. 1595, and authorities cited.

The judgment is affirmed.

WHITE, C. J., and GARRIGUES, J., concur.

(25 Wyo. 122)

HUKOVEH v. ALSTON, Warden of State Penitentiary. (No. 908.)

(Supreme Court of Wyoming. June 27, 1917.)

CRIMINAL LAW 🔑1218—PUNISHMENT—STATUTES—CONSTRUCTION.

Comp. St. 1910, § 540, provides that any person between the ages of 16 and 25 years, convicted of a felony, who has not been convicted of a crime punishable by imprisonment in the state penitentiary, may, in the discretion of the court, be sentenced to imprisonment in the reformatory of the state, with which the state board of charities and reform of this state may make arrangements, for a period not exceeding the maximum term provided by the laws of this state for the offense of which he was convicted, etc. Laws 1913, c. 63, § 8, provides that every offender described in Comp. St. 1910, c. 44, who shall have been convicted, shall be sentenced to imprisonment in the Wyoming industrial institute. Laws 1911, c. 107, provides for the establishment of the 'Wyoming Industrial Institute' for the custody of that class of offenders described in Comp. St. 1910, c. 44, and which may be sentenced to terms of imprisonment therein by trial courts, in accordance with the provisions of said chapter. Section 6029, Comp.

St. 1910, makes all offenses punishable by death or imprisonment in the penitentiary felonies. Accused was convicted of robbery under Comp. St. 1910, § 5800. *Held*, that the discretion conferred upon the court by section 540 was not taken away by the act of 1913, but it was thereby intended only to substitute the Wyoming industrial institute for the reformatory mentioned in section 540, whenever the court in its discretion should impose a sentence of imprisonment in a reformatory instead of the penitentiary, and the words in the act of 1913, "under the provisions of said chapter," referred to section 540 not only as describing the offender but as prescribing the rule for imposing the sentence, and these provisions in those respects were adopted as part of the later statute, with the same effect as if they had been bodily incorporated therein, and hence plaintiff was properly confined in the state penitentiary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3320–3328.]

Original proceeding in habeas corpus by John Hukoveh against Felix Alston, as Warden of the Wyoming State Penitentiary. Writ denied.

Ivan S. Jones, of Kemmerer, for plaintiff.
D. A. Preston, Atty. Gen., for defendant.

POTTER, C. J. This is a habeas corpus proceeding; the plaintiff, John Hukoveh, alleging that he is illegally restrained of his liberty by imprisonment in the state penitentiary. Upon an information charging him with the crime of robbery, and his plea of guilty, he was sentenced by the district court in Lincoln county on February 15, 1917, to imprisonment in the state penitentiary for the term of not less than four nor more than six years; and under a mittimus issued out of said court reciting the judgment, and directing the sheriff to take and deliver the plaintiff to said penitentiary, and the warden and other officers thereof to keep and imprison him therein for the term of said sentence, he was delivered to and received at the penitentiary and is now there confined. The petition alleges these facts, and also that the charge and sentence was for a first offense, and that the plaintiff at the time of the sentence was under the age of 25 years, viz.: 18 years. The facts are not in dispute, but the answer denies that the plaintiff's imprisonment is unlawful.

The contention on behalf of the plaintiff is that the court was without authority to sentence him to imprisonment in the penitentiary, and that its only authority to sentence him to imprisonment was to require that he be imprisoned in the Wyoming industrial institute. That contention is based upon section 540, Compiled Statutes 1910, and section 8 of chapter 63 of the Laws of 1913. Section 540, Compiled Statutes of 1910, is the first section of chapter 44 of that compilation and was enacted as the first section of chapter 90 of the Laws of 1909. It reads as follows:

"Any person between the ages of 16 and 25 years, convicted of a felony, who has not theretofore been convicted of a crime punishable by imprisonment in the state penitentiary, may, in the discretion of the trial court, be sentenced to imprisonment in the reformatory of the state, with which the state board of charities and reform of this state may make arrangements for the care, custody and maintenance of such convict, as hereinafter provided, such person to be confined in such reformatory under the provisions of the law relating to that institution, and under the rules and regulations governing the same, to be treated, cared for, kept and confined in such reformatory in the same manner and for the same period of time, not exceeding the maximum term provided by the laws of this state for the offense of which the offender was convicted, as are convicts sentenced to such institution by the courts of the state in which such institution is situate and located. In imposing sentence in all such cases the courts of this state shall not fix or limit the duration of the period of confinement in such reformatory further than that it shall not in any event exceed the maximum term provided by the laws of this state for the offense of which the prisoner was convicted: Provided, however, that the governor of this state may upon the recommendation of the superintendent, superior officer or governing body of any such reformatory grant to such convict a parole or discharge from said reformatory in accordance with the laws of the state in which the same is situated or the rules of such institution."

The title of the original act was:

"An act authorizing the district court of this state, in sentencing certain persons convicted of felonies, to sentence them to a reform institution of some other state, and authorizing and empowering the state board of charities and reform to make arrangements * * * for the care, maintenance and custody of such persons so sentenced."

The other sections of the act are included in the same order in chapter 44 of the Compiled Statutes aforesaid, except the last section of the act, which declared that it should take effect and be in force from and after July 1, 1909, and they complete the chapter. Those sections provide for the parole and discharge of a person confined in the reformatory; that the board of charities and reform may contract with the authorities of any other state for the care, custody, and maintenance of persons sentenced, under the provisions of the chapter, to the reformatory of another state; and authorize the transfer from the penitentiary to said reformatory, on the order of the Governor when recommended by the board, of any person between 16 and 25 years of age thereafter sentenced to imprisonment in the penitentiary for more than one year, if the Governor is satisfied that the public interest and the welfare of the convict will be subserved thereby. Provision had previously been made by statute for committing to a reform institution of another state juvenile delinquents under the age of 16 years, and statutes to that effect had been in force since 1884, though an exception was made where the conviction was for homicide, and originally where the conviction was either for homicide, arson, or rape. Rev. Stat. 1887, §§ 2332–2336; Laws 1888, c. 57; Rev. Stat. 1899, §§ 4930–4934; Comp. Stat. 1910, §§ 3127–3131. And provision was also made in 1907 for the parole and discharge of juvenile delinquents so committed to an institution of another state. Comp. Stat. 1910, §§ 3132–3135.

Provision having been made by a statute enacted in 1911 for establishing the Wyoming industrial institute, and it having been located at Worland by a vote of the people, as provided by the act, another act was passed in 1913, published as chapter 63 of the Laws of 1913, making further provisions for that institution and containing the provision particularly relied on in support of the contention that plaintiff's sentence and his imprisonment in the penitentiary thereunder is unlawful. That provision is found in section 8 of the act, which reads as follows:

> "Every offender described in chapter 44, Wyoming Compiled Statutes, 1910, who shall have been convicted, shall be sentenced to imprisonment in the Wyoming industrial institute under the provisions of said chapter, and such other juvenile delinquents as in the discretion of the state board of charities and reform should not be confined elsewhere, shall be confined in said Wyoming industrial institute. The term of such imprisonment of any person so convicted and sentenced, shall be terminated by the state board of charities and reform, and (as) authorized by this act. But such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner is convicted and sentenced."

It is argued by counsel for plaintiff that the above-quoted provision of the 1913 statute for sentencing the offenders mentioned to imprisonment in the Wyoming industrial institute is to be construed as requiring that every such offender shall be sentenced to imprisonment only in said institute. But we do not so understand or construe that provision, when read, as it must be, in connection with the former statute to which it refers. On the contrary, we think the correct construction of the provision is that, whenever an offender described in the statute referred to (chapter 44, Compiled Statutes) is sentenced to imprisonment in a reformatory of the state instead of the penitentiary, that sentence shall be for imprisonment in the Wyoming industrial institute. That would be our conclusion if based alone upon the language of the statute, but a consideration of the history and purpose of the legislation and other statutory provisions bearing on the question leads inevitably to the same conclusion.

The provision relied on is that a convicted offender described in chapter 44, Compiled Statutes, shall be sentenced to the industrial institute "under the provisions of said chapter." Having thus referred to the other statute not only as describing the offender but as prescribing the rule for imposing the sentence, its provisions in those respects were adopted as part of the later statute "with the same effect as if they had been bodily incorporated therein" (Edwards v. Cheyenne, 19 Wyo. 110, 137, 114 Pac. 677, 122 Pac. 900), except as modified by naming the place of imprisonment, which was intended, as we think and shall endeavor further to show, as a substitute for the reformatory mentioned in the other statute, viz. a reformatory with which the state board of charities and reform may arrange for the care, custody, and maintenance of the convict, and which might be located in another state. It will be observed that the provisions of the other statute (Comp. Stat. § 540) thus referred to are that any person between the ages of 16 and 25 years, convicted of a felony, and not previously convicted of a crime punishable by imprisonment in the penitentiary "may" be sentenced, "in the discretion of the trial court," to imprisonment in the reformatory of the state. That statute expressly refers to and covers a crime punishable by imprisonment in the state penitentiary, and merely authorizes a sentence to imprisonment in the reformatory in the court's discretion. It does not require such a sentence or preclude a sentence to imprisonment in the penitentiary. As the section aforesaid of the act of 1913 provides for a sentence to imprisonment in the industrial institute, "under the provisions" of the said statute referred to, the necessary result is to leave the court with authority to exercise its discretion to provide for imprisonment in the penitentiary or reformatory, as provided in that statute. And that seems to be the clear intention of the act of 1913, as indicated by the language employed. The crime of robbery, of which the plaintiff was convicted and sentenced, is made punishable under the general crimes act by imprisonment in the penitentiary for not more than 14 years. Comp. Stat. 1910, § 5800. It is therefore a felony, for all offenses which may be punished by death, or by imprisonment in the penitentiary, are declared by statute to be felonies. Id., § 6029.

That it was intended by the act of 1913 only to substitute the Wyoming industrial institute as the reformatory to which the offenders referred to should be sentenced, instead of a reformatory mentioned in section 540, c. 44, of the Compiled Statutes, whenever the court, in its discretion, should impose a sentence to imprisonment in the reformatory instead of the penitentiary, is further made clear by the first section of chapter 107 of the Laws of 1911, the first act providing for the establishment of the said industrial institute. It was provided by that section as follows:

> "There shall be established within the state a reform institution which shall be known as the 'Wyoming Industrial Institute' for the custody and discipline of that class of offenders described in chapter 44, Wyoming Compiled Statutes, 1910, and which may be sentenced to terms of imprisonment therein by trial courts, in accordance with the provisions of said chapter."

The effect of that provision is to declare only that the institute mentioned shall be established for the custody and discipline of the class of offenders described in the chapter of the statutes referred to who may be sentenced to imprisonment therein, in accordance with the provisions of said chapter, and discloses no intention to prescribe a rule as to the sentence taking away the discretion conferred upon the court by the other existing statute. The words "under the provisions of said chapter," found in section 8 of the act of 1913, were used and intended, we think, in the same sense as the words "according to the provisions of said chapter," in section 1 of the act of 1911; allowing the court the discretion aforesaid.

That act of 1911 provided further for the location of the institute through a vote of the people of the state at the general election in 1912. And the institute having been so located, the act of 1913 was passed, entitled:

> "An act authorizing the purchase of land for site, construction of buildings, establishing, maintaining and administration of the Wyoming industrial institute; providing for officers and employés of same, and for the education and employment of the inmates thereof, and making an appropriation therefor."

By section 1 of that act it is declared that the institute shall be under the management of the state board of charities and reform. Section 2 authorizes said board to purchase or acquire land at or near Worland to be used by the institute, and to erect suitable buildings thereon. Sections 3, 4, and 5 provide for the government of the institute. Sections 6 and 7 contain provisions for a record of the trial of persons sentenced to the institute and for the transfer and delivery of such persons to the institute. Then follows section 8, containing the provisions upon which plaintiff in this case relies; and section 9, declaring that the discipline of the institute shall be reformatory, that criminals therein may be employed in agriculture, horticulture, or mechanical labor, as a means of support and reformation, and that the board may use such means of reformation consistent with the improvement of the inmates as they may deem expedient, and provide such machinery and mechanical appliances as may be required for such purposes. There are succeeding provisions in the act authorizing the board to transfer from the institute to the penitentiary persons who may become incorrigible, or may be shown to have been, at the time of conviction, more than 25 years of age, or to have been previously convicted of crime, or whose presence in the institute appears to be seriously detrimental to its well-being, and to order their return to the institute, and also to transfer to the institute from the penitentiary youthful, well-behaved, and promising convicts therein. And an appropriation is made for carrying out the provisions of the act. The provision for transferring certain inmates to the penitentiary seems to recognize that their crime was punishable by imprisonment in the penitentiary.

The purpose of the act, as expressed in its title and all its provisions, other than those found in section 8, is to provide for the establishment, maintenance, and government of the institute and the care and discipline of the persons confined therein. The provisions relating to the sentence of persons to imprisonment in the institute are incidental to the purpose thus stated, and must be construed in that light. Section 8 does not indicate a different purpose. Following the provision as to sentencing offenders described in the statute referred to, it is provided by the section that such other juvenile delinquents as in the discretion of the state board of charities and reform should not be confined elsewhere shall be confined in said Wyoming industrial institute; disclosing the sole object and intent of the section, in line with the general purpose of the act, to declare the institute the reformatory of the state for the confinement of persons theretofore authorized by law to be kept and maintained in reformatory institutions located in other states, except, it would seem, such juvenile delinquents as the board of charities and reform may, in its discretion, cause to be elsewhere confined. We see nothing in this of an intent to interfere with the discretion as to the sentence granted by the provisions of the Compiled Statutes referred to. It may be at least doubtful whether, under the title of the act of 1913, a provision could constitutionally be embraced therein amending the previous statute referred to, and the statute defining the crime and prescribing its punishment, so as to take away the authority to sentence to imprisonment in the penitentiary, or to suffer death where that punishment is prescribed.

We conclude therefore that the plaintiff is not illegally restrained of his liberty, and he will be remanded to the custody of the defendant, the warden of the state penitentiary.

BEARD, J., concurs.

(25 Wyo. 133)

JOHNSON v. ABBOTT. (No. 896.)

(Supreme Court of Wyoming. June 27, 1917.)

1. Fraudulent Conveyances ⟹95(2)—Consideration—Husband and Wife.

A chattel mortgage, given by a husband to his wife to secure a sum then owed her for labor performed by her for about two years just prior to their marriage, and money loaned to him by her which was the proceeds of the sale of real and personal property she owned before marriage, was based on sufficient consideration.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 251, 259.]

2. Fraudulent Conveyances ⟹118(2) — Preference to Creditors — Right to Prefer Wife.

A debtor may prefer one creditor to another, although the preferred creditor is his wife, if his purpose is to pay or secure a bona fide claim.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 380.]

Error to District Court, Hot Springs County; Charles E. Winter, Judge.

Action by W. J. Johnson against Frank Abbott, in which a writ of attachment was issued and levied upon defendant's property. From the action of the court sustaining a motion to dissolve the attachment and discharge the attached property, the plaintiff brings error. Affirmed.

John M. Hench, of Thermopolis, for plaintiff in error. C. W. Axtell, of Thermopolis, and Matson & Kennedy, of Cheyenne, for defendant in error.

BEARD, J. Plaintiff in error, as plaintiff below, commenced this action in the district court against the defendant in error, and caused a writ of attachment to be issued and levied upon defendant's property. Defendant moved to dissolve the attachment and discharge the attached property, which motion was upon a hearing sustained, and plaintiff brings error.

[1] The grounds for the issuance of the writ of attachment, as stated in the affidavit therefor, are as follows:

> "(1) That the defendant is about to remove his property, or a part thereof, out of the jurisdiction of the court, with intent to defraud his creditors. (2) That said defendant is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors. (3) Said defendant has property or rights in action which he conceals. (4) Said defendant has assigned, removed, disposed of, and is about to dispose of his property, or a part thereof, with intent to defraud his creditors."

[2] The motion to discharge the attachment was made upon the ground that the several grounds for the attachment contained in the affidavit therefor were not true. The defendant in his affidavit in support of his motion positively denied that either of said grounds existed or was true. The motion was heard upon affidavits and other evidence. The only ground for the attachment which the evidence tends to sustain is the fourth, that defendant had disposed of his property, or a part thereof, with intent to defraud his creditors. This action was brought upon a promissory note of defendant for $5,500, dated October 10, 1911, due three years after date, with 6 per cent. interest, on which two years' interest had been paid. The action was commenced April 20, 1916. It appears that about November 16, 1914, defendant gave a chattel mortgage on the property to one Duncan for $2,000, and one to the Thermopolis Bank for $600, and on that date one to his wife for $1,950. It is the latter mortgage which plaintiff claims was given to defraud creditors. Defendant testified that the mortgage to his wife was given to secure that sum which he then owed her for labor performed by her for about two years just prior to their marriage in July, 1912, and $521 money loaned to him by her, the same being the proceeds from the sale of some cattle and town lots which she owned before their marriage, and $330 of which he applied to the payment of interest on the note in suit. His evidence as to that is not contradicted, and if believed by the court, as it evidently was, established full consideration for the mortgage to her.

That a debtor may prefer one creditor to another, although the preferred creditor is his wife, we entertain no doubt, if the purpose is to pay or secure a bona fide claim. As stated in National Bank v. Croco, 46 Kan. 629, 26 Pac. 942:

> "It is well settled that a debtor in failing circumstances may prefer one creditor to another, although that creditor should be his wife, and he may in good faith transfer his property at a fair price to her in payment of her bona fide claim."

And in Rockford Boot & Shoe Mfg. Co. v. Mastin, 75 Iowa, 112, 39 N. W. 219, the court said:

> "The evidence tends to show, and we think it is established, that George W. either knew his father was in seriously embarrassed circumstances at the time of the conveyance, or, if not, he had sufficient knowledge thereof to put him on inquiry. But, as he was a bona fide creditor, he had a right to secure himself; and in such case the diligent creditor is entitled to priority over the tardy or less fortunate creditor, unless there was an actual intent to defraud, instead of a desire simply to secure an honest debt."

In Laird et al. v. Davidson, 124 Ind. 412, 25 N. E. 7, a case in which judgment creditors caused executions to be levied upon property which had been conveyed by the debtor husband to his wife, the court said:

> "No difference from what source the appellee (the wife) acquired money, so that such acquisition was not tainted with bad faith, she had a perfect right to loan it to her husband, and take his promissory note therefor; and thereafter, and when in failing circumstances, he had a right to prefer her to the exclusion of other creditors. We think these are not debatable questions."

Without further quotations, as sustaining our views, see Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; Micou v. National Bank, 104 U. S. 530, 26 L. Ed. 834; Wait on Fraudulent Conveyances and Creditors' Bills (3d Ed.) § 390; 20 Cyc. 472. In the present case the defendant testified—and it was not contradicted—that when he gave the mortgage to Duncan his wife asked him to give her security for her claim, and he did so. There was no evidence that she had any other purpose than obtaining security.

Evidence of the value of defendant's property at the time the mortgage was given was introduced. It was in sharp conflict, and if, as counsel for plaintiff states, the court decided that defendant was not insolvent, there was sufficient evidence to sustain such finding.

We discover no error in the record, and the order dissolving the attachment and discharging the attached property is affirmed.

Affirmed.

POTTER, C. J., concurs.

(25 Wyo. 138)

STANTON v. CHICAGO, B. & Q. R. CO.

(No. 887.)

(Supreme Court of Wyoming. June 27, 1917.)

1. APPEAL AND ERROR ⚷301—PRESERVATION OF GROUNDS FOR REVIEW—MOTION FOR NEW TRIAL.

Where the ruling of the trial court in denying a continuance was not assigned as error in the motion for new trial, it will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755.]

2. NEW TRIAL ⚷1—MOTION—SUFFICIENCY.

A motion for a new trial which states no statutory ground therefor is insufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 1-3.]

3. NEW TRIAL ⚷119—MOTION—FILING AFTER TIME.

The denial of a motion for a new trial filed after the time provided by statute cannot be held erroneous.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 243.]

4. APPEAL AND ERROR ⚷836 — COMPLIANCE WITH RULES—EXCUSE.

The Supreme Court cannot depart from well-established rules of practice and procedure because a party was conducting his own case without the assistance of an attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3247-3261.]

Error to District Court, Natrona County; Charles E. Winter, Judge.

Action by Frederick J. Stanton against the Chicago, Burlington & Quincy Railroad Company and another. Judgment for defendant named, and plaintiff brings error. Affirmed.

Frederick J. Stanton, of Denver, Colo., pro se. Burke & Riner, of Cheyenne, for defendant in error.

BEARD, J. The plaintiff in error seeks a reversal of a judgment of the district court of Natrona county, rendered in an action brought by him against the defendants in error, in which action he alleged in his petition that he was the owner of certain real estate situated in said county, that defendant railroad company claimed title thereto by virtue of a warranty deed from defendant Samuel J. Jordon, and that said defendant claimed that said Jordon on August 26, 1910, received a warranty deed to said land from plaintiff. And he alleged that said last-mentioned deed purporting to have been executed by plaintiff to said Jordon was a forgery, and that plaintiff had never parted with his title to said land. He prayed that said pretended deed from plaintiff to said Jordon be declared a forgery and null and void, and that defendants be enjoined and debarred from asserting any claim to said land adverse to plaintiff.

The defendant railroad company answered, admitted that prior to August 26, 1910, plaintiff was the owner of said land, admitted that it claimed title thereto by virtue of a warranty deed from said Jordon, and denied that the deed from plaintiff to said Jordon was a forgery.

Upon the issue thus joined the case was tried to the court, and the court found against the plaintiff, and that the title to said land was in the defendant, Chicago, Burlington & Quincy Railroad Company, and dismissed the action at plaintiff's costs.

The record filed in this court is so imperfect and defective that it is at least doubtful if it presents anything which can, under the well-settled rules of practice, be considered. It appears, however, that the issues were made up in May, 1912, and thereafter the case was set down for trial April 29, 1915, and on the application of plaintiff was continued until June 21, 1915. On that date the cause coming on for trial, the plaintiff not being present or represented by counsel, the court announced:

> "I have here a communication from Frederick J. Stanton, plaintiff in this action, asking for a further continuance of the case."

The application for a continuance was resisted, and by the court denied, and the trial proceeded with, the judgment being entered the same day.

[1] The communication referred to is not included in the bill of exceptions, nor is the ruling of the court denying a continuance assigned as error in the motions for a new trial. That ruling cannot therefore be considered being raised for the first time in this court.

[2] On July 1, 1915, plaintiff filed a motion to set aside the judgment and for a continuance of the case until the next term of the court. The motion contains none of the grounds prescribed by the statute for a new trial. On August 28, 1915, plaintiff filed another motion for a new trial, signed by himself and by two "advising attorneys for plaintiff." These motions came on for hearing and determination August 30, 1915, at which time, the order recites, plaintiff appeared in person and by counsel, A. H. Cobb, Esq., and Joseph N. Baxter, Esq. Upon consideration by the court both motions were denied, to which ruling exceptions were taken. There was no error in the ruling on the first motion, as it was insufficient, stating no statutory ground for a new trial.

[3] The second motion was filed long after the time allowed by law for filing the same had expired, and for that reason alone the denial of the same cannot be held to be erroneous. We have, however, considered the motion and the evidence given in support thereof, and are of the opinion that no abuse of the discretion of the court in its ruling is made to appear.

[4] It appears that plaintiff was conducting his own case without the assistance of attorneys, except as above stated, which may in a measure account for the defects in the record. But this court cannot on that ac-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

count depart from and disregard the well-established and necessary rules of practice and procedure.

The judgment is sustained by sufficient evidence, and is affirmed.

Affirmed.

POTTER, C. J., concurs.

(30 Idaho. 25)

HAYTON et ux. v. CLEMANS et ux.

(Supreme Court of Idaho. June 17, 1916. On Rehearing, June 28, 1917.)

1. CANCELLATION OF INSTRUMENTS 🔑37(1)—DEEDS—SUFFICIENCY OF COMPLAINT.

Where an action is brought to rescind a contract, to cancel and hold for naught a deed made and delivered, and to secure the recovery of a promissory note given at the time of, and in connection with, the making of the contract and deed, and for a reasonable rental of the premises possessed by defendant subsequent to the making and delivery of the deed, and the complaint alleges that the contract was entered into and the deed and promissory note made and delivered as the result of false and fraudulent representations of defendant known by him to be false and fraudulent when made, and to have been made with the intent to deceive the plaintiff and to have him act upon them, and that the plaintiff relied and acted upon such false and fraudulent representations and thereby suffered injury, *held*, that the complaint states facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66–68, 71.]

2. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDINGS.

Where there is a substantial conflict in the evidence, neither the findings nor judgment of the trial court will be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

On Rehearing.

3. CANCELLATION OF INSTRUMENTS 🔑37(4)—DEEDS — COMPLAINT — OFFER TO RESTORE CONSIDERATION.

In an action for the rescission of a contract, the complaint need not show that prior to the commencement of the action plaintiff offered to place defendant in statu quo.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 72, 73.]

4. CANCELLATION OF INSTRUMENTS 🔑37(4)—ACTION FOR RESCISSION — RESTORATION OF CONSIDERATION.

Where the complaint in an action for the rescission of a contract shows that the consideration received by plaintiff was an interest in land under a contract of purchase, and that such contract has been foreclosed by decree for default in payments due thereunder, which payments defendant represented to plaintiff had already been made, it is not necessary that the complaint should offer to restore to defendant the consideration received as a condition precedent to plaintiff's right to cancellation and rescission.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 72, 73.]

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by Charles G. Hayton and wife against W. R. Clemans and wife for the rescission of a contract, for the cancellation of a deed, for recovery of a note, and to recover rental. Judgment for plaintiffs, and defendants appeal. Affirmed.

George G. Pickett and A. L. Morgan, both of Moscow, for appellants. Frank L. Moore and J. H. Forney, both of Moscow, for respondents.

BUDGE, J. This suit was brought by respondents in the district court of the Second judicial district, in and for Latah county, against appellants, for the cancellation of a certain deed made by respondents by which certain lands and premises belonging to respondents situate in Latah county, Idaho, were conveyed to appellant W. R. Clemans, and for the cancellation of a certain promissory note for the sum of $1,000 made by respondents and payable to the order of appellant W. R. Clemans.

From the record it appears that respondents were the owners of certain lands and premises situate in Latah county, and that appellants were the owners of an undivided 58 per cent. of an interest in a large tract of land lying in Walla Walla county, Wash. This interest was by virtue of a contract for a sale of said land by one Preston to one Kenworthy. On March 27, 1913, appellant W. R. Clemans proposed to sell to respondent Charles G. Hayton a 25 per cent. or one-fourth interest in and to the lands and premises lying in Walla Walla county. It is charged in the complaint that appellant W. R. Clemans, for the purpose of inducing respondents to enter into this contract, made false and fraudulent representations in five different and distinct particulars: First, that there were 1,800 acres of growing crop upon said Walla Walla lands, when in truth and in fact there were not to exceed 800 acres of growing crop; second, that 320 acres of good land in section 8, township 12 north, range 36 E., W. M., was a part of the tract in which respondents were purchasing an interest, when in truth and in fact it was not a part, and was the land of another; third, that certain valueless land, consisting of 320 acres in sections 4 and 9 of said lands and premises, was not a part of the tract in which respondents were about to purchase from appellant a one-fourth interest; fourth, that for the year 1912 the lands and premises in Walla Walla county produced from 39 to 42 bushels of wheat to the acre, when in truth and in fact for that season the premises produced only 11 bushels per acre; fifth, that there was due from Walter Kenworthy to W. G. Preston, upon the contract, as the purchase price to be paid for these premises, the sum of $33,000 and no more, when in truth and in fact there was due upon this contract the sum of approximately $39,000.

The complaint also sets out that appellant W. R. Clemans made such false and fraudulent representations in each and all of these particulars, knowing the same to be false and untrue, for the purpose of inducing respondents to convey to him the said tract of land belonging to them, mentioned and described as being in Latah county, and for the purpose of inducing them to make, execute, and deliver to him a certain promissory note for the sum of $1,000; that respondents did not know, and had no means of knowing, that the fraudulent representations so made by appellant W. R. Clemans were false and fraudulent; and that, relying upon these representations and believing them to be true, they entered into a contract with said appellant for the purchase of his 25 per cent. or one-fourth interest in and to the lands and premises mentioned and described as being in Walla Walla county, Wash.; that, as a consideration for this purchase, respondents by a good and sufficient deed conveyed to appellant W. R. Clemans the property mentioned and described as being in Latah county, Idaho, at an agreed price of $9,300, and made and delivered to him their promissory note in the sum of $1,000, and assumed and agreed to pay the unpaid balance due under the contract between W. G. Preston and wife and Walter J. Kenworthy, aggregating $33,000 as represented by appellant W. R. Clemans, and further assumed the payment of one-fourth of $20,000 secured by mortgage upon the lands and premises in Walla Walla county, Wash.; that respondents did not discover such fraud until about the middle of April, 1913, and after they had made and delivered to the said W. R. Clemans the deed and note; that, upon discovering that they had been defrauded, they demanded of W. R. Clemans that he reconvey the lands and premises located in Latah county to them and return and surrender to them the said promissory note, with which demand and request he failed and refused to comply.

It is further alleged that on or about June 30, 1913, W. G. Preston and his wife, Matilda Cox Preston, began an action in the circuit court of Washington, Walla Walla county, against respondent Andrew M. Anderson and wife, C. Quesnell and wife, and appellant W. R. Clemans and wife, to annul, vacate, set aside, and rescind the contract between him, W. G. Preston, and Walter J. Kenworthy, for the sale to Kenworthy of the lands in Walla Walla county, and under which these respondents and appellants acquired and held an interest in said lands, which action was predicated upon a breach of this contract by default in the payment of moneys due November 1, 1912, according to the terms of the contract, which payments he (W. R. Clemans) had falsely and fraudulently represented to respondents had been made, and which default in said payment existed at the time the respondents made, executed, and delivered to W. R. Clemans the deed and promissory note; that appellant Clemans failed and refused to perform the conditions of his contract, and permitted W. G. Preston and his wife to prosecute the action to judgment; and that these lands were not redeemed, and the contract between W. G. Preston and Walter J. Kenworthy and all rights and interests thereunder by reason of the default were forfeited.

It is also alleged in respondents' complaint that the rental value of the lands so conveyed to W. R. Clemans was reasonably worth the sum of $4,000 for the years 1913 and 1914, and that from March 27, 1913, and up to and until the filing of the amended complaint, the appellants have been in possession of the lands and premises conveyed to them by respondents, and each and every part thereof.

The respondents prayed judgment in their complaint against appellants for a cancellation of the deed and the note mentioned and described in the complaint, and a reconveyance of their lands and premises to them, and a rescission of the contract to purchase said one-fourth interest in the Walla Walla county lands, for the sum of $4,000, the rental value of the Latah county lands, and for all equitable relief.

Upon the trial of this cause, judgment was rendered in favor of respondents rescinding the contract, canceling and setting aside the deed made and delivered by respondents to appellant W. R. Clemans, and decreeing that W. R. Clemans return and deliver to Charles G. Hayton the promissory note for the sum of $1,000, and awarding judgment in favor of respondents and against appellant W. R. Clemans in the sum of $300 as the rental of the lands conveyed by respondents mentioned and described in their complaint, located in Latah county, for the years 1913 and 1914.

[1, 2] This is an appeal from the judgment and from the order of the court overruling appellants' motion for a new trial. Appellants assign, and rely for a reversal of the judgment and the action of the court in denying their motion for a new trial, upon five specifications of error: First, that the court erred in finding and deciding that the representations made by appellant constituted fraud or in any manner sustains judgment of cancellation of the deed from respondents to Clemans; second, that the court erred in overruling appellants' demurrer to the complaint; third, that the court erred in admitting any evidence over appellants' objection for the reason that the complaint does not state facts sufficient to constitute a cause of action; fourth, that the court erred in overruling appellants' motion for a new trial; fifth, insufficiency of the evidence to support the findings, conclusions, and decree.

The foregoing assignments of error raise two material questions: First, does the complaint state facts sufficient to constitute a cause of action; and, second, is the evidence sufficient to support the findings of fact made by the trial court, and the judgment entered thereon?

We have carefully examined respondents' complaint, and are of the opinion that it states a cause of action. Kemmerer v. Pollard, 15 Idaho, 34, 96 Pac. 206; Breshears v. Callender, 23 Idaho, 348, 131 Pac. 15; Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; Pomeroy's Equity Jur. § 688, notes 67, 70, 73, 74.

As to the second contention, the trial court found from all of the testimony of the witnesses that appellant W. R. Clemans, at the time he procured the respondents to enter into the contract referred to in the complaint, to make and deliver the deed to the premises upon which they resided in Latah county, and to execute and deliver the note for $1,000, made false and fraudulent representations to the respondents, which he knew to be false and fraudulent at the time he made them, and which he made with the intention that respondents would act upon them, and that the respondents relied and acted upon such false and fraudulent representations to their injury. That these findings of fact are based upon substantially conflicting evidence is clearly apparent to us from an examination of the record. This being true, under the well-established holding of this court, neither the findings of fact nor the judgment based thereon will be disturbed on appeal. Heckman v. Espey, 12 Idaho, 755, 88 Pac. 80; Hufton v. Hufton, 25 Idaho, 96, 136 Pac. 605; Henry Gold Min. Co. v. Henry, 25 Idaho, 333, 137 Pac. 523; Commercial Trust Co. v. Idaho Brick Co., 25 Idaho, 755, 139 Pac. 1004.

We are therefore forced to the conclusion that the judgment of the trial court should be sustained, and it is so ordered. Costs are awarded to respondents.

SULLIVAN, C. J., concurs. MORGAN, J., did not sit at the hearing of this case, and took no part in the decision.

On Rehearing.

FLYNN, District Judge. A rehearing having been granted in this case, the court has very carefully reconsidered the questions presented to it upon this appeal. The point most strenuously urged is that the complaint fails to state facts sufficient to constitute a cause of action, in that it does not show that at the time plaintiff claims to have discovered that he was defrauded, and at the time the action was commenced, any offer was made to return to defendant the interest or title to the Walla Walla property. The allegations of the complaint as to the transactions between the parties are sufficiently shown in the original opinion. It is further urged that, not only is the complaint insufficient in this respect, but that the proof shows that no such offer was made, and that therefore the entire case must fail.

[3, 4] The contention of appellant on this point, as I understand it, is that before a party is entitled to rescind a contract he must put, or offer to put, the other party in statu quo by a full restoration of all that he has received. This court has heretofore held that this rule is applicable in cases where a rescission is made before an action is brought, but that such a tender or offer is not necessary as a condition precedent to a suit for rescission, and I feel that such decision is controlling and correct. Gamblin v. Dickson, 18 Idaho, 734, 112 Pac. 213.

After the filing of the original complaint in this action, the rights of all the parties hereto in the Walla Walla property were canceled by a decree of the superior court of Washington for Walla Walla county, forfeiting the rights of all parties claiming under the Preston-Kenworthy contract for default in payment of moneys due November 1, 1912, under the terms of the contract. The amended complaint, on which this action was tried, pleads the decree of the Washington court.

Conceding that it is necessary in a suit for rescission that the plaintiff plead his willingness to restore the consideration received by him and to do equity, do the facts pleaded in relation to the foreclosure of the Washington contract, under which contract both appellants and respondents acquired an interest in the Walla Walla property, obviate the necessity of an offer in the amended complaint to restore the consideration received? I think they do. One of the very purposes of pleading the Washington decree must have been to show that the consideration received by Hayton had gone from his control and could not be returned on account of the decree foreclosing for a default in a payment past due at the time Hayton and Clemans made their contract, which payment Clemans fraudulently and falsely represented had been made. At the time of the filing of the amended or supplemental complaint in this action, Hayton had no interest in the Walla Walla property. His rights had been foreclosed by the Washington decree. He had nothing to tender back to Clemans and was in this condition through no default of his own. Under these circumstances, it would be a futile offer on his part to assign back to Clemans his foreclosed equity in the Walla Walla land.

I agree also with the original opinion, filed in this case, that the findings of fact are based on substantially conflicting evidence and therefore should not be disturbed.

The former opinion of the court in this case is reaffirmed.

BUDGE, C. J., and RICE, J., concur.

(30 Idaho, 534)

STATE v. LEEPER.

(Supreme Court of Idaho. June 28, 1917.)

1. CRIMINAL LAW ⟹1076(2) — APPEAL—RECOGNIZANCE.

Failure to give a recognizance, as provided by section 8324, Rev. Codes, upon appeal to the district court, does not defeat the jurisdiction of that court to hear the case, nor render the appeal subject to dismissal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2708, 2709.]

2. CRIMINAL LAW ⟹1081—APPEAL—JURISDICTION OF DISTRICT COURT — WAIVER OF DEFECT.

The giving of notice of appeal in the manner provided by section 8321, Rev. Codes, is necessary to the jurisdiction of the district court; but the failure to have affixed thereto the signature of the appellant or his attorney is a formal, rather than a jurisdictional, defect and may be waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722-2724, 2962.]

Appeal from District Court, Clearwater County; Edgar C. Steele, Judge.

Roy H. Leeper was convicted of disturbing the peace, his appeal to the district court was dismissed, and he appeals. Reversed and remanded to district court, with direction to grant a new trial.

Chas. L. McDonald, of Lewiston, for appellant.

MORGAN, J. Appellant was convicted, in the probate court of Clearwater county, of disturbing the peace. A transcript of the docket of the probate court shows that immediately upon the rendition of judgment he gave oral notice of his intention to appeal and, within 10 days thereafter filed a written notice of his appeal to the district court: also that, upon appellant's request, the bail bond theretofore given was refiled as a bond on appeal.

The notice, which appears to be regular in all other particulars, is unsigned. It bears the following indorsement:

> "Service of a true copy of the within notice of appeal is hereby admitted, by receipt thereof, this 10th day of March, A. D. 1915. F. E. Smith, County Attorney."

[1] Respondent moved, in the district court, to dismiss the appeal upon the ground that the notice thereof was not sufficient to conform to the requirements of section 8321, Rev. Codes, and upon the further ground that no undertaking of bail, pending appeal, had been filed as provided by section 8324. The motion was granted, and from the judgment and order of dismissal this appeal is prosecuted.

Section 8324 merely provides that a party appealing may, in order to be released from custody or if he desires a stay of proceedings under the judgment, enter into a recognizance for the payment of any judgment, fine, and costs that may be awarded against him on appeal, and that he will faithfully prosecute the same and render himself in execution of any judgment or order entered against him in the district court.

Assuming that refiling the bail bond was not a substantial compliance with the requirements of sections 8324, supra, it may be said that failure to comply therewith would only result in failure to stay the execution of the judgment of the probate court and would not defeat the jurisdiction of the district court to hear the case, nor render the appeal subject to dismissal. In re Schuster, 25 Idaho, 465, 138 Pac. 135.

Section 8321 is as follows:

> "A defendant intending to appeal must give notice of his intention to do so at the time of the trial or rendition of the judgment, and must within ten days after the rendition and entry of the judgment, file with the judge or justice of the court wherein the conviction was had, and serve on the prosecuting attorney of the county, a notice of appeal, entitled in the action, setting forth the character of the judgment, and the intention of the defendant to appeal therefrom to the district court."

[2] The giving of notice of appeal in the manner provided by the foregoing section of the Code is necessary to the jurisdiction of the district court; but, it will be observed, the statute does not require the notice to be signed. Therefore the failure to have affixed thereto the signature of the appellant or his attorney is a formal, rather than a jurisdictional, defect and may be waived. In this case the prosecuting attorney, by accepting service in the manner and form he employed, waived the defect occasioned by the notice not being signed. Wilson v. Wilson, 6 Idaho, 597, 57 Pac. 708; People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717; Livermore v. Webb, 56 Cal. 489; Cella v. Schnairs, 42 Mo. App. 316.

The judgment and order of dismissal are reversed, and the cause remanded to the district court, with direction to grant appellant a new trial.

BUDGE, C. J., and RICE, J., concur.

(30 Idaho, 34)

RATHBUN et al. v. NEW YORK LIFE INS. CO.

(Supreme Court of Idaho. June 30, 1916. On Rehearing, June 26, 1917.)

INSURANCE ⟹137(2)—LIFE INSURANCE—CONDITION OF HEALTH—LIABILITY ON POLICY.

Where R., desiring life insurance, applied in writing to the insurance company for such insurance, and agreed that the policy of insurance applied for should not take effect unless the first premium was paid and the policy was delivered to and received by him during his lifetime and while he was in good health, and after applying for the policy and before the delivery thereof R. was stricken with appendicitis, from which he died five days after he received the policy, said policy having been sent to him by mail from the insurance company's branch office in Spokane, Wash., in total ignorance of the changed condition of R.'s health, and R.'s friends thereafter paid the first premium, which the company promptly returned when it discovered the fact of R.'s fatal illness, *held*, that the policy did not take effect by reason of the fact that R. was not in good health at the time it was received by him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 234.]

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by Julia M. Rathbun and husband against New York Life Insurance Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

A. L. Morgan, of Moscow, for appellants. St. Clair & St. Clair, of Idaho Falls, and Forney & Moore, of Moscow, for respondent.

SULLIVAN, C. J. This is an action brought by the mother and father to recover on a life insurance policy issued to their son, Ernest C. Rathbun. A demurrer to the complaint was overruled, and answer filed by the insurance company denying its liability. Thereupon the issues were tried to the court without a jury, and judgment was entered against the plaintiffs, from which this appeal was taken.

The action of the court in overruling plaintiffs' demurrer to the defendant's answer and in overruling plaintiffs' objection to the introduction of any testimony under the allegations of the answer, and in making findings of fact and conclusions of law and entering judgment in favor of the defendant, is assigned as error.

The following facts appear from the record: On the 9th day of April, 1913, Ernest C. Rathbun, son of the plaintiffs, made application to the defendant, New York Life Insurance Company, for a $2,000 insurance policy upon his life, in which policy the plaintiff Julia M. Rathbun was made the beneficiary. Thereafter, on April 17, 1913, the insurance company issued the policy, and the policy recites that the insurance is granted in consideration of the payment of the first premium amounting to $41.68, and the policy contains an acknowledgment of the receipt of such payment. The policy also contains the following, among other, recitations:

> "After its delivery to and receipt by the insured, the policy takes effect as of the 9th day of April, 1913, that being the date upon which the application for such policy was made."

It is alleged in the complaint that subsequent to the execution of said contract, and prior to the 10th day of May, 1913, the policy was delivered to said insured, and that during the month of June, 1913, the beneficiary made due proof of the death of Ernest C. Rathbun in accordance with the terms of said policy, and demanded from said insurance company the payment of the sum of $2,000 as provided in such policy, which payment said company refused, one of the grounds for such refusal being, as appears from the answer, that said policy was issued by the company upon application, and that the applicant paid at the date of application $5 in cash and executed and delivered to the agent who took said application his promissory note for the balance of the amount due for the first premium, and that the policy was forwarded by registered mail addressed to the insured from the company's branch office in Spokane, Wash., and the same was receipted for by one C. L. Williamson, and on the 5th day of May was by said Williamson delivered to Ernest C. Rathbun. On the 28th day of April, 1913, the applicant became ill with appendicitis, and died on the 10th day of May, 1913. It is further alleged that the application for said policy contains, among other things, the following stipulation or agreement:

> "That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application.
>
> "That any payment made by me before delivery of the policy to, and its receipt by, me as aforesaid shall be binding on the company only in accordance with the terms of the company's receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made and is the only receipt the agent is authorized to give for such payment."

As stated above, on the trial of the case judgment was entered in favor of the respondent insurance company.

In its answer and on the trial of the case, the main contentions of the insurance company were: First, that under the terms of the contract the first premium was to be paid in cash; and, second, the policy was not to take effect unless the insured was in good health at the time it was delivered to him. Said contentions are partly based upon the stipulations above quoted from the application for said insurance.

The court in its findings of fact, among other things, found as follows:

> "The court further finds that Ernest C. Rathbun, the plaintiffs' son, applied in writing for insurance on his life, agreeing therein that the insurance thereby applied for should not take effect unless the first premium was paid and the policy was delivered to and received by him during his lifetime and good health. After applying for the policy and before its delivery, the applicant was taken with appendicitis, from which he died. While he was in the hospital, the soliciting agent at Spokane, in total ignorance of the changed condition of the applicant's health, mailed him the policy. The applicant's friends thereafter paid the first premium, which the company promptly returned when it discovered the facts."

The evidence is clearly sufficient to sustain this finding of fact.

Then if the parties understood and agreed that the policy should not become effective unless the first premium was paid and the policy was delivered to and received by the applicant during his lifetime and while he was in good health, and both of those conditions failed, the contract of insurance was never completed, and the policy was of no force and effect. It is a well-recognized rule that life insurance results from contract, and that the true rule is that no other or different rule is to be applied to a contract of insurance than is applied to other contracts. Quinlan v. Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645. In life insurance contracts, the assent of both parties is required as in any other contract. Stephens v. Insurance Co., 87 Iowa, 283, 54 N. W. 139; Weidenaar v. N. Y. Life, 94 Mont. 592, 94 Pac. 1.

In the determination of this case, the application and the policy itself must be examined and considered in order to ascertain the true situation of the parties under the negotiations and agreements between them. Iowa Life v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; Behling v. N. W. Nat. Life, 117 Wis. 24, 93 N. W. 800.

If we concede in this case that the first premium was paid by the payment of the $5 and the delivery of the insured's promissory note to the agent of the company for the balance, the plaintiffs would not be entitled to recover for the reason that the policy was not delivered to and received by the applicant while he was in good health, but when he was fatally ill. He became ill with appendicitis on the 28th of April, 1913, was operated on that day, and thereafter died on the 10th day of May, 1913, five days after receiving the policy.

Upon a proper construction of the contract between the applicant and the insurance company, and on the evidence introduced on the trial, the plaintiffs are not entitled to recover. The judgment must therefore be affirmed; and it is so ordered, with costs in favor of respondent.

BUDGE, J. concurs. MORGAN, J., did not sit at the hearing, and did not take any part in the decision of this case.

On Rehearing.

FLYNN, District Judge. A rehearing having been granted, this case was submitted on briefs.

We concur in the conclusion reached by the court in its original opinion, that the policy in question never took effect, because it was not delivered to and received by the applicant while he was in good health. The policy provides that "the policy and the application therefor constitute the entire contract between the parties;" and under the terms of the application, it was made a condition precedent to the policy's taking effect that the insured should be in good health when the policy was delivered and received. 14 R. C. L. 900, § 78.

We are not in accord, however, with the intimation that the first premium was not paid, though we are probably precluded from holding otherwise because of the fact that the trial court found that the giving and acceptance of a note for the balance of the first year's premium, after paying $5 cash thereon, was a personal matter between the applicant for insurance and the agent, and that defendant had no rights thereunder or interest therein. The evidence not being before this court, it will be presumed that it supports this finding. McCornick v. Brown, 22 Idaho, 52, 125 Pac. 197. The former judgment of this court is therefore reaffirmed.

BUDGE, C. J., and RICE, J., concur.

(30 Idaho, 537)

STATE v. CURTIS et al.

(Supreme Court of Idaho. June 28, 1917.)

1. CRIMINAL LAW 🔑1159(3)—APPEAL—QUESTION OF FACT.

Where there is sufficient evidence, if uncontradicted, to justify a conviction, a verdict and judgment based thereon will not be reversed because of conflict in the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

2. CRIMINAL LAW 🔑59(1) — AIDERS AND ABETTORS—"LIABILITY PRINCIPALS."

Persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, should be charged and tried as principals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 71.

For other definitions, see Words and Phrases, First and Second Series, Principal.]

3. CRIMINAL LAW 🔑1144(14)—INSTRUCTIONS AS A WHOLE—PARTICULAR INSTRUCTION.

All instructions given in a case must be read and considered together, and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion which, considered alone, does not fully and clearly state the law applicable to the facts in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2767, 2901, 3032.]

4. CRIMINAL LAW 🔑941(1) — APPEAL — DISCRETION OF TRIAL COURT—RULING ON MOTION FOR NEW TRIAL.

Where affidavits of newly discovered evidence are merely cumulative or corroborative of testimony introduced at the trial, the order of the court denying a motion for a new trial will not be reversed upon appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2330.]

Appeal from District Court, Twin Falls County; Wm. A. Babcock, Judge.

Zachariah Curtis and Cora Atkinson were convicted of grand larceny, and they appeal. Affirmed.

Guthrie & Bowen and H. C. Hazel, all of Twin Falls, for appellants. J. H. Peterson, Ex-Atty. Gen., T. A. Walters, Atty. Gen., and J. P. Pope, Asst. Atty. Gen., for the State.

MORGAN, J. Appellants were convicted of the larceny of a certain cow, the property of H. P. Larson. From the judgment of conviction and from an order denying their motion for a new trial, they have appealed to this court.

[1] The assignments of error question the sufficiency of the evidence to sustain the verdict, and it is particularly urged that appellant Atkinson is not shown to have unlawfully participated in taking the animal, nor to have been in any manner connected with the commission of the crime.

It appears from the record that for about four years prior to the arrest of appellants they had been residing upon what is known as the Curtis homestead, where the cow was slaughtered. H. M. Pinkham, a witness for the state, testified that in December, 1914 (the exact date he was unable to fix), while he was employed by appellants, Curtis, early in the morning, left the place, and Mrs. Atkinson stated he was going to the hills to get one of his steers; that later in the day he returned driving two head of cattle; that as he approached the premises Mrs. Atkinson took two cows from the corral and drove them out to meet the cattle Curtis was driving in order to lure them into the corral; that one of the animals driven by Curtis escaped, but the other, being the cow alleged to have been stolen, and described by the witness as "a white-faced cow, crop off right ear, light red with bobtail," was driven into the corral, and was thereafter tied in the stable by appellants and the witness, and late in the afternoon was slaughtered and skinned by Curtis and Pinkham; and that Mrs. Atkinson assisted in dressing the carcass. Pinkham further testified that in the evening of the day the animal was killed he noticed the hide in the manger; that next morning it was gone, and he observed that a pile of manure near the stable had been disturbed; that on the day following the killing of the animal appellants took half of the carcass to Twin Falls, and upon their return Mrs. Atkinson told the witness she had spent nearly all of her share of the proceeds of the sale of the beef, amounting to $15. Pinkham further testified that he was acquainted with the cattle belonging to appellants, and that the animal slaughtered was not one of them; that his suspicions were aroused, and on or about January 12, 1915, he reported the matter to the prosecuting attorney of Twin Falls county. A search of the Curtis premises was made on January 14th, and resulted in the discovery in the manure pile of 19 pieces of hide and the feet of a cow brute, which Pinkham identified as being the hide and feet of the animal slaughtered by himself and appellants. Larson identified the hide as that of his cow, basing his identification upon the color, a portion of his brand found upon one piece of the hide, and a bobbed tail which was also found in the manure pile. Pinkham testified that after appellants were arrested he had a conversation with Mrs. Atkinson in which she asked him to repudiate certain statements he had made concerning the transaction and to lay the blame wholly upon Curtis.

Appellants introduced evidence contradictory of that produced by the state, tending to show that the cow which was killed belonged to them, and that they knew nothing of the hide found in the manure pile. It was also shown that in the event of their conviction Pinkham expected to receive a reward of $500 from the Cattlemen's Association.

It has been repeatedly held, and may be said to be the established rule in this state, that where sufficient evidence is introduced, if uncontradicted, to justify a conviction, a verdict and judgment based thereon will not be reversed because of conflict in the testimony. State v. Nesbit, 4 Idaho, 548, 43 Pac. 66; State v. Silva, 21 Idaho, 247, 120 Pac. 835; State v. Downing, 23 Idaho, 540, 130 Pac. 461; State v. Hopkins, 26 Idaho, 741, 145 Pac. 1095; State v. Bouchard, 27 Idaho, 500, 149 Pac. 464; State v. Mox Mox, 28 Idaho, 176, 152 Pac. 802.

[2] While the record discloses that the animal slaughtered was first in possession of Curtis and afterwards of both the appellants, it also clearly appears that Mrs. Atkinson assisted in bringing it off the range, in butchering, and disposing of it. They were in partnership in the stock business, and she knew their cattle as well as he did. Appellants do not contend they were mistaken in the identity of the animal slaughtered; their defense is that it belonged, not to Larson, but to themselves. Mrs. Atkinson's connection with the larceny is fully covered by section 6342, Rev. Codes, wherein it is provided:

> "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, * * * are principals in any crime so committed."

Whether she was directly responsible for the original taking or aided and abetted in it, she was properly charged and tried as a principal under the provisions of section 7697, Rev. Codes, which is as follows:

> "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal."

[3] The action of the trial judge in giving certain instructions to the jury is assigned as error. The portions of the charge complained of will not be quoted here nor commented upon at length. Certain of the instructions given and parts of others, taken alone, which are relied upon by appellants for a reversal, do not fully and correctly state the law, but, read and construed in the light of the entire charge given to the jury, they are not misleading and do not constitute prejudicial error.

All the instructions given in a case must be read and considered together, and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion thereof. Osborn v. Cary, 28 Idaho, 89, 152 Pac. 473; Cady v. Keller, 28 Idaho, 368, 154 Pac. 629; Taylor v. Lytle, 29 Idaho, 546, 160 Pac. 942; State v. Curtis, 29 Idaho, 724, 161 Pac. 578.

One of the assignments of error brings before us for review an exception taken by appellants to a portion of the argument of counsel for the state wherein the conversation between Pinkham and Mrs. Atkinson, after the arrest, was referred to as a confession. Whether or not her statements on that occasion amounted to an admission against interest, or confession, was a legitimate subject for argument, and we cannot imagine that the jury was in any manner misled by the remarks of counsel.

[4] In support of their motion for a new trial appellants filed affidavits of newly discovered evidence, which, however, tend only to corroborate testimony produced by them at the trial. Where affidavits of newly discovered evidence are merely cumulative or corroborative of testimony introduced at the trial, the order of the court denying a motion for a new trial will not be reversed upon appeal. People v. Biles, 2 Idaho (Hasb.) 114, 6 Pac. 120; State v. Davis, 6 Idaho, 159, 53 Pac. 678.

The judgment and order appealed from are affirmed.

BUDGE, C. J., and RICE, J., concur.

(85 Or. 677)

BENSON v. JOHNSON.*

(Supreme Court of Oregon. June 26, 1917.)

1. PROPERTY 🔑9—EVIDENCE OF TITLE—PRESUMPTION—STATUTE.

The legal probabilities regarding ownership of personal property established by L. O. L. § 799, are not conclusive presumptions, although they are sufficient to support a prima facie case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 78.]

2. PARTNERSHIP 🔑64 — ASSUMED NAME — FAILURE TO COMPLY WITH STATUTE—WAIVER OF DEFECT.

The registration requirements of Laws 1913, p. 270, to be complied with by persons doing business under assumed names before bringing suit, will be waived by failure to object to bringing of the action by answer or demurrer; L. O. L. § 68, providing that a demurrer lies when a pleading attacked shows on its face that plaintiff has not legal capacity to sue, and section 71, providing that when such defects do not appear from the fact of the complaint the objection may be taken by answer, in view of section 72, providing that if such objection be not taken by demurrer or answer it will be deemed to have been waived, excepting only objections to jurisdiction, and that complaint does not state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87–91.]

3. FRAUDULENT CONVEYANCES 🔑263(1)—NECESSITY OF PLEADING—BULK SALES LAW.

The Bulk Sales Law (L. O. L. §§ 6069–6072), as amended by Laws 1913, p. 537, must be pleaded by the creditor who would avail himself of it, since it merely attaches to vendor's conduct a conclusive presumption that the transfer is fraudulent as to any and all creditors of vendor, and gives them a right which they may assert or ignore, and the law has the effect of creating a statutory fraud, necessary to be pleaded.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 771–774.]

4. FRAUD 🔑49—PRESUMPTION.

Fraud is never presumed, but must be pleaded and proved.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 44, 45.]

5. FRAUDULENT CONVEYANCES 🔑172(1) — BULK SALES LAW—EFFECT.

Failure to comply with the Bulk Sales Law as amended does not affect validity of the transfer as between the parties, but only as against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 523–526, 542.]

6. WITNESSES 🔑269(2)—CROSS-EXAMINATION —MATTER NOT COVERED BY DIRECT EXAMINATION—BULK SALES LAW.

Where a witness testified only to a sale between himself and plaintiff's bankrupt, he could not be cross-examined as to compliance with the Bulk Sales Law as amended, in view of L. O. L. § 860, confining cross-examination to matters stated in direct examination, since noncompliance therewith did not affect the transfer as between the parties the "orthodox rule," extending cross-examination to every issue in the case, not being in force in this state; but such cross-examination could include all elements going to make up the transaction as between the parties, such as circumstances of sale, payment of consideration, time, and place.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 950, 954.]

7. FRAUDULENT CONVEYANCES 🔑269(1) — PLEADING—ISSUES AND PROOF—BULK SALES LAW.

Where compliance with the Bulk Sales Law as amended was not pleaded, it could not be proved by cross-examination of the defendant.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 789–794.]

8. BANKRUPTCY 🔑302(1)—ACTION BY TRUSTEE—NECESSITY OF PLEADING PREFERENCE.

A bankrupt's trustee, claiming that acts of bankrupt and another constituted a preference, must plead such preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456.]

Department 1. Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Action by E. C. Benson, as trustee of O. F. Smith and Dee Howard, individually and as partners under the firm name of the Roseburg Garage, against Harley L. Johnson. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff, as trustee in bankruptcy of C. F. Smith and Dee Howard, both as in-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 19, 1917.

dividuals and as partners under the firm name of the Roseburg Garage, brought this action in replevin in the ordinary form to recover the possession of certain personal property said to have been owned by Smith prior to plaintiff's election as trustee. The answer admits the official character of the plaintiff and his demands for the custody of the chattels, but otherwise denies the complaint. The defendant alleges that he himself is the owner of all the effects in dispute, with two minor exceptions, which were laid out of the case by stipulation. He claims that the property was taken from him by virtue of the plaintiff's writ, and demands its restoration. The allegation of the defendant's ownership is denied by the reply, which final pleading contains no allegation of new matter. A jury trial resulted in a verdict for the defendant, and from the ensuing judgment the plaintiff appeals.

B. L. Eddy, of Roseburg, for appellant. Albert Abraham and O. P. Coshow, both of Roseburg, for respondent.

BURNETT, J. (after stating the facts as above). [1] A minor exception will be first determined. It is to the effect that the court erred in refusing to instruct the jury, in substance, that it is presumed that things in the possession of a person are owned by him; that a person is the owner of property from exercising acts of ownership over it; and that, until these presumptions are overcome by other evidence, the jury is to accept them as binding so far as they apply to the facts of the case. It is true that section 799, L. O. L., gives these in the list of disputable presumptions. The requests of the plaintiff to instruct the jury about them would have been proper, except for the fact that he sought to make them binding and conclusive. Such legal probabilities are sufficient to support a prima facie case, but the qualification appended would impart to them a quality not mentioned in the statute. For that reason the court was not in error for refusing the direction as propounded.

[2] It is contended by the plaintiff that the testimony was to the effect tnat Howard and Smith were doing business as partners under an assumed name of the Roseburg Garage, and that Smith as an individual was trading under the assumed name of Duffy Auto Company, all without having registered the same as provided by chapter 154 of the Laws of 1913, p. 270. This statute requires such business names to be certified to the county clerk of every county in which the traffic is to be conducted. After making certain declarations about procedure and to whom the act shall apply, it is said in section 5:

> "No person or persons carrying on, conducting or transacting business as aforesaid, or having any interest therein, shall hereafter be entitled to maintain any suit or action in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in section 1, and failure to file such certificate shall be prima facie evidence of fraud in securing credit."

The plaintiff claims that Smith alone constituted the Duffy Auto Company; that he transferred the property in question to the defendant, who continued under the same name, both without conforming to the statute mentioned. This enactment was construed in Beamish v. Noon, 76 Or. 415, 149 Pac. 522. The substance of that decision was that the statute merely disqualified the party from bringing an action, and that the defect was waived by failing to answer or demur in case it appeared upon the face of the pleadings. A demurrer lies when the pleading attacked shows on its face, among other things, that the plaintiff has not legal capacity to sue. L. O. L. § 68. By section 71, L. O. L., we find that, when any of the matters enumerated in section 68 do not appear upon the face of the complaint, the objection may be taken by answer; and section 72 reads:

> "If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

In alleging the property to be his own and demanding its redelivery, the defendant practically instituted a cross-complaint in replevin. If, on account of having acquired the title from one acting under an unregistered, assumed business name, or on account of his own like conduct, he was disqualified to maintain the action, his adversary should have pleaded it either by demurrer or reply. Not having done so, he has waived the same and cannot now urge it.

[3, 4] The plaintiff maintains also that, in making the alleged sale to the defendant, Smith violated what is known as the Bulk Sales Law (L. O. L. §§ 6069-6072), which in its amended form is found in chapter 281, p. 537, Laws of 1913. The substance of the charge in this respect is that Smith transferred practically all his property in trade to the defendant without making a sworn statement of the names and addresses of his creditors, together with the amounts of indebtedness due to each of them, and that on the other hand the defendant here did not notify such creditors of his intention to buy. The act merely attaches to such conduct a conclusive presumption that the purchase, sale, or transfer is fraudulent and void as to any and all creditors of the vendor. The effect of this law is to create a statutory fraud. Upon such a deceit the plaintiff essays to rely before us, and contends that the court was in error in refusing to instruct the jury on the subject or to allow evidence that the sale was in violation of the statute. The pleadings, however, are utterly silent on this subject. It is said in 20 Cyc. 734:

> "Where fraud is an essential ingredient of the cause of action or defense, it must be pleaded and proved. It is never presumed."

To the same purport are Walker v. Goldsmith, 14 Or. 125, 12 Pac. 537, Leasure v. Forquer, 27 Or. 334, 41 Pac. 665, and Leavengood v. McGee, 50 Or. 233, 91 Pac. 453. The fraud of defendant and his vendor, although of statutory origin, constitutes a ground of defense on the part of the plaintiff against the defendant's assertion of title. The legislation cited vests in creditors a right which when acting for themselves they are at liberty either to assert or ignore. If the trustee as their representative would avail himself of it, he must plead it.

The contention of the plaintiff on this subject is presented in another form. The defendant as a witness on his own behalf testified about having advanced money to Smith, only part of which had been repaid, and to making an arrangement about August 28, 1915, whereby in consideration of that indebtedness and an additional sum of money then paid to him Smith transferred the property in question to the defendant. The plaintiff sought to develop on cross-examination of the defendant all he claims with respect to the violation of the Bulk Sales Law and the statute against doing business under an unregistered assumed name. In section 860, L. O. L., it is said:

> "The adverse party may cross-examine the witness as to any matter stated in his direct examination, or connected therewith, and in so doing, may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination."

[5-7] The subject of Johnson's testimony was a sale consummated between himself and Smith wherein the latter was the vendor and the witness himself the vendee. It was manifestly good as between themselves. The Bulk Sales Law only creates a conclusive presumption that such a sale is void as against creditors. It is clear that even then it is void only at the option of such creditors. Having testified only to a sale between himself and Smith, the witness could be cross-examined as to all the elements going to make up such a transaction. The circumstances of the sale, the payment of consideration, the time when, and the place where, might be developed on cross-examination, because these are essential elements of and necessarily connected with what the witness asserted was a sale. Whether or not the same was void as to other persons at their election is an entirely different matter and is not a subject of cross-examination. Ah Doon v. Smith, 25 Or. 89, 34 Pac. 1093, cited by the plaintiff, was where the plaintiff testified on his own behalf to the bald fact that he had loaned the defendant the amount mentioned in the complaint. Called upon in cross-examination for time, place, and circumstances, he disclosed that it was money which he had let the defendant have in the course of gambling with each other and which he had won again in that very game. On the ground of public policy, and not to enforce any right of the defendant, the court dismissed the action sua sponte, leaving the parties where it found them. There the moving party sought to affirm an unlawful transaction. Here if the actor in the litigation would disaffirm a convention valid as between the immediate participants, but which is void only at the option of those he represents, he should present averments adapted to that purpose. The case just noted is not apropos here.

The plaintiff is endeavoring to apply to the cross-examination what is styled in the note to St. Louis, etc., Ry. Co. v. Raines, 17 Ann. Cas. 1, as the "Orthodox Rule." By that so-called precept:

> "When a party produces a witness who is sworn and examined, the opposing party is not confined in his cross-examination to the matters upon which the witness is examined in chief, but may extend the cross-examination to every issue in the case."

On the contrary, as stated in the same note:

> "According to the weight of authority in the United States, the cross-examination of a witness is limited to an inquiry into the facts and circumstances connected with the matters brought out on the direct examination of the witness."

Section 860, L. O. L., is a statutory declaration of the American rule and in our judgment was properly applied by the circuit court. Reduced to its lowest terms, the contention of the plaintiff is that, without pleading a defense to the defendant's claim, it may be proved by cross-examination of the defendant. The testimony sought to be adduced to establish the statutory fraud created by the Bulk Sales Law was irrelevant because there was no pleading to support it.

[8] The same may be said of the contentions of the plaintiff about the acts of Smith and Johnson constituting a preference within the meaning of the Bankruptcy Law. The rule is thus laid down in 2 Loveland on Bankruptcy, § 545:

> "In a suit to recover a preference, the trustee should allege and prove the filing of the petition in bankruptcy, the adjudication and his appointment and qualification as trustee of the estate of the bankrupt. * * * He should also allege and prove all the statutory elements constituting a preference, and that the person receiving it, or his agent, had a reasonable cause to believe that it was in effect a preference. * * * If the trustee fails to allege any one of these elements, his bill, declaration or petition is bad on demurrer."

Various assignments of error are pressed upon our attention; but, fairly considered, they all urge upon us a question which should have been pleaded but was not.

The judgment of the circuit court is affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(84 Or. 632)

PORTLAND GAS & COKE CO. v. GIEBISCH et al.

(Supreme Court of Oregon. June 26, 1917.)

1. MUNICIPAL CORPORATIONS 🔑393—INJURY TO GAS MAINS FROM SEWER CONSTRUCTION—LIABILITY.

A gas company could not recover damages to its mains necessarily resulting from construction of a city sewer, since a municipality does not abdicate its paramount right in a street by giving a franchise therein to a public service corporation, and the gas company's franchise was subordinate to the city's control of the streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 937.]

2. MUNICIPAL CORPORATIONS 🔑393—CONSTRUCTION OF SEWER—DUTY TO USE CARE.

A municipality and its contractor are obliged to use reasonable care in construction of sewers and will be liable for damages occasioned by negligence in the performance of the work to property of a gas company consisting of its mains, pipes, and appliances situate in the public streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 937.]

3. MUNICIPAL CORPORATIONS 🔑393—INJURY TO GAS MAINS FROM SEWER CONSTRUCTION—LIABILITY FOR NEGLIGENCE.

Where it was possible to construct sewers without injuring gas mains, the gas company could recover from a city contractor damages for the latter's negligence resulting in disturbance of mains, leakage of gas, and fire.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 937.]

4. MUNICIPAL CORPORATIONS 🔑393—INJURY TO GAS MAINS FROM SEWER CONSTRUCTION—ITEM OF RECOVERY—PATROLLING STREETS.

A gas company could not recover from a city contractor a charge for patrolling the streets in which defendants were constructing a sewer, and by whose negligence gas mains were injured, since, although defendants performed their work with care, plaintiff was chargeable with the duty of patrol and inspection.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 937.]

5. GAS 🔑14½—COMPANY'S DUTY TO PROTECT PROPERTY OWNERS.

It is the duty of a gas company to protect residents and property owners from damage arising from the escape of gas caused by sewer construction interfering with gas mains.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 12.]

Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Suit by the Portland Gas & Coke Company against A. Giebisch and another. Decree dismissing bill, and plaintiff appeals. Reversed, and judgment entered for plaintiff.

This is a suit brought originally to restrain the defendants from negligent interference with plaintiff's gas mains in the Montavilla district in the city of Portland. In December, 1913, when the suit was brought, the defendants were engaged in the construction of a sewer in this district, pursuant to a contract given them by the city of Portland. The complaint charges that the work was being done in disregard of plaintiff's rights and to the serious impairment of the service rendered by plaintiff to consumers of gas in the vicinity of the sewer which was under construction. A preliminary injunction was granted by the circuit court. The cause was subsequently put at issue and tried out on the question of damages, after the sewer had been constructed. The lower court was of the opinion that the defendants could not be held liable for negligence in performing the work, and the decree dismissed the bill. Plaintiff appeals.

John A. Laing, of Portland (H. W. Strong, of Portland, on the brief), for appellant.

McCAMANT, J. (after stating the facts as above). [1] Defendants' brief cites a respectable line of authority to the effect that a municipality does not abdicate its paramount right in a street by giving a franchise therein to a public service corporation. Booth on Street Railways (2d Ed.) § 42; National Waterworks Company v. City of Kansas (C. C.) 28 Fed. 921; Kirby v. Citizens' Railway Company, 48 Md. 168, 30 Am. Rep. 455; Scranton Gas Company v. City of Scranton, 214 Pa. 586, 64 Atl. 84, 6 L. R. A. (N. S.) 1033, 6 Ann. Cas. 388; Gas, Light & Coke Company v. Columbus, 50 Ohio St. 65, 33 N. E. 292; City of San Antonio v. San Antonio Street Railway Company, 15 Tex. Civ. App. 1, 39 S. W. 136; Brooklyn Electric Company v. City of Brooklyn, 2 App. Div. 98, 37 N. Y. Supp. 560. These authorities abundantly sustain the proposition that plaintiff cannot recover in this cause for any damage which necessarily follows from the construction of the sewer. The city of Portland was within its rights in authorizing such construction, and the franchise under which plaintiff maintained its service is subordinate to the paramount control over the streets vested in the municipality.

[2] None of the foregoing authorities on which defendants rely involved charges of negligence. Even if the city of Portland in its corporate capacity had constructed the sewer it would have been bound under the law to exercise due care in the premises and would have been liable for any damages occasioned by its negligence in the performance of the work. Giaconi v. Astoria, 60 Or. 12, 113 Pac. 855, 118 Pac. 180, 37 L. R. A. (N. S.) 1150; Warren v. Astoria, 67 Or. 603, 135 Pac. 527. A contractor performing the work at the instance of the city is also chargeable with the duty of reasonable care, and is liable in damages for negligence in the performance of the work. Pacific Laundry Company v. Pacific Bridge Company, 69 Or. 306, 138 Pac. 221; Millville Gas Company v. Sweeten, 75 N. J. Law, 23, 68 Atl. 1067; 6 McQuillin on Municipal Corporations, § 2695;

8 Dillon on Municipal Corporations (5th Ed.) § 1243. Even if the city of Portland had had the power to relieve the defendants from their obligation to perform the work with due care, it did not attempt to do so in this case. On the contrary, the specifications attached to the contract of the defendants contained the following stipulation:

> "The contractor shall at his own expense carefully protect from injury, trees, buildings, telephone, telegraph, or light poles, water or gas pipes, conduits, drain culverts, or any other structures, public or private, which are encountered or affected by the work, and shall repair any damage done to the said structures, leaving them in as good condition as they were previous to this interference, and the contractor shall be liable for any damages or claims arising from his interference with said structures."

Plaintiff has a property right in its mains, pipes, and appliances situate in the public streets, and this property right is entitled to protection. 20 Cyc. 1168.

[3] The following allegation contained in plaintiff's complaint is admitted by the answer of the defendants:

> "Plaintiff alleges that it is practicable for defendants to so dig said sewer ditch as not to injure plaintiff's gas mains, services, and property, and not to injure its business, and not to disturb or destroy its service to a large number of the people of the city of Portland, by properly bracing the sides of said ditch as the ditch is being dug, and by being careful in its work in and around the services of plaintiff in said streets, the exact location of all of which services and gas mains defendants know and have been informed."

The testimony of the defendant Gieblsch also admits that it was possible for the defendants, by properly shoring up the sides of its ditch, to prevent the earth from sliding and so disturbing the gas mains of plaintiff. The testimony shows clearly that the work done by the defendants materially interfered with plaintiff's pipes and mains. A number of pipes connecting gas mains with the houses of plaintiff's patrons were torn out by the defendants. Plaintiff's mains in other cases were left suspended in the air without support from the earth, resulting in leaks and in a fire which threatened great damage and was extinguished with difficulty. A small part of the damage asserted by plaintiff was admitted by the defendants. Bills to the amount of $43.29, presented by plaintiff to the defendants, were approved by H. W. Joplin on behalf of the defendants.

We think that plaintiff is entitled to relief.

[4, 5] The damages claimed by plaintiff amount to $1,742.91. They are specified and proved with unusual exactness. Included in the above amount is a charge of $778.69 for patrolling the streets on which defendants were working. An additional charge of 10 per cent. for overhead is superimposed on this amount, making the total charge for this purpose $856.56. The evidence fails to satisfy us of the reasonableness of this charge against the defendants. It was the duty of plaintiff to protect residents and property owners in the neighborhood from damage arising from the escape of gas. Sharkey v. Portland Gas Company, 74 Or. 327, 331, 144 Pac. 1152, 145 Pac. 660. The sewer constructed by defendants paralleled plaintiff's gas mains for 14 blocks; at frequent intervals service pipes ran from the mains to houses. Even if defendants had performed their work with care, plaintiff would have been chargeable with the duty of patrol and inspection. This item of plaintiff's claim will therefore be reduced by $500. We are convinced that the remainder is an adequate sum to cover the reasonable expense of such inspection and superintendence as are chargeable to defendants' negligence.

We think that plaintiff should have judgment for its claim, with the above modification.

The decree will therefore be reversed, and a judgment entered in favor of plaintiff for $1,242.91, and for the costs and disbursements in this court and in the circuit court.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

(84 Or. 643)

WHITE v. PORTLAND GAS & COKE CO.

(Supreme Court of Oregon. June 26, 1917.)

1. Gas 🔑14½—Highways—Action for Injuries—Liability of Gas Company.

If plaintiff's injury was due solely to the negligence of the automobile driver with whom she was riding as a guest, and not to the manner in which defendant, who laid gas pipes along the highway, had refilled the trenches, she could not recover.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 12.]

2. Gas 🔑14½—Highways—Actions for Injuries—Instructions.

In an action by plaintiff for injuries alleged to have been caused by the wheels of the automobile in which she was riding going down into the loose dirt, refilled into trenches dug along the highway by defendant, when turning out to avoid colliding with an approaching car, where there was evidence that the approaching car was being driven rapidly and taking the greater part of the highway, an instruction that, if the accident was due to the negligence of those in control of the other automobile, defendant was not liable was proper.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 12.]

3. Negligence 🔑93(1)—Guest in Automobile—Due Care.

While the negligence of the driver of an automobile cannot be imputed to a guest therein, the guest must exercise such care for his own safety as a reasonably prudent person would under like circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148.]

4. Negligence 🔑136(26) — Contributory Negligence—Guest in Automobile—Question for Jury.

Whether the guest in an automobile has exercised reasonable care for his own safety is usually a question for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 333.]

Department 1. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by M. L. White against the Portland Gas & Coke Company, a corporation. From an order granting plaintiff's motion for a new trial after verdict for defendant, it appeals. Reversed and remanded, with directions.

The plaintiff brought this action stating, in substance, that by permission of the county court of Clackamas county the defendant dug a trench along the edge of the traveled portion of the county road leading from the north towards Oregon City and installed therein a gas main, but so negligently refilled it that the highway was rendered unsafe, in that the wheels of vehicles would sink into the fill. She avers, in effect, that as she was riding lawfully in an automobile on that thoroughfare as the guest of a friend who operated the car, it was turned out to the right to meet another one coming from the opposite direction, and while the machine she occupied was being carefully operated and driven slowly, the loose earth in the trench gave way under the wheels so that they skidded, in consequence of which the automobile rolled down the embankment on the right of the road, resulting in her injury. It is admitted that there was an accident at the place mentioned in the complaint, by reason of which the plaintiff received an injury, but otherwise the declaration is traversed in all material particulars. It is stated in the answer that the automobile was being driven at a dangerous rate of speed, and that it was turned out so sharply to the right on meeting the other car that it became unmanageable and ran off the side of the road, causing the injury. As against the plaintiff herself it is alleged:

"That the said accident did not happen through any negligence on the part of said defendant, but happened because the said plaintiff and the person driving said machine, who was under the direction and control of the said plaintiff at the time of the said accident, did not properly or safely drive said machine, but drove the same at a too fast and dangerous rate of speed * * * and the said plaintiff, while the said machine in which she was riding was being operated, although she knew and understood and appreciated all of the conditions under which said machine was being operated, and the speed under which said machine was being operated, at the time, made no remonstrances with the driver of the machine in which she was riding as to the careless and negligent manner in which said machine was being operated, and without objection or remonstrance permitted the said driver to drive the said machine at said dangerous and reckless rate of speed, although the said plaintiff was in a position to warn the driver of the automobile in which she was riding of the impending danger, and said accident could have been avoided had the said plaintiff remonstrated with the driver of said machine, or warned him or protested against the dangerous manner in which said machine was being operated, and said machine was being operated with the consent of the said plaintiff in said dangerous and reckless manner, all of which was sufficient, and should have caused the said plaintiff to understand the conditions, and it was apparent to said plaintiff under the conditions that said automobile in which she was being driven was being driven recklessly and carelessly, all of which was negligence contributing to said accident herein."

This was denied by the reply. The jury trial resulted in a verdict for the defendant. The plaintiff filed a motion for a new trial, urging, among other things, that the trial court erred in giving the following instructions:

"(1) The defendant in this case is not liable for any negligence, if there was any negligence, on the part of Mr. Rands, who was driving this automobile in which the plaintiff was riding at the time of the accident, and if this accident happened solely on account of the negligence of Mr. Rands, then the plaintiff is not entitled to recover.

"(2) Contributory negligence is simply the failure on the part of the person injured to exercise reasonable and ordinary care under the particular circumstances. The defendant in his answer has set forth certain allegations wherein it is alleged that the plaintiff in this case was guilty of contributory negligence, contributing to bring about the accident, and I instruct you that if the plaintiff was guilty of negligence contributing proximately to bring about the accident and injury in any of the particulars set forth in defendant's answer, then the plaintiff cannot recover.

"(3) There has been some evidence in this case that there was another automobile proceeding in a northerly direction on this hill on which the accident happened, and if you should find from the evidence in this case that this accident happened solely on account of the negligence of the automobile that was proceeding in a northerly direction, then I instruct you that the plaintiff would not be entitled to recover in this action, or if you find from the evidence that this accident happened solely on account of the concurring negligence of the people who were in the automobile going in a northerly direction on the hill and the negligence of Mr. Rands who was driving the machine, then your verdict should be for the defendant."

The court allowed the motion, basing its conclusion on the giving of instruction numbered 1, and ignoring the other assignments. The defendant appeals.

H. B. Beckett, of Portland (Geo. C. Brownell, of Oregon City, and Stapleton & Conley and Wilbur, Spencer & Beckett, all of Portland, on the brief), for appellant. C. Schubel, of Oregon City (Livy Stipp, of Oregon City, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). Supporting the complaint there is evidence to the effect that, at the invitation of Mr. Rands as his guest, the plaintiff with her two daughters and his wife went riding in his automobile. Mrs. White sat on the left side in the rear seat, one of her daughters next to her, and Mrs. Rands on the right, while another daughter rode on the right of Mr. Rands on the front seat. They were proceeding towards Oregon City from the north on the main traveled road and were going down a hill which had been cut down, using the excavated earth to make a fill about 10 feet in height near the foot of the hill. This fill was graveled to a width of about 14 feet. The gas main was laid in a ditch approximately 2 feet in depth, about 14 inches in width, and some 2 feet west of the edge of the gravel. The slope on the sides of the fill was quite steep. Testimony on behalf of the plaintiff is to the effect that as they approached it another automobile was being driven quite rapidly up the hill, meeting them occupying the major portion of the graveled road; that the Rands machine was going at the rate of about three or four miles an hour; that when turned to the right the off wheels sank into the loose earth some 6 or 8 inches and ran thus 10 or 15 feet in the ditch when, owing to the declivity, it turned over, rolled down the embankment lodging against a fence and injuring the plaintiff.

The testimony for the defense is to the purport that the track of the off wheels of the automobile driven by Rands led to the right and across the trench at an angle of about 60 degrees, and then proceeded parallel with it some distance, making then a slight turn to the left, and immediately afterwards turning precipitously down the embankment. One of the plaintiff's daughters, testifying, said the other car was coming pretty fast, occupying the greater part of the road, and was larger than the one driven by Rands. The plaintiff stated as a witness that she felt the rush of the air of the car they met, and thought they might collide with it. She says she knew the general lay of the land, and that the gas main had been laid in that neighborhood, but that she did not interfere with or protest with Rands about his method of driving.

[1] The principal complaint of the plaintiff is about the giving of the instruction first quoted. The exception urged before the circuit court was against it as an entirety. The attack made upon it was to the effect that it "did not properly state the law of negligence or contributory negligence which would excuse the negligence of the defendant, and that it assumed as a matter of law the responsibility of the plaintiff for the actions and negligence of Mr. Rands." In the first place it is clear that if "this accident happened solely on account of the negligence of Mr. Rands, then the plaintiff is not entitled to recover." This is because there was no relation existing between Rands and the defendant which would render the latter liable for his shortcomings, and consequently that part of the instruction was sound. Therefore if we regard the principle laid down by the precedents to the effect that if part of an instruction objected to is sound it will save the remainder, we cannot countenance the objection to the one in question. Murray v. Murray, 6 Or. 17; Salomon v. Cress, 22 Or. 177, 29 Pac. 439; McAlister v. Long, 33 Or. 368, 54 Pac. 194. Moreover, the charge now under consideration does not. in any way, impute to the plaintiff the negligence of Rands. It is one thing to charge her with his negligence and quite another to exonerate the defendant from its effect. The whole subject of that excerpt was the negligence of Rands. Nothing else was discussed therein, and it was left to the jury to determine whether he was negligent or not. The sum of the situation on that branch of the case is that if the negligence of Rands, provided there was such negligence, was the sole cause of the injury, the defendant could not be held responsible. This is a reasonable paraphrase or interpretation of that part of the charge to the jury.

[2] Plaintiff also urged before the trial court that there was no testimony justifying the instruction numbered 3, to the effect that if the accident happened solely on account of the negligence of the people in the other automobile, or solely on account of their negligence and that of Rands together, the verdict should be for the defendant. As noted above, the testimony tends to show that the other car was being driven rapidly up the hill, taking the greater part of the graveled way, so that it practically crowded the Rands machine out of the road, at least to a large extent. This would be negligence on the part of those in control of the other automobile, and if, as the jury may have found, it operated to compel Rands to turn out to avoid what seemed to be the greater danger of collision, so that this was the single cause of the accident, it would exonerate the defendant. This instruction was predicated on the hypothesis that the mishap resulted solely from the negligence of parties over whom the defendant had no control. In order to sustain this instruction it is only necessary to point out that there was some evidence to go to the jury on that subject.

[3, 4] The most difficult proposition is whether the court erred in giving instruction numbered 2 on the subject of contributory negligence. It has been decided very frequently, and in some of our own precedents, that the negligence of one operating an automobile cannot be imputed to his guest. Tonseth v. Portland Ry., L. & P. Co., 70 Or. 341, 141 Pac. 868. That, however, is not the precise question in hand. The guest cannot abdicate his duty to use reasonable diligence in caring for himself. As said in Thompson v. Los Angeles, etc., Railway Co., 165 Cal. 748, 753, 134 Pac. 709, 712:

> "It is, of course, true that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety."

If such passenger is aware that the operator is carelessly rushing into danger, it may be incumbent upon him to take proper steps for his own safety. Whether the occupant has exercised reasonable care in the matter involved is usually a question for the jury. The standard of care is the conduct of a reasonably prudent person in such environments. The application of this rule must be left to the judgment of the 12 triers of the fact. It may be that Rands' attention was so thoroughly riveted upon the approaching car as to make him unconscious of being so near the edge of the embankment, and that if his attention had been called to that matter by the plaintiff, he would have avoided the slope. It may be also that the jury considered she was remiss in her duty in not warning him. We cannot say as a matter of law whether she was heedless or not. It must be left to the jury whether she failed in her duty as a reasonable person under the circumstances in not calling the attention of Mr. Rands to the danger of going over the embankment in his effort to avoid a collision with the other machine. Under the conditions disclosed by the record, the court was not in error in giving an instruction on contributory negligence.

Negligence may be grounded in action or refusal to act, in speaking or failing to speak, all with reference to duty in the premises. We can easily conceive of cases where a clamor of direction by the guest would confuse a driver or chauffeur and increase the danger in a manner amounting to contributory negligence of the passenger. In others the duty to utter warning might be imperative. In some instances it would be rank folly to wrest the reins or the wheel from the hands of the one in charge of the vehicle. In others it might be highly necessary to do that very thing. The court cannot lay down a mathematical precept as a rule of law enjoining in detail what should be said or done or omitted in every juncture of danger. It is plain, however, that an invited guest is not to be supine and inert as mere freight. Accepting the hospitality of his friend does not excuse him from the duty of acting for his own safety as a reasonably prudent person would under like conditions. Whether he does so or not must be decided by the 12 who declare the facts embodied in the verdict.

The distinction between the doctrine that the fault of the driver is not to be imputed to his guest and the other principle that the guest himself may be guilty of contributory negligence in not acting as a reasonably prudent person would in the exigency involved is elaborated in Dale v. Denver City Tramway Co., 173 Fed. 787, 97 C. C. A. 511, 19 Ann. Cas. 1223, and note; Christopherson v. Minn. etc., Ry. Co., 28 N. D. 128, 147 N. W. 791, L. R. A. 1915A, 761, and note, Ann. Cas. 1916E, 683; Wachsmith v. B. & O. R. R. Co., 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679, and note; Anthony v. Kiefner, 96 Kan. 194, 150 Pac. 524, L. R. A. 1915F, 876, Ann. Cas. 1916E, 264, and note; Rebillard v. Minn., etc., Ry. Co., 216 Fed. 503, 133 C. C. A. 9, L. R. A. 1915B, 953.

The conclusion is that the trial court did not err in its instructions to the jury, but was mistaken in its ruling granting a new trial. The order to that effect is therefore reversed, and the cause remanded to the circuit court, with directions to reinstate the original judgment for the defendant. Sullivan v. Wakefield, 65 Or. 528, 133 Pac. 641.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(175 Cal. 395)

CONLIN v. STUDEBAKER BROS. CO. OF CALIFORNIA et al. (L. A. 3980.)

(Supreme Court of California. June 8, 1917.)

1. Judgment 🔑250 — Relief Authorized —Sales.

A judgment allowing plaintiff buyer to retain a purchased automobile, and restoring to him the entire consideration paid therefor, is erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436.]

2. Sales 🔑398 — Rescission — Amount of Recovery.

Upon rescission of a sales contract, neither of defendant sellers should be required to return more than he actually received, since a rescission action contemplates that the parties be placed in their former position.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1137–1139.]

3. Sales 🔑114—Buyer's Remedies—Election.

A defrauded buyer may elect to rescind the sales contract, or to affirm it and recover damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 288.]

4. Sales 🔑52(4)—Buyer's Action for Damages—Admissibility of Evidence.

Where the buyer, in an action to rescind a sales contract, claimed the batteries in the purchased automobile were old, evidence contradicting this claim is admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 129–135.]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by C. D. Conlin against the Studebaker Bros. Company of California and L. E. Dresbach. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Horace S. Wilson and George C. Mansfield, both of Los Angeles, for appellants. Chas. S. McKelvey, of Los Angeles, for respondent.

SLOSS, J. Plaintiff alleged in his complaint that the defendants had sold him an electric automobile, for which he had paid $1,700 as follows: $300 in cash and a note for $300 to the defendant, Studebaker Bros. Company of California, and 204 shares of stock of the Peerless Brick & Artificial Stone Company, of the agreed value of $1,100, transferred to the defendant Dresbach. It was alleged that the defendants had falsely represented that the automobile was new and in first-class condition; that the plaintiff, upon learning that the machine was, in fact, old and in poor condition, had notified the defendants that he rescinded his contract, and demanded the return of the consideration paid by him, offering to return the automobile. The demand and offer being refused, he brought this action. The defendants answered, denying many of the allegations of the complaint, and filed a cross-complaint, alleging that the automobile had been put in the hands of the plaintiff under a contract of conditional sale, under which title was to remain in the Studebaker Bros. Company until the note for $300 was paid. The plaintiff having refused payment of said note, the cross-complainants demanded judgment for the recovery of the automobile, or its value, fixed at $1,700. The court found in favor of plaintiff's allegations regarding fraud and rescission. It found that the title was not to remain in the Studebaker Bros. Company until the note was paid, and that said company was not the owner of the automobile, or entitled to the possession thereof, "except on the rescission of the contract with plaintiff." An amendment to plaintiff's complaint, filed after the findings were made, alleges that the 204 shares of stock transferred to the defendant Dresbach had become valueless through no fault of the plaintiff. There is no finding on this allegation. The judgment was that plaintiff's promissory note for $300 be returned to him, and that he have judgment against both defendants for the $300 paid by him, and for $1,100, the agreed value of the 204 shares of stock. The defendants appeal from the judgment and from an order denying their motion for a new trial.

[1] The judgment is open to objection on several grounds. The facts of the transaction were these: Dresbach had bought the automobile from Studebaker Bros. Company, and still owed $600 on the purchase price. He then made a sale to the plaintiff, the agreement being that the plaintiff was to pay him $1,100, and was to pay the Studebaker Bros. Company the $600 still owing to them. Accordingly the 204 shares of stock agreed to be worth $1,100 were transferred to Dresbach, and the Studebaker Bros. Company received $300 in cash and the plaintiff's note for $300. A written agreement of conditional sale was made between Studebaker Bros. Company and the plaintiff. While the complaint alleges, and the court finds, that plaintiff has suffered damage in the sum of $1,700, the action and the judgment are both based upon the theory of a rescission, rather than of an action for damages for fraud. By the judgment there is restored to the plaintiff the entire consideration which he had given for the automobile; that is, his note for $300, the $300 paid by him in cash, and the equivalent in money of the 204 shares of stock, which, as alleged in the amendment to the complaint, had become worthless. But there is no provision in the judgment for the return to the defendants, or either of them, of the automobile itself. So far as the judgment goes, the plaintiff gets back the purchase price paid by him for the automobile and keeps the automobile too. Such a judg-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ment cannot stand. In decreeing the rescission of a contract the court—

> "requires equity at the hands of the complaining party as well as from the defendant, and * * * will place the parties in statu quo by requiring the plaintiff to restore to the defendant everything of value which the plaintiff has received under the contract." 18 Enc. Pl. & Pr. 858; Sanchez v. McMahon, 35 Cal. 218; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797.

It is no answer to this objection to say that the plaintiff, in his complaint and at the trial, asserted his willingness to make a return of the purchased property. It appeared from the evidence that it remained in his possession, and the defendants were entitled to some security for its return beyond the mere expression of plaintiff's willingness to restore it. The judgment should have made the return of the consideration conditional upon the placing of the automobile in the possession of the defendants.

[2, 3] Furthermore, the judgment is erroneous, in that it makes both defendants liable for the return of the entire consideration, although only a part of it had gone to each of them. Studebaker Bros. Company had received (in addition to plaintiff's note) the $300, and Dresbach the shares of stock worth $1,100. Upon a rescission, which contemplates that the parties are to be placed in statu quo, neither defendant should be required to return anything more than that which was obtained by him. If the action had been one for damages for deceit, the two defendants, if jointly connected with the alleged wrong, would both have been liable for the full amount of all damages. But, as we have said, the action was not of that character. The party defrauded may elect to rescind the contract, or to affirm it and claim damages. He cannot do both at the same time. 20 Cyc. 88; Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667. Here he has elected the former remedy.

[4] Of the alleged errors in rulings on evidence, only one is important enough to require notice. The court should have permitted the defendants to introduce the evidence offered by them on the question whether the batteries in the automobile were new. The plaintiff's main ground of complaint was that the machine was equipped with old batteries. The defendants were clearly within their rights in endeavoring to contradict the testimony which had been offered by the plaintiff on this point.

Other points are made, but the foregoing are sufficient to dispose of the appeal, and to direct the course of proceedings upon the new trial which must be had.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

(175 Cal. 354)

In re ALLEN'S ESTATE.

ALLEN v. UNION TRUST & SAVINGS BANK OF PASADENA.

(L. A. 4714.)

(Supreme Court of California. June 7, 1917.)

APPEAL AND ERROR ⟹635(3)—RECORD—FAILURE TO SET FORTH ALL THE EVIDENCE.

An order denying a petition, under Code Civ. Proc. § 1723, to obtain a decree declaring that the homestead of petitioner's deceased had vested in herself, will be affirmed, where the record does not contain all the evidence given at the trial on which the court found that the homestead had been abandoned, and appellant did not request a transcript under section 953a.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2779, 2829.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Clark P. Allen, deceased. Hattie E. Allen, widow, appeals, adversely to Union Trust & Savings Bank of Pasadena, guardian of George E. Allen, from an order denying her petition to obtain a decree that the homestead of herself and her deceased husband had vested in herself. Affirmed.

Charles Lantz, of Los Angeles, for appellant. Hahn & Hahn, of Los Angeles, for respondent.

SHAW, J. The appeal here presented is from an order denying the petition of Hattie E. Allen, as the widow of the decedent, under section 1723 of the Code of Civil Procedure, to obtain a decree declaring that the homestead of herself and said decedent, declared and filed by her alone, during their marriage, upon a certain lot of land, said lot being her separate property, has vested in her as the surviving spouse. Opposition to her petition was made by the respondent as guardian of the child of the decedent, and also as executor of the estate of the decedent. Thereupon there was a trial of the cause, evidence oral and documentary was introduced, the court made findings to the effect that the declaration of homestead on the lot had been duly filed as alleged, and that subsequently, during said marriage, the petitioner and Clark P. Allen, her husband, abandoned the homestead by executing, acknowledging, and causing to be duly recorded their deed conveying said lot in fee to Harriet E. Winslow. Thereupon the order was made denying the petition.

The record does not set forth the evidence given at the trial upon which the court found that the homestead had been abandoned. The clerk and the judge of the superior court each certify that the record contains true copies of certain documents on file in the cause; but the certificates do not state that these comprise all the documents used at the hearing, or that no other evidence was intro-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

duced. The findings state that oral testimony was given. It does not appear that the appellant ever gave to the clerk the notice required by section 953a of the Code of Civil Procedure, specifying the papers to be included in the transcript, or requesting a transcript of the testimony. Hence there is no affirmative showing that she was entitled to a reporter's transcript of the testimony, or to a clerk's transcript of papers on file. Schmitt v. White, 172 Cal. 559, 158 Pac. 216; Pierce v. Works, 171 Cal. 687, 154 Pac. 852; Hibernia S. & L. S. v. Doran, 161 Cal. 118, 118 Pac. 526. There is no bill of exceptions. All presumptions are in favor of the action of the court below. Error must be affirmatively shown by the record. The finding that the homestead was abandoned is sufficient to defeat the petitioner's claim and to support the order appealed from.

The order is affirmed.

We concur: VICTOR E. SHAW, Judge pro tem; SLOSS, J.

(175 Cal. 356)

In re ALLEN'S ESTATE. (L. A. 4964.)

(Supreme Court of California. June 7, 1917.)

1. Appeal and Error 🔑117 — Orders Appealable—Orders in Probate.

An order denying appellant's motion, under Code Civ. Proc. § 473, to be relieved from the consequences of her failure to propose a bill of exceptions within the time allowed, is not appealable, as it does not come within the single exception to the rule that the appellate jurisdiction of the Supreme Court in probate matters extends only to such orders and judgments as are specified in section 963, subd. 3.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 805–812.]

2. Appeal and Error 🔑82(1)—Appealable Order—Statute—Construction.

The provision of Code Civ. Proc. § 963, subd. 2, that an appeal may be taken from a special order made after final judgment, has no application to probate proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 517.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Clark P. Allen, deceased. Hattie E. Allen, widow, appealed from an order denying her petition for a decree adjudging that a homestead had vested in her. The decree was affirmed, and she appeals from an order denying her motion, under Code Civ. Proc. § 473, to be relieved from the consequences of her failure to propose her bill of exceptions within the time allowed. Appeal dismissed.

Charles Lantz and Howard F. Shepherd, both of Los Angeles, for appellant. Hahn & Hahn, of Los Angeles, for respondent.

SLOSS, J. Hattie E. Allen, widow of the decedent, appealed from an order denying her petition for a decree that a homestead had vested in her. We have just given judgment affirming the order. Estate of Allen (L. A. No. 4714) 165 Pac. 1010. The opinion filed on that appeal shows that no reporter's transcript or bill of exceptions was brought up. The present appeal has to do with the petitioner's effort to secure such bill of exceptions. It appears that, for some reason, she failed to propose her bill within the time allowed, and then, upon due notice, applied to the court, under section 473 of the Code of Civil Procedure, for relief from the consequences of such failure. Her motion was based upon the ground of excusable neglect. The court denied the motion, and from the order of denial the widow now appeals.

[1] The appeal cannot be considered. The order sought to be reviewed is not one from which an appeal lies. We have very recently (Estate of Spafford, 165 Pac. 1) had occasion to reaffirm the well-settled rule that the appellate jurisdiction in probate matters extends only to such orders and judgments as are specified in the third subdivision of section 963 of the Code of Civil Procedure (Estate of Calahan, 60 Cal. 232; Estate of Lutz, 67 Cal. 457, 8 Pac. 39; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393; Estate of Cahill, 142 Cal. 628, 76 Pac. 383). This rule is subject to the limitation that an appeal will lie from an order granting or denying a motion for a new trial, in those proceedings in probate in which such motion is proper. Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532; In re Walkerly, 94 Cal. 352, 29 Pac. 719; In re Spencer, 96 Cal. 448, 31 Pac. 453. But, with this exception, subdivision 3 is the only part of section 963 to which resort may be had in determining what orders or judgments in probate may be made the subject of an appeal.

[2] The provision of subdivision 2 that an appeal may be taken from a special order made after final judgment has no application to probate proceedings. Estate of Walkerly, supra; Estate of Smith, 98 Cal. 636, 33 Pac. 744; Iversen v. Superior Court, 115 Cal. 27, 46 Pac. 817; Estate of Cahill, supra. The order here in question is not embraced within the terms of subdivision 3 of section 963.

Counsel for appellant cites a number of cases, of which Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332, is an example, in which this court has entertained appeals from orders granting or refusing the relief which was here sought. None of these, however, was a proceeding in probate. All were civil actions, and the order was therefore appealable as a "special order made after final judgment." Code Civ. Proc. § 963, subd. 2.

The appeal is dismissed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

(33 Cal. App. 296)

GRACA v. RODRIGUES. (S. F. 8247.)

(Supreme Court of California. May 21, 1917.)

1. ASSIGNMENTS 🔑27—CONTRACTS ASSIGNABLE—COVENANT.

A covenant or obligation entered into with one buying a business, binding the seller to refrain from engaging in a like business within specified territorial limits, is assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 40.]

2. GOOD WILL 🔑6(1)—COVENANT IN RESTRAINT OF TRADE—PERSONS ENTITLED TO ENFORCE.

Civ. Code, § 1673, providing that every contract restraining the exercise of a lawful business except as otherwise provided shall be void, and section 1674, providing that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified territory so long as the buyer or any person deriving title to the good will from him carries on a like business therein, do not limit a covenant in restraint of trade to a person deriving title directly from the original buyer, but permit an assignee of the buyer's assignee to rely on and enforce such a covenant.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 2.]

In Bank. Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by A. F. Graca against Frank Rodrigues. From judgment for defendant, plaintiff appeals. Reversed, with directions.

The following is the opinion of Kerrigan, J., in the District Court of Appeals, in which Lennon, P. J., and Richards, J., concurred:

This is an appeal taken on the judgment roll from the judgment sustaining the defendant's demurrer to plaintiff's amended complaint, the order sustaining the demurrer being made without leave to the plaintiff to amend.

The purpose of the action is to restrain the defendant from conducting a grocery business within a certain locality in the city of Oakland, contrary to an express covenant by him not to engage in a like business within that area. The complaint alleges that the defendant, the original owner of the business, agreed with his immediate covenantees, their executors, administrators and assigns, not thereafter to open or conduct any other grocery store or grocery business within a certain specified limited area; that thereafter said covenantees sold and transferred the grocery store and the good will thereof to one Luz, and assigned and transferred to him the bill of sale and the covenant and agreement just referred to; that Luz on or about February 26, 1916, sold, and delivered the said grocery business together with the good will thereof to the plaintiff, and assigned and transferred to the plaintiff said bill of sale and agreement of defendant. It thus appears from the face of the complaint that the plaintiff is the assignee of an assignee of the original covenantee of the defendant; and for this reason the defendant asserts that the complaint fails to state or show a cause of action in the plaintiff. It is argued in support of the defendant's contention that the action is one to enforce a covenant which is void for the reason that it is in restraint of trade, and does not come within the exception to section 1673 of the Civil Code provided in the section following. Those two sections read, respectively, as follows:

"Sec. 1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by the next two sections, is to that extent void.

"Sec. 1674. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified city, county, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein."

It is argued that under the provisions of these sections the limit to which a covenant in restraint of trade can be carried is in favor of a person deriving title directly from the original purchaser. This position is sustained by the case of Johnston v. Blanchard, 16 Cal. App. 328, 116 Pac. 975, in which the court says: "While appellant does not direct our attention to the fact or make any point thereon, reference to the judgment discloses that it is erroneous in this, that by its terms defendant is enjoined from engaging in or carrying on the business * * * in the county of Los Angeles * * * so long as plaintiff, 'or his successors or assignees,' continue in business." After quoting section 1674, Civil Code, the court, continuing, says: "Under the provision of this section of the Code, plaintiff, who derived his title to the good will of the business by a transfer from W. W. Lee, who was the buyer from defendant, is entitled to have the contract enforced for his protection so long as he carries on a like business in the county, but such right cannot be extended to his successors or assigns. It therefore follows that the judgment, in so far as it has reference to the successors or assignees of plaintiff, is unwarranted and to that extent erroneous."

[1, 2] With diffidence and reluctance we disagree with this view of the law. Good will is an important and valuable incident to a business which the law recognizes and protects. With a business it may be sold or mortgaged, and is property transferable like other property. Civ. Code, § 993. A covenant or obligation entered into with a buyer to refrain from engaging in a like business within specified territorial limits is assignable. Cal. Steam Navigation Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511. Such contract and good will are valid when held by the assignee of a purchaser even if no reference is made therein to the successors and assigns of the purchaser. 12 R. C. L. 991. In Swanson v. Kirby, 98 Ga. 586, 26 S. E. 71, it appeared that the defendant had sold out his business as a ticket broker to the plaintiff, and had contracted not to open another ticket business in the city of Atlanta without his consent. The purchaser transferred the contract to a third party, who sold the business to another, and the latter entered into partnership with the plaintiff, the original purchaser from the defendant. This partnership was later dissolved and the plaintiff continued in the business alone. It was held that the benefit of the contract not to engage in the ticket business without the consent of the plaintiff passed to the purchaser with each transfer of the business. An examination of the authorities discloses that the law generally provides that the good will of a business may be sold with the business and assigned through successive transfers without limit. We do not believe that the Legislature of this state, when enacting section 1674, intended to adopt a different rule. We can conceive of no good reason why it should have done so, or why the assignee of an assignee of a purchaser of the good will of a business is not as much entitled to protection as any of his predecessors in interest. We think under a reasonable construction of this section that he is so entitled. It is often said that contracts in restraint of trade should be strictly construed,

that they are against public policy, and therefore presumably bad; and that their provisions should not be extended by construction or implication so as to favor persons desiring to enforce them beyond what their terms would clearly require. Perhaps the modern rule is that such contracts should be construed without any adverse bias. 24 Am. & Eng. Ency. of Law, 857; Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. However that may be, under the contract here in question the defendant, as vendor, did intend to bind himself in favor of his immediate purchaser and the latter's successive transferees; and the only question that we are called upon to consider is whether the parties to the contract under the sections above quoted have the power to so contract. Construing the sections liberally, as required by the Code of this state, we think the benefit of the covenant of the contract not to engage in the grocery business within the designated limited area passed to the purchasers with each transfer of the business.

The judgment is reversed, with directions to the trial court to overrule the demurrer and permit the defendant to answer.

On resubmission, Lennon, P. J., filed the following:

The judgment is reversed, with directions to the trial court to overrule the demurrer and permit the defendant to answer, for the reasons stated in an opinion filed March 1, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

A. Q. Lomba and W. W. Moreland, both of Oakland, for appellant. Gonsalves & Keller, of Oakland, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District is denied.

The opinion is in conflict with what was said by the District Court of Appeal of the Second Appellate District as to the proper construction of section 1674 in Johnston v. Blanchard, 16 Cal. App. at page 328, 116 Pac. 973, as is shown by the opinion in this case. We are satisfied that the opinion in this case correctly states the law on the point discussed, and that what was said thereon in Johnston v. Blanchard, supra, must be disapproved.

(175 Cal. 358)

FRESNO TRACTION CO. v. ATCHISON, T. & S. F. RY. CO. (S. F. 7070.)

(Supreme Court of California. June 7, 1917. Rehearing Denied July 5, 1917.)

1. Negligence 🔑6 — What Constitutes — Noncompliance with Statute.

Failure to perform duty imposed by law is sufficient evidence of negligence, though the person damaged had knowledge of such failure prior to the accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8.]

2. Negligence 🔑56(3) — Noncompliance with Statute—Proximate Cause.

No action for damages can be founded on negligence from failure to perform a duty imposed by a statute, unless such negligence directly contributed to the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 70.]

3. Railroads 🔑297(4) — Disobedience of Ordinance—Evidence.

The rule that proof of disobedience of an ordinance constitutes proof of negligence per se is not altered by the fact that the corporation, bound under the ordinance to maintain a safety device, proves its continued disobedience.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 947.]

4. Railroads 🔑297(4)—Violation of Ordinance—Proximate Cause—Proof.

Evidence that the owners of intersecting railway tracks by mutual consent discontinued the use of safety gates required by a city ordinance, and substituted a system of signals by watchmen, conclusively showed that the negligence involved in disobedience of the ordinance was not the proximate cause of a subsequent collision.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 947.]

5. Railroads 🔑345(3)—Evidence Admissible Under Pleading—Ordinance.

In an action by one railway company against another for damages from a collision, due to violation of an ordinance requiring the maintenance of safety gates, the ordinance and proof of its violation were admissible under general allegations of the complaint.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1115.]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Fresno Traction Company against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, and denial of new trial, defendant appeals. Affirmed.

U. T. Clotfelter, of Los Angeles, James Gallagher, of Fresno, and A. H. Van Cott, of Los Angeles, for appellant. Short & Sutherland and Everts & Ewing, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for respondent.

MELVIN, J. Defendant appeals from a judgment for $3,000 by way of damages and from an order denying its motion for a new trial. The cause was tried before a jury. Plaintiff and defendant are transportation companies. Their tracks intersect at a street crossing in the city of Fresno, and at that place, in the nighttime, one of defendant's trains backed into a car belonging to plaintiff, causing the damages for which judgment was given.

The complaint alleged that the injury to the property of the plaintiff was caused by the negligence of defendant's employés in the operation of a freight train. It was specifically charged that defendant's servants were negligent because of the failure to maintain lights upon the rear end of the train which backed into plaintiff's electric car, by reason of the neglect to ring the bell or blow the whistle of the locomotive, and owing also to the fact that a watchman employed by defendant and stationed near the point of intersection of the tracks gave the motorman and conductor of plaintiff's car a signal that a safe crossing might be made. There was also the general allegation, usual in such complaints, that the collision was wholly caused by the carelessness and negligence of the defendant, and without any fault on the part or behalf of plaintiff. The answer denied the acts of negligence specifically set forth in the complaint, and pleaded as a distinct defense that the collision was caused solely and proximately by the negligence of plaintiff's servants.

The principal contentions on behalf of defendant in favor of a reversal (and the only ones requiring discussion by this court) are made in connection with the admission in evidence of an ordinance of the city of Fresno and certain instructions with reference to that by-law given by the court to the jury. This ordinance required the maintenance and operation of safety gates by defendant at the crossing where the accident occurred, and it was shown by the evidence that, in obedience to the mandate of the law, defendant had erected such gates; but because it was shown without contradiction that for several months preceding the collision defendant had ceased to operate the gates, and that this fact was known to plaintiff, and particularly to the motorman in charge of the car which was demolished, it is argued that the ordinary rule with reference to negligence imputable to a defendant by its violation of a statute has no application to the case at bar, and that the introduction of the ordinance and the giving of instructions based thereon amounted to error, entitling the Atchison, Topeka & Santa Fé Railway Company to a new trial.

[1, 2] We do not agree with this contention. It is the settled law of California that the failure of any person to perform a duty imposed by law is sufficient evidence of negligence. But no action for damages may be founded upon such negligence unless it directly contributed to the injury. McKune v. Santa Clara Valley Mill & Lumber Co., 110 Cal. 480–486, 42 Pac. 980; Cragg v. Los Angeles Trust Co., 154 Cal. 663–667, 98 Pac. 1063, 16 Ann. Cas. 1061; Stein v. United Railroads, 159 Cal. 368–371, 113 Pac. 663; Simoneau v. Pacific Electric Ry. Co., 166 Cal. 264–269, 136 Pac. 544, 49 L. R. A. (N. S.) 737; Fenn v. Clark, 11 Cal. App. 79–81, 103 Pac. 944; Scragg v. Sallee, 24 Cal. App. 133–143, 140 Pac. 706; Slaughter v. Goldberg, Bowen & Company, 26 Cal. App. 318–327, 147 Pac. 90.

[3-5] The rule of law that proof of disobedience of an ordinance constitutes proof of negligence per se is not altered by the fact that the corporation bound under that ordinance to maintain a device intended for the safety of the public proves its continued disobedience to the law. This, of course, will not be disputed, nor will any one deny the right of the legislative body having proper police power to prescribe such automatic appliances rather than the constant attendance of watchmen. Safety gates rarely get out of order and never get drunk or careless. If, however, by mutual consent of the owners of intersecting tracks, use of the safety gates has been discontinued, and a system of signals by watchmen has been substituted, those facts, if proven, constitute a complete showing that the negligence involved in the violation of the law was not the proximate cause of any collision. But it does not follow by any means that, where the negligence of the defendant, in a case like this, is averred generally as well as specifically, the court is in error in admitting the violated ordinance, and in stating to the jury the law substantially as it is expressed in the foregoing citations. The ordinance and its violation became relevant under the general averments of the complaint. Such a matter is essentially one of evidence, and not of pleading. Cragg v. Los Angeles Trust Co., supra; Connell v. Harris, 23 Cal. App. 537, 138 Pac. 949.

As the ordinance was properly received in evidence, it was permissible for the court to instruct the jury upon the law of negligence as declared by our decisions. This was done. That failure to comply with an ordinance such as the one introduced in evidence would be negligence on the part of defendant was stated to the jury; but the jurors were also told that upon the plaintiff was placed the burden of proving by a preponderance of the evidence that "the sole proximate cause of the collision * * * was the negligence of the employés of the said defendant." Taken all together, the instructions fairly stated the law to the jury, and we cannot see that defendant was prejudiced. The motorman in charge of plaintiff's electric car testified unequivocally that he knew of the disuse of the safety gates for several months immediately preceding the collision. The conclusion is almost inevitable, therefore, that the verdict was founded upon other elements of negligence, which were supported by abundant evidence tending to establish also their proximate relation to the destruction of the plaintiff's car.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 401)

SCHWARZ & GOTTLIEB, Inc., et al. v. MARCUSE et al. (S. F. 6991.)

(Supreme Court of California. June 8, 1917. Rehearing Denied July 5, 1917.)

1. PARTNERSHIP 🔑64—RIGHT TO SUE—FICTITIOUS NAME.

An action was not maintainable by P. H. M. and E. W. M. under the designation of M. & Son, without filing the certificate contemplated by Civ. Code, §§ 2466, 2468, prohibiting any partnership from doing business or maintaining an action under a fictitious name without having first filed a certificate with the clerk of the county showing the names of the persons interested as partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87–91.]

2. MECHANICS' LIENS 🔑121 — NOTICE — ESTOPPEL.

In view of the fact that Code Civ. Proc. §§ 1187, 1190, give several starting points for the filing of a mechanic's or a materialman's lien, any one of which may be equivalent to "a completion," not "the" completion, of a building, the owner is estopped to deny the timeliness of a notice, where it is filed within 90 days of completion or abandonment, unless such period is lessened by his act in giving the formal notice provided for by the statute, even though the lien claimant has previously filed and afterwards abandoned a claim filed within 30 days of completion or abandonment of work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 164.]

Angellotti, C. J., and Sloss, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Consolidated actions by Schwarz & Gottlieb, Incorporated, and others against Felix Marcuse and others. From judgment for defendants, plaintiffs appeal. Affirmed as to part of appellants and reversed as to part.

Henry A. Jacobs, of San Francisco, for appellants. Alexander D. Keyes, of San Francisco, for respondents.

MELVIN, J. The case was decided upon appeal by the District Court of the Third Appellate District and was transferred to this court for the purpose of a further consideration of two of the points involved.

[1] The first of these questions was whether or not P. H. Murphy and E. W. Murphy could maintain an action under the designation of P. H. Murphy & Son without filing the certificate contemplated by sections 2466 and 2468 of the Civil Code. If this were a question unaffected by Californian precedent we might, perhaps, hold that the partnership had the right and capacity to sue, but in view of the decisions of this court, and particularly the opinion in the case of North v. Moore, 135 Cal. 621, 67 Pac. 1037 (decided in 1902), in which it was held that "Abrams Bros." was not a designation showing the names of persons interested as partners, we are satisfied that the opinion of the District Court of Appeal written by Mr. Presiding Justice Chipman correctly states the law. Supplementing his comments upon Axe v. Tolbert, 179 Mich. 556–566, 146 N. W. 418, we may say that the statement of the court in that case is not entirely supported by the citations made. The first of these (Castle Bros. v. Graham, 87 App. Div. 97, 84 N. Y. Supp. 120; s. c., 180 N. Y. 553, 73 N. E. 1120) is in absolute conflict with North v. Moore, and is therefore not authoritative in California. The two Californian cases cited by the Michigan Supreme Court (Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659 and Carlock v. Cagnacci, 88 Cal. 600, 26 Pac. 597) involve partnerships in which suit was brought in each instance by partners using their names, but not their initials. Bovee v. De Jong, 22 S. D. 163, 116 N. W. 83, was exactly like the two cases last discussed, and was decided upon their authority. Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566, was a case in which "Guiterman Bros." was held a sufficient designation of the names of the partners. This also is of no value as authority in this state, owing to the later decision of North v. Moore. Patterson v. Byers, 17 Okl. 633, 89 Pac. 1114, 10 Ann. Cas. 810, the last case cited by the Supreme Court of Michigan in the Axe Case, announces the remarkable conclusion that "Patterson Furniture Company" shows that there is a company composed of persons whose surname is Patterson; and that "it further shows that there are no other members of the firm except those whose surname is Patterson." Evidently the learned justice who wrote that opinion overlooked the fact that commonly the title "Patterson Furniture Company" might indicate a corporation or copartnership in which the stockholders or members might or might not be Pattersons. It will thus be seen that neither by its reasoning nor its cited authority is Axe v. Tolbert of convincing weight.

Upon the appeals of P. H. Murphy & Son and of William A. Fagan we adopt the opinion of the learned district court of appeal as follows:

"Several actions to enforce laborers' and materialmen's liens were consolidated. Of these, the following plaintiffs appeal from the judgment, namely: P. H. Murphy & Son, William A. Fagan, Pope & Talbot (a corporation). There is an appeal also by plaintiffs H. W. B. Taylor and Henry Walter, but the finding as to them is not challenged and the judgment must be affirmed.

"The Claim of P. H. Murphy & Son.

"Respondents assign two grounds in support of the judgment against the claim of P. H. Murphy & Son: First, that the firm name of P. H. Murphy & Son does not show the names of the persons interested in the partnership, and, as it was admitted that P. H. Murphy & Son had not filed with the clerk of the county in which was their principal place of business the certificate required by section 2466 of the Civil Code, they were forbidden by section 2468 of the same Code to maintain the action; second, that the lien was filed too late or at the wrong time.

"Upon the first of these grounds the court made the following finding: 'That at the date of the filing of the complaint in action No. 47202 and during all the times therein mentioned and continuously ever since the date of the filing of the last-mentioned complaint, the plaintiffs P. H. Murphy and E. W. Murphy were partners transacting business in the state of California under a designation not showing the names of the persons interested as partners in such business, to wit, under the designation of P. H. Murphy & Son. That a certificate stating the names in full of all the members of such partnership and their places of residence was never filed with the clerk of the county in which the principal place of business of such partnership was situated during all the times mentioned in the last-mentioned complaint and in these findings, and that such certificate was not published in a newspaper published in such county or elsewhere, and that the contract and transaction upon which the causes of action of the plaintiffs P. H. Murphy and E. W. Murphy, hereinbefore referred to, are based, were made and had under said partnership name of P. H. Murphy & Son, and for that reason the said plaintiffs P. H. Murphy and E. W. Murphy cannot maintain any action on said contract or transaction.'

"P. H. Murphy testified: 'The firm of P. H. Murphy & Son is a copartnership composed of myself and my son, E. W. Murphy. There are no other members of the firm. We are transacting business in this state. No certificate of copartnership * * * has been filed in the office of the county clerk of the city and county of San Francisco, or has any such certificate been filed elsewhere. The name of my son who is my partner is Edward William; he is not my only son; I have two others.'

"Section 2466 of the Civil Code reads as follows: 'Except as otherwise provided in the next section every person transacting business in this state under a fictitious name and every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence. Such certificate must be published once a week for four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county.'

"Section 2468 as amended provides: '* * * No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required.'

"The Supreme Court, in North v. Moore, 135 Cal. 621, 67 Pac. 1037, said: '"Abrams Bros." cannot be said to be a designation "showing the names of the persons interested as partners." The firm name might apply equally to a partnership composed of two or more, and might embrace all or only some of the brothers of the name of Abrams. The statute clearly defeats their right to maintain the action against Moore, and leaves them without any right to be heard on this appeal.'

"In Nicholson & Co. v. Auburn G. M. & M. Co., 6 Cal. App. 547, 92 Pac. 651, it was held, as also in Byers v. Bourret, 64 Cal. 73, 28 Pac. 61, that Nicholson & Co. in the former, and J. D. Byers & Co. in the latter, case was not a designation showing the names of the persons interested as partners in the business. Trudel v. Butori, 19 Cal. App. 584, 127 Pac. 76, cited by appellant, is not in point. There the claim of F. X. Trudel & Son was assigned to plaintiff in whose favor judgment was entered, and it was held, on the authority of Gray v. Wells, 118 Cal. 11, 50 Pac. 23, that the assignee could maintain the action. The statute was amended in 1911 (Stats. 1911, p. 441), probably because of this decision, making the section applicable to assignees of persons doing business as partners contrary to the provisions of the article, which was not the case prior to the amendment. Section 2468, Civ. Code. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659, and McLean v. Crow, 88 Cal. 644, 26 Pac. 596, are cited by appellants. In the Pendleton Case it was held that the firm name of Pendleton & Williams was not fictitious, and that 'it was true as far as it went,' and fell short only in not showing the full names of all the partners; that the reason underlying the statute for all practical purposes 'is satisfied by information as to the surnames of the partners.' McLean v. Crow followed this rule.

"In the case of Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418, a contract was entered into in which 'Wm. Axe & Son' were mentioned 'as party of the second part,' the contract relating to an option given second party to purchase certain land. The action was brought by 'Wm. Axe and another, partners as Wm. Axe & Son.' It was urged as a defense 'that plaintiffs had no standing in court for the reason they do not show that they had filed with the county clerk a proper certificate setting forth the names of the members of the firm in compliance with Act No. 101, Pub. Acts 1907.' It appeared that 'no mention was made of this defense in the plea and notice filed.' This, under our decisions, would have been sufficient to justify the court in disregarding the defense, for it has been held that the failure to file the required certificate must be taken advantage of, as matter of defense, by answer or plea in abatement, and will otherwise be deemed waived. Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Carlock v. Cagnacci, 88 Cal. 600, 26 Pac. 597. It was not necessary to the decision in the Axe Case that the statute should be construed as it was. The court, however, stated that the firm name was not 'an assumed or fictitious name in contemplation of the statute. * * * It gives the full name of the head of the firm, and plainly discloses the identity of the other member. Persons doing business with the firm would be advised who the members were and whom to hold responsible.' The court cites, among others, the cases in 85 and 88 Cal., supra, which, as has been shown, are quite different from the Axe Case, for there the surnames of all the partners were given. The statute in the Axe Case is not before us, and it may refer to 'an assumed or fictitious name.' Our statute deals, not only with fictitious names, but refers also to a name which does not 'show the names of all the persons interested as partners.'

"We cannot accept the reasoning in the Axe Case. The name P. H. Murphy & Son may not be fictitious in the sense of the statute, nor is it claimed so to be by respondents. What they claim is that 'the designation does not show the name of E. W. Murphy.' There were other sons of P. H. Murphy besides E. W., the partner. Respondents in their brief say: 'The word "son" may have been a family name. There is a well known text-book written by a lawyer named Son, "Son on Corporations." In the San Francisco directory we find the firm name "Kingsley & Son," a firm composed of Ampro A. Kingsley and Emma Son. The most that can be said of the name of P. H. Murphy & Son is that it suggests the probability that the partner referred to as Son bears the same name as the partner referred to as Murphy. But the designation does not show the name of Murphy more than once, whereas the statute requires it to show the name of Murphy twice in order to comply with section 2466.' It seems to us our Supreme Court went as far as we should go, without frittering away the statute, in holding, as it did in Pendleton v. Cline and McLean v. Crow, supra, that where the surnames appear the full names are not required. Here, however, we are asked to hold that 'Son' in the designation of the firm not only means Murphy, but a particular son of P. H. Murphy, to wit, E. W. Murphy, whereas in fact he had two other sons. The designation of P. H. Murphy & Son, it is true, as was said in the Axe Case, 'gives the full name of the head of the firm,' but it does not 'plainly or at all disclose the name of the other member,' as was held in that case. It is not sufficient to identify the head of the firm alone. The statute expressly says, where the business is conducted under 'a designation not showing the names of the persons interested as partners in such business,' the certificate must be filed. We can, in applying the statute, see no difference between the designation 'Abrams Bros.' (North v. Moore, supra), and the designation 'P. H. Murphy & Son.' The identity of the partners or partner is not shown in either case.

"Defendants in their answer alleged that P. H. Murphy and E. W. Murphy were a partnership transacting business in this state under a designation not showing the names of the persons interested as partners in such business, to wit: Under the designation of 'P. H. Murphy & Son,' and further alleging 'that a certificate stating the names in full of all the members of such partnership and their places of residence was never filed with the clerk of the county,' etc. This answer was filed long before the trial. At the trial, and after the evidence had been given upon the question, counsel 'requested the court, in the event that the court should decide that plaintiffs were such a partnership as would be included under section 2466 of the Civil Code, that a continuance be granted in the trial for the purpose of permitting plaintiffs P. H. Murphy and E. W. Murphy to comply with the provisions of sections 2466 and 2468 of the Civil Code by filing the certificate required and publishing the same, and that the trial of the action thereupon proceed.' It is now urged that the court erred in not complying with this request. Whether the court, against defendants' objection, at this stage of the trial could have granted such request we do not decide, but that it was a matter within its discretion we have no doubt; and we cannot say that its discretion was abused. We think the plaintiffs could not maintain the action, and hence it is not necessary to discuss the second ground urged in support of the judgment.

"The William A. Fagan Claim.

"The court found 'that the plaintiff William A. Fagan was a person transacting business in the state of California under a fictitious name, to wit, the name of Panama Electric Company, and that the said plaintiff never filed in the office of the county clerk * * * a certificate stating the name in full and the place of residence of said William A. Fagan, who was then and there a person transacting business under said fictitious name of Panama Electric Company, and never published such certificate in any newspaper. That the contract and transactions upon which the plaintiff William A. Fagan based his complaint in the said action No. 47202 were in fact contracts made between the plaintiff William A. Fagan, doing business under the fictitious name of Panama Electric Company with the defendant, Felix Marcuse (the contractor), and were in fact transactions had by the said plaintiff under the said fictitious name, and for that reason the said William A. Fagan cannot maintain any action on said contract or transactions.'

"It appeared that Henry Walter and H. W. B. Taylor filed and published a certificate in which they stated that they were partners doing business under the firm name of Panama Electric Company, and that Walter and Taylor were the only members of the firm. Fagan explained in his testimony the reason for this being done as follows: 'The reason Mr. Taylor and Mr. Walter became members of the Panama Electric Company is this: I am a member of local No. 6 of the Electrical Workers, and therefore cannot work on contracts. I asked Taylor and Walter if I might use their names, thus allowing me to work on contracts, and they said I could without giving them any compensation.' Fagan testified further: 'Q. What interest did the Panama Electric Company have in the contract in question? A. All interest. Q. What are the facts of the relation between yourself and the Panama Electric Company with reference to this particular contract and the work done? A. I own the Panama Electric Company; in fact the Panama Electric Company is William A. Fagan. * * * Q. Had the Panama Electric Company received any compensation or any amount for the work done on that building? A. The Panama Electric Company received $300 on account of the work done on that building. Q. When I state Panama Electric Company I mean Taylor and Walter. A. They have earned nothing. I received $300. Total amount I claimed is $650.50. Balance of $350.50 has not been paid.' On cross-examination he testified: 'Q. Mr. Fagan, as I understand you, during the time the Waldmann building was being put up you were doing business as a contractor under the name of Panama Electric Company. You had no partners? A. Legally I think I had. Q. Did you divide the profits? A. No. Q. Did you divide the expenses? A. No. Q. Between you and them the understanding was that it was only their names that were to be used, and that all losses were to be borne by you and you were to get all the profits? A. Yes. Taylor and Walter had no financial interest in the Panama Electric Company; did no work and had no work to be done; purchased no materials and supplied no materials; all done by me alone.'

"As set forth in the complaint the order given by the contractor, Marcuse, under which the work was done was as follows: 'San Francisco, Cal., May 3, 1912. Panama Electric Co., 426—24th Avenue. San Francisco—Gentlemen: You can go ahead with electric wiring at Golden Gate and Pierce at $612.00 as arranged today. Building will be ready in about ten days. Yours truly, Felix Marcuse.'

"We quote from appellant's brief: 'The contention of appellant is that the contract was entered into by Panama Electric Company as the agent of William A. Fagan, although the work was actually performed by William A. Fagan, and that it was not necessary for said William A. Fagan to file such certificate as required by the provisions of sections 2466–2468 of the Civil Code, in order to maintain this action. * * * If H. W. B. Taylor and Henry Walter were willing to enter into contracts for William A. Fagan in order to permit plaintiff Fagan to carry on business, they are the persons to complain, and not defendants herein. The defendants were not injured in any manner by the agreement entered into between Fagan and H. W. B. Taylor and Henry Walter.'

"We cannot accede to this view of Fagan's relation to the Panama Electric Company. He testified that he and the company were identical; that he is the company. If he was the company how could it be his agent in a legal sense, i. e., a distinct and separate entity, acting for him and in his stead? We understand the statute to require, not only that the names of the persons comprising the fictitious partnership must be stated, but truthfully stated. A person should not be permitted to do business under a fictitious name and be protected by a certificate that falsely represents the names of the partners to be some other persons. The very object of the statute would be thwarted if such evasion of the statute were countenanced. The court found, and it is not disputed, that Taylor and Walter had nothing to do with the contract or the building. If they represented the Panama Electric Company, it was a false as well as fictitious company. The real and true Panama Electric Company was Fagan, and as he filed no certificate he cannot maintain the action."

Pope & Talbot Claim.

Regarding the claim of Pope & Talbot a new question arises, but it is one in the solution of which we are aided by a decision of this court given since this matter was discussed by the District Court of Appeal. The essential facts and the question to be decided are well set forth by the District Court of Appeal, and we adopt that part of the opinion as follows:

"Pope & Talbot filed two claims of lien, the first on November 9, 1912; the second on December 27, 1912. Both claims were sufficient in form and substantially identical. Plaintiff failed to foreclose the first claim of lien, but brought an action to foreclose the second lien on March 14, 1913, within 90 days after the filing of the second claim of lien. The court found that, on October 17, 1912, the owners 'began to occupy and use the said building and entered into the occupation and use of the said building on the last-mentioned date, and that such occupation and use of the said building by the defendants (the owners) continued ever since said last-mentioned date; that the said occupation and use * * * has been open, notorious and continuous; * * * that none of the materials referred to in any of the said complaints and no part of the labor therein referred to were furnished after the 17th day of October, 1912; that on the 26th day of October, 1912, all labor upon the said contract between the defendants (the owners) and the said defendant Marcuse (contractor) ceased, and that no labor upon the last-mentioned contract or upon the last-mentioned building has been performed since the last-mentioned date; that at the time when the said labor ceased the last-mentioned contract was not completed, and never was completed; that within 40 days after cessation of labor upon the said contract, to wit, on the 30th day of November, 1912, the defendants (owners) filed for record in the office of the said recorder a notice setting forth the date on which such cessation of labor occurred, to wit, the 26th day of October, 1912, together with their names and the nature of their title and a description of the property sufficient for identification, to wit, the property referred to in the said complaints; that the said notice was verified by the defendants (owners).'

"The court found that: 'The claim of lien filed by the said plaintiff, Pope & Talbot, for recordation the 9th day of November, 1912, was in all respects valid, but that the action to foreclose the lien of said Pope & Talbot was commenced on the 14th day of March, 1913, more than 90 days after the said claim of lien was filed on the 9th day of November, 1912.' The court also found that Pope & Talbot filed another claim of lien 'for the same demand as that for which the said claim of lien on the 9th day of November, 1912, * * * and was precisely similar to that filed on the 9th day of November 1912,' except that it set forth that defendants [the owners] had, on November 30, 1912, filed a notice of cessation of labor upon the said building, and except one or two other statements not necessary to be stated. The court further found that the cause of action of Pope & Talbot 'is barred by the provisions of section 1190 of the Code of Civil Procedure.'

"Appellants contend that, the owners having recorded a notice of the cessation of labor showing, among other facts, that the contractor had on the 26th day of October, 1912, abandoned the contract, this notice gave appellant the right to file a second claim of lien, and that respondents are estopped from questioning the validity of the second claim of lien. Defendants contend that 'by filing their claim of lien upon November 9, 1912, Pope & Talbot perfected their lien, and that their time to foreclose commenced then to run. They could not, by filing a second claim on the 27th day of December, 1913, extend by 48 the 90-day period which the law gave them in which to commence their action of foreclosure. Their lien, and their only lien, is therefore barred by the statute of limitations, and is not saved by the fact that a second claim of lien was thereafter filed'

"Plaintiffs now contend that defendants, the owners, 'are estopped from questioning the validity of the second claim of lien, as the defendants are necessarily barred by their voluntary act in recording a notice of cessation.'"

It is true that, as Mr. Phillips says in his work on Mechanics' Liens:

"Where the law allows 90 days for filing a lien, and 90 days after filing in which to bring suit, and a good lien is filed, the second 90 days begins to run, and the time cannot be extended by amending or filing a new lien, though within the original 90 days." Phillips on Mechanics' Liens, § 323.

The text is supported by Battle v. McArthur (C. C.) 49 Fed. 715, and Mulloy v. Lawrence, 31 Mo. 583, is also to the same effect. In both of these cases the courts were construing a statute of the state of Missouri which gives to a railroad contractor a lien which must be filed within 90 days next after the completion of the work. It was properly held that the filing of one lien under the Missouri statute set in motion the statute of limitations, and that unless suit was brought within 90 days thereafter the lien ceased to exist by the express provisions of the law. But in California we have a very different statute which must be carefully examined in connection with the facts here presented. That is section 1187, Code of Civil Procedure, which in part, is as follows:

"Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder of the county or city and county in which such property or some part thereof is situated, a claim of lien. * * * In all cases any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred. * * * In case such notice be not so filed then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter; provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto."

In the recent case of Hughes Manufacturing & Lumber Co. v. Hathaway, 161 Pac. 1159, in which a petition for rehearing was denied on January 15, 1917, the court decided, after a review of said section 1187, Code of Civil Procedure, that a claim filed within 30 days after formal notice of completion by the owner (and, of course, the same rule would apply where notice of cessation from work was given) might be foreclosed as if filed within 30 days after the actual completion of the building (and, of course, the same principle is applicable in a case where the contractor had ceased to perform work and the statutory notice had been given). There were not successive liens filed in that case, as here, one prior and one subsequent to the owner's notice of completion, but the purpose and spirit of the statute were reviewed by Mr. Justice Shaw, in part, as follows:

> "The 10 days allowed for filing the notice of completion of such a contract begins to run at the time of its actual completion by the contractor. The lien claimant for materials furnished or labor done under such contract may not know the time of actual completion thereof, and the statute intends that he need not inquire diligently concerning it. He may watch the files of the county recorder and rely on the filing of the notice of completion, which, for the purpose of his time to file his claim of lien, is deemed to be the equivalent of the completion of the original contract under which he claims, and he may then file his claim within 30 days after the filing of such notice.
>
> "If no notice of completion is filed, the claimant is only required to see that his claim is filed before the expiration of the period of 90 days after the completion of the building, that is, of the building as a whole, as provided in the last clause of the section. If his claim is filed within that period and also within 30 days after the filing of the notice of completion of the contract under which he claims, he may rest secure that it is filed in time. If he files the claim within 90 days after completion of the building, and the owner fails to file a notice of the completion of the original contract under which the lien is claimed, within 10 days after its actual completion or 40 days after cessation of labor thereon, the claimant may rely on the estoppel created by the statute to prevent the owner from disputing the timely filing of the action."

[2] The statute gives several starting points for the filing of the mechanic's or materialman's notice of lien, any one of which may be equivalent to "*a completion*"—not *the* completion—of the building. Unless the period is lessened by the owner's act in giving the formal notice, provided by the statute, of completion or cessation from the work, he is estopped to deny its timeliness if it be filed within 90 days of completion or abandonment. If Pope & Talbot had chosen to refrain from filing any claim at all until after the owner's act of giving notice of cessation from work, undoubtedly the claim of December 27th would have been entirely available, and the owner might not complain. How, then, is he injured by the abandonment of the original claim and the filing of a new one timed by his own act which by the statute is made "equivalent to a completion"? We can discover nothing operating to his detriment. The first claim of lien was not available against him at the time of the suit because of the limitation of section 1190 of the Code of Civil Procedure, but even if it had been, no court would permit two recoveries for the same items. Under the statute a lien claimant may select any one of several times as "equivalent to a completion." It is our opinion that these periods are not each exclusive of all of the others, or that action by the lien claimant, measured from one period, forecloses him from all resort to the other rights to which he may be entitled under section 1187. Nor do we conclude that because he has filed his claim within 30 days of actual completion or abandonment of work on the building he has inexorably set in motion the limiting restraint of section 1190, Code of Civil Procedure, against all of his rights. Rather do we regard each of those times and circumstances "equivalent to a completion" as setting in motion a new period for the filing of a claim, and that the limitation expressed in section 1190 applies to each of such claims as such, and not to all rights which the claimant may possibly enjoy under any one of them.

The judgment is affirmed as to all appellants except Pope & Talbot. As to that corporation, plaintiff and appellant, it is reversed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, C. J. I concur in the opinion and judgment, in so far as the affirmance as to all the appellants except Pope & Talbot is concerned.

I dissent from that portion of our judgment which reverses the judgment of the superior court as to appellant Pope & Talbot. It seems clear to me that, upon the facts stated in the opinion as to the claim of such appellant, the superior court correctly held that the cause of action for enforcement of the lien was barred by the provision of section 1190, Code of Civil Procedure. The lien of that claimant was fully perfected by the first filing, that of November 9, 1912, and, by express provision of the section, the property subject thereto was absolutely freed therefrom by the failure to commence enforcement proceedings in the proper court within 90 days thereafter. That our statute, as held in Hughes Mfg., etc., Co. v. Hathaway, 161 Pac. 1159, authorizes a lien claimant to select any one of several events as equivalent to the completion, within a certain time from which he must perfect his lien by filing his claim, appears to me to be altogether immaterial to the question here involved. Of course, as there held, he may select, at his option, any one of the events so prescribed. But he has only one lien. And when, whatever selection as to date of completion he may make, he has perfected that lien by the filing of a proper claim, the statute (section 1190, Code Civ. Proc.) begins to run against the lien itself, rendering it ineffectual for any purpose at the expiration of 90 days in the event that no action is instituted within that time for its enforcement.

SLOSS, J. I agree with the views expressed by the Chief Justice relative to the claim of Pope & Talbot.

I wish to express, in addition, my dissent from the court's decision on the claim of P. H. Murphy & Son. In my judgment, the firm name "P. H. Murphy and Son" showed "the names of the persons interested as partners," within the fair meaning of section 2466 of the Civil Code. I see no good reason for giving the section the strict interpretation adopted by the court. Anyone dealing with a firm called "P. H. Murphy & Son" would naturally assume (as was the fact here) that the firm was composed of two men named Murphy, P. H. Murphy being the father, and the other member his son. This assumption would be correct in all but very unusual cases. The partnership designation, therefore, disclosed the surnames of the partners, and this, we have held, is sufficient. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659; McLean v. Crow, 88 Cal. 644, 26 Pac. 596.

(33 Cal. App. 586)

MAYBURY RANCH CO. v. DEVENNEY.

(Civ. 1823.)

(District Court of Appeal, Second District, California. May 7, 1917.)

PRINCIPAL AND AGENT 🔑103(12)—IMPLIED AUTHORITY—PURCHASE OF REAL ESTATE.

Where an agent is authorized to use his principal's check to bind a bargain for purchase of land by him, purchaser may assume that agent possesses authority to make contract for the purchase of land, which does not entitle his principal to a deed and a showing of clear title until the full amount of the purchase price has been paid, and is not put upon notice of any limitation on his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 290.]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Maybury Ranch Company against William Devenney, substituted for Orange County Title Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. L. Rowland and R. S. Parker, both of Pasadena, for appellant. Williams & Rutan, of Santa Ana, for respondent.

JAMES, J. Plaintiff appeals from a judgment adverse to it and from an order denying a motion for new trial. The suit was brought against the defendant corporation to recover the sum of $500 as money alleged to have been received from and for the use of the plaintiff. The defendant being an escrow holder, William Devenney was substituted in its place, upon the defendant paying into court the amount of money involved in the controversy. The case proceeded to trial as against Devenney, who is respondent herein.

Prior to October, 1913, one Cook was a person well known to the plaintiff corporation; he had served in their employ as superintendent of ranch properties, and on one occasion had acted as agent in the sale of 40 acres of land belonging to the plaintiff. Devenney controlled in some quality of ownership 189 acres of land located in the county of Orange, which was considered to be suitable for the growing of sugar beets. The plaintiff company desired to acquire this land, and were told by Cook that he could secure it at a price of $300 per acre. The president and vice president of the plaintiff corporation had visited and viewed the land and were satisfied with it. On about the 13th of October, 1913, the vice president of the plaintiff company delivered to Cook, on behalf of the company, his personal check for the sum of $500, with direction to Cook to use the money to bind the bargain on the purchase of the property mentioned; the direction being, however, that this money was to be paid into the Orange County Title Company in escrow, pending the bringing down of the title and the making of a contract of purchase. Cook followed the direction given him, and deposited the money with the title company, and secured a contract from Devenney and persons interested with him, which contract was drawn by the escrow officer of the title company. The contract so drawn provided for an initial payment of $7,000 to be made, the $500 being a part thereof, the remaining $6,500 to be paid within 20 days; and thereafter the balance of the purchase price was to be paid at the rate of $5,000 per year, with interest. The contract did not in terms entitle the vendee to a deed and a showing of clear title until the full amount of the purchase price had been paid. The plaintiff, through its officers, after the deposit had been made and the contract executed, insisted that it was entitled to have a deed given it and to give a mortgage back and have a clear title shown upon the completion of the first payment of $7,000. In the evidence of these officers given at the trial they denied any authority in Cook to stipulate for any other conditions as to payments, deed, mortgage, and title. They tendered the $6,500 to the title company and made demand for a deed, which demand was refused as not being within the terms of the contract. This action was then brought. There was some testimony given by the escrow officer of the title company from which the court might have properly concluded that when the demand for a deed was made by the plaintiff, plaintiff's contention was rather upon the matter of the construction of the contract as made than upon the contention of any lack of authority in Cook to close the deal upon the terms so embodied in the contract. It did appear in evidence that Cook was to receive a commission from Devenney (the escrow instructions so recited), and by fair inference from the evidence it may be said that the plaintiff's officers were advised of that fact. In delivering the check for $500 to Cook it seems very clear that the plaintiff was not making a payment to Cook as the agent of the vendor; the money was delivered to Cook to be by him deposited with the title company to close the transaction. That for such purposes Cook acted as the agent for the plaintiff can hardly be denied. Being authorized to deposit the money and so close the deal, we think that Devenney had the right to assume that Cook possessed all authority necessary to complete the transaction in the way it was. Devenney was not put upon notice of any limitation on the authority of Cook. The money was paid on account of the purchase price and a receipt taken therefor from the vendor and a contract drawn binding the vendor to convey upon terms which were indicated by Cook to be satisfactory to the vendee. Under such condition of the evidence we think the trial court was justified in denying to the plaintiff judgment for the recovery of the $500.

The judgment and order are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 547)

THOMAS et al. v. CITY OF PETALUMA.

(Civ. 2048.)

(District Court of Appeal, First District, California. April 28, 1917.)

1. Municipal Corporations 🔑301—Street Improvement—Necessity of Ordinance.

In view of charter, providing that, in absence of procedure for carrying out any granted or implied power, the general law of the state should be followed, where not inconsistent with express provisions of the charter, a city could authorize street improvements as provided by charter without enacting an ordinance relating thereto, although by another section of the charter the council was granted power to pass street ordinances not in conflict with state law, since the passing of such an ordinance would be useless, where the state law was applicable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 802.]

2. Municipal Corporations 🔑294(4) — Street Improvement — Republication of Notices—Cure of Error in Description.

Although street improvement notices did not refer to the proper official city map, the error was harmless, where a correct republication of the notices was made.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 783, 791.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Proceeding to determine difference and controversy between J. S. Thomas and others and the City of Petaluma in respect to validity of proceedings for performance of street improvement work. Judgment sustaining validity of proceedings, and J. S. Thomas and others appeal. Affirmed.

W. F. Cowan, of Santa Rosa, for appellants. G. P. Hall, City Atty., of Petaluma, for respondent.

RICHARDS, J. This is a proceeding instituted in the superior court of Sonoma county to determine the difference and controversy between the parties named therein in respect to the validity of certain proceedings for the doing of street work in and by the city of Petaluma, whereby the property of the appellants herein was sought to be charged with their proportion of the expense incident to such work. The sole question presented upon this appeal involves the legality of the procedure adopted and pursued by the said municipal corporation in doing the street work in question.

The city proceeded under the provisions of the act of the Legislature approved March 6, 1889 (St. 1889, p. 70); and it is conceded by the appellants that the procedure prescribed in this state law was correctly followed out in making said improvements except in certain respects to be hereafter noted.

[1] The main contention of the appellants is that prior to entering upon the work of such street improvement under said state law the city of Petaluma failed to adopt an ordinance electing to proceed under said law and adopting its procedure as the one to be followed in making said improvements. This contention on the part of the appellants is based upon the terms of section 21 of article 3 of the charter of the city of Petaluma, which reads as follows:

"The council shall have the power by ordinance which shall not be in conflict with any street (state) law now on the statutes of the state of California or which in the future will be placed on the statutes of this state, and such ordinance may embrace all the powers as are granted by any state law now in existence or which shall be in the future in existence.

"To establish and change the grade and lay out, open, extend, widen, change, pave, repave or otherwise improve all public streets and highways and public places, construct sewers, drains and culverts, to plant trees, construct parking, and to remove shrubs and weeds, or cause objectionable shrubs and weeds or any manner of uncleanliness or obstruction to be removed, and compel the owner of the property to pay for such removal, to levy special assessments to defray the whole or any part of the cost of such work or improvements; also to provide for the repair, cleaning and sprinkling of such streets and public places."

Our attention is, however, called by the respondents to section 68 of article 3 of the city charter, which reads as follows:

"In the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of this state, where applicable and where not inconsistent with any express provision of this charter, shall prevail and shall be followed."

It seems clear to us, when these two sections of the city charter of Petaluma are read together, as they must be, that no preliminary ordinance was necessary to entitle the city authorities to proceed immediately under the state law in making the street improvement under review. The city charter did not itself embrace a procedure for the doing of such work; and the only requirement of section 21 of article 3 of its charter is that when this character of work is to be done it should be done by ordinances not in conflict with state laws. The particular state law adopted by the city for the purposes of this work provides that the contemplated improvement shall have its inception in an ordinance of the city, for such the resolution of intention is, as required by said state law. The passage of an additional ordinance by the city resolving to adopt this ordinance required by the state law would be the doing of an idle act; and any construction of section 21 of article 3 of the charter which would require the doing of such act would do violence to the intendments of section 68 of article 3 of the same charter. We find no merit, therefore, in the appellants' contention in this regard.

[2] As to the further point made by the appellants to the effect that there were certain specified defects in the proceedings of the city council in the course of doing the work in question, we find that these all turn upon the question as to whether the references for purposes of description contained in certain notices published during an early stage in the proceedings were to the proper city official map. The record, however, shows that whatever mistakes were made by the city officials in this respect were speedily discovered, and were, we think, sufficiently rectified by republication of the notices in question for the statutory period containing the corrected references to the proper official map. There is no merit, therefore, in the several points urged by appellants predicated upon this corrected error.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(33 Cal. App. 595)

WARD v. GOETZ et al. (Civ. 1812.)

(District Court of Appeal, Second District, California. May 9, 1917.)

1. HUSBAND AND WIFE 🔑279(2) — SETTLEMENT AGREEMENT—WAIVER OF RIGHTS.

A letter, written by the attorney of a divorced wife to the attorney of the husband, promising to procure from such wife an agreement releasing the husband from liability for back payments of alimony under a property settlement made at the close of former litigation if the husband's attorney would agree to a continuance in another case between the parties in another state, was not a waiver of the wife's right to alimony installments under the settlement agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1057.]

2. STIPULATIONS 🔑7—STATEMENTS OF COUNSEL.

In an action to recover upon a bond for payment of alimony installments under a settlement contract, a statement by the counsel for the defendant that the only question in the case was whether or not plaintiff had waived further payment, and the response of plaintiff's counsel, "All right," amounted to a stipulation that the only question to be tried was whether the plaintiff waived her right to monthly installments from and after a date named.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 14.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Margaret Ward, formerly Margaret Ward Goetz, against Harry X. Goetz and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ben S. Hunter and Emmett W. Miller, both of Los Angeles, for appellants. Alfred F. MacDonald, of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment. The appellant Goetz and the respondent were formerly husband and wife. Some time prior to February 16, 1911, the respondent commenced an action for separate maintenance against her husband. On the date mentioned, the two entered into an agreement to live apart, the instrument also providing for a dismissal of the maintenance suit and for the payment by the husband to the wife of the sum of $50 each month, so long as they should remain married. As a part of the same transaction, the appellant Goetz, as principal, and the appellant Nebeker, as surety, executed to respondent a bond in the sum of $1,000, securing the payment of the monthly installments. In December, 1913, respondent obtained a divorce by decree of a Nevada court, and her maiden name of Ward was restored to her. With the payment of January, 1913, Goetz ceased meeting the installments agreed by him to be paid to his wife, and this action was commenced to recover on the bond for the payments due from that time forward. The plaintiff had judgment.

[1] The first contention made by the appellants is that Miss Ward has waived her right to collect the installments and that she is estopped to claim them. It appears that there was pending in California a suit for divorce brought by the husband at the same time that the Nevada action was in the courts of that state. One C. N. Gary, a Nevada lawyer, was counsel for the wife in the action in that jurisdiction. At a certain stage of the Nevada litigation, Gary became fearful that the California case might first reach a conclusion and wrote Ben S. Hunter, Goetz's California lawyer, as follows:

> "I will procure from Marguerite W. Goetz and deliver in escrow an agreement that in the event that a continuance for two days be stipulated in the action of Goetz v. Goetz pending in the Sup. Ct. of L. A. County, California, she will release Harry X. Goetz from all liability for back payments or alimony under the property settlement made at the close of the former litigation."

After the writing of this communication, Gary had a conference with Hunter in Los Angeles about the proposed continuance of the California case, and a continuance was then had, although there was no agreement delivered in escrow, or ever entered into, by Miss Ward releasing Goetz from his liability to pay the monthly installments. Nevertheless, it is claimed that a waiver and an estoppel arose against respondent because of the granting of the continuance, following upon the letter from Gary and the conference between him and Hunter. It is not necessary to proceed to the discussion of legal questions in connection with the claims of waiver and estoppel. We need not be concerned as to whether Gary had authority to act for Miss Ward in the premises. The letter certainly was not a waiver of her right to the installments, granting that he had such authority. Whether a waiver resulted from the conference between Gary and Hunter, again granting Gary's authority, depends upon what was said there, and the finding of the trial court is with respondent on that question. That finding is amply supported by the testimony of Gary, and Hunter did not take the stand. As to the question of estoppel, it is enough to say that no estoppel was pleaded. Carpenter v. Markham, 172 Cal. 112, 155 Pac. 644.

[2] The trial court found that the parties had stipulated in open court "that the only issue to be tried was whether the plaintiff had waived her right to said monthly payments from and after the 10th day of January, 1913," and exception is taken to the finding as not supported by the evidence. The point is without merit. Soon after the trial commenced and immediately after respondent had testified that Goetz's last payment to her was the one due on the day mentioned in the finding, counsel for appellants volunteered the following statement:

> "There is only one question, as I understand, and that is whether she has waived future payments. The fact that the agreement was executed and the action that was then filed was dismissed is admitted."

To this remark counsel for Miss Ward responded, "All right," and proceeded with the examination of the witness. The colloquy between counsel was in effect a stipulation, and the language of the finding is a correct presentation of the actual occurrence.

The appellant objects to certain rulings of the trial court in admitting and excluding evidence, but it appears to us that none of them was erroneous.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 589)

SMALLEY v. HOLT et al. (Civ. 1645.)

(District Court of Appeal, Second District, California. May 8, 1917.)

1. EXCHANGE OF PROPERTY 🔑5—ABROGATION OF CONTRACT — PROVISION BY RECEIPT AGREEMENT.

A provision of a land exchange contract that $750 was to be paid as part of the cash consideration was abrogated by the later contract, embodied in the receipt therefor, that it was to be returned if the parties receiving were unable to comply with the main contract in 30 days.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 5, 6, 8–10.]

2. EXCHANGE OF PROPERTY 🔑8(3)—PLEADING AND PROOF.

In action to recover part payment under land exchange contract for failure of the other party to comply with the contract, the defense of invalidity of the contract for want of consideration, not being pleaded, was not available.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 16½.]

3. APPEAL AND ERROR 🔑1010(1)—CONFLICTING EVIDENCE.

The question on appeal is, not where the preponderance of evidence on a given issue lies, but whether there is any evidence whatever in support of the finding upon it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by M. E. Smalley against H. R. Holt and another. From judgment for plaintiff, defendants appeal. Affirmed.

R. W. Richardson and Eugene A. Tucker, both of Los Angeles, for appellants. J. W. Ballard, of Los Angeles, and Clyde Bishop, of Santa Ana, for respondent.

WORKS, J. pro tem. This is an appeal from the judgment.

On June 29, 1911, respondent and appellant Holt entered into an agreement for an exchange of real property, together with the passing of certain mortgages and cash considerations as a part of the trade. The sum of $3,000 was agreed by respondent to be paid to Holt when certain abstracts and certificates of title were brought down to date, and it was further provided:

> "$750.00 in cash is to be paid to H. R. Holt on this agreement on or before July 3, 1911, which amount is to be credited and taken out of the $3,000.00 hereinbefore mentioned in this agreement."

On July 1st Smalley paid to appellants the sum of $750, and they executed to him a document in the following form:

> "Received from M. E. Smalley the sum of seven hundred and fifty dollars, which is the first cash payment mentioned in contract made and dated June 29, 1911, by and between H. R. Holt and M. E. Smalley.
>
> "It is hereby distinctly understood and agreed by H. R. Holt and Florence M. Wendell that in case said Holt is unable to comply with the terms of said contract within a reasonable time and within thirty days from this date, the said $750.00, without interest is to be returned to M. E. Smalley."

Florence M. Wendell was a party to the receipt and is a party to the action only because the property agreed in the first contract to be conveyed to Holt was actually to be conveyed to her to hold for him.

The action was commenced to recover the $750 paid to appellants, upon the ground that Holt was unable, up to the time of filing the complaint, which was on September 11, 1911, to comply with the terms of the original agreement by him to be performed. The complaint alleges that Smalley kept and that Holt did not keep all the covenants of the contract of June 29th by them respectively to be performed, thus apparently holding to the idea that the action was based upon that contract. The trial court found for respondent on these issues, and appellants insist that the finding is not supported by the evidence. Respondent rejoins that the allegation of his performance and of Holt's nonperformance under the contract of June 29th was surplusage, and therefore immaterial; that the action is really based on the paper executed July 1st; and that the complaint states and the evidence proved a cause of action under it. Upon which of these agreements was the cause of action founded?

[1] It seems plain that the paper, receipt, or agreement of July 1st displaced the provisions of the contract of June 29th as to the payment of the $750. Under the earlier arrangement, it was to have been paid as a part of a total sum of $3,000, which was a part of the consideration for the trade; under the later, it was made as a payment which might or might not be retained by Holt, depending upon whether he could comply with the main contract within thirty days. The two arrangements concerning the $750 were inconsistent, and the first was abrogated by the second. The cause of action was therefore on the latter, and the allegations concerning performance under the former were immaterial.

[2] The appellant claims that the agreement of July 1st, in the respect that it provided for a possible return of the $750, was void for want of consideration; but the defense is not pleaded, and it is not open to appellant without a pleading to support it.

[3] The trial court found that appellants, "for thirty days next after" July 1, 1911, "failed to comply with the terms" of the two agreements "and were at all times wholly unable to do so." It was further found that this inability to perform was not owing to any conduct of the respondent. In objecting to these findings, and to the others above mentioned, appellants continually insist that Smalley did not prove his case by a preponderance of the evidence; but that point is utterly devoid of interest here. The question on appeal is, not where the preponderance of the evidence on a given issue lies, but whether there is any evidence whatever in support of the finding upon it. This point has been so often decided that it is as well settled as any question in the jurisprudence of California. It is mentioned now only because of the insistent and lengthy argument of appellant upon it. We will assume that appellant has presented the only question which could be presented on appeal in this regard; that is, does the evidence support the findings from which quotation has just been made? We have examined the record, and answer the question in the affirmative. In fact, they find partial support in the admissions in the answer.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 592)

Ex parte WENMAN. (Cr. 683.)

(District Court of Appeal, First District, California. May 9, 1917.)

1. DIVORCE ⟹332—FOREIGN DIVORCE—CUSTODY OF CHILDREN.

The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 843.]

2. HABEAS CORPUS ⟹99(4) — CUSTODY OF CHILD.

In view of kidnapping statutes (Pen. Code, §§ 207, 208), where a minor child whose custody was given to his father by a divorce decree in Connecticut was abducted by his divorced mother and taken to California, the California court would, on habeas corpus, award the child's custody to the father in the absence of showing that the father had become an unfit or unsafe person to have such custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84.]

Habeas corpus by Byrd Wilson Wenman, St., against Louise Ladew Nave to recover the custody of Byrd Wilson Wenman, Jr., a minor child. Custody granted to petitioner.

Garret W. McEnerney, Gavin McNab, R. P. Henshall and Andrew F. Burke, all of San Francisco, for petitioner. Sullivan & Sullivan and Theo J. Roche, Hiram W. Johnson, Jr., and Archibald M. Johnson, all of San Francisco, for respondent.

PER CURIAM. This is a proceeding in habeas corpus brought to recover the custody of a minor child alleged to have been abducted and at present unlawfully detained. The writ having issued a return was made thereto by the person detaining the child, and the matter is before us for decision upon demurrer to the return.

In May, 1914, in the state of Connecticut, the parents of the child, a boy now seven years of age, were divorced, and his custody was by the decree awarded to the petitioner, the father, with the right to the mother to visit her son twice a week at his father's home in the state of Connecticut and to be given his custody during certain vacation periods each year. That decree was subsequently, in the month of June, 1915, modified, by consent of the parties, and as modified provided that the mother should be permitted to visit the boy at his father's said home twice a month, remaining all day, and that he should be permitted to be with his mother at the home of her parents on Easter Sunday and Christmas day of each year, to remain overnight, and to be returned to his father on the following day as soon as reasonably convenient.

In the closing days of December, 1916, the boy's mother (who is the respondent in this proceeding) "abducted and kidnapped" him, says the petition, and caused him to be taken out of the state of New York, where he was at the time visiting her, and brought to the state of California. The child's parents at the time of the entry of the decree were residents of Connecticut. The mother has since remarried and become a resident of the state of New York, and at the time of the alleged abduction the petitioner with the child was temporarily residing in that state.

Kidnapping is denounced as an offense against the law both in Connecticut and New York, and when committed in another state, and the person kidnapped is brought into the state of California, is a continuing offense and punishable in this state. Pen. Code, §§ 207, 208.

[1] The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child. State ex rel. Nipp v. Dist. Court, etc., 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256.

In the case of Hartley v. Blease et al., 99 S. C. 92, 82 S. E. 991, it was held in a proceeding similar to this that, where in a suit for divorce the husband was granted the custody of a minor child of the marriage, who was subsequently kidnapped by the wife, the decree itself was evidence of the husband's moral fitness to care for the child, and that, unless his conduct since the rendition of the decree had been such as to render him an unfit guardian, he should, in a proceeding for the recovery of the child, be awarded his custody.

Some of the more important matters with which the respondent charges the petitioner in her return are alleged to have existed prior to and at the time of the entry of the decree of divorce. As to them, we think it evident that the decree is conclusive, and that this court cannot now re-examine them for the purpose of depriving the petitioner of a custody therein awarded to him. Other matters set forth in the return consist of alleged discourtesies to the respondent on the part of the petitioner when visiting the child; of failure to permit the child to remain overnight with her twice a year as in the modified decree provided; of failure to notify her on one occasion when the child was ill, as was required by the terms of the decree. By these and other allegations respondent in effect complains that she has been denied in a large measure the enjoyment of the society of her child contemplated by the decree.

[2] Without stopping to consider that these matters are alleged to have occurred, not in California, but at the domicile of the petitioner and minor in the state of Connecticut, or near there in the state of New York, where evidence concerning them is accessible, and where a proper enforcement of the decree may be readily had, they have little or no bearing on the question of the fitness of the petitioner to have the care and custody of his minor child, even if we concede for the sake of argument that under the circumstances existing in this case the courts of California would be warranted in assuming jurisdiction, and determining under the facts as they exist to-day who is entitled to such custody. It is shown by the record before us that the minor was brought to this state by the respondent in direct violation of a decree of a court of competent jurisdiction of a sister state awarding its custody to the petitioner. The child's presence here is founded on a tort or offense against the law, and it is not made to appear that since the entry of the decree under which the petitioner is now claiming he has become an unfit or unsafe person to have the care and control of his minor child, and it is admitted, at least tacitly, by the respondent in her return that she could not establish her right in the courts of Connecticut or New York, to the relief which, 3,000 miles away from the place where the

difficulties between the parties arose, she hopes to get in the courts of this state. Under these circumstances we think there is no question but that a due respect for the orderly administration of the law and according to the doctrine of comity among sister states requires this court to recognize the right of the petitioner under the decree of the court of the state of Connecticut hereinbefore referred to to the custody of Byrd Wilson Wenman, Jr., the said minor.

It is therefore ordered, that said respondent, Louise Ladew Nave, forthwith deliver to the petitioner, Byrd Wilson Wenman, Sr., the said minor child of petitioner and respondent.

(33 Cal. App. 630)

INGRAM v. SLAYTON. (Civ. 1861.)

(District Court of Appeal, Second District, California. May 10, 1917.)

1. Forcible Entry and Detainer ⇐29(4)—Evidence.

In action for forcible entry, evidence *held* not to show such forcible entry as defined in Code Civ. Proc. § 1159.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140.]

2. Appeal and Error ⇐903—Record.

Where the statement of testimony heard is settled as correct by the trial judge, the appellate court must assume that it shows all the material evidence received in support of the issue made by the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3671.]

3. Forcible Entry and Detainer ⇐29(3)—Evidence.

In action for forcible entry, evidence by defendant of his title and right is not material, for one who enters where actual possession has been acquired by another may do so only in a peaceable way or under authority of a judgment of court or permission given him by the occupant.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Stuart H. Ingram against John T. Slayton. From judgment for plaintiff, defendant appeals. Reversed.

Childers & Bruce, of El Centro, for appellant. James E. Shelton and Parker & Collier, all of Los Angeles, and Herbert L. Iasigi, of El Centro, for respondent.

JAMES, J. Plaintiff brought this action to recover possession of a certain tract of real property in the county of Imperial, alleging that defendant had forcibly intruded upon his peaceable possession and "by force and by menacing the employés of plaintiff with a show of superior force entered thereon and in a forcible manner ejected plaintiff from the said land. * * * " The court entered judgment in favor of the plaintiff, from which this appeal is taken.

[1, 2] The main contention put forth by the appellant is that there is no evidence to sustain the finding of the court as to a forcible entry having been made, as such entry is defined in section 1159 of the Code of Civil Procedure. With this contention we must agree. The statement of the testimony heard is exceedingly meager; but in view of the fact that it was settled as correct by the trial judge, we must assume that it shows all the material evidence received in support of the issue made by the complaint. Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458. Counsel for respondent, outside of the record, suggest that the statement was prepared wholly by the appellant, and that it was served and offered for settlement just prior to an earthquake having occurred in Imperial county, and that presumably for that cause the counsel resident in that county, being other than the counsel who appear here, neglected to have the record show a complete statement of the testimony. Respondent is not entitled to have any consideration given to that suggestion. The bill of exceptions presents in abstract form the testimony of the plaintiff and the defendant. The plaintiff testified that he had been in possession of the tract of land, which was raw and brush-covered before he started to work upon it, since the 30th of September, 1912; that he had had several teams at work on the land, off and on, up to the 22d of December, 1913, and that some of the land had been leveled and cleared; that he had an employé on the land on the 22d of December, 1913, but that he (the plaintiff) was at that time in the state of Nevada; that when he returned—the time is not stated—he found the defendant on the land with between seven and eleven teams which were at work. He testified that he had not fenced the land, nor watered it, nor cropped it; that when he first went upon the ground he put a stake at each corner, with a notice stating that he was making a claim to the property, and that when he put up these notices he found other notices, partially obliterated, already posted. Defendant testified that he had known the land since October, 1906, and on the 24th of December, 1909, he did some scraper work upon it and put up notices at each corner stating that he was the successful contestant, and had acquired a 30 days' prior right of entry to the land; that he plowed a furrow around the entire tract at that time in order to establish possession and show the public what his claim was; that he had never abandoned the land; that the first time he knew that plaintiff was on the land was in the latter part of October, 1912, and that in November, 1912, he had informed the plaintiff that he (the defendant) had a prior right of entry, won by a successful contest, and that he would assert his right when the land was restored to entry, to which the plaintiff had replied that he would follow the advice of his attorneys, and that he knew that the land was claimed by the defendant, but thought that he had abandoned it. Defendant further testified that in

December he went upon the land and found a man by the name of Jones there. He then testified as follows:

> "He (Jones) was not doing anything when I went there, but he came out where I was working and asked if I had the consent of Ingram to work there. He then asked me to tell him to get off the land and not to work there. He said Mr. Ingram owed him and he wanted to get his pay and get away. He said that he would tell Mr. Ingram that I just gave him hell. I told him not to tell Mr. Ingram anything of the kind, as I did not want him to carry any such news as that from me. I did not make any threats or exercise any force at all against Mr. Jones whatever. I asked Mr. Jones to eat dinner with us, and he did not show any evidence of being afraid of me.

Defendant offered to prove by an exemplified copy of a record of the United States Land Office that the Secretary of the Interior, upon a contest between the defendant and a third party, had rendered a decision stating that the land would be restored to entry, and that the defendant would be given 30 days after notice of such restoration, during which time he would have a preference right to make entry on the land. Objection was made to this testimony and the offer was refused. It was not shown that the land had ever been restored to entry. It thus appears that there was no proof of any violence, offer of violence, or show of superior force attendant upon the entry of the defendant upon the land. The testimony shows that the plaintiff's possession was more than a scrambling possession; in fact, that he at the time of the defendant's entry had actual peaceable possession of the ground. However, the plaintiff could not succeed in the action unless he established the facts alleged. The proof was wanting to show any circumstances such as those set forth in the complaint and relied upon by the plaintiff. As to the proof required in such a case, we cite, in addition to the section of the Code noted, section 1172, Code of Civil Procedure; Castro v. Tewksbury, 69 Cal. 562, 11 Pac. 339.

[3] The additional point is made that the defendant was entitled to have received the documentary evidence offered showing the action of the land department taken with respect to the contest formerly decided. He says that he was entitled to make this proof to show the nature of his possession and to show a color of right. From the evidence as stated, it is clear that at the time of the entry by the defendant the plaintiff was in actual possession of the land, and no showing of constructive possession could avail the defendant as against the plaintiff on that issue. It is generally held under such facts that the question of the entryman's title is not material to a recovery by his adversary, for one who enters where actual possession has been acquired by another may do so only in a peaceable way or under authority of a judgment of court, excepting, of course, where he enters under some form of permission given him by the occupant. Carteri v. Roberts, 140 Cal. 164, 73 Pac. 818. We think the last contention of appellant is without merit.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 637)

PEOPLE v. GRANDI. (Cr. 376.)

(District Court of Appeal, Third District, California. May 10, 1917.)

1. CRIMINAL LAW ⚷1169(3)—HARMLESS ERROR—EVIDENCE.

In a trial for assault with a deadly weapon, where the defendant admits that he discharged a pistol at the time of the assault, the admission of a pistol not sufficiently identified as that with which defendant did the shooting is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3139.]

2. ASSAULT AND BATTERY ⚷92 — DEADLY WEAPON—SUFFICIENCY OF EVIDENCE.

In a trial for assault with a deadly weapon, the fact that the pistol with which the assault was committed was loaded is sufficiently proved where it is admitted that the weapon was discharged, and the prosecuting witness testified that he heard the hissing of the bullets.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139.]

3. CRIMINAL LAW ⚷396(2)—COMPETENCY OF EVIDENCE—MATTER GONE INTO BY OPPOSITE PARTY.

Where the state's attorney on cross-examination calls for a written statement which is pure hearsay, but does not introduce it, it is not admissible on behalf of defendant under Code Civ. Proc. § 1854, providing that, when part of an act or writing is given in evidence by one party, the whole truth on the subject may be inquired into by the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 862.]

4. CRIMINAL LAW ⚷829(3)—INSTRUCTIONS—REFUSAL OF REQUESTS COVERED.

The refusal of an instruction that to convict jury must find that defendant was armed with a pistol loaded in such a manner that its discharge would produce death or a great bodily injury on person assaulted is not error where it is clearly covered by court's charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

5. CRIMINAL LAW ⚷829(8), 1173(1)—HARMLESS ERROR—INSTRUCTIONS.

The refusal of an instruction that accused was presumed to have a good character for the traits involved in the charge on which he is tried is harmless, where no evidence is introduced as to his character; as it is covered by instruction as to presumption of innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2011, 3164, 3168.]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Flori Grandi was convicted of an assault with a deadly weapon, and appeals. Affirmed.

H. B. Wolfe, of Quincy, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information filed in the superior court of Plumas county with the crime of assault with a deadly weapon with intent to commit murder, and was convicted of assault with a deadly weapon. He appeals from the judgment.

The assault occurred on the 20th day of July, 1916, between the hours of 4 and 5 o'clock, p. m., in Clover valley, a short distance from the town of Beckwith, in Plumas county. The party assaulted was one William Tognola. Both men are Italians, and were employed at a dairy owned by one Samuel Bonta. The prosecuting witness, Tognola, on the day before that upon which the assault was committed, mounted a horse for the purpose, as he stated, of going out into a field belonging to Bonta and driving therefrom some calves. Upon his return to the cabin in which he and the defendant had been living, and which was situated near the dairy, the accused, with a large stick or club in his hand, approached Tognola, and, addressing him, said, "You must be killed," or "You will be killed." Becoming frightened at this demonstration upon the part of the defendant, Tognola dismounted from the horse and ran some distance away from the premises. On the following day, at the hour above named, while Tognola was engaged in milking, the defendant again approached him, this time with a pistol, and as Tognola, who saw him approaching with the weapon, started to run from him, fired two shots at the latter, neither of which struck Tognola. This statement of the circumstances under which the assault was committed is taken from Tognola's testimony, which was corroborated by the testimony of one Paul Patonti, another employé of Bonta, and the only other person present at the time of the assault.

The motive for the assault is not clearly shown by the testimony, although Tognola testified that the defendant appeared to have become very angry with him on the day before because he (Tognola) had used the horse, which was the property of Bonta for the above-stated purpose.

Tognola testified that he owned the weapon used by the defendant in making the assault, that he (Tognola) had left the pistol on a table in the cabin, and that the defendant had evidently gone into the cabin and taken it with him, perhaps for the special purpose of assaulting Tognola. The latter further testified that he heard the hissing noise of the bullets as they passed near him, and also said that, after the shooting, he slipped into the cabin through a window, procured some blankets, and went out into the field, where he slept that night. The defendant, during the night left the premises, and was later placed under arrest.

The defendant admitted on the witness stand that he fired two shots from a "gun" at the time of the alleged assault, but positively declared that he did not shoot at Tognola.

The complaint on this appeal is of alleged errors in the action of the court disallowing certain testimony and declining to allow and read to the jury certain instructions requested by the defendant.

[1] Of these asserted errors the first to which attention is directed is in the ruling whereby the pistol with which the prosecution claimed the defendant committed the assault was admitted in evidence. The ground of the objection was that the weapon was not sufficiently identified as the weapon used by the accused on the occasion of the shooting. But, assuming that the weapon was not sufficiently identified as the one with which the defendant did the shooting, the action of the court in admitting it in evidence was clearly without prejudice, since the defendant himself admitted that he had a pistol at the time of the assault and that he discharged it. In view of that admission and of the fact that Tognola testified that the defendant fired the weapon at him, it obviously became a matter of little or no consequence whether the weapon actually used on the occasion of the shooting was identified at the trial and introduced in evidence or not. The only purpose which could be subserved by proof and the identification of the weapon would be to corroborate the testimony of the witnesses that one was in the possession of the defendant at the time of the alleged assault and that he used it as described by the witnesses for the people; and the admission by the accused that he did have such a weapon at the time referred to and discharged it supplied every evidentiary purpose which the production of the weapon itself could possibly have accomplished. It follows that even the introduction in evidence of a pistol which was not used by the defendant on the occasion of the assault could not in any degree have affected the verdict.

[2] It is next contended that there was entirely a failure to prove that the pistol by means of which the alleged assault was made was a deadly weapon. Confessedly it is essential for the people, in a case where, as here, the claim is that the assault charged was committed by shooting a pistol or gun at the prosecuting witness, to show that the pistol or gun used as the means for committing the assault was loaded with powder and ball, or, in other words, that it was, when so used, a weapon which, when employed as a means of assaulting another, is "likely to produce great bodily injury," and we think that there is evidence produced by the prosecution which tended sufficiently to prove that fact. The prosecuting witness and the witness Patonti, as well as the defendant himself, testified that the weapon was fired or discharged and Tognola declared that he heard the hissing sound which always accompanies a bullet as it whizzes through and against the air currents. These constituted circumstances from

which the inference would naturally follow that the pistol was loaded.

[3] There was no error in the action of the court in refusing to allow in evidence, on the motion of the defendant, a certain written statement to which a number of the residents of the vicinity of Beckwith had subscribed, and in which it was declared that the reputation of Paul Patonti, a witness for the people, for truth, honesty, and integrity in the community in which he lived was bad. The offer of the statement was made during the examination of the witness Rudolph Righetti, who testified for the defense. It appears that, after the defendant was charged with assaulting Tognola and after it was known that Patonti would give testimony at the trial against the defendant Righetti, an intimate friend of the latter, prepared the statement referred to and went about for the purpose of securing signatures thereto and succeeded in inducing a number of persons to sign it. These facts were brought to light through the cross-examination by the district attorney of Righetti, and the statement was called for by that officer and produced by the witness, but it was not read to the jury by the district attorney. The object of the cross-examination, so far as it was based upon said written statement, was merely to show the interest of Righetti in the case and in behalf of his friend, the defendant. The statement, if received in evidence, would have shown, as before stated, that certain persons regarded the reputation of Patonti for truth, honesty, and integrity as bad, and, under the circumstances under which it was offered as proof, it would, if admitted, have been hearsay, pure and simple. The statement was undoubtedly offered upon the theory that it was allowable under the terms of section 1854 of the Code of Civil Procedure, but, as stated, while the district attorney called for and was given and examined the statement, he read no part of it to the jury, but only referred to it to show that Righetti had taken unusual interest in the case in favor of the accused.

[4] The next assignment involves the action of the court in disallowing the following instruction requested by the defendant:

> "You are instructed that you must find that defendant was armed with a loaded pistol, and by that is meant a pistol loaded in such manner that the discharge of it would produce death or great bodily injury upon William Tognola, and, unless you find the pistol was so loaded, you must find defendant not guilty."

The court defined a deadly weapon within the meaning of section 245 of the Penal Code, and then covered and clearly explained to the jury the proposition contained in the above-quoted instruction as follows:

> "You are instructed that in this case defendant, Flori Grandi, is charged with the crime of assault with a deadly weapon with intent to commit murder, and you are instructed that, before you can find defendant guilty of the crime as charged, you must be satisfied to a moral certainty and beyond all reasonable doubt that defendant, Grandi, was armed with a pistol so loaded that it would inflict serious bodily injury or death upon William Tognola under the circumstances as shown by the evidence in this case."

Thus it will be observed the proposition enunciated in the rejected instruction was clearly covered by the court's charge.

[5] It is further objected that error was committed in the rejection of the following instruction, proposed by the defendant:

> "You are instructed that a person accused of a criminal offense is presumed to have a good character for the traits involved in this action for peace and quiet until the contrary is established by competent evidence, and you are further instructed that it is the duty of each and every of you as jurors to give the defendant the benefit of this presumption."

Generally, so far as the writer has observed, such an instruction is never proposed or given where the character of the accused for the traits involved in the charge upon which he is tried is not directly made an issue by the introduction of proof addressed thereto. It cannot be doubted, however, that the instruction correctly states the rule, and it would have been just as well to have given it, since the defendant requested that it be submitted to the jury; but it cannot be assumed, from the fact that the instruction or one bearing upon the subject to which it related was not given, that the jury considered the case upon the hypothesis that the defendant was not a man of good character for peace and quiet. It is, on the contrary, to be assumed, in view of the fact that the defendant's character was not directly assailed by the people, and that it was not made a direct issue by himself—that is, that there was no evidence whatever presented as to his character—that the jury considered the case as it was directly and actually made by the proofs and upon the case as so made arrived at their verdict. But, at all events, under the circumstances, it seems to us that what is said in the rejected instruction was substantially and sufficiently declared in the instruction which was given that the defendant was to be presumed to be innocent until his guilt was confirmed by the evidence beyond all reasonable doubt.

We have now considered all the points urged for a reversal, and, having fully examined and considered the whole record, have found no legal reason for setting at naught the result arrived at below.

The judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(33 Cal. App. 572)

HAY v. McDONALD. (Civ. 1851.)

(District Court of Appeal, Second District, California. May 3, 1917. Rehearing Denied by Supreme Court, July 3, 1917.)

1. EVIDENCE 🔑459(2)—CONTRACTS OF CASHIER—PARTIES—PAROL EVIDENCE.

Although where a written contract in the form of an I. O. U. was signed by the defendant, followed by the descriptive word "cashier," parol evidence was admissible to identify the party against whom the obligation is legally chargeable, it is not competent for the purpose of exonerating the signer from personal liability.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1908, 2110.]

2. BROKERS 🔑7—PAST CONSIDERATION.

Where plaintiff was attempting to sell real property, but failed to make satisfactory terms with the owner as to commission to be paid him, and made a contract with a bank which had authority to sell the land that the sale be made through the bank, and that plaintiff be protected as to commission in an amount stated, a subsequent agreement by the plaintiff to accept the sum of $400 as his commission was not based on sufficient consideration to make it binding.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5–8.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by George Hay against R. McDonald. From a judgment for defendant and from an order denying motion for new trial, plaintiff appeals. Reversed.

C. L. Claflin, E. W. Owen, and J. W. Wiley, all of Bakersfield, for appellant. Geo. E. Whitaker and E. L. Foster, both of Bakersfield, for respondent.

JAMES, J. Appeal from a judgment in favor of defendant and from an order of the trial court denying a motion for new trial. The action was brought to enforce payment of $1,000 on an alleged written promise of the defendant. The writing evidencing the alleged agreement was in the following form:

> "Bakersfield, Mar. 29–07.
>
> "I. O. U.
>
> "One thousand dollars on completion of sale of lots 3 & 4 in block 273 in city of Bakersfield.
>
> "R. McDonald, Cashier."

It appears that plaintiff as an agent was attempting to effect a sale of certain real property which was owned by one Weill. Plaintiff had failed to make satisfactory terms with Weill as to the commission to be paid to him for his services, and, learning that the Kern Valley Bank had authority in some contingency to sell the lots of land for the price of $15,000, proposed to the bank through McDonald, the cashier, that the sale be made through the bank for $16,000, and that plaintiff be protected as to a commission in the amount of $1,000. As evidence of this agreement for the payment of commission, the "I. O. U." above set out was made by McDonald. It will be noted that the Kern Valley Bank was not a party to this action. The court made findings, which are supported by the evidence, to the effect that plaintiff at all times knew that in the making of the contract by McDonald the latter was acting for the Kern Valley Bank of which he was managing agent and cashier. Further findings were made, however, to the effect that when Weill, the owner of the property, learned that the sale was to be made to a buyer represented by Hay, he threatened to refuse to complete the transaction, but offered to allow the bank to pay to the plaintiff the sum of $400, which it is found the plaintiff agreed to accept, and that thereupon the property was sold and the purchase price paid; that thereafter the Kern Valley Bank tendered to plaintiff the sum of $400, which the plaintiff refused to accept. The conclusions of law are brief and are as follows:

> "That the I. O. U. described was the contract of the Kern Valley Bank, and not that of the defendant; that the plaintiff knew and accepted said I. O. U. as the act and deed of the Kern Valley Bank; that the defendant is entitled to judgment."

The chief point raised here by the appellant is that the court erred in allowing oral evidence to be introduced to show that the contract was the contract of the Kern Valley Bank, and not of the defendant. This finding of the court, which followed the proof so made, is claimed to be erroneous:

> "That the plaintiff did not, at any of the times mentioned, treat or negotiate with the defendant in his individual capacity; that the said plaintiff had all of said negotiations and transactions with the said Kern Valley Bank, and it was so understood and agreed by him."

As we gather from the conclusions expressed by the trial judge, the judgment as entered depended for support upon that particular finding of fact which appellant attacks, and which is quoted above. This case was here on a former appeal. See Hay v. McDonald, 21 Cal. App. 204, 131 Pac. 74. The trial judge there had granted a motion for nonsuit, after the plaintiff had introduced his evidence. The motion was granted upon the same ground as that which is made the basis for the judgment here, to wit, that the contract was not the contract of McDonald, but of the Kern Valley Bank. This court there said:

> "The written contract or memorandum in the form of an 'I. O. U.' cannot be said to evidence a contract of the Kern Valley Bank when it is examined alone and for what it shows upon its face. Where, in the body of an instrument, no words appear which serve to define the agreement as being made on behalf of a party other than he whose signature is attached thereto, it will not be deemed to be the contract of another party, even though there may appear after the appended signature of the individual, qualifying or descriptive words, such as 'President,' 'Secretary,' or, as here, 'Cashier.' In such cases parol proof is admissible to identify the party against whom the obligation is legally chargeable. Hobson v. Hassett, 76 Cal. 203 [18 Pac. 320, 9 Am. St. Rep. 193]; Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368 [50 Pac. 650]; McCormick v. Stockton, etc., R. R. Co., 130 Cal. 100 [62 Pac. 267]."

[1] It is a rule which has been many times illustrated by the decisions that where an agent contracts in terms not fully expressing his representative capacity, parol evidence is admissible to show that it was understood by the parties that another person was intended to be bound, or that there was a principal wholly undisclosed or unknown to the opposite contracting party. In such cases such principal may be held. This rule, however, does not operate to allow an agent who contracts apparently in his own name to relieve himself of liability, but is a rule which extends to the other party the option of proving a charge under the contract against the real principal also. We find no difference in the decisions or statements of the text-writers on this subject. "Where an agent has entered into a contract which in terms charges himself, parol evidence is not admissible to discharge him by showing that he intended to charge the principal, but where the contract bears upon its face evidence that the person signing was in fact an agent, and where the contract is so framed as to render it uncertain whether the agent or the principal was intended to be bound, parol evidence may be received to show that it was the intention to bind the principal and not the agent. But although parol evidence may not in other cases be admissible to release the agent, it may be made use of to charge the principal. * * * And this doctrine applies as well to those contracts which are required to be in writing as to those to whose validity a writing is not essential." 1 Mechem on Agency (2d Ed.) § 1176. In Hobson v. Hassett, supra, the contracting party signed, "A. Hassett, President." The court there, in discussing the subject pertinent to this case, said:

> "Prof. Parsons says: 'If an agent make a note in his own name, and add to his signature the word "Agent," but there is nothing on the note to indicate who is principal, the agent will be personally liable, just as if the word "Agent" were not added.'"

In S. P. Co. v. Von Schmidt Dredge Co., supra, the court declared:

> "Thus the rule is well settled that where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent. This is not contradicting by parol the terms of a written instrument, for, as has been said: 'It is no contradiction of a contract, which is silent as to the fact, to prove that a party is acting therein, not on his own behalf, but for another. "This does not deny," said Parke, B., "that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal."' Bishop on Contracts, § 1084."

[2] As will be noted from the authorities to which we have called attention, while parol evidence in such a case as this is competent, it is not competent for the purpose of exonerating the signer from personal liability, but is competent for the purpose of extending the liability to other parties for whom the signer may have intended to contract and for whom he had authority to contract. Such is the rule which we deduce from a reading of the cases. We have noted that the court made a finding of an alleged compromise agreement by which it was asserted that the plaintiff agreed to accept the sum of $400 in lieu of the amount set out in the written instrument sued upon. The sufficiency of these facts found to establish a modification of the original agreement or a substituted or new agreement is not argued in the briefs, and a consideration of those questions is not necessary to the decision in the case. However, it may be proper to suggest that under the facts found and alleged by the defendant, is would seem that such subsequent agreement was lacking in the essential of a sufficient consideration to make it of binding effect. The judgment of the court was plainly based upon the finding that defendant assumed no liability by the contract, but that the liability was rather that of the Kern Valley Bank. In this conclusion we think the court erred for the reasons stated.

The judgment and order are reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 581)

MYERS v. HERSKOWITZ. (Civ. 1855.)

(District Court of Appeal, Second District, California. May 7, 1917.)

1. LANDLORD AND TENANT ⚿112(2) — RECEIPT OF RENT AS WAIVER OF FORFEITURE.

Where a particular act or omission entitles the landlord to declare a forfeiture of the lease, generally receipt of rent accruing subsequent to the act which works the forfeiture waives the forfeiture.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 345.]

2. LANDLORD AND TENANT ⚿94(5)—RECEIPT OF RENT AS WAIVER OF FORFEITURE — "WAIVER."

While unconditional acceptance by landlord of rent accruing after a tenant should have surrendered possession because of breach of lease condition will constitute strong evidence of the landlord's waiver of his notice to quit under Code Civ. Proc. § 1161, subd. 3, nevertheless the question of waiver is one of intent, waiver being the intentional relinquishment of a known right after knowledge of the facts, and to establish such waiver the evidence must indicate a meeting of the minds and the intentional forbearance to enforce a right.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 320.

For other definitions, see Words and Phrases, First and Second Series, Waiver.]

3. LANDLORD AND TENANT 🔑112(2) — RECEIPT OF RENT AS "WAIVER" OF FORFEITURE —CONTINUING BREACH.

Tenant of a section in a storehouse had been notified of his violation of a lease requirement that aisle space in the storehouse reserved for common use of tenants should be kept free of goods, and on June 1st his check for rent was returned by the landlord. He then deposited it to the landlord's credit in a bank. On June 4th the landlord served on him notice requiring compliance with such provision or surrender of possession, as provided by Code Civ. Proc. § 1161, subd. 3, and on June 15th, on tenant's noncompliance, began action in unlawful detainer. In July the landlord drew from the bank the money deposited by the tenant, and the same procedure as to monthly rent was followed to the time of trial, which was the following March. *Held*, the conduct of plaintiff in accepting the money, not in advance, but after the completion of the several months, was not a waiver of his right to prosecute the action, for the covenant was of a continuing nature, defendant was continuing to violate it, and plaintiff was continuing to object to such violation, and, the tenant having succeeded in retaining possession during the pendency of the action, plaintiff might accept compensation therefor after the benefit had been received, without waiver of his right of action.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 345.]

4. EVIDENCE 🔑474(18)—OPINION AS TO VALUE—QUALIFICATION OF WITNESS.

A witness stating he had been familiar with rental value of the premises in question for eight or nine years, and especially for the last three or four years, sufficiently qualified himself to testify thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by W. L. Myers against David Herskowitz. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

John C. Stick, of Los Angeles, for appellant. Edward M. Selby, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the defendant from the judgment and from an order denying his motion for a new trial.

The plaintiff was the owner of a lease covering a storeroom building in the city of Los Angeles. One of the storerooms of that building was known as No. 554 South Main street. The storeroom was sublet in separate sections to several tenants. The defendant was the owner of one of these subleases for a described portion of said storeroom for a period ending December 31, 1914. There was extending through the storeroom an aisle space reserved for common use of the tenants. Defendant's lease provided that:

"That certain space so reserved shall be used for the common purpose of ingress and egress of any and all persons doing business in said room and their patrons, and to be used exclusively for said purpose; it being especially and expressly agreed that no goods, wares, or merchandise shall be placed, kept, or permitted in said space so set aside for the common use aforesaid, but that the same shall at all times be kept free and clear for the uses hereinbefore specified."

In September, 1913, the plaintiff and defendant entered into an agreement whereby defendant's lease (subject to the conditions set out therein, with exceptions not important here) was extended for a further period of two years. It was agreed that, if any default be made in any of the covenants or conditions of the lease, the defendant would by such default forfeit all right, title, or interest thereunder.

This is an action in unlawful detainer. It is alleged in the complaint, which was filed on June 15, 1914, that at all times since the 4th day of September, 1913, the defendant failed, neglected, and refused to permit said space so reserved to be used exclusively for the purposes limited by the lease, and has repeatedly placed and kept goods, wares and merchandise in said space so set aside for common use, and has refused to keep said space free and clear for the uses specified in the lease. It was alleged that by reason of defendant's breach of said conditions and covenants the plaintiff was unable to rent or sublet other portions of said storeroom, whereby plaintiff was damaged in the sum of $750. On June 4, 1914, the plaintiff served upon defendant a notice in writing which referred definitely to the covenants above stated and the claimed breach thereof by the above-mentioned acts of the defendant, and required the defendant to perform said conditions and covenants or deliver possession of said premises to the plaintiff within three days after the service of said notice. It is alleged that defendant neglected to comply with this notice. The notice given was the notice required by section 1161, subd. 3, Code of Civil Procedure. The defendant by his answer herein admitted the contract as pleaded, but denied that he had refused, neglected, or failed to perform the said conditions of the lease, and denied that because of such neglect or failure the plaintiff was unable to rent or sublet the premises, and denied that the plaintiff had suffered damages by reason of any act or neglect on the part of defendant. The defendant further alleged, as a separate defense, that the plaintiff and the plaintiff's assignor had waived all right which they may have had under the lease to the space alleged in the complaint to have been occupied by the defendant.

[1, 2] The principal contention requiring attention here arises from appellant's claim that respondent waived the alleged infraction of the lease by accepting payments of rent at times when respondent knew the facts constituting such infraction. The rent was regularly paid and accepted monthly in advance until and including May, 1914. On June 1, 1914, appellant tendered the amount of rent for that month by sending to respondent a check therefor, and the check was re-

turned to appellant. Appellant then deposited the same to the credit of respondent in a bank at Los Angeles, and respondent was notified thereof. In July respondent drew that money from the bank. The same procedure was followed by the respective parties each month thereafter down to the time of the trial, which occurred in March, 1915. Where a particular act or omission entitles the landlord to declare a forfeiture of the lease, the general rule is that the receipt of rent accruing subsequent to the act which works the forfeiture, waives the forfeiture, if the lessor at the time of receiving such rent has knowledge of the facts entitling him to such forfeiture. The rent which he accepted must be rent which became due after the breach committed by the tenant. McGlynn v. Moore, 25 Cal. 384, 394; Silva v. Campbell, 84 Cal. 420, 24 Pac. 316. But in the application of this rule there is a distinct difference between a covenant or condition which is of a continuing nature and one not of that nature. While the unconditional acceptance by the landlord of moneys as rent, which rent has accrued after the time a tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of his notice to quit, nevertheless the question of waiver is one of intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. To establish such waiver the evidence must indicate a meeting of minds and the intentional forbearance to enforce a right. Alden v. Mayfield, 164 Cal. 6, at page 11, 127 Pac. 45. Where the general course of dealing between parties has led one of them to believe that a strict compliance with the terms of a condition binding him will not be required, the other party may be estopped from claiming the forfeiture. What we have to determine, therefore, is whether the plaintiff manifested an intention to waive his objections to the conduct of the defendant, and whether in so doing he misled the defendant to his injury by causing defendant to believe these infractions of the covenant would be condoned.

[3] The court found that it was not true that the plaintiff or his assignor had waived their rights as to this matter. Appellant insists that the evidence is insufficient to support that finding; but we think that the evidence does support the finding. The defendant admitted that he received from the plaintiff two letters prior to the time of the notice served on June 4th. One of these stated that the defendant occupied too much space around a certain post at the side of the aisle. The second letter, dated March 17, 1914, called defendant's attention to the aisle space in question here. During the month of May, 1914, additional violations of the same covenant of the lease took place. Thereafter the plaintiff proceeded as above stated, and diligently prosecuted this action. Under these circumstances, we think that the conduct of the plaintiff in accepting the money, not in advance, but after the completion of the several months, was not a waiver of his right to prosecute the action. The covenant was of a continuing nature, the defendant was continuing to violate it, and the plaintiff was continuing to object to such violation and continuing his attempt to obtain possession of the premises. The tenant having succeeded in retaining possession of the premises during the pendency of the action, plaintiff was entitled to compensation therefor, and after the benefit had been received by the defendant the plaintiff might reasonably accept such compensation to which he was entitled without being held to have waived the right of action which he was then prosecuting. In Ramish v. Workman, 164 Pac. 26, decided by this court February 14, 1917, it was held:

> That the landlord was entitled to recover rent for a period which included the time between the entry of a judgment for possession and the date of actual ejectment of the tenant. "So long as defendants continued to occupy the premises pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession."

Under these circumstances we perceive no reason why plaintiff's acceptance of compensation to which he was clearly entitled should force upon him an implied waiver which he did not intend, and which evidently the defendant knew that he did not intend.

> "Neither will the receipt of rent after a landlord has actually commenced his action of ejectment for the forfeiture, or as compensation for the occupation, the landlord reserving the right to re-enter, amount to a waiver." Taylor on Landlord and Tenant (9th Ed.) § 497.

Appellant contends that the clauses of the lease involved in this controversy constitute a covenant, and not a condition, and that under the rules applicable thereto a forfeiture for a breach thereof should not be permitted. Since the agreement between these parties affirmed the right of forfeiture through breach of the "covenants or conditions of the lease," it would seem that the stipulations here in question created qualifications whereby the estate granted might be defeated and did amount to a condition. Knight v. Black, 19 Cal. App. 518, 522, 126 Pac. 512. But the distinction is not material, since the provisions of section 1161, Code of Civil Procedure, under which this action is maintained, apply equally to "conditions or covenants."

Appellant urges also that the evidence is insufficient to support the findings which determine that the defendant violated the conditions or covenants of the lease, and that by reason thereof the plaintiff was unable to rent other portions of said storeroom, whereby plaintiff was damaged in the sum specified. Without incumbering this opinion with a statement of the evidence, it is sufficient to say that we have examined the evidence referred to in the briefs of counsel and are satisfied that it supports the findings.

[4] Appellant claims error by the court in receiving the testimony of the witness Elderton, who testified to the rental value of the premises, as a basis for the award of damages. The claim is that a sufficient foundation was not laid, and that the witness did not sufficiently qualify himself, although he stated that he had been familiar with such rental value for eight or nine years, and especially the last three or four years, and that the court erred in overruling appellant's objection to the foundation question asked of the witness, which was:

> "Are you familiar with the rental value in the neighborhood of these premises at 554 South Main street?"

The ruling was correct and the defendant did not attempt to show that the witness was not qualified and did not introduce any evidence contradicting his testimony.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(33 Cal. App. 605)

PEOPLE v. FEALY. (Cr. 366.)

(District Court of Appeal, Third District, California. May 9, 1917. Rehearing Denied by Supreme Court July 5, 1917.)

1. Criminal Law 🔑1158(1)—Appeal—Indictment—Sufficiency of Evidence.

The action of the grand jury in finding an indictment cannot be reviewed on the ground that there was not sufficient competent evidence adduced before it to warrant the finding of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3070, 3071, 3074.]

2. Criminal Law 🔑422(6)—Evidence—Acts of Coconspirators.

Under Code Civ. Proc. § 1870, subd. 6, testimony may be given, after proof of the conspiracy, as to statements and transactions of the alleged conspirators relative to the conspiracy after its formation and before the consummation of its object, whether or not the accused was present when they occurred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 984.]

3. Witnesses 🔑337(3) — Impeachment — Character of Accused.

Where defendant in a criminal case testifies for himself, he, like any other witness, may be impeached by evidence that his general reputation for truth, honesty, and integrity is bad, under Code Civ. Proc. § 2051.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1130.]

4. Criminal Law 🔑1172(2) — Review — Harmless Error — Instructions — Credibility of Accused.

Giving of an instruction that jury should fairly and impartially consider testimony of accused, and "if it produces conviction in your minds, you should act upon it; otherwise you may reject it,"—is harmless error, where the evidence of his guilt is clear and convincing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155.]

5. Criminal Law 🔑741(6)—Instructions—Matters of Fact.

An instruction that "circumstantial evidence may consist of incriminating admissions made by one accused of crime, plans laid for the commission of the crime by the accused, such as putting himself in a position to commit it, in short, any act, declaration, or circumstance admitted in evidence tending to connect accused with the commission of the crime," is not an instruction on matters of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1727, 1728.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Richard W. Fealy was convicted of the crime of willfully burning and destroying property with the felonious intent to injure and defraud the insurer, and appeals. Affirmed.

E. S. Bell, of Napa, and Knight & Heggerty, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was indicted by the grand jury of Napa county for the crime of "willfully and feloniously burning, injuring, and destroying property with the felonious intent to injure, prejudice, damage, and defraud the insurer" of said property. Thereafter he was put upon his trial thereunder, and was convicted by the jury of the crime as so charged, and he appeals from the judgment of conviction and the order denying him a new trial.

The law upon which the indictment was founded is to be found in section 548 of the Penal Code, whose language is as follows:

> "Every person who willfully burns, or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person or of any other, is punishable by imprisonment in the state prison not less than one nor more than ten years."

Following what is conceived to be the more orderly course in this case, the story of the alleged crime, as it was developed by the evidence, should first briefly be narrated.

It should first be explained that the theory of the people at the trial and in the prosecution of the defendant was that the burning of the building was the climax of a conspiracy concocted by Fealy, his wife, other members of his family and one Will Dodson, and that the motive for the act was to secure the insurance which had been placed upon the building and its contents.

The crime charged was committed on the 23d day of September, 1913, at about 8 o'clock in the evening. The property alleged to have been set on fire and burned by the accused was a dwelling house, situated at the corner of Hudson avenue and Main street, in the city of St. Helena, Napa county. This property was originally owned by Mrs. Mary Center, the mother of Mrs. Laura Ida Fealy, wife of the defendant. Mrs. Laura Ida Fealy at the time of her intermarriage with the defendant, on the 12th day of June, 1910, was a widow, having previously been the wife of one Gisin, by whom she had two male children, Ernest and George, aged, respectively, at the time of the trial, about 22 and 24 years.

Mrs. Center conveyed the property in question to her daughter, Mrs. Fealy, on the 1st day of November, 1910. This conveyance was a deed of gift, the expressed consideration being love and affection. On the 18th day of July, 1913, Mrs. Fealy conveyed said property, by a deed of grant, bargain, and sale, for the nominal consideration of $10, as expressed in said deed, to said Will Dodson, a resident of the city and county of San Francisco. On the 11th day of November, 1915, said Dodson reconveyed the property to Mrs. Fealy.

The facts above recited concerning the several transfers of the property prior to the burning of the building and the retransfer of said property by Dodson to Mrs. Fealy after the burning are, as may readily be apprehended, established by record evidence, as to the verity of which no question is raised. Further facts of the case, a brief statement of which, following an orderly course, is to follow, are reasonably deducible from the evidence as presented, and show quite conclusively that the verdict is well supported, although, it is to be remarked, there is evidence in the record which, if believable, would support a conclusion the reverse of that evidenced by the verdict.

For several years prior to and at the time of the fire, on the 23d day of September, 1913, the defendant and his wife, together with the latter's mother, Mrs. Center, and two sons, Ernest and George Gisin, resided in the house in question. Upon the said property there then subsisted an incumbrance amounting to a trifle over $4,000. On various occasions the members of the family above referred to discussed their financial affairs, and it was finally suggested by the defendant that the better way to relieve themselves of their financial obligations and burdens would be to burn the property, secure the insurance, and with the money so obtained pay off their indebtedness and, with the balance of the money, set themselves up in the ranching business. This proposition was frequently discussed among the members of the family, and on several occasions when Thomas Fealy, a brother of the defendant, was present. As a part of the scheme thus proposed, the property was, as above shown, transferred by Mrs. Fealy to Dodson. The insurance on the house at the date of this transfer stood in the name of Mrs. Center, the mother of Mrs. Fealy. Upon the conveyance of the property to Dodson, the latter, accompanied by Mrs. Fealy, went to the local agent in St. Helena of the companies issuing the policies of insurance on the property, and had the insurance transferred to Dodson, Mrs. Fealy at the same time explaining that she had transferred the property to Dodson. On this same occasion, Dodson applied for and received additional insurance of $1,500 on the contents of the house, that is, the furniture and other household equipments. As the property then stood, the aggregate insurance on the house and its contents amounted to the sum of $9,000, of which the sum of $6,000 was on the house and the balance, $3,000, on the furniture and other contents. There is evidence tending to show, and which, in fact, if believable, does show, that the house, which was a frame two-story building and, with the exception of a small addition built to it in recent years, an old structure, was of no greater value than of the sum of $3,500. It is not seriously claimed that the furniture and other contents of the building were not of the value of the sum for which they were insured, viz. $3,000.

After the last-mentioned transaction was consummated, the defendant and his brother proceeded to remove the furniture and other household paraphernalia from the building to the home of the defendant's father, Thomas F. Fealy, Sr., near Rutherford, Napa county, and distant about six miles, northeasterly, from the Hudson street property, or the property that was burned. The bulk and the most valuable of the furniture, carpets, silverware, kitchen utensils, and dining room equipments were by degrees or at near intervals so taken to the senior Fealy's home and there stored. The defendant then placed in the burned house a quantity of old furniture, which was of very little value, and scattered it about the house in the several rooms in irregular order.

The building was only partly damaged, the fire having been observed and an alarm thereof given in time to enable the fire department and citizens of the town to get to the building before the fire had made much progress or gained any considerable headway. After the flames were extinguished, an examination of the interior of the house very plainly disclosed that some four or five fires, originating in different rooms and parts of the building and independently of each other, had started. One of these fires was started in the attic of the building. It was further discovered that large-sized holes had been punched into the walls of some of the rooms, the plastering and lathing having thus been broken in at a number of different places. Into these holes there had been placed or stuffed a large quantity of old newspapers, excelsior, evidently taken from an old, dilapidated lounge found in one of the rooms, and other like inflammable materials.

The house was lighted by electricity furnished by a local power company. There were two or three kerosene oil lamps in the house, but these were used only when the lighting system was temporarily out of repair or in defective condition for brief periods, as from heavy rain or wind storms. It was shown by an expert electrician who was thoroughly familiar with the electric wiring of the house, and who minutely examined the wires and their connections immediately after the fires in the house had been extinguished, that it was absolutely certain that the fires were not caused, either directly or indirectly, by the electrical currents transmitted to and through the wires or from electricity at all.

That a large quantity of the most valuable contents of the house upon which insurance had been placed was removed therefrom at different times by the defendant prior to the fire seems to have been very clearly shown. The Gisin brothers, or at least one of them, testified to seeing the defendant take the furniture from the house, load it into a wagon and haul it away, and that they subsequently saw it at the home of the elder Fealy. The boys were corroborated by other witnesses, who saw the wagon loaded with furniture leaving the Hudson street house, and by the statement of the defendant himself to one of said witnesses that, Dodson having bought the house and realty, he (defendant) was moving the furniture away to be stored until such time as he could settle upon a farm which he intended quite soon to take over. In fact, the circumstance of the removal of the furniture from the Hudson street house to the home of the defendant's father seems to have been quite conclusively shown by the production in court at the trial of the furniture, etc., itself, it having been further shown in this connection that the officers of the law had, under the authority of a search warrant, found the furniture and taken possession thereof at the home of the elder Fealy.

The Gisin brothers, who claimed to have known, from its very inception, of the scheme to destroy the Hudson street property by fire, after the removal of the contents of the building therefrom, but who declared that they were forced to secrecy concerning said scheme by threats of the defendant that, if he went to jail for the crime, they (the Gisin boys) would go with him, gave exceedingly damaging testimony against the accused. From the testimony of the one or the other or both, these facts were elicited: That, at some time prior to the fire, one of the streets upon which the building abutted was plowed and torn up, preparatory to the bituminizing thereof, and that, while the street was in that condition, the defendant remarked to one of the boys that "this would be a good time for the fire, as the fire engine could not get down near the house and put the fire out"; that, just preceding the date of the fire, the water connection of the premises with the city water mains was disconnected by the defendant, and this for the avowed purpose of circumventing any efforts which might be found requisite properly to combat and extinguish the fire; that, on the night of the fire, the large water tank maintained on the premises was dry or without even a trace of water therein; that, several days before the fire, the defendant was in one of the rooms of the house, engaged in experimenting with burning candles to determine, as he declared to one of the Gisins, how long it would require a lighted candle five inches in length to consume itself or burn to the end; that he said that he intended to use the candles for the purpose of setting fire to the house, by placing them in the holes in the wall into which paper and other readily combustible material had been placed, and in such a position with reference to said material that the candles, being lighted, would in a brief time burn down to the material and thus set it afire; that, on the evening of the fire, having, according to other witnesses, left the Hudson street house in a buggy, accompanied by his wife, at about 6 o'clock, the defendant two hours later arrived at the "Farrier place," in Conn valley, Napa county, where the Gisin boys, Mrs. Center and a brother of the latter were then temporarily domiciled in an "old shack," as one of the Gisins described the structure; that he told the boys that it was then about time that the house should "go up" and that if they would go up "on the hill" they could probably see the blaze from that point; that the defendant's wife commenced to cry and said, "Yes, he set the house on fire"; that the defendant remained at the Farrier place for a brief time and then went away.

It was shown that, near the hour of 10 o'clock that night, the defendant appeared at the Hudson street house while many of the people that had been attracted to the place by the fire were still there. He had left his wife in the buggy, and himself went into the house, where he met a man named Beck. He asked the latter: "What is the matter; is there a fire?" Beck replied: "Well, you, s——n of a b——h, can't you see that the house is on fire?" to which the defendant made no reply, but afterwards inquired whether the piano had been saved. Having been told that it was not, he immediately left the house without going into any other room than the living room, where the above conversation took place.

Some weeks after the fire, Dodson filed with the insurance companies a sworn statement of the loss, and included in said statement was a detailed list of the furniture, pictures, silverware and other contents of the house, upon which an insurance of $3,000 had been placed and which, previously to the fire, had been removed from the house as above indicated and described. The companies carrying the insurance on the house and the contents refused to pay the policies, and thereupon suits were instituted in the superior court for the recovery of the insurance money.

There is a vast amount of other testimony in the record than that from which the foregoing facts are extracted. In fact, the testimony covered a wide range of topics, all bearing in a greater or less degree upon the charge set forth in the indictment, and disclosing and establishing against the accused circumstances of the most incriminatory character, including statements by the defendant which involved, in effect, admissions of the incendiary origin of the fire and his responsibility therefor. We have, however, briefly stated herein enough of the testimony presented before the jury in support of the charge preferred against the defendant clearly to show that the verdict stands before this court amply supported.

It is not seriously urged here, though, that the conclusion arrived at by the jury as indicated by the verdict is not sustained by the proofs. It is claimed, however, that the defendant was denied a legal trial for these reasons, generally stating them: (1) That a large amount of the evidence presented before the grand jury, and upon which the indictment was founded, was irrelevant and incompetent, and that there was not sufficient competent proof adduced before that body to warrant the finding of the indictment; that therefore the trial court erred in denying the motion of the accused to set aside the indictment; (2) that the court erred in admitting certain testimony to which objection was made by the accused; (3) that the charge of the court involved an erroneous and prejudicial statement of the law in certain indicated particulars. These propositions will now be considered in the order in which they are thus stated.

1. We are not prepared to say that the testimony taken before the grand jury was not of a character to warrant the indictment of the accused. It is true that the investigation before that body was not as full and complete as was the trial, and that many facts and circumstances brought out at the trial were not developed before the grand jury; still, the fact of the removal by the defendant of the furniture, etc., from the house shortly before the fire, the fact that certain oil paintings which had been hung from the walls of the house before the fire and some furniture were found stored in the "tank house" after the fire, the fact that holes had been bored in the walls and paper and other inflammable materials stuffed in said holes, the fact that several fires, evidently starting independently of each other, broke out in the house and in different rooms, and the fact of the securing of additional insurance on the furniture, etc., which was removed from the house, were all brought to the attention of the inquisitorial body. In addition to these facts, the actions of the defendant and his wife prior to and on the day and evening of the fire were shown, thus disclosing conduct on their part which, when considered in connection with the circumstance of the burning of the house, was, to say the least of it, of a very suspicious character.

[1] But conceding, for the purpose only of the decision of the point now before us, that the testimony so heard was entirely incompetent and in any event entirely insufficient to justify the indictment, yet, under the law, an appellate court cannot review that question to any purpose. It is true that section 919 of the Penal Code provides that the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence. It is also true that section 921 of said Code declares that "the grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction," which, no doubt, also means that, unless the evidence is such as is thus described, an indictment ought not to be returned, although it has been held that as far as said section was intended to go was to operate "only as a matter of advice to the jury." State v. Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. It has, however, repeatedly been held in this state that there is no method provided for revising the action of a grand jury on the ground that there was not sufficient evidence to support it. In re Kennedy, 144 Cal. 636, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840, and cases therein cited; Brobeck v. Superior Court, 152 Cal. 289, 92 Pac. 646. See, also, Bishop on Criminal Procedure, § 872, and United States v. Reed, 2 Blatchf. 437, Fed. Cas. No. 16,134. In the Kennedy Case it is said:

> "An indictment is the record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for revising it; and there is no method for revising it on the ground that there was not sufficient evidence to support it" (citing Bishop on Crim. Proc. § 872; State v. Boyd, 2 Hill [S. C.] 288, 27 Am. Dec. 376; Smith v. State, 61 Miss. 759; Hight v. United States, Morris [Iowa] 407, 43 Am. Dec. 111; U. S. v. Reed, 2 Blatchf. 437, Fed. Cas. No. 16,134; Hammond v. State, 74 Miss. 214, 21 South. 149).

In all the cases just named, the question was reviewed on appeal, and in the Kennedy Case, supra, our Supreme Court said that:

> "The statutes of the states where the decisions above referred to were made do not differ materially on the subject of grand juries * * * from those of this state."

2. Counsel for the defendant, in their briefs, make a general objection that a mass of evidence was admitted which involved irrelevant and hearsay testimony, all prejudicial to the substantial rights of the accused. The fact is, indeed, that the alleged errors of which the defendant thus seeks to avail himself here are not pointed out with that definiteness essential to make it entirely clear what particular rulings it is claimed the court erroneously made to the detriment of the accused. But we are able to gather from the briefs that it is the claim that all the testimony relating to the several transfers of the property, when those transactions were not carried on or discussed in the presence of the defendant, was hearsay and incom-

petent; that the testimony relative to the insurance, involving the statements and acts of Dodson, Mrs. Fealy, and the insurance agents and adjusters, made and done both before and after the fire, in the absence of the defendant, was likewise incompetent and prejudicial; that the testimony of the notary public, before whom the deed from Mrs. Fealy to Dodson was acknowledged, disclosing what was done and said by and between Dodson and Mrs. Fealy constituted hearsay statements, the defendant not having been present when that transaction took place; that certain witnesses were erroneously permitted to testify that certain furniture which was found to have been removed from the house before the fire they had seen in the house prior to the fire; that the testimony offered and received in impeachment of the defendant's general reputation in Napa county for truth, honesty, and integrity was improperly allowed and seriously damaging to the defendant. As before stated, the theory upon which the case was tried was that the defendant, his wife, his brother Tom, and Dodson had entered into a confederation or conspiracy to destroy the building by fire for the purpose of securing the insurance money. Necessarily, from the very nature of the case —that is, from the fact that, to support the charge and prove the defendant's connection with the alleged conspiracy, reliance upon circumstantial evidence was necessary—the proofs covered an extensive and varied field of inquiry. The evidence in the case of a conspiracy, where the defendant's connection therewith it is necessary to prove, is wider than perhaps in any other case. Taken by themselves, the acts constituting a conspiracy, while perhaps more or less incriminatory, are seldom of an unequivocally guilty character, and can only be properly and justly estimated when connected with all the surrounding circumstances. And there is no rule of evidence better settled than that:

> "Where the guilt of a party depends upon the intent, purpose, or design with which an act is done, or upon his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose, or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or induced by the same motive, and it is immaterial that they show the commission of other crimes." 8 Cyc. 684.

In this case, the theory that there had been formed by and between the defendant, his wife and brother and Dodson a conspiracy to destroy the building by fire is an exceedingly plausible one. It, indeed, was supported by what appear to be very powerful circumstances; and, while it is no doubt true, as might reasonably be expected and, indeed, quite unavoidable in a case where, as in this, multitudinous as well as multifarious circumstances are required to be shown to prove the ultimate fact, some erroneous statements or testimony found their way here and there in the record, still careful examination and consideration of all the testimony has convinced us that, in the main, the testimony complained of was not only pertinent to the case but legally competent, and that the few errors which were committed were of little consequence, or bore upon matters which, in view of the strong circumstantial case legitimately made against the defendant, could have exerted no baleful influence in bringing about the result arrived at by the jury.

[2] Replying, however, somewhat specifically, though briefly, to the objections urged here against some of the testimony, it may be observed that it was obviously not only proper, but, considering the hypothesis upon which the case was presented by the people (that the burning was the consequence of a conspiracy formed for that purpose) it was necessary to show that the property in reality belonged to Mrs. Fealy, and that she had never in fact parted with title thereto before the fire, and the conveyance to Dodson, as he himself admitted, was not intended nor understood to be a bona fide transfer of the fee; that it was likewise proper and necessary to show that the insurance had been transferred to Dodson; that he obtained additional insurance on the furniture or building; that he, aided by the defendant and his wife, made out the inventory of losses to present to the insurance companies, and included therein furniture, silverware, pictures, and other household equipments which had, prior to the fire, been removed by the defendant and his wife from the house and stored and safely preserved elsewhere. It was proper to show that the insurance companies refused to pay the losses, when such payment had been applied for by Dodson and Mrs. Fealy, even though some of the conversations relating thereto were had when the defendant was not present. All these conversations and transactions were had before the consummation of the transaction for the execution of which the conspiracy or corrupt agreement was formed, viz. fraudulently to obtain money from the insurance companies holding policies on the property. They, therefore, involved statements only of certain of the alleged conspirators relative to the conspiracy after its formation and before the consummation or abandonment of its object, thus rendering testimony thereof, whether the accused was or was not present when they occurred, admissible under the rule. Code Civ. Proc. § 1870, subd. 6; 8 Cyc. p. 680, and cases cited in the footnotes; People v. Irwin, 77 Cal. 494, 20 Pac. 56.

[3] The proposition that the testimony of the general reputation of the defendant in the community in which he had resided for many years, for truth, honesty, and integrity was erroneously allowed is to be met by reference to the provisions of section 2051 of the Code of Civil Procedure. That section declares that a witness may be impeached, among other ways, "by evidence that his general reputation for truth, honesty, and in-

tegrity is bad." The defendant took the witness stand in his own behalf, and gave testimony the purpose and the tendency of which were to exculpate him from the charge or absolve him entirely from any connection with the commission of the alleged crime. It has from a very early date and time and again been held that, when a defendant in a criminal case testifies for himself and gives testimony tending to exonerate him from the crime for which he is on trial, he for the time being removes from himself the character of a defendant and takes on that of a witness, and that the moment he so submits himself as a witness, "his character *as such witness*, for truth, honesty, and integrity is involved," and he becomes subject to the same rules for testing his credibility before the jury, by impeachment, as is any other witness. People v. Beck, 58 Cal. 212; People v. Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Hickman, 113 Cal. 80, 86, 87, 45 Pac. 175; People v. Mayes, 113 Cal. 618, 624, 45 Pac. 860. It follows that it was proper in this case for the people, by way of rebuttal, to show that the defendant's general reputation for the traits mentioned was bad.

[4] The defendant complains of the following instruction which was given by the court:

> "The defendant has offered himself as a witness in this case, and given testimony in his own behalf, which is his constitutional right, and you should not reject his testimony solely because he stands accused of a crime. It is your duty to fairly and impartially consider his testimony under the rules of evidence given you, and, *if it produces conviction in your minds, you should act upon it, otherwise you may reject it.*"

The criticism is aimed at the portion of the instruction in italics, and it is said that by that language the court in effect instructed the jury that it was incumbent upon the defendant to establish his innocence beyond a reasonable doubt.

It may perhaps be well enough in criminal cases to remind the jury of their duty of considering and weighing the testimony of a defendant as they are required to consider the testimony of any other witness in the case, and regardless of the fact that the defendant stands accused of the crime which is under investigation; but the other parts of the instruction it is unnecessary under any view to submit to a jury and should never be given, lest they may produce the impression that the judge himself questions the veracity of the accused. The portions of the instruction referred to embrace, as a matter of fact, mere commonplaces, or propositions with which the most ordinary understanding should be familiar. The truth is that the criticized language of the instruction does not accurately state the proposition which it purports to express, for it is the duty of the jury to *act* upon the defendant's testimony in any event, either by accepting it as truthful or rejecting it as unworthy of belief, or by giving it some weight or no weight. What was really intended to be expressed by the language referred to, however, was probably this: That, if the jury believed the defendant's story, he would be entitled to an acquittal, and if they did not believe it, they should, in reaching a conclusion upon the question of his guilt or innocence, reject it. If a jury of citizens could be found in this enlightened day and generation who would not know, without being told, that it would be their duty to reject testimony which they did not believe, or, if they did believe it, to give it due weight and so let it perform its proper function in the determination of the final result, it would indeed be necessary to declare that there had been a noticeable as well as lamentable decline in the efficacy of the jury system as an instrumentality for the administration of public justice. If, however, it could justly be said that the language of the instruction is misleading, or, as we believe to be true, does not accurately expound the rule so sought to be explained, and even if to some extent it may be obnoxious to the other objections made against it, yet we cannot say that the defendant suffered any prejudice by the submission of it to the jury; or, considering all the evidence, that a miscarriage of justice followed from it. Article 6, § 4½, Const. The record upon the whole shows that the accused was given a fair trial, and the evidence of his guilt appears to be clear and convincing, and we cannot persuade ourselves that the instruction, even though, as is further said of it, it singles out the defendant from among the many witnesses testifying, and so refers solely to his testimony, could have affected the verdict. People v. Loomis, 170 Cal. 351, 149 Pac. 581; People v. Weston, 169 Cal. 396, 146 Pac. 871; People v. Stephens, 29 Cal. App. 621, 157 Pac. 570, 572; People v. Burns, 27 Cal. App. 237, 149 Pac. 605.

[5] 5. The defendant requested an instruction stating that the law recognizes two classes of evidence, upon either of which, if legally sufficient in the degree of its persuasiveness in probative force, a jury may lawfully find an accused guilty of crime, to wit, direct and circumstantial evidence. In allowing and giving the instruction the court added thereto the following language:

> "Such circumstantial evidence may consist of incriminating admissions made by one accused of crime, plans laid for the commission of the crime by the accused, such as putting himself in a position to commit it; in short, any act, declaration, or circumstance admitted in evidence tending to connect the accused with the commission of the crime."

It is claimed by the defendant that, in thus modifying the instruction and as so modified reading it to the jury, the court instructed upon matters of fact. We do not so view the instruction as given. It is general in form, and makes no special reference to the case in hand, is abstractly correct in stating the nature and elements constituting circumstantial evidence, and, indeed, like the instruction first above considered, involves only the statement of propositions coming within the range of common knowledge, and which should be obvious to every person possessing common intelligence.

We have found no prejudicial error in the record, and the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(33 Cal. App. 619)

JOHNSON v. CORDES. (Civ. 2029.)

(District Court of Appeal, First District, California. May 10, 1917.)

1. Vendor and Purchaser 🔑44—Evidence—Sufficiency.

In a vendor's action for damages and costs for breach of the contract to purchase real estate, evidence *held* insufficient to show that the defendant entered into the written agreement set forth in plaintiff's complaint.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69–76.]

2. Alteration of Instruments 🔑4—Materiality—Contract for the Sale of Real Estate—Purchase Price.

A change in the purchase price to be paid for real property as stated in a contract for the sale of the property is a material alteration of its terms.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 10, 17.]

3. Alteration of Instruments 🔑5(1) — Materiality—Contract for Sale of Real Estate—Taxes.

The addition to a contract for the sale of real estate of a clause to the effect that the taxes upon the property should be prorated constituted a material alteration of its terms.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 18–20, 28, 29.]

4. Appeal and Error 🔑959(4) — Pleading 🔑261—Amendment—Discretion of Court—Review.

The matter of permitting the defendant a year and a half after he was served with a copy of the alleged contract to amend his pleading so as to set up in defense that such contract had been materially altered since he signed it rested in the sound discretion of the trial judge, which, being exercised in favor of permitting the proposed amendment, is not the subject of review upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3831; Pleading, Cent. Dig. §§ 794–800.]

5. Pleading 🔑264—Answer—Amendment.

When such amendment was made, it related back to the time of filing the original answer, and entitled the defendant to all the advantages of its defense which he would have had if the amended matter had been a part of his original pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803–805.]

6. Trial 🔑83(1)—Objections to Evidence—Sufficiency.

The defendant's objection to the admissibility of such contract made immediately after the amendment to his answer and with direct reference to it was sufficiently specific.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193–198, 200–209.]

7. Appeal and Error 🔑970(3)—Trial 🔑59(2)—Review—Order of Proof—Discretion of Court.

The time when the proofs shall be presented upon an issue as to the validity or admissibility of a writing claimed to have been altered after its execution is a matter of procedure during the trial within the regulation of the trial court, and the order in which the evidence is presented is not ordinarily reviewable where the evidence itself is responsive to an issue, and is admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3851; Trial, Cent. Dig. §§ 139, 140.]

8. Appeal and Error 🔑843(2)—Review—Questions Considered.

Misrepresentations made by the vendor are immaterial, and need not be discussed, where it appears that the agreement itself was not binding because of material alterations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331.]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by Frank H. Johnson against W. F. Cordes. Judgment for plaintiff, and defendant appeals. Reversed.

C. W. Durbrow and Frank B. Austin, both of San Francisco, for appellant. Grant H. Smith, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $2,000 damages, and costs, in an action arising out of a contract for the sale of real estate.

The facts of the case are these: The plaintiff, Frank H. Johnson, had listed a certain piece of real estate known as "Highlands," situated in Marin county, Cal., with A. J. Rich & Co., a firm of real estate brokers in San Francisco, for sale. On April 6, 1912, the defendant, W. F. Cordes, met one A. C. Blumenthal, an employé of A. J. Rich & Co., at the real estate office of another broker at San Rafael, and there discussed the subject of the sale and purchase of the property. After certain representations had been made by Blumenthal, two printed blank forms of A. J. Rich & Co.'s combined receipt and agreement for the purchase of real estate were produced by the latter, which, after being filled out to a certain—or rather uncertain—extent by him, were both signed by Blumenthal, acting for A. J. Rich & Co. One of these was then subscribed by the defendant, Cordes, and retained by Blumenthal. The other was not signed by Cordes, but was delivered to him apparently as his receipt for the sum of $250 then paid by him on account of said purchase, and also as his memorandum of the agreement thus made. Within the course of a month after the execution of these papers the defendant, Cordes, repudiated his promised purchase of the premises and refused to proceed further with the matter, asserting that he had signed the agreement upon the understanding that the property could be sold at an advance, and that he had no use for the property. After some efforts to induce the defendant to take the property at the agreed figure of $17,000, the plaintiff sold the premises in January, 1913, for the sum of $15,000, and then instituted this action to recover in the form of damages the sum of $2,000 for the defendant's alleged breach of his contract.

To his complaint in said action the plaintiff attached as an exhibit the alleged contract upon which his cause of action was founded. In his answer as at first filed the defendant did not dispute the form or due execution of said contract as set forth in said exhibit, but relied upon certain alleged false representations on the part of Blumenthal to defeat the plaintiff's claim. When the cause came on for trial and the original contract itself was produced, and for the first time after the date of its execution exhibited to the defendant, he at once asserted that it had been changed after its execution by the making of certain erasures, interlineations, and additions which went to the essence of the contract itself and vitally affected its validity; and in support of this assertion the defendant asked and was granted leave of court to so amend his answer as to set up these matters by way of defense. This being done, the plaintiff offered his alleged contract in evidence, and the court admitted it over the objection of the defendant, which, while quite general in its terms, was evidently made in the light of and with direct reference to the subject-matter of the amendment to his answer. After the admission of the paper in evidence the trial court heard the evidence offered by both parties touching the alleged alteration of the contract after its execution. The cause having been submitted, the court made its finding to the effect that on April 6, 1912, the defendant had entered into the agreement in writing as set forth in the plaintiff's complaint, but made no direct finding upon the issue as to the alleged alteration of the writing after its execution. The other findings of the court were in plaintiff's favor, and judgment was thereon entered against the defendant for the sum of $2,000, from which he now prosecutes this appeal.

[1] The first contention of the appellant is that the finding of the trial court that the defendant entered into the written agreement set forth in the plaintiff's complaint is unsupported by the evidence in the case. From a careful reading of the record before us, as well as from an inspection of the two original documents claimed by the plaintiff to have been made contemporaneously on April 16, 1916, we are constrained to uphold the appellant's contention in this regard. There were but two witnesses to the facts and circumstances attending the execution of the documents in question—the defendant and the witness Blumenthal. The defendant testified positively and unequivocally that the two papers were in substantially the same identical form at the time of their execution, and that the erasures made in the copy retained by Blumenthal, and the insertion therein of the purchase price of the property in both letters and figures, and also the addition of the clause relating to the prorating of the taxes and insurance upon the property, were made at some time after his signing said paper and without his knowledge or consent. On the other hand, the witness Blumenthal is, even in his direct examination upon the subject, most equivocal as to when the evident erasures and interlineations were made; while upon his cross-examination and in response to a direct and pointed inquiry he expressly stated that he could not say whether it was before or after the execution of the contract that these changes were made. The original paper produced before us upon the argument on this appeal supplies to our minds its own irresistible proof that the erasures and interlineations in this document were made at some time after the original writing was executed.

[2, 3] What these erasures and insertions were appears by comparison with the substantial copy of the agreement delivered to the defendant; but chief among these in the point of vital importance to the validity of the original writing itself as an agreement for the sale of real estate was the insertion, in both letters and figures, of the purchase price of the property to be transferred. It has been held by this court that one of the essentials to an enforceable contract to sell real estate is that the writing shall expressly set forth the purchase price to be paid for the property. Baume v. Morse, 13 Cal. App. 456, 110 Pac. 350. It is also needless to say that the addition to the original record of a clause to the effect that the taxes upon the property should be prorated would also constitute a material alteration of its terms.

The respondent, however, insists that the appellant is not entitled to take advantage of these alterations in his agreement, for two reasons: First, that in his original answer he did not attack the integrity or due execution of the writing a copy of which was attached to the complaint served upon him, and that his subsequent objection thereto made for the first time more than a year and a half after he had been served with a copy of such paper, in the form of his amended answer, comes too late; and, second, that the defendant's objection and proofs should have been specifically made and tendered at the time the instrument was offered in evidence, and not at a later time in the trial after the court had received the instrument in evidence.

[4, 5] Neither of these objections is in our

opinion well taken. The matter of permitting the defendant to amend his pleading so as to set up the defense referred to rested in the sound discretion of the trial judge, which, being exercised in favor of permitting the proposed amendment, is not the subject of review upon this appeal. When such amendment was made, it related back to the filing of the defendant's original answer, and entitled him to all the advantages of its defense which he would have had if the amended matter had been a part of his original pleading.

[6, 7] As to the respondent's other insistence, that the defendant should have specifically made and stood upon his objection to the admissibility of the changed document in evidence, and then and prior to its admission proffered his proofs as to its alteration, there are two answers: The first of which is that the defendant's objection to the admissibility of this document, made immediately after the amendment to his answer and with direct reference to it, was in our opinion sufficiently specific; and, second, that the time when the proofs shall be presented upon an issue as to the validity or admissibility of a writing claimed to have been altered after its execution is a mere matter of procedure during the trial within the regulation of the trial court. The order in which the evidence is presented is not ordinarily reviewable upon appeal where the evidence itself is responsive to an issue and is admitted without objection.

[8] The foregoing views with respect to the invalidity of the original contract for the sale of the real estate in question render unnecessary a discussion of the appellant's further contention as to the effect of the alleged misrepresentations of Blumenthal as a sufficient ground for the avoidance of the defendant's agreement for the purchase of said property; for these alleged misrepresentations are immaterial if the agreement itself was not of binding effect.

Judgment reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

(33 Cal. App. 577)

ELLIOTT v. ROBBINS. (Civ. 2234.)

(District Court of Appeal, Second District, California. May 4, 1917. Rehearing Denied by Supreme Court July 2, 1917.)

1. ADVERSE POSSESSION 🔑7(3) — PUBLIC LANDS—RIGHT TO POSSESSION—STATUTE.

Under Code Civ. Proc. § 1925, providing that a certificate of purchase and of location of public lands is primary evidence that the holder or assignee of such certificate is the owner of the land described therein, but that this evidence may be overcome by proof that at the time of location or the time of filing a pre-emption claim on which the certificate may have been issued, the land was in adverse possession of the adverse party or those under whom he claimed, in action to recover possession of public land the statement in the answer that defendant was in adverse possession of the land at the date of the inception of the claim upon which plaintiff's certificate of entry was founded and at all times since under claim of right to make a homestead entry constituted a defense to plaintiff's alleged cause of action.

2. PUBLIC LANDS 🔑106(1)—PROCEEDINGS IN LAND OFFICE — CONCLUSIVENESS OF DECISIONS—STATUTE.

The decisions of officers of the land department upon questions of fact upon evidence tending to prove the same are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them, and if fraud is practiced upon them their rulings may be reviewed and annulled by the courts when private parties are affected by their decisions.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 305.]

3. PUBLIC LANDS 🔑106(3) — DECISIONS OF LAND OFFICE—ATTACK.

Where a decision made by the officers of the land department in a contest of conflicting claims concerning land entries is attacked upon the ground of fraud in obtaining it, the right to make such attack is governed by the same principles which control in testing the validity of the ordinary judgments of courts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301.]

4. PUBLIC LANDS 🔑106(3)—PROCEEDINGS IN LAND OFFICE — CONCLUSIVENESS OF DECISIONS—FRAUD.

In an action to recover possession of public land in which plaintiff relies upon a certificate of entry, and it appears that in a contest between the plaintiff and the defendant before a competent tribunal the claim of the plaintiff of right to enter upon the land was sustained, and that the certificate of entry upon which plaintiff relies was issued pursuant to that judgment, such decision could not be set aside on the ground of plaintiff's fraud and perjury in procuring it, and plaintiff was entitled to recover possession, since, where a trial of issues in any case is had, the parties must be prepared to meet and expose perjury then and there, and a judgment will not be nullified subsequently upon the ground of such fraud.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301.]

5. PLEADING 🔑350(3) — MOTION FOR JUDGMENT ON THE PLEADINGS.

For the purposes of plaintiff's motion for judgment on the pleadings, plaintiff is deemed to have admitted the truth of all the allegations of the defendant's answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1075, 1077.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Andrew J. Elliott against Earl E. Robbins. From a judgment for plaintiff, defendant appeals. Affirmed.

Noel & Sorensen, for appellant. Conkling & Brown, of El Centro, for respondent.

CONREY, P. J. This is an action to recover possession of public land the legal title to which is vested in the United States of America. The defendant appeals from the judgment, which was entered pursuant to an order granting the plaintiff's motion for judgment on the pleadings.

[1] The plaintiff relies upon a certificate of entry issued by the register and receiver

of the United States land office at Los Angeles, Cal., upon the application of plaintiff to make desert land entry for the land described in the complaint. The answer admitted the issuance of the certificate of entry, but alleged adverse possession by the defendant of the land at date of the inception of the claim upon which plaintiff's certificate of entry was founded, and at all times since under claim of right by the defendant to make homestead entry for said land, and alleged compliance by defendant with all of the requirements of the homestead laws of the United States. Counsel for respondent admit that if this had been the entire answer the defense might have been sufficient. While a certificate of purchase and of location of public lands is primary evidence that the holder or assignee of such certificate is the owner of the land described therein, this evidence may be overcome by proof that "at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims." Code Civ. Proc. § 1925; Haven v. Haws, 63 Cal. 452. It follows that when the defendant stated in his answer that he was in adverse possession of the land at the times stated, such answer constituted a defense to the plaintiff's alleged cause of action.

But the answer alleged further facts as follows: That at a time prior to the commencement of this action the defendant had offered and attempted to make a homestead application upon said land; that the plaintiff also filed an application to enter said land pursuant to an alleged claim of preferenced right of entry thereon as successful contestant in certain contests against the desert land entries of certain other persons, and that in making his application plaintiff alleged that the land described in his said application was formerly embraced within said successfully contested entries; that at a hearing had before the register and receiver of the United States district land office at Los Angeles to determine the respective rights of entry of the plaintiff herein and this defendant "the plaintiff herein testified falsely as to the location of the land described in the said contested entry, and that said false testimony was so given by said plaintiff herein with intent to deceive the register and receiver of said land office, and that as a result of the fraud and deceit so practiced upon them the said officials of said land office, relying upon said false testimony so given with intent to deceive them, held and decided that the land described in plaintiff's complaint herein was formerly embraced in said contested entry, and that the said plaintiff herein as successful contestant was entitled to exercise a preferenced right of entry for said land; that the land described in the complaint herein was not embraced in said contested desert land entry, nor in either of them, and but for the false testimony given by the plaintiff herein at the hearing above mentioned the officials of the United States land office would not have held that said land, or any part thereof, was embraced within either of said contested entries, and would not have held that the plaintiff herein was entitled to exercise any preferenced right of entry, or any right of entry, for said land."

[2, 3] It is a well-established proposition that the decisions of the officers of the land department on questions of fact upon evidence tending to prove the same are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them. And if fraud is practiced upon them, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties affected by their decisions. Sanders v. Dutcher, 168 Cal. 353, 357, 143 Pac. 599; Shepley v. Cowan, 91 U. S. 340, 23 L. Ed. 424; Marquez v. Frisbie, 101 U. S. 476, 25 L. Ed. 800. But where a decision made by the officers of the land department in a contest of conflicting claims concerning land entries is attacked upon the ground of alleged fraud in obtaining the same, the right to make such attack is governed by the same principles which control in testing the validity of the ordinary judgments of courts. Those principles are thoroughly settled. "Even granting that the decree in Marceau v. Fiske was based upon Mrs. Marceau's false testimony, it may not be set aside in this action for that reason. There was no extrinsic fraud by which the unsuccessful litigants in that case were prevented from having a fair submission of the controversy. True the plaintiff swore falsely, but where a trial of issues in any case is had, the parties must be prepared to meet and to expose perjury then and there. * * * Therefore we must hold that we may not upon the ground of such fraud nullify the effect of that judgment." Fresno Estate Co. v. Fiske, 172 Cal. 583, 593, 157 Pac. 1127, 1131, and decisions there cited; United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Nicholson v. Leatham, 28 Cal. App. 597, 603, 153 Pac. 965, 155 Pac. 98.

[4, 5] In the present case it appears by the allegations of the defendant's answer that in a contest between the plaintiff and the defendant before a competent tribunal, the claim of respondent Elliott of right to enter upon this land was sustained, and that the certificate of entry upon which the plaintiff relies was issued pursuant to that judgment. The defendant alleges that the decision was obtained by fraud and deceit, but the fraud and deceit described by his answer are exclusively of a kind which, under the decisions above mentioned, do not authorize the court to set aside or disregard the land office decision. For the purposes of the motion for judgment on the pleadings, the plaintiff is deemed to have admitted the truth of

all of the allegations of the defendant's answer, and of course they are admitted and affirmed by the defendant. The case thus exhibited to the court was sufficient to establish the plaintiff's right to recover possession of said land.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(33 Cal. App. 598)

PEOPLE v. MABRIER. (Cr. 372.)

(District Court of Appeal, Third District, California. May 9, 1917. Rehearing Denied by Supreme Court July 5, 1917.)

1. Criminal Law 🔑121, 1150—Trial—Discretion of Court—Motion for Change of Place of Trial.

In a rape case an application for change of place of trial is addressed to the sound discretion of the trial court, and where error is assigned, a clear case must be shown by the record before the appellate court will interfere, since the trial court is in a better position to weigh the statements of the parties.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 241, 3044.]

2. Criminal Law 🔑122 — Trial — Motion for Change of Place of Trial.

Where facts are disclosed at the impanelment of the jury in a criminal case which would warrant a renewal of a motion for the change of the place of trial, such renewal seems to be a proper proceeding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 254.]

3. Criminal Law 🔑1150 — Review — Discretion of Court—Abuse.

That the population of the county was 6,000, and at the trial 39 talesmen were examined before a jury of 12 men to try defendant was secured, and 10 of these talesmen whose residences were scattered throughout the county swore upon their voir dire that they could not give the defendant a fair and impartial trial on account of their bias and prejudice, would not justify the appellate court in holding that the trial court had abused its discretion in overruling defendant's motion for a change of place of trial on the ground that, owing to the bias and prejudice against him throughout the county, he could not have a fair and impartial trial in that county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3044.]

4. Criminal Law 🔑1152(2) — Review — Discretion of Court.

The trial court is charged with the duty of resolving contradictions in the answers of jurymen on their voir dire examinations, and its decision is binding upon the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3056.]

5. Criminal Law 🔑1170(2)—Appeal and Error—Review—Harmless Error.

Refusal of the trial court to allow the defendant's attorney to testify to a conversation with the father of the complaining witness the day after the alleged assault "about having an examination of [complaining witness] to determine whether or not sexual intercourse had been had with her," and whether or not at the preliminary examination of defendant he applied to the court for an examination of this kind by a competent physician, was not prejudicial error, where the record shows that upon stipulation of counsel and by order of the court eight days after the alleged offense was committed such an examination was made by three physicians, and their testimony appears in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3146.]

6. Witnesses 🔑388(2) — Impeachment — Foundation.

Where no foundation for impeachment was laid while a witness was on the stand, the reading of his testimony at a former trial was properly refused, since to warrant its being read to the jury the witness' attention should have been called to it, and he should have been asked if he made the answers theretofore given by him, and upon his denial it would have been permissible to show that he testified as claimed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233.]

7. Witnesses 🔑388(2) — Impeachment — Foundation.

Where no question was asked the witness which would serve as a foundation for impeaching questions propounded to other witnesses, the court properly sustained objections thereto.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233.]

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Jeff Mabrier was convicted of rape upon a female under the age of 18 years. From a judgment of conviction and an order denying a motion for a new trial, he appeals. Affirmed.

Jamison & Wylie, of Alturas, and G. P. Johnson, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Information was laid by the district attorney of Modoc county charging defendant with the crime of rape upon a female person under the age of 18 years. He was convicted by the jury, and was sentenced by the court to imprisonment in the state prison for the period of 47 years. The appeal is from the judgment of conviction and from the order denying motion for a new trial.

The sufficiency of the evidence to justify the verdict is not called in question. The point most strongly urged for a reversal is that the court erred in denying defendant's motion, made under section 1033 of the Penal Code, to change the place of trial to some county other than Modoc on the ground that, owing to the bias and prejudice against him throughout the county, defendant could not have a fair and impartial trial in that county.

[1] It appeared that defendant's conviction was upon the third trial for the same crime, and that at the two former trials there were disagreements, the jury standing eleven for conviction and one for acquittal. An application for the change of the place of trial was made and denied before the second trial, and again before the third trial began. The application was also made and denied after defendant had exhausted his peremptory

challenges, but before the jury was completed. The second and third applications were made upon affidavits, newspaper clippings, and the record in the case used at the hearing of the first application; the only additional matter being a newspaper article published after the second trial. It was shown that the comment upon the former trial by the three principal newspapers published in Modoc county were of such character as would have a tendency to prejudice the readers of these papers against defendant in so far as newspaper articles might influence their readers, and it appeared that these papers circulated very generally throughout the county and were read by many people, and in affidavits submitted at the hearing the opinion was expressed that these newspaper articles had created such a widespread feeling of bias and prejudice against defendant as to prevent his having a fair and impartial trial in Modoc county. Affidavits of citizens residing in different parts of the county were read in which affiants stated that they had talked with many residents of the county, and from what they had learned in these conversations they were convinced that defendant could not have a fair trial in that county. Counter affidavits were submitted by the people stating that affiants were widely acquainted with the residents of the county and had talked with many people in various parts of the county since the first trial, and that they (affiants) "had no knowledge of any bias or prejudice existing against defendant in said county or among the citizens of said county," and from their knowledge derived from meeting and talking with citizens of the county affiants expressed the opinion "that defendant could have as fair a trial in Modoc county as elsewhere."

The statements in the affidavits, both in support of and against the motion, were by persons having apparently equal opportunity to form an opinion as to whether or not a fair trial could be had in Modoc county. Specific instances of persons having been or being influenced adversely to defendant by the newspaper articles referred to are wanting. No affiant mentioned the name of any person with whom he had talked or that any named person exhibited hostility to defendant; nor did any affiant furnish the court with facts from which the court could intelligently determine the value to be given to the opinion of affiant. This is equally true of all the affidavits; for they are but the expression of opinions and conclusions of affiants, "after having talked with many citizens of the county." The newspaper clippings show that they went much beyond a report of the evidence, condemning by name in severe terms the juror who voted for acquittal. In one of these newspapers it was stated that the district attorney had "the case of this juror under advisement and an example may be made of him." But the affidavits did not make clear that these comments of the newspapers had so poisoned or influenced the minds of the citizenry of the county generally as to make it unlikely that a fair and impartial trial could be had in that county.

Applications such as this are addressed to the sound discretion of the trial court, and, as was said in People v. Goldenson, 76 Cal. 328, 339, 19 Pac. 161, 166:

> "Where error is assigned, a clear case should be shown by the record, or this court will not interfere. The court below was then in a better position to weigh the statements of the parties and to determine the truth than this court is now."

[2] Where facts are disclosed at the impanelment of the jury which would warrant a renewal of the motion for a change of the place of trial, such renewal seems to be a proper proceeding. People v. Staples, 149 Cal. 405, 412, 86 Pac. 886.

[3] Our attention is called to the fact that:

> "At this trial 39 talesmen were examined before a jury of 12 men to try the defendant were secured. Ten of these talesmen whose residences are scattered throughout Modoc county swore upon their voir dire that they could not give the defendant a fair and impartial trial, on account of their bias and prejudice."

It is stated that the population of Modoc county is about 6,000. It does not appear to us that the number of talesmen examined was unusually large or that the fact that 10 out of this number disqualified themselves on the ground of bias would justify the inference sought to be drawn from it. We cannot say that the court abused its discretion in overruling defendant's motion.

Error of the court is claimed in overruling defendant's challenge for cause against Talesman Osmund Ratcliffe and sustaining plaintiff's challenge against W. C. Clark. Ratcliffe was examined at great length on his voir dire, in the course of which he stated:

> That he had formed an opinion in the case unfavorable to defendant and that his "mind was set"; that his opinion was formed from rumors; that he had not talked with any witness in the case nor with any of the former jurors. "Q. And you have made up your mind that if you were accepted as a juryman you would be against him? A. Yes, sir. Q. If you were sworn to try the case you would be against him? A. My mind is made up."

At this point the challenge was interposed. In reply to questions by the district attorney Ratcliffe stated that he had not talked with any witness and had formed an opinion from "current talk." He was asked if he would try the case—

> "upon those rumors, or try it upon the evidence introduced here? A. Well, I don't think there would be any evidence to change my mind at all. * * * Q. Is it your understanding that you are to try the case upon the evidence and not upon rumors? A. Yes, sir. Q. If you were accepted as a juror, wouldn't you try the case upon the evidence? A. Well, I don't know."

He testified:

> That if he was himself upon trial he would accept a juror in his frame of mind, and that "if the evidence should not be like what he had heard he would go according to the evidence"; that he had no prejudice against defendant per-

> sonally, and that he "could give the defendant a fair and impartial trial on the evidence. The Court: Do you understand, Mr. Ratcliffe, that when you are sworn as a juror, it is your duty to try the case upon the evidence presented here alone, and not upon public rumor; do you understand that to be the law? A. Yes, sir. Q. If you were accepted as a juror in this case, would you try it solely upon what you hear in court, upon the evidence only? A. Yes, sir; I would have to."

He also testified that notwithstanding any opinion he then had he would lay aside that opinion and try the case solely on the evidence.

> "Mr. Jamison (defendant's attorney): Q. Mr. Ratcliffe, if that opinion is in your mind, it is a strong opinion, and it would go with you into the jury box, and after they began to introduce evidence, would it not? A. No; I think I could go according to the evidence. Q. But you would have that opinion until sufficient evidence has been introduced to overcome it? A. Yes, sir. Q. You have a strong fixed opinion in your mind that this defendant is guilty? A. No; I could not say that. Q. Do you think you could lay that opinion aside and try the case wholly on the evidence, or would that opinion influence you? A. No; I don't think so. I don't think it would influence me. The Court: The challenge is disallowed."

Ratcliffe was still further interrogated:

> "Mr. Wylie (defendant's attorney): Q. Mr. Ratcliffe, do you understand that under the law a man is presumed to be innocent until his guilt is proven? A. Yes, sir. Q. Would you accord the defendant the benefit and protection of that law if you were accepted as a juryman? A. Yes, sir. Q. Would you insist that the people in this case prove his guilt to a moral certainty and beyond a reasonable doubt before you find him guilty? A. Yes, sir. Q. And you will do so? A. Yes, sir. Q. Will you try this case on the evidence and nothing else? A. Sure. Q. Will you take the law regulating and controlling this case from the court, as instructed by the court from his instructions? A. Yes, sir. * * * Q. Will you try this case irrespective of outside opinion or what the public might say? A. I would act according to the evidence."

Ratcliffe was one of the first 12 called to the jury box, and was peremptorily challenged by defendant. In the case of People v. Ryan, 152 Cal. 364, 371, 92 Pac. 853, 856, certain jurors impaneled to try the case gave contradictory answers upon the subject of their ability to disregard opinions as to defendant's guilt, which they had formed from newspaper reports and public rumors. Said the court:

> "Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. It should, of course, be liberal in giving the defendant and the people the benefit of any doubts that may arise as to the fairness of the juror and his ability to lay aside preconceived impressions and should excuse the juror if such doubt is created. But where there are such contradictions its decision is binding upon this court"—citing cases.

[4] It is urged that the examination of Juror Clark showed a similar state of mind to that of Ratcliffe's, except that he had formed an opinion favorable to defendant, and that to be consistent the court should have refused the district attorney's challenge of Clark for cause. What was said as to the ruling in Ratcliffe's case applies to Clark's. The trial court was charged with the duty of resolving the contradictions in the answers of these jurymen and "its decision is binding upon this court." The foregoing will apply equally to Jurymen Dannhauser and McDaniels, the latter having been called as a juror after defendant had exhausted his peremptory challenges.

[5] Error is assigned because of the refusal of the court to allow defendant's attorney, Wylie, to testify that he had a conversation with the father of the complaining witness the day after the alleged assault "about having an examination of Mary to determine whether or not sexual intercourse had been had with her," and whether or not at the preliminary examination of defendant he applied to the court for an examination of this kind by a competent physician. The record shows that, upon stipulation of counsel and by order of the court, eight days after the alleged offense was committed, such an examination was made by three physicians, and their testimony appears in the record. We see no prejudicial error in the ruling.

[6] The witness Frank Hardin, a boy of 15 years of age, testified at a former trial that he followed the defendant and the prosecuting witness and saw them at the place where the crime was alleged to have been committed, and that nothing of the kind happened there. When called at the present trial, to the disappointment and surprise of defendant's attorney, he said he was not at this place and admitted that he did not tell the truth at the former trial. Hardin left the witness stand and was not again recalled. Attorney Wylie was sworn and asked to state whether or not, just before being called as a witness, Hardin had not stated that his testimony would be the same as at the former trial. Objection was made and sustained that no proper foundation for Hardin's impeachment had been laid. An offer was then made to introduce the testimony of Hardin given at the last trial. The ruling was not error. No foundation was laid while Hardin was on the stand as a witness for his impeachment. The reading of his former testimony was properly refused. To have warranted its being read to the jury Hardin's attention should have been called to it, and he should have been asked if he made the answers theretofore given by him. Upon his denial it would have been permissible to show that he testified as claimed by defendant at the former trial.

[7] Witness L. F. Gill was called by defendant, and the following questions were asked:

> "Q. I will ask you to state whether or not at that time he stated to you that he had followed Jeff. Mabrier and Mary Ostrom across the field where they had gone to the place where it is alleged that the rape was committed upon the girl, and that no such act had been committed. Q. I will ask you what he told you or said to you in reference to the act charged in this case and whether such act had been committed or not."

Objection that no proper foundation had been laid and that the questions were incompetent, immaterial, and leading was sustained. Clearly, inasmuch as no question had been asked the witness Hardin which would serve as a foundation for the impeaching questions propounded, the court properly sustained the objection.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(33 Cal. App. 634)

BUNNELL v. THOMAS, Constable, et al.

(Civ. 1822.)

(District Court of Appeal, Second District, California. May 10, 1917.)

1. APPEAL AND ERROR 🔑108—TRIAL 🔑400(1) — FINDINGS OF FACT — CHANGING AFTER JUDGMENT—REVIEW.

The court has no authority to change its findings of fact after its entry of judgment; hence an appeal from the order denying a motion for substituted findings of fact after judgment cannot be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 588, 740; Trial, Cent. Dig. §§ 269, 269½.]

2. ATTACHMENT 🔑314—CLAIMS—JUDGMENT.

In an action to recover possession of an automobile attached as the property of a third person, where the facts found showed that the automobile was the property of the plaintiff at the time of the submission of the case, the action of the court in entering judgment denying possession of the automobile to plaintiff, based upon a purported assignment of plaintiff's rights in the action subsequently filed with the papers in the case, was error, and a motion for another and different judgment should have been granted, giving plaintiff possession of the property or its value in case delivery could not be had, and damages during the period of detention.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1120-1130, 1133, 1138, 1379½.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. A. Bunnell against Charles R. Thomas, Constable of Los Angeles Township, and others. From a judgment for defendants and from an order denying a motion to substitute other findings of fact for the findings of fact signed by the court, and from an order denying plaintiff's motion to vacate and set aside the judgment and enter another and different judgment, plaintiff appeals. Reversed and remanded for new trial.

Winslow P. Hyatt and Stephen L. Sullivan, both of Los Angeles, for appellant. M. A. Fleming, W. R. Law, C. W. Hall, and A. J. Mitchell, all of Los Angeles, for respondents.

CONREY, P. J. The plaintiff appeals from the judgment and this appeal is presented on the judgment roll. He also appeals from an order denying plaintiff's motion to substitute other findings of fact for the findings of fact signed by the court, and from an order denying plaintiff's motion to vacate and set aside the judgment and enter another and different judgment. The appeals from these orders are presented upon "bills of exceptions" duly certified, which set forth the papers used on the hearings in the court below.

[1] As the court would have no authority to change its findings of fact after the entry of judgment, the appeal from the order denying the motion for substituted findings of fact cannot be sustained.

By virtue of a writ of attachment issued out of a justice's court of Los Angeles township in an action of one Wilson v. Karl Brehme and Mae E. Brehme, an automobile was attached as property of the defendants Brehme. The attachment was made by Charles R. Thomas, township constable, defendant in the present action, and this action is brought against Thomas and the sureties on his official bond by the plaintiff C. A. Bunnell as a third party claiming to be the owner of said automobile. This action is brought to recover possession of the automobile, or for the value thereof in case delivery cannot be had, together with damages for its detention and for costs. This action was tried on the 15th day of September, 1914, and the findings were filed on the 25th day of September, 1914. On the 16th day of September, 1914, there was filed with the papers in this action in the superior court a document purporting to have been signed and delivered by C. A. Bunnell, purporting to transfer to other parties "all property and sums of money arising from the cause of action" herein, and the judgment recovered herein. That instrument was not introduced as evidence at the trial of the case; and manifestly did not exist at the conclusion of the trial when the case was submitted for decision. Nevertheless, the court annexed said purported assignment to the findings as an exhibit, and the judgment was in part based thereon. The findings of fact, after reciting the fact of the trial, and that evidence oral and documentary had been introduced by the respective parties, state that:

> "The court having read and seen on file a purported assignment of this cause of action, and all rights thereto, and said purported assignment of said cause of action, and said bill of sale being made by the plaintiff herein to strangers to this suit, a copy of which assignment and bill of sale is hereto attached and marked 'Exhibit A,' the court now renders its decision and finds the following facts."

The findings are that the plaintiff has no interest in and is not the owner and is not entitled to the possession of the described property, "but was such owner from May 4, 1914, until September 15, 1914, when he parted with his title thereto by such Exhibit A"; that the defendant as constable did, on the 5th day of May, 1914, without plaintiff's consent, wrongfully and unlawfully take and detain said property from the possession of the plaintiff and has ever since and continuously retained the same under and by virtue of the described writ of attachment, as the property of the defendants in the action of Wilson v. Brehme; that on the 5th day of May, 1914, the defendants Brehme had no right, title, or interest in said automobile; that the automobile on the 5th of May, 1914, was of the value of $500; that on the 9th day of May, 1914, the plaintiff demanded possession thereof from the defendant Thomas; that plaintiff is not damaged in any sum because of the alleged wrongful act of Thomas. The complaint alleged that the value of the use of the automobile during the period of its detention was $10 per day. The answer herein denied that the value of such use was any sum in excess of $1 per day. As conclusions of law from its findings of fact the court found that the plaintiff was not entitled to possession of the automobile nor to damages, and judgment was entered accordingly.

[2] It thus appears upon the face of the record that the court based its judgment upon supposed facts which were not in evidence at the trial, and that when the complaint was filed and until the time of trial and submission of the case for decision the plaintiff was the owner and entitled to possession of the property. Since the findings established plaintiff's ownership of the automobile when the case was submitted for decision on September 15, 1914, the court should have granted a motion for another and different judgment, and should have amended its conclusions of law and rendered another judgment accordingly, which judgment would have been for possession of the property, or its value in case delivery could not be had, and damages should have been awarded in the sum of $1 per day during the period of detention thereof by the defendant Thomas. And the judgment itself as rendered and entered is clearly erroneous, because on the face of the findings it appears that the case was not decided upon the evidence, but upon a transaction which the court was not entitled to consider. It may be that, as claimed by appellant, the evidence was sufficient to establish damages in the sum of more than $1 per day as the value of the use of the automobile while thus detained. In the interest of justice, therefore, it would seem that the judgment should be reversed, and the case remanded for a new trial, rather than that judgment should now be ordered as demanded by the motion for another and different judgment.

For that reason the order denying the motion for another and different judgment is affirmed, and the judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(97 Wash. 15)

MAGALLON v. SCHREINER et al.

(No. 13922.)

(Supreme Court of Washington. June 18, 1917.)

MORTGAGES ⚿280(5)—ASSUMPTION OF MORTGAGE.

The mere execution of a deed providing that the second party (referring to the grantee, but the grantee's name being left blank) agreed to assume and pay a mortgage on the land did not make one contracting for such land liable for the mortgage, where it did not appear that such deed was ever delivered to him, that he knew its contents, or that he ever asserted any ownership or dominion over the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 746.]

Department 1. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Adrian Magallon against George Adam Schreiner and others. From a judgment, defendant Henry T. Hill appeals. Reversed and remanded, with direction.

Rader & Barker, of Walla Walla, for appellant.

MAIN, J. The purpose of this action was to foreclose a real estate mortgage, and for a deficiency judgment. The trial resulted in a judgment of foreclosure which provided that, in the event the property covered by the mortgage did not sell for enough to satisfy the indebtedness secured thereby, a deficiency judgment be taken. From this judgment, the defendant Henry T. Hill, against whom was rendered a contingent deficiency judgment, appeals.

The facts are these: On the 28th day of December, 1909, George A. Schreiner and wife, being then the owners of certain real estate in Walla Walla county, mortgaged the same to Adrian Magallon, the plaintiff in this action, for the purpose of securing an indebtedness in the sum of $3,500. On the 23d day of February, 1912, Schreiner and wife sold and conveyed the property covered by the mortgage to John S. Wickersham, the deed providing that the purchaser assumed and agreed to pay the mortgage. On the 11th day of April, 1912, Wickersham sold and conveyed the property to James D. Stewart. The deed making this conveyance also provided that the purchaser assumed and agreed to pay the mortgage. On the 12th day of November, 1912, Stewart, being then the owner of the property covered by the mortgage, contracted to sell the same to Henry T. Hill, and the latter, by the same contract, agreed to convey to Stewart certain property then owned by Hill in the state of Oregon. This contract was signed by Stewart and Hill, but contained no provision that Hill should assume or pay the mortgage upon the property which was to be conveyed to him by Stewart. On the 26th day of November, 1912, Stewart executed a deed of conveyance of the property covered by the mortgage. This deed was a conveyance to a grantee in blank, as no person was named therein to whom the title to the property was conveyed. This deed contains a provision that the second party (blank grantee) agreed to assume and pay the mortgage. There is no evidence that this deed was ever delivered to Hill, that he knew its contents, or that he ever asserted any ownership or dominion over the property. The decree of foreclosure provides for a deficiency judgment against Schreiner and wife, Wickersham and Stewart, with the further provision that Stewart, for any sum that he may be compelled to pay in satisfaction of the deficiency judgment against him, shall have a judgment over against Hill. It is from this provision of the judgment that Hill appeals. By this appeal, no other provision of the judgment is affected. The trial court did not make formal findings of fact and conclusions of law, but it is recited in the judgment that, on or about the 26th day of November, 1912, Hill entered into an agreement and understanding with Stewart, whereby the former was obligated to reimburse the latter for any payments which he [Stewart] might be obligated to make in satisfaction of any deficiency judgment against him. The record contains no evidence to support this finding. As already stated, the contract of sale or exchange between Stewart and Hill did not provide that the latter should assume or pay the mortgage. There is no evidence that the deed executed in blank on the 26th day of November, 1912, was ever delivered to Hill, or that he knew of its contents. Neither is there any evidence that Hill ever asserted or claimed ownership or dominion over the property described in the deed executed by Stewart to a blank grantee. Under these facts, it cannot be held that Hill agreed to assume and pay the mortgage. It was error, therefore, for the trial court to provide, in the judgment, that Stewart, in the event that he should be called upon to pay a deficiency judgment, should have a judgment over against Hill. The effect of the delivery of a deed in blank, where a person, acting thereunder, takes possession of, or assumes dominion over, the property described therein, is not before us in this action, and no opinion is expressed thereon.

The judgment, to the extent appealed from, will be reversed, and the cause remanded, with direction to the superior court to eliminate therefrom that provision which provides for a judgment over in favor of Stewart and against Hill.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(97 Wash. 46)

BLYSTONE et al. v. WALLA WALLA VALLEY RY. CO. (No. 13806.)

(Supreme Court of Washington. June 19, 1917.)

1. CARRIERS ⚿320(30)—INJURIES TO PASSENGER—QUESTION FOR JURY.

Testimony showing a sequence of events, such as physical symptoms, beginning at once, and increasing in intensity, till the operation, warrants the inference that the breaking of plaintiff's pus tube was caused, or contributed to, by her fall in defendant's car, and is sufficient to go to the jury, though the surgeon testified only that the fall may have ruptured it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1248.]

2. WITNESSES ⚿380(5) — IMPEACHING OWN WITNESS.

A party, taken by surprise by affirmative testimony of his witness, prejudicial to his interest, may show prior contradictory statements of witness, to affect his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214, 1219.]

3. TRIAL ⚿255(4)—INSTRUCTIONS—NECESSITY OF REQUESTS.

A party, desiring evidence of the other party limited to a certain purpose, as impeachment of witness, must request an instruction to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632.]

Department 1. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Daisy D. Blystone and husband against the Walla Walla Valley Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

John A. Laing, of Portland, Or., and Sharpstein, Pedigo, Smith & Sharpstein, of Walla Walla, for appellant. E. L. Casey, of Walla Walla, and A. S. Bennett, of The Dalles, Or., for respondents.

MAIN, J. The plaintiffs in this action are husband and wife. The defendant is a corporation, and owns and operates a street railway in the city of Walla Walla. The purpose of the action was to recover damages alleged to have been sustained by Mrs. Blystone, through the negligence of the defendant. The cause was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiffs. From this judgment the defendant appeals.

The facts are these: On the 28th day of May, 1914, and for some time prior thereto, Daisy D. Blystone, who will hereafter be referred to as the respondent, was employed at the Grand Hotel, in Walla Walla. In going from her home to work, and returning therefrom, she traveled over the appellant's street railway. On the morning of the day mentioned, shortly after the hour of 7 o'clock, the respondent left her home for the purpose of going to work. and traveled from a point near her home to the business district of the city, where she was accustomed to leave the car. The point where the respondent ordinarily left the car was just south of the intersection of Main street and Second street, this being a place where the car usually stopped. About midway of the block, south of Main street, and intersecting Second street, is an alley. On the morning in question, the respondent, before the car reached this alley, arose from the seat in which she was sitting, and approached the rear end of the car, preparatory to alighting therefrom, when it came to its usual stopping place. When the car had reached a point at or near the alley, it stopped, as the evidence shows, in a "violent, sudden, and in an unusual manner." By reason of this sudden and unusual stopping of the car, the respondent was thrown against the door thereof, precipitated down the steps, and fell upon the street. She got up from the place where she had fallen, and went on to her work. On this day, another employé of the hotel assisted her with the work she was expected to do. On each of the two days following, she returned to work. On the next day, which was Sunday, she called a physician. The physician, after treating the patient for some days, performed an operation, and removed one of her ovaries, and also one of the Fallopian tubes. The Fallopian tube was ruptured, and pus was oozing therefrom.

At the conclusion of the evidence offered on behalf of the respondent, the appellant moved for a nonsuit, on the ground that the evidence was not sufficient to take the case to the jury. This motion was overruled, and the appellant stood upon the record as then made, and offered no testimony in its own behalf. The cause was submitted to the jury, and resulted in a verdict as above stated. The evidence of other facts will be referred to in connection with the consideration of the points presented by this appeal.

[1] The first question is whether the trial court erred in refusing to grant the motion for a nonsuit. It is claimed that the nonsuit should have been granted, because the respondent had failed to show that any negligence of the appellant contributed to the respondent's condition, and for the further reason that, from the evidence, it was probable that the respondent's condition was due to other and different causes, wholly apart from any act of the appellant. It is not claimed that the stopping of the car in a violent, sudden, and unusual manner would not be negligence. The question, then, is whether the negligent act of the appellant, in so stopping the car, produced the condition which rendered necessary the operation performed upon the respondent. The evidence shows that, for a year and a half prior to the accident, she had been in good health. The physician who performed the operation, and who had been the respondent's family physician for a number of years prior thereto, testified that a woman "may go through life with two pus tubes and have no trouble," because the pus tubes may lay dormant. He further testified that an exciting cause, like a fall, or a blow, may liberate the adhesion, and permit the pus to go into the abdominal cavity, where it sets up peritonitis. The physician testified, further, that there were causes other than those mentioned which might produce the same result. Testifying as to this particular case, the doctor gave it as his opinion that the fall did not produce the pus tube, but that it may have ruptured it. He did not testify that the rupture was probably caused by the accident. The respondent testified that, immediately after the accident, she had a pain in her side, and that she was unable to do her work that day as usual. During the three days following this, she gradually grew worse each day, until the physician was called. The coemployé at the hotel testified that the respondent, on the morning of the accident, when she reached the hotel, complained of a pain in her side. This evidence warrants the inference that the breaking of the pus tube was caused, or contributed to, by the accident. The testimony shows a sequence of events, such as physical symptoms, beginning at once, and increasing in intensity, until the operation was performed.

The probabilities of the case were to be weighed and decided by the jury. When the respondent offered evidence which made it appear more probable that the injury came in whole or in part from the appellant's negligence than from any other cause, the jury was warranted in finding in her behalf. Atwood v. Washington Water Power Co., 79 Wash. 427, 140 Pac. 343. The trial court did not err in refusing to withdraw the case from the consideration of the jury.

[2] The other point urged, if sustained, would not result in a dismissal, but in a retrial. One J. A. Dunham, who was a passenger upon the street car at the time the accident occurred, and witnessed it, was called to testify in behalf of the respondent. Prior to the trial, this witness signed a written statement, wherein the details of the accident were attempted to be set forth. In certain particulars, the testimony of the witness and the statement are not harmonious. While the witness was on the stand, the statement was presented to him, and he was cross-examined thereon. Subsequently another witness testified as to the manner in which the statement had been prepared, and the signing thereof by Dunham. The written statement was offered in evidence, and was received over objection. Two of the particulars in which the statement and Dunham's testimony did not coincide, were these: The statement recited that "the car stopped

very sudden and in an unusually sudden manner." The witness testified that the car "stopped as they usually do, maybe a little bit quicker at that time; when they throw on the brakes, and take them off, there is a rebound of the car any time." In the statement, also, he said that the car was stopped "near the intersection of the alley between Alder and Main street with Second street"; in his testimony, that it stopped in the usual place, "closer to Main street" than the alley.

If the testimony correctly presents the facts, the appellant company would not be guilty of negligence. If the statement correctly describes the manner of the accident, it would furnish a basis for the charge of negligence in the manner of stopping the car. The statement, therefore, would contradict the witness upon material facts. The rule is that, where a party calling a witness is taken by surprise, by reason of affirmative testimony prejudicial to the interest of the party by whom he was called, prior contradictory statements may be shown for the purpose of affecting the credibility of the witness. Jones, Commentaries on Evidence, vol. 5, § 855; State v. Catsampas, 62 Wash. 70, 112 Pac. 1116. Under this rule, the respondent had a right to offer the writing for the purpose of showing the contradictory statements made by the witness.

[3] Some complaint is made that the writing was not offered and received solely as impeaching testimony. No request was made by the appellant that its effect be so limited. If the appellant desired that the evidence be limited to a special purpose, it should have requested an instruction so limiting it. In the absence of such a request for instruction, error cannot be predicated upon the admission of the statement. Burger v. Taxicab Motor Co., 66 Wash. 676, 120 Pac. 519.

The judgment will be affirmed.

ELLIS, C. J., and WEBSTER, MORRIS, and CHADWICK, JJ., concur.

(96 Wash. 677)

TRIMBLE v. DONAHEY et al. (No. 13743.)

(Supreme Court of Washington. June 15, 1917.)

1. Frauds, Statute of 🔑125(2)—Contract Regarding Land — Damages for Breach.

Where a contract void under the statute of frauds will not be specifically enforced, an action for damages for breach thereof will not lie.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 277.]

2. Frauds, Statute of 🔑56(1) — Contract Regarding Land—Contract Not to Probate a Will.

Where the devisee after command by the testatrix to destroy the will had burned a piece of paper in her presence telling her that it was the will, an oral agreement between the devisee and another heir who was disinherited by the will, in which it was agreed that the will should not be presented for probate, but should be treated as destroyed in accordance with the express command and understanding of the testatrix, although not referring specifically to real estate, was void under the statute of frauds, since it would result in sustaining an oral contract for the transfer of real estate, which, under Rem. Code, § 1366, vested in the devisee on the death of testatrix.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 84, 87, 89.]

3. Wills 🔑212 — Agreement Not to Probate Will Containing Devise — Statute of Frauds.

A contract between heirs, in which it was agreed by and between them that the will, making one of the heirs in effect sole devisee, should not be presented for probate, but should be treated as destroyed according to the express command and understanding of the testatrix, in consideration of a waiver of the disinherited heir's right to contest the will because of alleged undue influence and the fraud in preventing its destruction, and the avoidance of litigation between members of the same family, if in compliance with the requirements of the statute of frauds, was binding and enforceable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 519.]

4. Frauds, Statute of 🔑129(5)—Remedy of Parties—Damage — Specific Performance —Recovery of Money Paid.

The fact that there may have been good consideration, or that the full consideration had been paid in cash, would not take an oral agreement out of the statute of frauds, and neither an action for specific performance nor damages would lie, but only a right to recover any money paid.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 311, 312.]

5. Frauds, Statute of 🔑129(3)—Removal of Bar—Part Performance.

The joining in the petition for the appointment of an administrator was not a part performance of a contract not to probate a will containing a devise sufficient to remove the bar of the statute of frauds, where the petition does not refer to the contract, but alleges as a fact that the will was made and destroyed prior to the death of the testatrix, when in fact the will was not so destroyed.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 289-291.]

6. Estoppel 🔑102—Grounds—Oral Agreement Respecting Lands.

The devisee is not estopped to deny the validity of the oral contract, since every right which the other heir had to contest the will existed at the time that a subsequent petition for the probate thereof was filed the same as at the time of the making of the oral agreement.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 294.]

Department 1. Appeal from Superior Court, Whitman County; R. L. McCroskey, Judge.

Action by E. T. Trimble against H. A. Donahey and Harvey A. Donahey, as executor of the estate of Rebecca A. Donahey, deceased. From a judgment sustaining a demurrer to the complaint and dismissing the action, plaintiff appeals. Affirmeu.

E. T. Trimble, of Seattle, John Pattison, of Spokane, and F. L. Stotler, of Colfax, for appellant. Hanna & Hanna, of Colfax, for respondents.

MAIN, J. The purpose of this action was either to enforce specific performance of a contract relating to real estate, or damages for the breach thereof. To the amended complaint, which will hereafter be referred to as the complaint, a demurrer was interposed and sustained. The plaintiff refused to plead further, and a judgment was entered, dismissing the action. From this judgment, the appeal is prosecuted.

The facts alleged in the complaint stated in a somewhat abbreviated form, are as follows: Rebecca A. Donahey died in Whitman county on the 2d day of June, 1908, leaving an estate consisting of real and personal property. The deceased left surviving her, as her only heirs, two sons, E. T. Trimble (appellant) and H. A. Donahey (respondent). On the 10th day of May, 1905, the deceased made and executed a nonintervention will, by the provisions of which the whole of the estate was devised and bequeathed to Donahey, except the sum of $1 to Trimble. The will, and the contents thereof, were well known to Donahey, who, at the time of its execution, and until the death of the testatrix, resided with her. On the 22d day of May, 1908, the deceased, who was then over 81 years of age, feeble, and confined to her bed by her last illness, directed one J. W. Cairns, who was then present at her bedside, to procure the will and destroy it. Cairns made known to Donahey, who knew of the place in which the will was kept, the request of the deceased regarding the will, and directed Donahey to produce the will for destruction. Donahey and Cairns there conspired together, and agreed to defeat the expressed wish of the testatrix, and Cairns thereupon, in the presence of the deceased and Donahey, burned and destroyed another paper, and informed the deceased that he had completely burned and destroyed the will. After the death of the testatrix, Donahey called the attention of Trimble to the existence of the will, and Trimble then informed Donahey that, by reason of the undue influence used over the deceased at the time of her making the will, and the fraud practiced by Cairns and Donahey in deceiving the deceased regarding the destruction thereof, he (Trimble) would contest the same if produced for probate. On the 8th day of June, 1908, Donahey voluntarily, and of his own motion and free will, and in consideration of avoiding a contest over the will and a family controversy, entered into an oral contract with Trimble, in which it was agreed by and between them that the will should not be presented for probate, but should be treated as destroyed, according to the expressed command and understanding of the testatrix. The oral agreement there made was to be executed at once, and the parties thereto joined the petition for the probate of the estate as though the testatrix had died intestate, and they agreed that Cairns should act as administrator. In making the agreement for the administration of the estate, it was understood that the whole of the estate should be thus administrated upon and distributed according to the law, each receiving half thereof. The petition for the appointment of Cairns as administrator contains an allegation as follows:

> "That on the 10th day of May, A. D. 1905, said deceased made and executed her last will, and on the 30th day of May, 1908, said deceased revoked and destroyed said will, and said deceased died intestate."

Attached to the petition, and forming a part thereof, was the following:

> "Come now E. T. Trimble and H. A. Donahey, sole and only heirs of Rebecca A. Donahey, deceased, and each waives his right to administer upon said estate of Rebecca A. Donahey, deceased, and state that they have read the foregoing petition and join therein and request that the prayer of said petition be granted, and that said J. W. Cairns be appointed administrator of said estate. E. T. Trimble.
> "H. A. Donahey."

On the 8th day of June, 1908, Cairns filed a petition for appointment as administrator, and thereafter was appointed and duly qualified as such. On the 1st day of September, 1908, and after letters of administration had been issued to Cairns, Donahey, disregarding the agreement entered into, and in violation thereof, filed a petition for the probate of the will, and for the revocation of the letters of administration theretofore issued. On the 29th day of March, 1909, the superior court admitted the will to probate, and revoked the letters of administration. The estate consisted of personal property of a specified value, and certain described real estate of an alleged value. Ever since the death of the deceased, Donahey has been in possession and control of the real and personal property. Donahey voluntarily entered into the agreement with Trimble, and joined in the petition for the appointment of Cairns as administrator of the estate. By reason of the breach of the agreement by Donahey, Trimble has been damaged in the amount stated. The prayer of the complaint is that Trimble be decreed to be the owner of one-half of the real and personal property, and, in the event that such property cannot be conveyed to him, that he have and recover damages in the sum of $2,567, and the value of the rents and profits. The original complaint was filed on the 18th day of April, 1911. The cause of action there stated is the same as that stated in the amended complaint, which was filed on the 13th day of March, 1914.

The first question is whether the oral agreement pleaded relates to real estate in such a way that it is controlled by the statute of frauds. From the facts stated, Donahey, from the date of his mother's death, and until the filing of the complaint, had been in possession of the real estate. Under the law, the title thereto vested in him, as devisee, immediately upon his mother's death. Rem.

Code, § 1366; Murphy v. Murphy, 42 Wash. 142, 84 Pac. 646.

[1, 2] It is contended, however, that the oral agreement does not relate to real estate in such a way as to be void under the statute of frauds, because the agreement, as alleged, provided that the will should not be presented for probate, but should be treated as destroyed. The effect of the agreement, if sustained, would be either to divest the title which had already vested in Donahey, and transfer the same to Trimble, or give damages for the breach thereof. Where a contract, void under the statute of frauds, will not be specifically enforced, an action for damages for breach thereof will not lie. This is a proposition so well understood, and generally accepted as to make the citation of authorities in its support unnecessary. While the contract does not refer specifically to real estate, yet, from the facts alleged, it is obvious that, if the contract were sustained, it would result in sustaining an oral contract for the transfer of the title to real estate, or an action for damages for breach thereof. Looking to the substance, and not to the form, it seems clear that the contract is one that relates to real estate in such a way as to be void under the statute of frauds.

[3, 4] The next question is whether there has been a sufficient part performance to remove the bar of the statute. The part performance relied upon is the consideration for the contract, and that Donahey joined in the petition for the appointment of an administrator. The consideration was: (a) The waiver of Trimble's right to contest the will because of the alleged undue influence and the fraud in preventing its destruction; and (b) the avoidance of litigation between members of the same family. It may be here admitted that, if the contract complied with the requirements of the statute of frauds, it was binding and enforceable, but the fact that there may have been a good consideration for the agreement is not alone sufficient to take the case out of the statute. The fact that Trimble may have surrendered a valuable right is not sufficient. Indeed, if the full consideration had been paid in cash, the contract would still have been void under the statute, and neither an action for specific performance nor for damages would lie, but only a right to recover the money paid. Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796.

[5, 6] It cannot be said that the joining in the petition for the appointment of the administrator was in part performance of the contract sufficient to remove the bar of the statute, because the petition does not refer to the contract, but alleges, as a fact, that the will was made and destroyed prior to the death of Mrs. Donahey. The will was not destroyed. No case has been called to our attention, holding that part performance will remove the bar of the statute, when there has neither been a writing, nor possession of the property taken in pursuance of the contract.

It cannot be said that Donahey is estopped from denying the validity of the oral contract, because every right which Trimble had to contest the will existed at the time that the petition for the probate thereof was filed, the same as at the time of the making of the oral agreement. In other words, when Donahey breached the oral agreement, Trimble had the right to contest the will because of the alleged fraud which prevented its destruction, or the claimed undue influence which induced its making.

A number of authorities are cited by the appellant, wherein agreements between heirs to take according to the law, instead of according to the last will and testament of the parent, had been sustained, but in each one of the cases, with two exceptions, the contract was in writing, and, consequently, the statute of frauds was not involved.

In Phillips v. Phillips, 8 Watts (Pa.) 195, the contract was oral, but that case is distinguishable. There, there was an agreement among the heirs to destroy the will, and, in pursuance of this agreement, the will was actually destroyed. Thereafter the chief beneficiary desired to probate the will and prove its contents by oral testimony. It was there held that, since he had voluntarily participated in the destruction of the will, he would be estopped from proving its contents by oral testimony. In the present case, there was no destruction of the will, and, consequently, in probating it, there would be no resort to oral testimony as to its contents. In Bellows v. Sowles, 55 Vt. 391, 45 Am. Rep. 621, a certain heir who was threatening to wage a contest against a will agreed with the chief beneficiaries thereunder that he would abandon the contest in consideration that he be paid the sum of $5,000. In that case, the contract had no relation to real estate, and was therefore not affected by the statute of frauds.

The judgment will be affirmed.

ELLIS, C. J., and PARKER, MORRIS and WEBSTER, JJ., concur.

(97 Wash. 115)

LAUBACH UNION CHECK VALVE CO. v. LAUBACH. (No. 13721.)

(Supreme Court of Washington. June 22, 1917.)

1. Patents ⚿193—Assignments.

Since a patentee enjoys absolute freedom in the use or sale of rights granted under a patent, he can grant an exclusive license or monopoly of his patent or a restricted and qualified license or use of it, or can assign the letters patent absolutely and without restriction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 270.]

2. PATENTS ⟹195—AGREEMENT TO ASSIGN—SUFFICIENCY OF EVIDENCE.

Evidence in an action to compel a patentee to execute and deliver unqualified assignments of letters patent for an invention and to quiet plaintiff's title thereto *held* sufficient, though conflicting, to show that the patentee agreed to make unconditional and unrestricted assignments.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 272–274.]

3. APPEAL AND ERROR ⟹1011(1)—TRIAL DE NOVO—FINDINGS—CONFLICTING EVIDENCE.

Considerable weight should be given to the findings of the trial court on conflicting evidence, where it appears that he separately weighed the evidence and decided according to his judgment, though the trial of the case on appeal is de novo upon the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by the Laubach Union Check Valve Company against Hiram F. Laubach. From decree for plaintiff, defendant appeals. Affirmed.

Leo & Flaskett and H. F. Garretson, all of Tacoma, for appellant. Gordon & Easterday and Belcher & Gordon, all of Tacoma, for respondent.

HOLCOMB, J. As the result of an action by respondent to compel appellant to execute and deliver to it unrestricted and unqualified assignments of United States and Canadian letters patent for a union check valve invention and to quiet its absolute title thereto and for other equitable and injunctive relief, after a trial upon the merits, the demands of respondent were granted.

Appellant was the holder of letters patent from the United States and Canada covering certain inventions for improvements in unions and valves. On April 22, 1914, the respondent corporation was organized in this state by the appellant and two other incorporators for the purpose of manufacturing and selling a device covered by the patents. On April 27, 1914, at the first meeting of the board of trustees of the respondent, appellant made an assignment of the letters patent issued to him by the United States, which contained the following restrictive provision:

> "Provided, however, that I do not release or relinquish my claim, interest, or title, or any of them, in the event that the Laubach Union Check Valve Company becomes insolvent."

Afterwards, on July 17, 1914, appellant made to the respondent another assignment of the same letters patent, except that it was more formally executed, which was registered in the patent office of the United States. The Canadian patent was subsequently assigned in the same restricted terms. The capital stock of the respondent company consists of 5,000 shares of the par value of $10 per share. Under the preliminary agreement between himself and the company, appellant received 2,500 shares as representing his interest in the company. The assigned interests in the patents were the sole assets of the company when organized.

The one determinative question on this appeal is this: Are the restricted assignments made by appellant the assignments agreed upon between him and respondent? This is purely a question of fact.

[1] It was properly conceded by respondent that it is a fundamental proposition that, under the patent laws of the United States, a patentee enjoys absolute freedom in the use or sale of the rights granted thereunder. This being true, appellant could grant an exclusive license or monopoly of his patent or a restricted and qualified license or use of it, or he could assign the letters patent absolutely and without restriction.

There is a sharp conflict of evidence in this record as to whether appellant agreed before the assignment was made that the assignment of all his right, title, and interest in his letters patent should be made absolute, or that the restriction set forth herein should be made for his protection and benefit.

[2] The minutes of the first meeting of the board of trustees, made prior to the execution of the assignments, stated that the appellant transferred the letters patent to the respondent. In that connection there was no allusion to a qualified or restricted transfer by assignment. Appellant seems to think that the respondent and the trial court took the position that the minutes were to be considered as conclusive as to the nature of the transfer, and that therefore the transfer must necessarily be construed as unconditional. Much stress is laid on an observation of the trial judge as follows:

> "The records which are binding are simply that there was an assignment. They used the word 'transfer,' and it is not qualified."

It is vigorously contended that this shows the trial judge had an erroneous conception of the law, and that for that reason he did not correctly weigh the evidence. But an examination of the further observations of the trial judge in passing upon the merits of the case discloses that he did weigh the conflicting evidence and simply used the minutes as so much evidence, not conclusive, but entitled to so much weight in support of the view that it was intended and agreed by the transferor and transferee of the assignment that the assignment was to be unconditional and unrestricted. The minutes were made when there was no apparent controversy and with the full knowledge of both parties and approval of appellant. There is evidence also that the first suggestion to the appellant, that such a condition should be incorporated in the assignment in order to protect him in case of the insolvency of the corporation during the life of the letters patent, was made to him by the attorney to whom the parties went for the preparation of the instrument which consummated their agreement. While this is contradicted by the appellant, it is to be borne in mind that the appellant is one of the most interested parties, and that there is other testimony not so interested in character contrary to his testimony, and that the court weighed all the evidence and found against appellant.

[3] While this case is to be tried de novo upon the record, considerable weight is to be given the findings of the trial court upon conflicting testimony where it is apparent that he properly weighed the conflicting testimony and decided according to his judgment. The evidence does not preponderate against the court's finding.

The decree is therefore affirmed.

ELLIS, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

(97 Wash. 99)

CITY OF HOQUIAM v. MOE et al.

(No. 13964.)

(Supreme Court of Washington. June 20, 1917.)

1. Municipal Corporations ⟹466—Streets and Alleys — Special Assessments — Validity.

An assessment by a municipal corporation for opening an alley is on a fundamentally wrong basis if in fixing the amount to be levied against one lot the benefits to another lot owned by the same persons and not assessed were considered.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1109.]

2. Municipal Corporations ⟹466—Streets and Alleys—Special Assessments—Validity.

If true that the property described in the roll is so assessed that each piece of property shall bear its relative equitable proportion of the full amount of the cost and expense of the improvement, and the assessment set forth apportions and assesses the amounts therein which are found to be a benefit to the property upon the several lots, tracts, and parcels of land in the proportion in which they will be severally benefited by such improvement, the assessment cannot be disturbed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1109.]

3. Municipal Corporations ⟹502(3) — Streets and Alleys—Special Assessments —Validity.

Evidence *held* insufficient to show that an assessment for opening an alley objected to by defendants was unjust or unequal or made on a wrong basis.

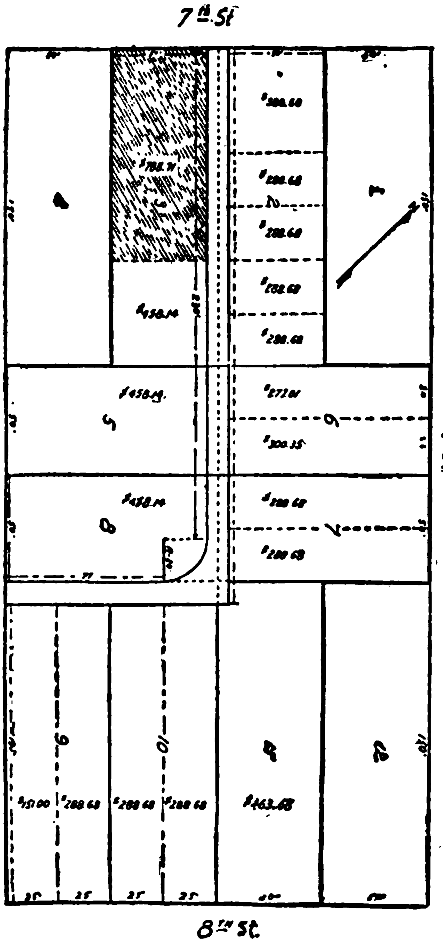
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1174.]

Department 2. Appeal from Superior Court, Grays Harbor County; Walter M. French, Judge.

Proceedings by the City of Hoquiam for the assessment of the costs of public improvement against Eric F. Moe, his wife, and others. From an order confirming the assessment roll, the defendants appeal. Affirmed.

William E. Campbell, of Hoquiam, for appellants. Sidney Moore Heath, of Hoquiam, for respondent.

HOLCOMB, J. Appellants seek to reverse an order of the superior court confirming the assessment roll made by a board of eminent domain commissioners, assessing the cost of a public improvement levied upon a public improvement district in the city of Hoquiam for opening an alley through block 49 in the city of Hoquiam. A plat of the block, showing the location of the alley in the block, the assessment district, and the amount of the assessment placed upon each lot in the district, is herewith shown:



The appellants are the owners of the northwesterly 100 feet of lot 3 in the block, shown on the plat as shaded in order to distinguish it from the other lots. It will be seen that lots 1, 4, and 12 of the block are omitted from the improvement district. This improvement was ordered in 1912 by an ordinance of the city which established an alley 10 feet in width in L-shape through this block, provided for the condemnation of the necessary ground, and established the assessment district to pay the costs of the alley upon the property in the block benefited thereby, and also provided that the city should not be liable for any of the costs. Condemnation proceedings were had, and, after a trial by jury, a verdict was rendered for the damage to each lot, and appellants were awarded $485 for the land taken from their lots. The jury found no damages to the remaining land owned by them. Judgment was entered upon this verdict, and it was provided that the owners of the abutting lots 2 and 3 might, when the alley was constructed, arcade the alley 50 feet back from the street and 12 feet in height above the surface of the alley. This provision was not made obligatory but optional to the owners.

Appellants objected to the confirmation of the assessment roll returned by the eminent domain commissioners upon the grounds, and they now contend, that: (1) The eminent domain commissioners in making the assessment upon appellants' lot acted arbitrarily, fraudulently, and on a fundamentally wrong basis; (2) that the assessment is in excess of the benefits and inequitable; (3) that the board of eminent domain commissioners considered lot 4 as benefited, which was not included in the assessment district, and added the benefit which they believed lot 4 received from the alley to lot 3 belonging to appellants which was included in the improvement district.

[1] The principal argument of appellants is made upon the supposition that the eminent domain commissioners considered some supposed benefits to lot 4, which is also owned by appellants, as accruing to them from the establishment of the alley, in assessing the benefits upon lot 3 which abuts upon the alley. If this were true, then the assessment was made upon a fundamentally wrong basis. It is shown that the appellants used their property transversely to the manner in which it is platted and that they sold a portion of both lots 3 and 4, being the southeasterly 50 feet of both lots fronting on the street and on the newly established alley, in that manner; but there is not a word of testimony that the eminent domain commissioners, in assessing the benefits that would accrue to lot 3, considered any benefits that might accrue secondarily to lot 4 belonging to appellants.

[2] The only evidence there is upon that subject is the assessment roll of the commissioners, and their oath attached thereto, wherein they say that:

> "The property described in the roll is so assessed that each piece of property shall bear its relative equitable proportion of the full amount of the cost and expense of the improvement herein contemplated, and the assessment set forth apportions and assesses the amounts therein which are found to be a benefit to the property upon the several lots, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement."

This conforms strictly to the statute relating to such special assessments and, if actually so assessed, the assessments cannot be disturbed.

[3] Appellants (the husbands) and two other witnesses testify concerning the assessment, and none of them testify that the commissioners, in assessing the benefits to lot 3, took into consideration the supposed benefits to lot 4, nor does any other witness; and none of these witnesses testify that, in formulating their own opinions as to the amount of benefits accruing or not accruing to lot 3, they took into consideration the amount that the other lots in the district would be benefited or attempted in any way to compute the just assessments over the whole of the district according to the benefits received. In brief, their testimony is merely opinionative, and not so well informed and considered as to be convincing.

It will be observed that appellants' lot with a frontage of 100 feet upon the alley is assessed at $785, and the same amount of land owned by three parties on the other side of the alley was assessed $966.04, which tends to show that the commissioners in assessing the benefits were attempting in good faith to assess them with due regard to the benefits actually conferred, and tends to disprove that the property of appellants was assessed in excess of the benefits and inequitably, and that the board considered any supposed benefits to lot 4 in assessing appellants' lot 3, or proceeded upon a fundamentally wrong basis.

There is no just inference that can be derived from the testimony in the record which sustains the contentions of the appellants. Judgment affirmed.

ELLIS, C. J., and MOUNT and PARKER, JJ., concur.

(97 Wash. 166)

SOWLES et ux. v. FLEETWOOD et ux.

(No. 14042.)

(Supreme Court of Washington. June 22, 1917.)

1. SALES ⚷52(7)—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that the seller of hotel property falsely and fraudulently misrepresented its worth, and that the buyers relied upon such representations without having at hand any means of ascertaining their falsity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 140–144.]

2. SALES ⚷51 — FRAUD — RATIFICATION — LACHES.

In action on notes given for price of hotel, defendants cannot be held to have ratified the contract by laches in failing to set up the fraud in the sale within nine months, but could plead the fraud in defense.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 115–117.]

Department 2. Appeal from Superior Court, Spokane County; John R. Mitchell, Judge.

Action by Fred L. Sowles and wife against W. W. Fleetwood and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Thomas M. Vance and Parr & Marts, all of Olympia, for appellants. R. H. Fry and Troy & Sturdevant, all of Olympia, for respondents.

PARKER, J. The plaintiffs, Sowles and wife, commenced this action in the superior court for Thurston county seeking recovery upon two promissory notes and the foreclosure of a chattel mortgage securing the same, executed by the defendants, Fleetwood and wife. The notes evidence a debt for a balance of $1.500 due upon the purchase price of the furniture and good will of the Willard Hotel, a rooming house in Olympia which had been purchased by the defendants from the plaintiffs. The defendants admit the purchase of the business and the execution of the notes and mortgage for the balance of the purchase price, but defend against recovery thereon by claiming damages in the sum of $2.000 resulting to them from false and fraudulent representations made to the defendants inducing them to purchase the business. Trial in the superior court upon the merits resulted in judgment and decree in effect awarding the defendants damages against the plaintiffs in the sum of $1.500, offsetting the balance due upon the purchase price, and canceling the notes and mortgage. From this disposition of the case the plaintiffs have appealed to this court.

[1] For several years prior to January, 1915, appellants owned the furniture and good will of the Willard Hotel, occupying a building under a lease. While the property was evidently community property the business was under the management and control of Mrs. Sowles. Early in January of that year negotiations were commenced between respondents and Mrs. Sowles looking to the purchase of the business by respondents. Respondents up to that time had been farmers and were wholly inexperienced in the hotel business, of which fact Mrs. Sowles was fully aware at the time she was dealing with them. Mrs. Sowles asked $2,500 for the business. Respondents, after looking at the rooms and furniture, expressed themselves as considering the price too high. This belief on their part was manifestly because of their view of the value of the furniture. Mrs. Sowles told them that the business was worth all that she was asking for it, and that she had two offers of $2,000 for the business, one of which she told them was a standing offer, naming the persons who she claimed made such offers. She also told them that the business had been and was then making $200 per month clear. Relying upon these representations respondents consummated the purchase on January 16th, paying Mrs. Sowles $1,000 in cash and executing the notes and mortgage above mentioned for the balance of $1,500.

The evidence is not free from conflict, but we think it fully warrants the conclusion that these statements were made by Mrs. Sowles, that they were false, that they were made with the intention of having respondents rely thereon, and to induce them to purchase the business. We think also that the evidence warrants the conclusion that respondents did rely upon these statements of Mrs. Sowles, and that they were induced thereby to purchase the business, and that they did not have readily at hand any means of ascertaining their falsity. That they were statements of fact the truth or falsity of which was peculiarly within the knowledge of Mrs. Sowles is of course evident. The evidence is all but conclusive that the furniture was not worth over $500, and if the statements of Mrs. Sowles touching the value of the business related only to the value of the furniture, respondents might not be permitted to complain in view of their inspection of the furniture before the purchase, but manifestly the good will and earning power of the business as an established business as represented by Mrs. Sowles was the real inducement leading respondents to purchase it at the price of $2,500. The evidence we think also warrants the conclusion that the total value of the furniture and business in no event exceeded $1.000, the amount paid in cash by respondents upon the purchase price. This manifestly, in substance, is the view of the evidence taken by the learned trial judge, and we think that he was fully warranted in so viewing it. We think it would be unprofitable to discuss the evidence in detail here. With these facts before us the law of the case seems a simple matter in view of our repeated decisions; and plainly calls for an affirmance of the judgment rendered by the trial court. Stewart v. Larkin, 74 Wash. 681, 685, 134 Pac. 186, L. R. A. 1916B, 1069; Duffy v. Blake, 80 Wash. 643, 141 Pac. 1149; Christensen v. Koch, 85 Wash. 472, 148 Pac. 585; George v. Kurdy, 92 Wash. 277, 158 Pac. 965.

[2] Some contention is made in appellants' behalf that respondents should be held to have affirmed the contract and waived any remedy they might have as against appellants because of lapse of time and their continuance in possession of the business. We have seen that the sale was consummated on January 16, 1915. This action was commenced in August of the same year shortly after the maturity of the notes. It was then for the first time that respondents asserted their claim of damage. It is possible that there was such a lapse of time as would have prevented respondents from rescinding the sale and seeking relief in equity to that end, but we are to remember that respondents' claim made in this action is in effect a suit for damages on their part, and the fact that it

is invoked by way of set-off or counterclaim in this equitable foreclosure action does not change its nature so far as their right to assert it is concerned. Viewed as such, manifestly it was brought within the period prescribed by law. It seems plain therefore that their right to so assert their claim for damages is not lost by lapse of time whatever may be said of their right to rescission. In Pronger v. Old National Bank, 20 Wash. 618, 626, 56 Pac. 391, 393, Judge Fullerton, speaking for the court, said:

> "Nor does an affirmance of the contract after discovery of the fraud extinguish the right to an action for damages on account of the fraud. An affirmance bars only the right to rescind. All other remedies remain unimpaired."

In Samson v. Beale, 27 Wash. 557, 562, 68 Pac. 180, 182, Judge Hadley, speaking for the court, said:

> "Ordinarily it is the injured party who seeks a rescission. He may pursue either the equitable remedy of rescission, and offer to place the other party in statu quo by tendering back the benefits of the contract, or he may retain the benefits of the contract and bring his action at law for his damages."

We conclude the judgment must be affirmed. It is so ordered.

ELLIS, C. J., and MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

(97 Wash. 158)

ABERDEEN CONST. CO. v. CITY OF ABERDEEN. (No. 13995.)

(Supreme Court of Washington. June 22, 1917.)

INDEMNITY 🔑13(2)—JOINT TORT-FEASORS—LIABILITY OF CITY.

If the city engineer knew that the method of grading was defective, and such fact was not known to the contractor or his employés, one of whom was injured due to the defect, the employé could recover from the contractor, and the contractor could recover over from the city; but if the contractor knew of the danger he could not recover from the city, and if the employé knew of the danger he could not recover from the contractor.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 31.]

Department 2. Appeal from Superior Court, Grays Harbor County; Geo. D. Abel, Judge.

Action by the Aberdeen Construction Company against the City of Aberdeen. From an order granting new trial, the City appeals. Reversed and remanded, with instructions.

John C. Hogan and A. Emerson Cross, both of Aberdeen, for appellant. Ballinger, Battle, Hulbert & Shorts, of Seattle, and Boner & Boner, of Aberdeen, for respondent.

MOUNT, J. This appeal is from an order of the lower court, granting a motion for a new trial. The action was brought by the plaintiff to recover the sum of $7,309, paid by the plaintiff to an injured employé. The action is based upon a complaint which is set out in Aberdeen Construction Co. v. Aberdeen, 84 Wash. 429 et seq., 147 Pac. 2, and need not be here restated. Upon that appeal, we held that the complaint stated a cause of action against the defendant. Thereafter, the city filed an answer, which, after denying the material allegations of the complaint, alleged four separate affirmative defenses, to the effect: First, that the plaintiff was not liable to the injured employé, and therefore the payment which the plaintiff made to the employé was made voluntarily and gratuitously; second, that the injuries which the employé received were caused by his own carelessness and negligence, and that he assumed the risk of such injury; third, that the city never assumed or exercised any right or authority over the plaintiff under the contract, and that the plaintiff, in the performance of the contract, exercised an independent employment, and pursued its own methods, not subject to the control of the city or its engineers, that the injury to the employé did not result from any vice of the contract, and was not due to any defective plans or specifications, or to any direction of the city engineer, pursuant to which the defective work was done; and, lastly, that the plaintiff was aware of the condition of the earth embankment at the time the employé was injured, and that the dangers from the embankment were open and apparent to the plaintiff and to the injured employé, and that both were negligent, and their negligence was the sole cause of the injury. Upon the issues made by the complaint and answer and reply, the cause was tried to the court with a jury. At the conclusion of the trial, the jury returned a verdict in favor of the defendant. The plaintiff thereupon moved for a new trial, and the motion was argued to Judge Irwin, who took it under advisement, but died before disposing thereof. Afterwards, the motion for a new trial was argued to his successor, and was sustained by an order, as follows:

> "It is ordered by the court that said motion for new trial be granted solely upon the ground of error in the giving of instructions to the jury on the trial of said cause to which exceptions were duly taken by plaintiff, and said motion is hereby denied upon all other grounds set forth in said motion for new trial, to which ruling of the court granting said motion for new trial defendant excepts, and its exception is allowed, and to which ruling of the court, refusing to grant such motion for new trial on other grounds, plaintiff excepts, and its exception is allowed."

The instructions referred to in this order are as follows:

> "No. 2. You are instructed that if you believe from a preponderance of the evidence that the plaintiff construction company was engaged in grading streets in the city of Aberdeen under a contract with the city, and that the man Brockett was engaged on the work, and while so engaged a portion of the finished side of the street under the construction work caved in and injured him, and that the caving in was owing

> to the embankment on the finished side of the street being too precipitous, and that it was so graded and finished under the instruction and direction of the city engineer, and if you further believe that the bank was such that the engineer knew or should have known, with the exercise of reasonable care and diligence in that regard, that the same was dangerous and was liable to slide, and that the man Brockett and the plaintiff construction company, or either of them, did not know that it was dangerous and liable to slide, then the plaintiff would be entitled to recover what would have been a reasonable compensation to Brockett for the injury sustained.
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> "No. 3. On the question of contributory negligence of the man Brockett and the plaintiff the construction company, or either of them, you are instructed that if Brockett or the construction company, either one, was guilty of negligence and carelessness which materially contributed to the accident which caused the injury to Brockett, then the plaintiff is not entitled to recover anything in this action; and, on the question of whether either Brockett or the plaintiff was guilty of negligence and carelessness themselves, you should take into consideration whether or not it was negligence or carelessness on the part of Brockett to sit on the wagon when it was being loaded, and as to whether or not he had been warned not to sit there, and as to whether or not Brockett or the construction company either one—and in that regard the president of the construction company, Andrew Peterson, and Carl Gylling, the superintendent of the construction company on the work, and Oberg, the foreman, or either one of them, must be considered as the representative of the construction company—knew that the bank where Brockett was working was dangerous and liable to cave in, then it would be contributory negligence on the part of Brockett to work under such conditions, and it would also be contributory negligence on the part of the construction company to permit him to work under such condition, and if the likelihood of the caving in of the bank was open and apparent to any person working in the vicinity, and was open and apparent to Brockett or the construction company or the officers of the construction company, then they would assume the risk of working in such dangerous place, and the plaintiff would not be entitled to recover. * * *
>
> "No. 7. I instruct you that, even though you should find that Brockett was entitled to recover from the Aberdeen Construction Company, it does not follow as a matter of law that the Aberdeen Construction Company is entitled to recover anything from defendant, city of Aberdeen; that even if the Aberdeen Construction Company, under these instructions, was liable to Brockett, yet the Aberdeen Construction Company could not recover from the city of Aberdeen anything in this action, unless you are satisfied by a preponderance of the evidence that the injuries which said Brockett received were caused by defective plans and specifications or the carelessness and negligence of the city engineer of the city of Aberdeen in directing the manner in which a finished bank was sloped, and that it was a portion of the finished bank that caved in and caused injuries to said Brockett; and you further find that the dangers of such bank caving in were known, or by the exercise of ordinary care should have been known, by the city engineer of the city of Aberdeen and was unknown to the plaintiff or its representatives in charge of the work."

It will be noticed that instruction No. 2 told the jury in substance that the construction company, the plaintiff, cannot recover unless the city engineer knew, or should have known, that the bank was dangerous and liable to slide, and also that Brockett and the plaintiff, or either of them, did not know that it was dangerous and liable to slide. By instruction No. 3, the jury was told that, if either Brockett or the construction company knew the bank was dangerous and liable to cave in, then they were both guilty of contributory negligence, and the construction company could not recover from the city, and also that, if the likelihood of the bank caving in was open and apparent to Brockett or the construction company, then they assumed the risk and the construction company could not recover. By instruction No. 7 the jury was told in substance that, even though the accident was caused by defective plans and specifications, or the carelessness or negligence of the city engineer in directing the manner in which the finished bank was sloped, and the dangers of such bank caving in were known, or by the exercise of ordinary care should have been known, by the city engineer, still the construction company could not recover unless such dangers were unknown to said company or its representatives in charge of the work.

It is argued by the respondent that these instructions were erroneous because the law of the case was settled upon a consideration of the sufficiency of the complaint when the case was before us in 84 Wash., 147 Pac., supra. The principal question upon the consideration of the sufficiency of the complaint was whether the appellant and respondent, as shown by the complaint, were joint tort-feasors. We there said (84 Wash. at page 433, 147 Pac. 3):

> "The principal question before us is whether appellant and respondent were joint tort-feasors, and, if so, whether appellant stands in such a relation to respondent with reference to the facts involved as will preclude it from obtaining contribution. The doctrine announced in Alaska Steamship Co. v. Pacific Coast Gypsum Co., supra,[1] upon which appellant relies, is sufficient to sustain its contention. Conceding that appellant and respondent are joint tort-feasors, it is a well-recognized principle of law that, to preclude appellant from recovering, it and respondent must stand in pari delicto."

Then, after quoting from Lowell v. Boston & L. R. Corporation, 23 Pick. (Mass.) 24, 34 Am. Dec. 33, we continued:

> "The facts pleaded in this case show that the defective plans and specifications were adopted by respondent, and that the appellant contracted to do the work in accordance therewith under the direction and supervision of the city engineer. This contract imposed an obligation to do the work in the manner required. This appellant did. In the absence of any stipulation in the contract that appellant warranted the sufficiency of the plans and specifications, no such warranty can be imputed to it. We in substance so held in Huetter v. Warehouse & Realty Co., 81 Wash. 331, 142 Pac. 675 [L. R. A. 1915C, 671]. No such warranty by appellant has been called to our attention. It necessarily follows that the sufficiency of the plans and specifications was warranted by the city. To now hold, as a matter of law, that appellant, in performing its contract in accordance with such plans and under the direction of the city engineer, was in equal fault with the respondent or was guilty of negligence as between it and respondent, would be unjust. The only wrong charged against appellant as between it and its

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[1] 71 Wash. 359, 128 Pac. 654.

> employé involved no moral delinquency or turpitude, nor was its offense one that can be considered a malum prohibitum or immoral in any respect. It therefore should not be held to be against the policy of the law to inquire into the relative delinquency of appellant and respondent.
>
> "Assume that respondent had let the contract to an individual instead of the appellant corporation, and that such individual had been doing the work personally in accordance with the plans and specifications under the direction of the city engineer, and upon his assurance that the banks were free from danger, and assume that the contractor had been injured by the bank falling upon him; it would hardly be contended as a matter of law that he could not recover damages from the city. At most, under such circumstances, the questions whether he assumed the risk or had been guilty of contributory negligence would be issues of fact which should be submitted to the jury. While it must be conceded that, as between it and its employé, appellant was guilty of negligence in failing to furnish the employé a safe place in which to work, it would seem that, as between it and the respondent municipality, it should not be held guilty of negligence, as a matter of law, in performing the work in exact compliance with the defective plans and specifications and under the supervision of the city engineer."

All that was then said was based upon the allegations of the complaint, which were taken as true. The complaint alleged that the whole fault was the fault of the plans made by the city and adopted by the city. It was alleged that the plaintiff was free from fault. Upon these allegations, the complaint was held sufficient. An answer was afterwards filed, and this answer alleged that the whole fault was the fault of the plaintiff, and that whatever sum it paid to this injured employé was by reason of the fault of the plaintiff, so that, when the case was tried upon the issues joined, the question was not of equal fault, but was whether the plans were defective and the injury was caused solely thereby, or whether the plaintiff was wholly at fault in the injury which occurred to its employé. So that the question of comparative negligence, or equal negligence, was not in issue in the case. That question was presented in the case which was here upon a demurrer to the complaint only, because it was contended that the complaint showed that the parties—the city and the contractor—were each guilty of negligence, and upon that question the discussion was made in the opinion which we have quoted hereinbefore. We there held that the complaint was sufficient, because it did not show that the parties were in pari delicto. We think the instructions do not violate the rule there stated, because they tell the jury in substance that, if the parties were equally guilty of negligence, there can be no recovery by one against the other. The injured employé of the plaintiff stood in the same position as the plaintiff itself, and in the assumption which was made in that case to the effect that, if the work had been let to an individual, and, upon the assurance of the city that the banks were free from danger, the individual had been injured by the bank falling upon him, it would hardly be contended, as a matter of law, that he could not recover for the injury. We said:

> "Whether he assumed the risk or had been guilty of contributory negligence would be issues of fact which should be submitted to the jury."

It seems clear that the plaintiff in this action may not recover for the injury to the employé if the plaintiff and the injured employé knew of the danger and assumed the risk. If the plan for doing the work was inherently dangerous, and the plaintiff undertook to do that work, knowing of the danger, clearly it could not recover from the city for an injury received by it. If an employé of the plaintiff, knowing the danger, was injured, he would clearly assume the risk the same as his principal. If the employé did not know the danger, he could recover from his principal, and his principal could not recover from the city, because both the city and the plaintiff, both knowing the danger, would be in pari delicto. If the city and the construction company were in pari delicto, it does not follow that an injured employé, who did not know of the danger, could not recover from his principal. This, we think, is conclusive of the question presented upon these instructions. We are satisfied they correctly presented to the jury the law of the case, and that, as between the plaintiff construction company and the city of Aberdeen, they were proper instructions. We conclude therefore that the trial court was in error in granting a new trial.

The order is therefore reversed, and the cause remanded, with instructions to enter a judgment upon the verdict.

ELLIS, C. J., and PARKER and HOLCOMB, JJ., concur.

(97 Wash. 95)

W. F. JAHN & CO. v. McCLAINE et al.
(No. 13874.)

(Supreme Court of Washington. June 20, 1917.)

SALES 🔑23(1) — CONTRACT — OFFER AND ACCEPTANCE.

Letter by J. to M. directing shipment of one car of hay at $18 per ton f. o. b. Seattle, settlement to be on Washington state weight grades, J. to have option of 200 tons additional at same price after first car is unloaded, followed by one asking when first car may be expected, and stating if hay turns out satisfactory J. would like to increase its order to 400 tons, and adding, "In any event, please confirm the 200 tons," with letter from M. to J. stating when he hoped to make shipment on first car, and that he will ship 200 tons just as fast as he can get it out, constitutes a definite contract as to one car only, there being no unconditional order for more, and the first car never having been shipped.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 44.]

Department 2. Appeal from Superior Court, Spokane County.

Action by W. F. Jahn & Co. against A. F.

McClaine and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with instructions.

Oscar Cain, of Spokane, for appellants. McWilliams, Weller & Brown, of Spokane, and Beechler & Batchelor, of Seattle, for respondent.

FULLERTON, J. The plaintiff, W. F. Jahn & Co., brought this action against A. F. McClaine and A. F. McClaine, Jr., alleging a breach of a contract for the sale of a quantity of hay. The cause was submitted to the court upon an agreed statement of facts the material parts of which are contained in the following letters:

"Seattle, Wash., Jan. 8, 1916.

"A. F. McClaine; Please ship one car Montana Timothy at $18.00 per ton f. o. b. Seattle settlement to be on Wash. state weight grades. W. F. Jahn & Co. to have an option of 200 ton additional at same price after first car is unloaded.
W. J. Jahn & Co.
"Per W. F. Jahn."

"Jan. 12, 1916.

"Mr. A. F. McClaine, Jr., 503 Spokane & Eastern Trust Bldg., Spokane, Wash.—Dear Sir: Referring to the order we gave you on Jan. 8th, kindly advise how soon we may expect the first carload. If the hay turns out satisfactory we would like to increase our order so as to take on the 400 ton you have to offer. In any event, please confirm the 200 ton by return mail, and oblige.

"Yours truly, W. F. Jahn & Co."

"Spokane, Washington, January 13, 1916.

"W. F. Jahn & Co., Seattle, Washington—Gentlemen: Your letter of the 12th at hand, and would say that we hope to make shipment on the first car of hay to you on January 20th or 21st. The shipping point of this hay, Marion, Montana, has very poor train service, and freight only leaves there one day per week, although I am trying to perfect some arrangements with the railroad, whereby hay will go out oftener from there.

"We will ship two hundred tons to you just as fast as we can get it out, but the balance is already contracted for by another firm, so cannot accept any increase in your order.

"Trusting that the hay will prove satisfactory in every way, I am
Very respectfully, A. F. McClaine,
"Per A. F. McClaine, Jr."

"Seattle, Washington, Feb. 8, 1916.

"Mr. A. F. McClaine, Jr., Spokane & Eastern Trust Bldg., Spokane, Wash.—Dear Sir: Kindly advise when we may expect some hay on the 200-ton contract we have with you and oblige
"Yours truly, W. F. Jahn & Co.,
"W. F. Jahn."

The court found that the correspondence between the parties amounted to a contract to furnish 200 tons of hay, and gave judgment for plaintiff in the sum of $900. The defendants appeal.

The sole question for consideration is how far, if at all, this correspondence constituted a contract of sale. It is plain, we think, that it constituted a contract for one carload of hay only. As to one carload there was plainly a definite proposal and a definite acceptance, and this under all of the authorities constitutes such a contract as to entitle a recovery in damages by the one party against the other who is guilty of its breach.

Although the question is not entirely free from doubt, we think that beyond the one carload there was no definite contract. In its letter of January 8, 1916, the vendee ordered but one carload, proposing for itself "an option of 200 ton additional at same price after first car is unloaded." In its letter of January 12th it asks for a confirmation of the order and how soon it may expect the first carload, and in addition proposes to increase the order to 400 tons "if the hay turns out satisfactory." In both of these letters the orders for an additional quantity above the one carload are conditional. Were the condition reversed—that is, had the vendor shipped the 200 tons additional without a further order and sought to hold the vendee for the price on a refusal to accept the hay—it is difficult to see how a recovery could have been had. The vendor's letter of acceptance is not, it is true, in the terms of the order, but it proposed no new terms and must be construed in the light of the order. The third letter of the vendee, of course, adds nothing to the contract. The terms of the contract were expressed in the preceding letters, and the vendee was not then at liberty to put a construction upon them which they do not reasonably bear.

Since no hay was shipped under the order, the vendee can recover only for the quantity definitely ordered. It cannot now be known whether the option would have been exercised. While the privilege of exercising the option was denied the vendee by the fault of the vendor, there is no rule by which the damages caused by such fault can be measured.

No authority directly in point has been called to our attention, but the general principle is well settled that an unconditional order and unconditional acceptance must be found in a contract evidenced by correspondence before there can be a recovery as for a breach. The following cases, while but a few of the many that could be cited, are illustrative: Van Keuren v. B. & B. Press Co., 143 App. Div. 785, 128 N. Y. Supp. 306; Hudson v. Arnold (Ky.) 93 S. W. 42; Topliff v. McKendree, 88 Mich. 148, 50 N. W. 109; Martin v. Northwestern Fuel Co. (C. C.) 22 Fed. 596; Johnson v. Stephenson, 26 Mich. 63; Smith v. Gowdy, 90 Mass. 566; Jenness v. M. & H. Iron Co., 53 Me. 20; Cornwells v. Krengel, 41 Ill. 394.

Our conclusion is therefore that there was no sale except as to the one carload. The stipulation covering this was that one car would contain 13 tons, and that the measure of the vendor's liability would be at the rate of $4.50 per ton.

The judgment is reversed, and the cause remanded, with instructions to enter a judgment for the plaintiff in the sum of $58.50.

ELLIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(97 Wash. 119)

HOPKINS v. COPALIS LUMBER CO.

(No. 13790.)

(Supreme Court of Washington. June 22, 1917.)

NEW TRIAL ⇨54—MISCONDUCT OF JURY.

Generally, when a party moves for new trial on the ground of misconduct of the jury and prevailing party which occurred during the course of the trial, he must aver and show affirmatively that he and his counsel were ignorant of the misconduct charged until after the trial, for such irregularity is waived if the party adversely affected does not call the court's attention to it upon the first opportunity.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 112–114.]

Department 2. Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action by W. W. Hopkins against the Copalis Lumber Company. From judgment for defendant, plaintiff appeals. Affirmed.

Morgan & Brewer, of Hoquiam, and A. Emerson Cross, of Aberdeen, for appellant. W. H. Abel, of Montesano, and George Dysart, of Centralia, for respondent.

FULLERTON, J. The appellant, W. W. Hopkins, while driving an automobile along a county road in Grays Harbor county, attempted to cross a railroad track, when he collided with a train of cars operated by the respondent, Copalis Lumber Company, and received injuries for which he sues in this action. The cause was tried by the court sitting with a jury. At the close of the evidence, the court concluded it proper that the jury should have a view of the place of the accident, and directed that they be conducted there for that purpose. They were so conducted and returned, when the trial proceeded to its conclusion; the jury returning a verdict for the respondent. After the return of the verdict, the appellant moved for a new trial on the grounds, among others, of misconduct on the part of the jury and misconduct of the prevailing party, supporting the motion by affidavits. The affidavits disclosed that the claimed misconduct occurred while the jury were absent from the courtroom on the view of the place of the accident. Counter affidavits were filed, after which the court overruled the motion for a new trial and entered a judgment in accordance with the verdict.

The only error assigned on this appeal is the overruling of that part of the motion for a new trial which is based on the misconduct of the jury and prevailing party. But whether the acts of misconduct shown to have been committed were of such a nature as to require a new trial we shall not determine, as we have concluded that the appellant is not in a position to make the objection. The rule is general that, when a party moves for a new trial on the ground of misconduct which occurred during the course of the trial, he must aver and show affirmatively that he and his counsel were ignorant of the misconduct charged until after the trial. The rule and the reasons for it are well stated by Mr. Thompson, in his work on Trials (volume 2, § 2613), in the following language:

> "In pursuance of the maxim, 'Omnis consensus tollit errorem,' the consent of the unsuccessful party in a civil case, to an irregularity in the conduct of a jury, will always estop him from claiming a new trial on that ground. Moreover, if he is cognizant of the irregularity, and does not avail himself of the first opportunity to call the attention of the court to it, he thereby waives any right to make it the ground of an objection. If he fails to do this, he cannot raise such an objection for the first time by motion for a new trial. The rule proceeds upon the ground that the party ought not to be permitted after discovering an act of misconduct which would entitle him to claim a new trial, to remain silent and take his chances of a favorable verdict, and afterwards, if the verdict goes against him, bring it forward as a ground for a new trial. Such a course is inconsistent with the candor and good faith which should characterize judicial proceedings. * * * In cases where this principle is applied, it follows that, where a party moves for a new trial on the ground of misconduct on the part of the jury, which took place during trial, he must aver in his motion, and show affirmatively that he and his counsel were ignorant, until after the jury had retired, of the fact of such misconduct."

A somewhat similar question was before us in the case of In re Jackson Street, 47 Wash. 243, 91 Pac. 970. In that case the court directed that the jury view the premises in charge of one of the court bailiffs, and that a Mr. Jeffrey, a witness for the plaintiff city, go along and point out to the jury the particular tract in controversy. At the time the order was made, the defendants interposed a general objection "to allowing Mr. Jeffrey or any person to go with the jury except a court bailiff." In an affidavit filed in support of a motion for a new trial, the further objection was made that Mr. Jeffrey was an officer of the city and a witness on the trial and was not sworn to perform any duty except as such witness. The trial court overruled the motion for the new trial, and the defendant appealed. Passing upon the specific objections to the appointment of Mr. Jeffrey, we held that they could not be urged in this court for the reason that they were not taken at the time of his appointment, saying in the course of the opinion:

> "Objections to the personnel of the person appointed or that he was not sworn should be taken at the time of the appointment, and cannot be urged for the first time on motion for new trial."

See, also, Grantz v. City of Deadwood, 20 S. D. 495, 107 N. W. 832; Woodruff v. Richardson, 20 Conn. 238; Peterson v. Skjelver, 43 Neb. 663, 62 N. W. 43; 12 Enc. Pl. & Pr. 558.

Here the affidavits filed in the case make it clear that the appellant and his counsel had knowledge of certain of the acts constituting the claimed misconduct at the time they occurred, and it is not averred nor attempted to be proven that they did not learn of all of them prior to the time the cause was submitted to the jury. Since they failed to call the attention of the court to the matters of which they had knowledge prior to the return of the verdict, and since they do not aver that the others were unknown to them prior to the rendition of the verdict, we are constrained to hold that they could not successfully urge them in support of a motion for a new trial.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ. concur.

(97 Wash. 51)

RUGE v. RUGE. (No. 13681.)

(Supreme Court of Washington. June 19, 1917.)

1. DIVORCE 🔑245(1)—ALIMONY—DECREE FOR SEPARATE MAINTENANCE—POWER OF COURT TO MODIFY.

Where a decree in the main action grants a divorce from bed and board and provides for the payment of alimony, it may be modified to meet changed conditions because of a continuance of a status of marriage and because the common-law courts have inherent jurisdiction in such cases under the rules of the ecclesiastical courts which have become a part of the common law.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 692, 695.]

2. DIVORCE 🔑1—POWER TO GRANT.

While inherently the matter of granting a divorce involves judicial process, the power to grant a divorce a vinculo is purely legislative, and hence there is no inherent jurisdiction in the common-law courts to grant a divorce absolutely severing and canceling the marital bonds, but they have only such power to grant absolute divorces as the legislative department in the particular jurisdiction expressly confers upon them or for such as is necessarily implied from those expressly given them.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 1.]

3. DIVORCE 🔑217—ALIMONY—POWER OF COURT TO ALTER TEMPORARY ALIMONY.

Where alimony awarded is temporary or pendente lite, the court has the power to modify it as it has to make any other appropriate order in a case pending in court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 637, 638.]

4. DIVORCE 🔑309—POWER OF COURT TO MODIFY.

In a divorce case, where alimony is for the purpose of providing maintenance for minor children, the decree may be modified so long as there are minor children to be cared for, since the duty to support the child springs from the parental relation, and continues to exist after the marital status out of which it arose has terminated.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803.]

5. DIVORCE 🔑245(1)—ALIMONY—POWER OF COURT TO MODIFY—EXPRESS RESERVATION IN THE DECREE.

Where a divorce decree contains an express reservation of the power to modify an allowance of alimony, the court may thereafter exercise the unexhausted portion of its jurisdiction; as the judgments in such cases do not purport to be final.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 692, 695.]

6. DIVORCE 🔑245(1)—ALIMONY—POWER OF COURT TO MODIFY—STATUTORY AUTHORITY.

Where the right to modify an allowance of alimony in a divorce case is conferred by statute, it clearly exists regardless of whether the decree be one of absolute divorce or mere separation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 692, 695.]

7. DIVORCE 🔑245(1)—ALIMONY—ABSOLUTE DECREE—POWER OF COURT TO MODIFY.

Where a decree grants absolute divorce and permanent alimony, although payment in installments is allowed, and there are no minor children to be cared for, and the decree contains no reservation of jurisdiction, and there is no statute conferring the power to modify, and the judgment is not attacked upon the ground of fraud or mistake, there is no power in the court to modify or alter the award of alimony to meet changed conditions after the time for which appeal has expired and the time limited by statute within which judgments may be modified has elapsed, since an adjudication by the court having jurisdiction of the subject-matter and of the parties is final and conclusive not only as to matters atually determined, but as to every other matter which the parties ought to have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action; hence, where the question of alimony is actually litigated and finally determined, the judgment operates as res adjudicata upon the question.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 692, 695.]

8. DIVORCE 🔑247—ALIMONY—FAILURE OF HUSBAND TO PAY.

Where a divorce decree grants permanent alimony, the fact that the delinquent husband is cited for contempt and it is made to appear that he is unable to pay does not modify or suspend the decree, which remains unaltered and in full force, but the wife is simply deprived of one of the means provided by law for the collection of her alimony, and if the husband should subsequently become able to pay, he could be compelled to satisfy the decree according to its precise terms.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 689, 697-700, 733, 736.]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Suit for divorce by Elsie G. Ruge against Edward C. Ruge, in which there was a decree granting an absolute divorce and permanent alimony payable in monthly installments. On petition by the husband to obtain an order modifying the decree for alimony. From a judgment sustaining a demurrer to the petition and dismissing it, the petitioner appeals. Affirmed.

S. M. Bruce and Romaine & Abrams, all of Bellingham, for appellant. Craven & Greene, of Bellingham, for respondent.

WEBSTER, J. This is an appeal from an order and judgment sustaining a demurrer to and dismissing a petition the purpose of which was to obtain an order modifying a decree for alimony payable in periodical installments as fixed by a decree of divorce rendered in an action between the parties to this proceeding by the court to which the petition was addressed. The material facts are as follows:

On November 16, 1912, a decree was rendered by the superior court of Whatcom county dissolving the bonds of marriage theretofore existing between plaintiff and defendant and adjudging, among other things, that the defendant and petitioner pay to the plaintiff as alimony the sum of $125 per month so long as the plaintiff should live. The decree was based upon findings to the effect that the defendant had been guilty of cruelty toward the plaintiff; that he was a regularly licensed physician with a lucrative practice, and was actually earning from $300 to $1,000 per month; that plaintiff was physically frail and delicate and would never be well and strong; that she was not able to support or maintain herself by her own exertions; and that she was totally without means of support. On February 23, 1915, the defendant filed a petition entitled in the original cause, wherein he alleged in substance that since the entry of the decree in the divorce action the plaintiff had become well and vigorous; that his practice as a physician had materially fallen off; that business conditions had greatly changed; and that he was not financially able to pay the installments of alimony. He prayed that the amount of alimony be reduced; that the same be converted into a gross sum to the end that he might pay the same either at one time or at such periods and in such installments as the court saw fit to provide. It is conceded that there were no children as the result of the marriage between plaintiff and defendant, and there is no reservation or provision in the decree whereby the allowance of alimony is subject to the further orders of the court.

To this petition the plaintiff interposed a demurrer upon the grounds, among others, that it did not state sufficient facts to entitle defendant to the relief prayed, and that the court was without jurisdiction to entertain it. The demurrer was sustained, and, the defendant electing to stand upon his petition, the same was dismissed. Defendant appeals.

The question presented for our consideration is this: Has the superior court which rendered the decree in the divorce action jurisdiction to modify the same in respect to the periodical installments of permanent alimony provided for therein, the divorce being an absolute one, there being no minor children of the parties, there being no provision in the decree reserving to the court the power to subsequently make further orders relating to the alimony, but being absolute and final upon its face, there being no statute in this jurisdiction expressly or by necessary implication conferring upon the court the power to change or modify decrees in such cases to meet altered conditions, the defendant not having appealed from the decree nor moved or petitioned the court for its modification within the time limited by statute, and the decree not being attacked on the ground of fraud or mistake.

The question thus presented is one of first impression in this court, is exceedingly vexatious, and one upon which the authorities are in an unsatisfactory condition. Because of the great importance of the question not alone to the defendant in this case, but to the public as well, and in the hope of bringing something approximating order out of the chaotic mass of judicial expression upon the question, we have made a painstaking examination of the authorities. From our investigation we are induced to conclude that what at first blush appears to be a hopelessly entangled skein of discordant and conflicting cases upon closer analysis will be found not to be such, but that, by resorting to scientifically sound fundamental principles and by keeping in mind well-established lines of demarcation, the question is one upon which there is not great actual conflict. Upon careful analysis the cases seem naturally to arrange themselves into six well-defined and distinct classes, each class being based upon sound fundamental principles and the rule pertaining to it being the result of clear logic. These classifications are as follows:

[1, 2] I. Where the decree in the main action is one granting a divorce a mensa et thoro, which in modern parlance we refer to as a decree for separate maintenance. Cases falling within this class are controlled largely, if not entirely, by the thought that, inasmuch as the power of the court to award alimony in such cases is a power incident to the jurisdiction to regulate the rights of the parties growing out of and pertaining to the marital status, and this status being unaffected by the decree for legalized separation, but continuing to exist, the power to modify the decree in respect to alimony to meet changed or changing conditions likewise continues to endure. This rule seems to have had its origin in the ecclesiastical courts, where absolute divorces were never granted. These tribunals sometimes entered decrees of annulment for causes which rendered the marriage void ab initio, but such decrees were not in the proper sense of the term divorces; they amounted merely to an official declaration of a pre-existing fact, viz. that there had never been a valid marriage between the parties. Absolute divorces were infrequently granted in England by acts of Parliament, and hence it is that the granting of such divorces is historically a legislative function. While inherently the matter of granting a divorce involves the judicial process, historically and theoretically the power to grant a divorce a vinculo is purely legislative. Consequently there is no inherent jurisdiction in the common-law courts to grant a divorce absolutely severing and can-

celling the marital bonds; but they have only such power with respect to granting absolute divorces as the legislative department in the particular jurisdiction sees fit to expressly confer upon them, or such as are necessarily implied from those expressly given them. In an early English case, however, after careful consideration and debate, it was determined that the rules announced and acted upon by the ecclesiastical courts were part and parcel of the common law. In cases of divorce from bed and board, therefore, the courts of the common law exercising the powers formerly exercised by the ecclesiastical courts have authority to modify decrees relating to alimony. The continued existence of the status of marriage upon which the power to grant decrees of alimony depends carries with it the continuing power to modify or alter the allowance of alimony to meet new conditions.

[3] II. The second class includes the cases where the alimony awarded is temporary or pendente lite, as distinguished from permanent. In these cases the power to modify exists for reasons which are perfectly obvious. While the cause is still pending in the court of first instance the power to made any appropriate order in the premises clearly exists. The court has the same power to modify its order with respect to temporary alimony that it has to make any other appropriate order in a case pending in court.

[4] III. This class includes cases where there are minor children of the parties to the divorce action, and the courts of all the states are at one upon the proposition that, so far as the decree of alimony is for the benefit of the minor children of the spouses, the power to modify the decree continues so long as there are minor children under the protection of the court. While in cases dealing with this aspect of the question the courts have not always paused to state the fundamental principle upon which the right to modify is based, it is manifest in reading them that the dominant thought and controlling circumstance in the cases is the fact that there are minor children to be cared for as wards of the court. As it seems to us, the true basis upon which the power to modify the decree in these cases rests is that out of the marital relation springs a new relationship, viz. that of parent and child. Palpably neither executive edict, enactment of Legislature, nor decree of court can change the relationship existing between parent and child. The courts may decree that the marital tie shall be absolutely severed and the parties be placed, so far as the law is concerned, in the same situation that they occupied prior to the solemnization of the marriage ceremony; but they cannot alter or modify the fact that a father is the parent of his offspring. This parental relationship springing as it does from the relationship of marriage is to this extent incident to the marital status. But the duty of the father, if he has means with which to do so, to support his infant children, springs immediately from the parental relationship. As this relationship, incidental as it is to the marriage state, continues to exist after the status out of which it arose has been terminated, either naturally as by death or artificially as by divorce, the duty incident to that continuing relationship still exists. The right of the wife to alimony arises immediately out of the marriage contract, but the right of the child to support at the hands of its parents springs from the incidental relationship which had its origin in marriage, to wit, that of parent and child. The court therefore, acting upon this relationship as one of the things brought to it by the divorce action, has the power to modify or alter its decree so long as there are minor children under the protection of the court.

[5] IV. Comprising this class are the cases where the court by express provision in its decree reserves to itself either all or a portion of its power to provide alimony for the wife or maintenance for the children. In such cases the decree is not final and conclusive as a matter of law, because it does not purport to be final and conclusive as a matter of fact. The reservation in the decree plainly indicates an unfinished determination of the judicial mind: that is, the court has not completely disposed of the case. The power of the court not having been exhausted, it reserves to itself the right to exercise the unexhausted portion of its power in such manner as changed conditions and circumstances may indicate to be just. As a judgment in any kind of action thus inconclusive and incomplete is not final, so also it is not final in a decree relating to alimony. The cases are in harmony that, where the power to modify is thus expressly reserved in the decree, the tribunal reserving it has the power to exercise it to meet changed or changing conditions thereafter arising.

[6] V. In this division are included the cases where by statute in the particular jurisdiction power is expressly conferred upon the court to from time to time, on the petition of either of the parties, revise or alter its judgment or decree respecting the amount of alimony or maintenance. Comment on this class of cases is unnecessary. Suffice it to suggest that the legislative department of the state, being the repository of all the power concerning absolute divorce and its incidents, may, if it sees fit, delegate this power to courts in the absence of constitutional inhibition.

[7, 8] VI. In this class fall all of the cases not included in the foregoing classifications, viz. cases where the divorce is absolute, the alimony awarded is permanent, there are no minor children, there is no express reservation in the decree, and there is no statute in the particular jurisdiction expressly or by necessary implication conferring upon

the court the authority to modify or alter its decrees in respect to alimony for the support of the wife. It is in this class that the case now under consideration is included.

The question, May decrees in this class of cases be modified? seems to carry its own answer. The status to which the power to award alimony is incident having by judicial mandate ceased to exist, the court having exercised all of the power in the premises that it possessed, there being no continuing relationship of parent and child to which the power to modify may be referred, the alimony in question involving the right of the wife only, the judgment or decree by its terms purporting to be final and conclusive upon the question, and there being no statute conferring upon the court the power to modify, there is no other source of authority to which we may look. The answer is scientifically and logically irresistible that such power does not exist. We must disabuse our minds of the thought that there is any peculiar mystery attaching to decrees of divorce and alimony merely because they are such. But if they and their incidents are to be treated differently from ordinary judgments and decrees, it must be so because of some scientifically and logically sound basis upon which they can be considered as exceptions to the general rules. Unless this be true, our boast that the law is a science is a mockery and a sham, and judicial tribunals will be left to embark upon a thick and uncertain sea with neither chart nor compass. In such a situation the judicial expressions upon the question in the very nature of things will result in a mass of conflicting and discordant utterances referable to no principle of law either substantive or adjective. Fortunately, however, the courts of the country have not fallen into the error of considering a decree for alimony or maintenance as a thing apart, but, speaking generally, have developed a jurisprudence pertaining to the question in keeping with sound fundamental principles. It is elementary that an adjudication by a court having jurisdiction of the subject-matter and of the parties is final and conclusive not only as to the matters actually determined, but as to every other matter which the parties ought to have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. Consequently, when the question of alimony is in fact actually litigated and finally determined in the divorce action, as it is in this class of cases, a judgment or decree in the action operates as res adjudicata upon the question of alimony. We therefore confidently assert that it is sustained both in principle and by the great weight of authority that, where permanent alimony is awarded as incidental to the granting of an absolute divorce, and there are no minor children of the parties, and the court does not reserve to itself the right to thereafter exercise an unexhausted portion of its power, but actually exhausts its jurisdiction at one time, and there is no statute conferring upon the court the power to modify or alter its decrees in respect to the allowance of alimony to meet new conditions thereafter transpiring, and the time for appeal or review has expired, and the period limited by law within which judgments may be modified on motion or petition has elapsed, and the judgment is not attacked on the ground of fraud or mistake, the court has absolutely no jurisdiction to change its decree, but possesses only the right to enforce obedience to it. Sammis v. Medbury, 14 R. I. 214; Sampson v. Sampson, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349; Smith v. Smith, 45 Ala. 264; Petersine v. Thomas, 28 Ohio St. 596; Kamp v. Kamp, 59 N. Y. 212; Kerr v. Kerr, 59 How. Prac. (N. Y.) 255; Erkenbrach v. Erkenbrach, 96 N. Y. 456; Coffee v. Coffee, 101 Ga. 787, 28 S. E. 977; Spain v. Spain (Iowa) 158 N. W. 529; Hardin v. Hardin, 38 Tex. 617; Shepherd v. Shepherd, 1 Hun (N. Y.) 240; Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600; Fries v. Fries, 1 McArthur (8 D. C.) 291; Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70; Mitchell v. Mitchell, 20 Kan. 665; Stratton v. Stratton, 73 Me. 481; Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. Rep. 477; Martin v. Martin, 6 Blackf. (Ind.) 321; Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; Bacon v. Bacon, 43 Wis. 197; White v. White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. Rep. 150; Silliman v. Silliman, 66 Or. 402, 133 Pac. 769; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652, note; Johnson v. Johnson, 12 Daly (N. Y.) 232; Methvin v. Methvin, 60 Am. Dec. 664, note; 2 Am. & Eng. Enc. Law (2d Ed.) p. 135; 1 R. C. L. p. 946; 9 R. C. L. p. 439; Brown on Divorce, p. 278; Nelson on Marriage and Divorce, vol. 2, § 933a; Stuart on Marriage and Divorce, § 366.

Mr. Bishop, in his valuable treatise on Marriage, Divorce, and Separation (Volume 2, § 872), states:

> "Because the procedure of a court always bends with the right to which it gives effect, it early became and it remains the doctrine in the country whence our laws are derived, and it is accepted and practised upon by a considerable proportion of our American tribunals, that the court may at any time and from time to time, on any change in the circumstances of the parties, increase or reduce the sum allotted for alimony temporary or permanent."

In support of this rather broad general statement the following cases which we are about to notice are cited:

Otway v. Otway, 2 Phillim. 109. In this case, decided by the ecclesiastical court, the divorce was one from bed and board, and the question of permanent alimony was expressly reserved in the decree.

The case of Cook v. Cook, reported in the same volume at page 40, upon which the Otway Case was based, is likewise a case of divorce a mensa et thoro.

Rogers v. Vines, 28 N. C. (6 Ired. Law) 293. In this case the divorce was one from bed and board.

Richmond v. Richmond, 2 N. J. Eq. (1 Green Ch.) 90. This case was based squarely upon a statute conferring upon the court the power at any time on a change of circumstances to vary the allowance of alimony by increasing or diminishing it, and the decree involved the rights of minor children.

Bursler v. Bursler, 5 Pick. (Mass.) 427. The divorce in this case was from bed and board.

Holmes v. Holmes, 4 Barb. (N. Y.) 295. This case was one where the divorce was a mensa et thoro.

Barber v. Barber, 1 Chand. (Wis.) 280. The decree in this case granted a divorce from bed and board.

Sheafe v. Sheafe, 36 N. H. 155. The opinion in this case was based upon a statute of New Hampshire expressly empowering the court to modify its decrees in such cases.

Saunders v. Saunders, 1 Swab. & Tr. 72. The divorce in this case was from bed and board.

Foote v. Foote, 22 Ill. 425. The decree involved the rights of minor children, and was rendered in a state having a statute expressly conferring upon the courts the power to modify decrees in divorce cases.

Sparhawk v. Sparhawk, 120 Mass. 390. The judgment was based upon a statute conferring the power to modify.

Coad v. Coad, 41 Wis. 23. This case is based upon a statute of Wisconsin expressly conferring the power to modify decrees in such cases.

Williams v. Williams, 29 Wis. 517. The power exercised was expressly reserved in the decree, and the case was based upon a statute.

Waters v. Waters, 49 Mo. 385. The allowance was for temporary alimony made, of course, during the pendency of the action.

Ellis v. Ellis, 13 Neb. 91, 13 N. W. 29. This case was based upon an express statute of Nebraska empowering the court to modify its decrees in reference to alimony from time to time.

Olney v. Watts, 43 Ohio St. 499, 3 N. E. 354. This case, stripped from the authorities upon which it is based, would seem to sustain the general statement in the text that all decrees for alimony might be modified or changed to meet new conditions. It is, however, based in part upon Mr. Bishop's former work on the Law of Marriage and Divorce, § 429, where the same authorities are referred to as those above noted and reviewed. It also cites the rule announced by Dr. Lushington in the ecclesiastical court, where, as we have already observed, the decrees were always from bed and board merely.

In addition to the authorities contained in the footnote to Bishop on Marriage, Divorce, and Separation, the cases of Fisher v. Fisher, 32 Iowa, 20, McGee v. McGee, 10 Ga. 486, Wheeler v. Wheeler, 18 Ill. 39, and Lockridge v. Lockridge, 2 B. Mon. (Ky.) 258, are cited. In the Fisher Case the opinion is based upon a statute of Iowa providing that, after a divorce is granted, subsequent changes may be made by the court in reference to maintenance of the wife when circumstances render them expedient. The McGee Case was one dealing with the question of temporary alimony. In the Wheeler Case the question was considered on appeal from the original decree, so that palpably no question of subsequent modification was involved, and the rather loose, general language contained in the opinion with reference to the right to modify such decrees was pure dictum. In the Lockridge Case the decree granted a divorce from bed and board only, as will be seen from the statement of the case on a former hearing in the Kentucky Court of Appeals. 3 Dana, 28, 28 Am. Dec. 52. It is therefore evident that the authority upon which the Olney Case is based does not warrant the conclusion reached in it. The soundness of this case has also been questioned by the learned tribunal which rendered it. In Law v. Law, 64 Ohio St. 369, 60 N. E. 560, it is said:

> "The view presented by counsel for the plaintiff in error is that the terms of the original decree, not being affected by fraud or mistake, were conclusive upon the subject of alimony, and not subject to modification for any reason. Since no question was reserved by the decree for future consideration, that view receives strong support from Petersine v. Thomas, 28 Ohio St. 596, and from the general course of decisions upon the subject. Authority for the subsequent modification of the decree is, however, said to be found in the later case of Olney v. Watts, 43 Ohio St. 499 [3 N. E. 354]. * * * If it be assumed that the case was correctly decided, it affords no warrant for the present judgment. * * *"

Thus it will be seen that not one of the cases save the Olney Case is in point in this case. They are all distinguishable in that they are either divorces from bed and board, cases relating to alimony pendente lite, where the rights of children are involved, where the power is expressly reserved in the decree or is based upon a statute expressly conferring it. Not one of them, except the Olney Case, is a case where the decree was absolute, the alimony permanent, the rights of children were not involved, there was no reservation in the decree, and no statute authorizing the change. And we have endeavored to show that the Olney Case is not sound in that the authorities upon which it is based do not sustain it.

14 Cyc. at page 784, in discussing the question here under consideration, uses this language:

> "A decree for permanent alimony is subject to modification because of fraud or mistake in the same manner and under the same circum-

> stances as other decrees. The general rule would seem to be that, where the divorce is absolute, a decree for permanent alimony containing no reservation of the power of modification cannot be altered after the expiration of the time within which an appeal may be perfected, although it has been held that the court may modify a decree for alimony at any time upon proper allegations of the changed conditions and circumstances of the parties."

In support of the latter statement it cites a number of the same cases referred to by Mr. Bishop and the cases cited in Olney v. Watts, supra, which we have already reviewed. In addition the following cases are cited upon which we shall comment in passing:

Stevens v. Stevens, 31 Colo. 188, 72 Pac. 1061. The entire opinion in that case is as follows:

> "By virtue of the general equity powers of a court granting a divorce, as well as by virtue of the provision of section 9 of the Divorce Act (Session Laws 1893, p. 240, c. 80), such court has the authority to modify the decree relative to alimony payable in the future, and the custody and control of minor children, as the changed circumstances of the parties may render necessary and just. Richmond v. Richmond, 2 N. J. Eq. 90; Sheafe v. Sheafe, 36 N. H. 155; Coad v. Coad, 41 Wis. 23; Foote v. Foote, 22 Ill. 425. There are no decisions of this court or the Court of Appeals to the contrary. The judgment of the county court is reversed, and the cause remanded, with directions to overrule the demurrer to the petition. Reversed."

It will be seen that the cases cited have all been distinguished in discussing the cases cited by Mr. Bishop. Justice Steele wrote a dissenting opinion, which was concurred in by the Chief Justice, wherein he pointed out that the Colorado statute did not confer the power to modify, and in the course of the opinion said:

> "The authorities cited in the opinion are not in point. In New Jersey, New Hampshire, Wisconsin, and Illinois the statutes provide that after final decree the court shall have power to change or modify it in accordance with the changed circumstances of the parties."

Andrews v. Andrews, 15 Iowa, 423, and Jungk v. Jungk, 5 Iowa, 541. Both of these cases are based upon the same statute referred to in Fisher v. Fisher, supra.

Bristow v. Bristow (Ky.) 51 S. W. 819. In this case the alimony allowed was for the benefit of the wife and a minor child, and, as we have already noted, the jurisdiction in such cases as it relates to children is continuing. The general language found in the opinion will be understood by reading section 2123, Kentucky Statutes.

Barbaras v. Barbaras, 88 Minn. 105, 92 N. W. 522. This case is based upon a statute conferring upon the court the power to modify, being section 4809, General Statutes of 1894.

King v. King, 38 Ohio St. 370. In this case the alimony was pendente lite, and the question involved was the power to increase it.

Whitton v. Whitton, 71 L. J. P. & Adm. 10. This was an action for the purpose of varying a marriage settlement, and was based upon the matrimonial causes act. None of these cases in our opinion in any way militate against the rule as we have heretofore stated it applicable to the class of cases we are now considering.

In our examination of the authorities we have found three cases which we deem worthy of special notice. These are Alexander v. Alexander, 13 App. D. C. 334, 45 L. R. A. 806, Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033, and Francis v. Francis, 192 Mo. App. 710, 179 S. W. 975. In the Alexander Case the court seems to have adopted the rule that, where the alimony awarded to the wife is payable in installments, the court has the power to subsequently change it, even though it was allowed in a case where the divorce was absolute and there was no reservation in the decree giving to the party who sought the modification the right to petition the court therefor. In reading the opinion, however, it is plain that the conclusion was induced somewhat by the acts of Congress relating to the District of Columbia. That this is so is indicated by the opinion in Emerson v. Emerson, supra. In that case Justice Constable, commenting upon the Alexander Case, said:

> "It declared the jurisdictional right of modification existed in virtue of the acts of Congress, which acts are virtually in the language and meaning of our acts."

No authorities are cited in support of the conclusion reached in the Alexander Case in the absence of statute, but it is sought to distinguish that case from the cases from Maine, Rhode Island, New York, Ohio, Alabama, and Kansas, and one from its own court, upon the thought that the alimony allowed in most of those cases was in gross and was not alimony in the proper sense of the term; that is to say, the alimony was not payable in periodical installments, but was an arrangement of property interests between the parties. It is admitted in the opinion, however, that in two of the cases sought to be distinguished the alimony allowed was payable in monthly installments of indefinite continuance. In the course of the opinion the court says:

> "It is conceded on the part of the appellant that, upon good cause shown of inability on the part of the husband to pay the alimony, the court might order a suspension of payment, and would not, or rather should not, punish him as for contempt of court. But it seems to us that this concession virtually concedes the whole case. If the decree for the allowance of the alimony is of the rigid, inflexible, and unchangeable character claimed for it in the bill of review now before us, it is not apparent how it can be suspended any more that it can be modified by a reduction of the amount."

We are unable to subscribe to this reasoning. It seems to us to confuse the means of enforcing the decree with the power to modify it. In the event the delinquent husband is cited for contempt and it is made to appear that he is unable to pay, the wife is simply deprived of one of the means provided by law for the collection of her alimony. The decree, however, is in no sense modified or suspended, but remains unaltered and in full force, and, if the husband should subsequently acquire property or become able to pay, he could be compelled to satisfy the decree according to its precise terms. If an execution is issued upon a judgment in an ordinary action and is returned by the sheriff "No property found," would it be contended that the judgment had been altered? In the latter as in the former case the holder of the judgment is merely deprived of one of the means by which it may be enforced. It will not do to say that the inability to enforce a judgment or decree either suspends it or works a modification of its provisions.

It is next argued that it is conceded that, if there is a reservation in the decree in favor of the one seeking to have the allowance of alimony changed, he or she may apply to the court at any time for a modification, and the court would have authority to make it. Then follows this statement:

> "And yet it is not quite apparent how the court could have well reserved to itself the authority to modify a decree if that authority was not already vested in it by law."

In our opinion, this argument overlooks the principle upon which the rule rests, that where the decree contains a reservation, the power to modify exists. By such a reservation the court does not undertake to confer jurisdiction upon itself. It merely reserves the right to exercise the unexhausted portion of jurisdiction which it already has. As we have heretofore pointed out, the reason such decrees are not conclusive as a matter of law is because they do not purport to be conclusive as a matter of fact. We freely confess that many reasons of practical convenience may be urged in favor of the conclusion reached in the Alexander Case, and these, no doubt, have had their influence in causing the Legislatures in most of the states to enact statutes expressly conferring upon the courts the power to alter or modify decrees relating to alimony, but the very existence of such statutes is at least some argument that the courts did not possess the power to modify in all cases prior to the enactment of the statutes. What was the necessity for such statutes if the courts prior to their enactment possessed the power to modify their decrees in all cases relating to alimony?

In the Emerson Case the statute of Maryland provided:

> "The courts of equity of this state shall and may hear and determine all causes for alimony in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there."

The statute also conferred upon the courts of equity power to grant alimony in all cases where divorces were granted, and there was no definition of alimony in the statute. It was therefore concluded that, as the power of the court was like that of the ecclesiastical courts of England, and that such courts had power to modify their decrees relating to alimony, the courts of Maryland likewise possessed that power by virtue of the statute regardless of the nature of the decree to which the award of alimony was incident, and cited with approval the Alexander Case with the comment, among others, heretofore quoted.

In the Francis Case the Supreme Court of Missouri recently discussed the question now before us at some length, notwithstanding the decree in that case contained the provision "until the further orders of this court," and further that by section 2375 of the Revised Statutes 1909 of Missouri it is provided that, on application of either party, the court may make such alterations in its decrees relating to alimony or maintenance as may be proper at any time. In the course of the opinion it is said that the case of Alexander v. Alexander, supra, was cited approvingly by the Supreme Court of the United States in Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009. An examination of the Audubon Case will disclose that the appeal in that case was from the District of Columbia, and the question presented was whether a judgment rendered in the state of Maryland requiring Shufeldt to pay alimony to his divorced wife at the rate of $50 per month was such a debt as might be discharged in bankruptcy. In commenting upon the law of Maryland and the District of Columbia, it notices, among other cases, the Alexander Case. In determining the character of the judgment the Supreme Court would look to the laws of the jurisdiction in which it was rendered, and the Maryland court has since approved the holding in the Alexander Case as being based upon statutes similar to its own. Mr. Justice Gray, in the course of his opinion in the Audubon Case said that, "generally speaking," alimony may be altered at any time as the circumstances of the parties may require. To this statement of the rule we subscribe, but cases of the character we are now considering are very exceptional.

We cannot without inordinately extending this already too long opinion undertake to discuss at length the cases from our own jurisdiction. We have endeavored to examine all of them, and our investigation discloses that, whenever a decree has been modified, it has been in a case where the right to modify was expressly reserved in the decree or the rights of children were involved, and in the latter class of cases this court has said in varying forms of words that, where alimony is awarded for the support of children, the decree is a continuing one and the jurisdiction of both the parties and the subject-matter continues so long as there is a minor child whose welfare and maintenance are provided for in the decree. If the power to modify decrees relating to childrer terminates when there is no longer a minor child whose welfare and maintenance are provided for in the decree, does it not necessarily follow that, if there had been no minor child, the power to modify would not have existed in the first instance? As the result of our study of the authorities, we are induced to conclude that, where the divorce is from bed and board, and the decree provides for the payment of alimony, it may be modified to meet changed conditions, because of the continuance of the status of marriage, and further because the common-law courts have inherent jurisdiction in such cases, the rules of the ecclesiastical courts being a part of the common law; that where the alimony is temporary, it may, of course, be changed during the pendency of the action; where the alimony is for the purpose of providing maintenance for minor children, the decree may be modified so long as there are minor children to be cared for, the duty to support the child springing from the parental relation which continues to subsist after the marital status in which it had its origin has terminated; that, where the decree contains an express reservation of the power to modify, the court may thereafter exercise the unexhausted portion of its jurisdiction, the judgments in such cases not purporting to be final; where the right to modify is conferred by statute, it clearly exists regardless of whether the decree be one of absolute divorce or mere separation; but that, both upon principle and authority, where the decree grants an absolute divorce and permanent alimony, though payable in installments, is allowed, and there are no minor children to be cared for, and the decree contains no reservation of jurisdiction, and there is no statute conferring the power to modify, after the time for appeal has expired and the time limited by statute within which judgments may be modified has elapsed, and the judgment is not attacked upon the ground of fraud or mistake, there is no power in the court to modify or alter it to meet changed conditions.

The judgment is affirmed.

ELLIS, C. J., and MORRIS and MAIN, JJ., concur.

CHADWICK, J. (dissenting). That the sea of matrimony is "thick and uncertain" with neither chart nor compass to guide the mariner who embarks upon it is well understood. Judge WEBSTER has most ably read the chart which marks the tortuous channels that lie in front of those who divide the life belt and thenceforward drift alone. His opinion is sustained by authority, and, as it demonstrates the state of the law, it seems to me that it as clearly demonstrates a necessity for curative legislation. After a marriage has been dissolved by divorce and alimony awarded the divorcée—it is not regarded as chivalrous to award alimony to a divorcé—there is no reason, except in law, why the parties should not be subject to the call of changed conditions.

The grass widow may marry again, or may prosper upon her own account. In either event the rejected spouse should be freed of the burden of support. Or the grass widower may become poor, or again marry, and happily, in which case society should concern itself to see that a tie that is broken between persons intolerable to each other does not become a club of revenge and hate in the hands of the one, or a millstone about the neck of the other.

As I have said, every reason, the dictates of common sense, the interest of society, and the logic of our statutes defining the status of married persons, save the law, call for a different rule.

It might well behoove the Legislature of this state to put us in line with other states where the evil to which we are bound by authority has been cured by appropriate legislation.

(97 Wash. 70)

CRAWFORD v. SEATTLE, R. & S. RY. CO. et al. (No. 13691.)

(Supreme Court of Washington. June 20, 1917.)

1. STREET RAILROADS ⟾69—USE OF STREETS —RIGHT TO PERCENTAGE OF INTERURBAN RAILWAY INCOME.

Where a city deprived an interurban railway company and its receivers of the use of a certain street as provided in its franchise, for a certain period, this was a partial eviction suspending the city's right to collect the percentage, stipulated in the franchise, of the gross income from operation of the railway during such period.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 157–165.]

2. TENDER ⟾17—NECESSITY OF ACCEPTANCE.

A tender not accepted is not a waiver of defense to claim for the amount tendered.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 54.]

3. STREET RAILROADS ⟾69—LICENSE TAX—ADMISSION BY PAYMENT OF AMOUNT SUBSEQUENTLY ACCRUING.

Where a city unlawfully deprived an interurban railway and its receivers of the use of a certain street for a certain period, the payment of the percentage of the railway's income, stipulated in its franchise, accruing after the railway had been restored to the use of the street, was not an admission of the city's right to such percentage during the period of deprivation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 157–165.]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by William R. Crawford against

the Seattle, Renton & Southern Railway Company and others for the appointment of a receiver, in which the City of Seattle filed petition for allowance of its claim. From judgment denying the City recovery, it appeals. Affirmed.

See, also, 92 Wash. 670, 159 Pac. 782.

Hugh M. Caldwell, Walter F. Meier, and George A. Meagher, all of Seattle, for appellant. Higgins & Hughes, of Seattle (Hyman Zettler, of Seattle, of counsel), for respondent.

PARKER, J. The city of Seattle filed in the above-entitled action its petition for allowance of its claim against the receivers of the Seattle, Renton & Southern Railway Company appointed therein. The city's claim is for $13,078, being 2 per cent. of the gross receipts of the operation of the lines of the railway company, and is rested upon the provisions of the franchise granted to it by the city. Trial upon the merits in the superior court resulted in findings and judgment denying recovery by the city, from which it has appealed to this court.

During the period here in question, the lines of the railway company were operated by it and its receivers under a franchise granted by the city of Seattle, which contained, among other provisions, the following:

> "The grantee, its successors and assigns, shall pay annually to the city of Seattle two per cent. per annum of the gross receipts derived from the operation of said railways from and after the date of the acceptance of this franchise until its expiration. * * * Said payments shall be made on the 15th day of January of each and every year for the year preceding. * * *"

Assuming that the railway lines were operated under and in full enjoyment of this franchise without interference by the city authorities, during the period from January 1, 1912, to March 4, 1915, there became due from the company and its receivers to the city the sum of $13,078, no part of which has been paid. At the time of granting the franchise, because of the prospective regrading of Dearborn street, over which one of the lines contemplated by the franchise was to be constructed and operated, the railway company was temporarily permitted by the city to maintain a line upon King street; the line upon Dearborn street to be constructed as soon as that street would be regraded. On December 23, 1910, the city passed an ordinance purporting to repeal and forfeit the franchise under which the railway lines were being operated. This repealing ordinance was decreed void and of no effect by the federal court sitting in Seattle on March 4, 1915, in an action then pending therein wherein the railway company was plaintiff and the city was defendant. Prior thereto the court rendered an opinion in accordance with which the decree was entered, which opinion is reported in Seattle, R. & S. R. Co. v. Seattle (D. C.) 216 Fed. at page 694. At all times in question there was in force in the city a general ordinance making it unlawful for any person or corporation holding a franchise to use or occupy any public street in the city to perform work upon the streets thereunder without first applying for and procuring a permit therefor from the board of public works. During the period from January 1, 1912, to March 4, 1915, the railway company and its receivers were prevented by the city authorities from constructing any tracks looking to the operation of a line of railway upon Dearborn street, though they had duly made application for permits to proceed with the construction of that line as contemplated by the franchise ordinance, and during all of that period Dearborn street had been regraded and was physically ready for the construction of the railway line thereon. The refusal of the city authorities to allow the railway company or its receivers to so proceed was because of the contention of the city that the railway company's franchise had been forfeited, and that it had no right to occupy any of the streets of the city with its railway lines. During this period, the railway company was compelled to continue to maintain its temporary line upon King street, which, by reason of conditions attending the operation of the line there, resulted in the railway company being under the necessity of expending more than $1,500 per month in excess of what it would have cost to maintain its lines upon Dearborn street, so that the railway company during the period of approximately 38 months incurred an expense of over $56,000 more than it would have incurred in the operation of a line upon Dearborn street had it been permitted to do so as its franchise contemplated. In January, 1913, and January, 1914, the receivers of the railway company tendered to the city sums equal to 2 per cent. of the gross receipts derived from the operation of the railway lines for the years 1912 and 1913, respectively. These tenders were refused by the city, they being made at a time when the city was contending that the franchise of the railway company had been forfeited.

It is contended in the city's behalf that neither the railway company nor its receivers should be permitted to avail themselves of the defense of the refusal of the city to permit the construction of the railway line on Dearborn street, because there was not sufficient showing that the railway company or its receivers were ready, willing, and able to construct that line. This contention, we think, is wholly without merit. As well said by counsel for the receivers, the city "is seeking to recover on a contract when it admits that it was not only unwilling to perform its part of the contract but positively refused to do so." Even if it were necessary for the receivers to affirmatively show willingness and ability on the part of the railway company and on their part to build the line on Dearborn street, the record, we think, makes sufficient prima facie showing in that regard. It is possible that in the latter part of the period in question, when the receivership was about to be wound up, it might then not have been practical for the receivers to proceed with the construction of the line on Dearborn street. But, even if this be true, we think the city is not in a position to now take advantage of that fact. Indeed, the amount of loss resulting to the railway company and the receivers because of being compelled to operate the line on King street instead of Dearborn street argues that the city was in no small degree responsible for whatever lack of ability there may have been on the part of the receivers to construct the line upon Dearborn street, during the latter part of the period in question.

[1] It is contended by counsel for the city that the continued operation of the King street and other lines of the railway system was such an enjoyment of the franchise that the railway company and its receivers should not be permitted to resist payment of the city's claim upon the ground of being prevented from enjoying the use of Dearborn street. We think this contention is answered in substance by the decision of the Supreme Court of Missouri in National Subway Co. v. City of St. Louis, 169 Mo. 319, 69 S. W. 290. The city had granted franchise rights to the subway company to construct and operate electric conduits in the streets; the company being obligated, as one of the conditions of the franchise, to pay the city certain sums semiannually. The city authorities, becoming of the opinion that the franchise ordinance was void, sought to revoke it and denied the company the right to occupy the streets thereunder. The validity of the franchise having been established in the courts, the city sought to collect the semiannual installments from the company during the whole life of the franchise, including the period when the company had been deprived of its rights thereunder. Denying the claimed right of the city to collect the semiannual installments for the period when the company's full enjoyment of its franchise was prevented by the city, Justice Marshall, speaking for the court, observed:

> "The city had the power to make the grant, and to prescribe the terms of the grant. The result attained was the right to so use the streets by the plaintiff, and the right of the city to exact the semiannual payments for the exercise of the right granted. The rights and duties of the parties were therefore mutual and interdependent. The city had no right to the money except as compensation for the enjoyment and exercise of the right granted, and the plaintiff was bound to pay only in case it was allowed to exercise and enjoy the right granted. The plaintiff could not, of course, avoid payment by a voluntary nonuser of the right, nor could the city deny the right, and still insist upon compensation for the exercise of the right denied. Such a position would be inconsistent and unconscionable."

After making some further observations likening the position of the company to that of a tenant of the city, Justice Marshall concluded the opinion as follows:

> "The city is the landlord, and the plaintiff is the tenant. The tenant's quiet enjoyment was interrupted and its possession taken away by the landlord, and therefore its obligation to pay the rent ceased while and as long as such eviction lasted, but sprung into existence again as soon as the enjoyment was restored. Hence the city had no right to demand or exact the semiannual payments during the time the city prevented the plaintiff from enjoying the rights conferred by the ordinances."

That case is exactly like this, except that there was apparently an entire prevention of enjoyment of the franchise in that case, while in this case the prevention of enjoyment of the franchise was only partial. That an eviction of some substantial part of leased premises suspends the right of the landlord to collect rent, even though the tenant remains in possession of other portions of the premises, is well settled by the authorities. In Smith v. McEnany, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272, the subject was reviewed by Justice Holmes, now of the Supreme Court of the United States, where he said:

> "It is settled in this state, in accordance with the law of England, that a wrongful eviction of the tenant by the landlord from a part of the premises suspends the rent under the lease. The main reason which is given for the decisions is that the enjoyment of the whole consideration is the foundation of the debt and the condition of the covenant, and that the obligation to pay cannot be apportioned."

In New York Drygoods Store v. Pabst Brewing Co., 112 Fed. 381, 50 C. C. A. 295, Judge Baker, speaking for the Seventh federal Circuit Court of Appeals touching the question of partial eviction as affecting the landlord's right to collect rent, said:

> "It is universally agreed by the authorities that the wrongful eviction or ouster of the tenant by the landlord from an appreciable, material, or substantial part of the demised premises, suspends the rent reserved under the lease, and will defeat the landlord's right to recover the same. The main reason which is given for the decisions is that the enjoyment of the whole consideration is the foundation of the debt and the condition of the covenant, and that the obligation to pay cannot be apportioned. To permit an apportionment of the rent would be to allow the landlord to take advantage of his own wrong."

It seems quite plain to us that the depriving of the railway company and its receivers of the use of Dearborn street, as provided in the franchise, amounted to a partial eviction and suspended the right of the city to collect the 2 per cent. of the gross income from the operation of the railway during the period in question.

[2, 3] It is further contended in behalf of the city that the tender of payments made by the receivers of 2 per cent. of the gross income which accrued for the years 1912 and 1913 was in effect a waiver of the defense which the receivers here make against the city's claim. We think it is a sufficient an-

swer that those tenders were not accepted. They were made at a time when the city was insisting in the federal court that the franchise had been forfeited, and manifestly were made by the receivers in an effort to induce the city to comply with the franchise contract and permit the receivers to proceed thereunder as well as to prevent the possibility of forfeiture of the franchise, then in litigation in the federal court. We are quite unable to understand how the city can now have these tenders construed as an admission on the part of the receivers that the city was legally entitled thereto. If there has been any payment and acceptance of the 2 per cent. of the income accruing after March 4, 1915, it seems plain that, whatever effect such payments might have as an admission that the city was entitled thereto, they could in no event have the effect of an admission that the city was entitled to any payments accruing prior thereto during the period that the railway company and the receivers were deprived of the use of Dearborn street; in other words, during the period when they were in effect partially evicted. Morris v. Kettle, 57 N. J. Law, 218, 30 Atl. 879; Kuschinsky v. Flanigan, 170 Mich. 245, 136 N. W. 362, 41 L. R. A. (N. S.) 430, Ann. Cas. 1914A, 1228.

We are clearly of the opinion that the city is not entitled to recover.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

(97 Wash. 137)

STATE v. GREAT NORTHERN RY. CO.

(No. 13895.)

(Supreme Court of Washington. June 22, 1917.)

Commerce 🔑14—Interstate Commerce—Intoxicating Liquors — Permits to Ship — Statutes—Construction.

Since the Webb-Kenyon Law (Act Cong. March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1916, § 8739]) divests interstate shipments of liquor of their character as interstate commerce, Laws 1915, c. 2, § 18, requiring a permit to be affixed to containers of liquor at the time of shipment, applies to a shipment originating in Kentucky consigned to Washington, and on failure to secure a permit the liquors are liable to seizure.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92.]

Department 1. Appeal from Superior Court, Whatcom County; Wm. H. Pemberton, Judge.

Suit by the State against the Great Northern Railway Company. Judgment for the State, and the Railway appeals. Affirmed.

F. V. Brown, F. G. Dorety, and R. J. Hagman, all of Seattle, for appellant. W. V. Tanner, Atty. Gen., Lindsay L. Thompson, Asst. Atty. Gen., and W. P. Brown, of Bellingham, for the State.

MAIN, J. The purpose of this action was to cause the seizure and destruction of intoxicating liquor which, it was claimed, had been transported into this state in violation of law. The trial resulted in a judgment directing the destruction of the liquor. From this judgment, one of the defendants, the Great Northern Railway Company, appeals.

The facts are these: The subject of the controversy is 15 casks of whisky, of the value of $500 or $600. On February 9, 1916, these casks were shipped by the Bernheim Distilling Company, at Louisville, Ky., to Collins & Co., regularly licensed pharmacists and druggists, in the city of Bellingham. The casks of whisky arrived in Bellingham in due course of transportation, and were held by the railway company, at its warehouse at that point, awaiting delivery to the consignee, Collins & Co., at the time the warrant was issued, and the property seized by the sheriff. No permit, as required by section 18 of the prohibition law (Laws of 1915, c. 2), was affixed to the casks at the time of shipment, or at any time prior to the seizure. It is claimed by the appellant that, since the breach of the prohibition law related to the manner of shipment, and there was no violation of a law which prohibited the shipment of intoxicating liquor into the state, the railroad company had the right to carry the whisky as an article of interstate commerce, even though in doing so it violated a provision of the prohibition law as to the manner or conditions upon which the transportation would be permitted. The act Congress passed during the year 1913, and known as the Webb-Kenyon Law, 1914 Fed. Stat. Ann. 208, prohibits the shipment or transportation of intoxicating liquor from one state into another, when such shipment would violate any law of the state into which the shipment is made.

The question, then, is whether that law was intended to prohibit the shipment when there was only a violation of the state law as to the manner of shipment, and there was no general prohibition in the state statute against the shipment of liquor into the state. In Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, the plaintiff sought to compel the railroad company to transport a shipment of liquor from the state of Maryland to a point of delivery in the state of West Virginia, there being in force in the latter state, at the time, a prohibition law. In the course of the opinion in that case, and speaking with reference to the scope of the Webb-Kenyon Act, it was said:

> "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act [Act Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1916, § 8738)] and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the

immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt, and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears, since, if that be not true, the coming into being of the act is wholly inexplicable.

“The case in this court relied upon to establish the contrary (Adams Exp. Co. v. Kentucky, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167) clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is Van Winkle v. State, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition, because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants ‘only when liquor is intended to be used in violation of the law of the state,’ and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

“The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

“4. Did Congress have power to enact the Webb-Kenyon Law?”

Then follows a discussion and holding which sustains the power of Congress to enact the Webb-Kenyon Law. From the excerpt quoted from that opinion, it appears that the movement of liquor in interstate commerce, which is prohibited by the state law, is divested by the Webb-Kenyon Act of its character as interstate commerce. The purpose of the act was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce “in states contrary to their laws.”

Under the doctrine announced in that case, we think that intoxicating liquor is divested of its character of interstate commerce by the Webb-Kenyon Act, where its shipment into the state violates the state statute as to the manner or conditions upon which such shipments may be made. The shipment here in controversy violated the section of the prohibition law which makes it unlawful for a railroad company, or other transportation company, to transport or convey intoxicating liquor into the state, without having a permit issued by the county auditor “affixed in a conspicuous place to the parcel or package containing the liquor.”

The briefs in the case now before us were written and filed prior to the decision in Clark Distilling Co. v. Western Maryland R. Co., supra, and we think the other questions presented are answered adversely to the appellant's contention in that case.

The judgment will be affirmed.

ELLIS, C. J., and CHADWICK, MORRIS, and WEBSTER, JJ., concur.

(96 Wash. 637)

MURPHY v. PANTON et al. (No. 13593.)

(Supreme Court of Washington. June 15, 1917.)

1. CORPORATIONS 🔑563(2) — STOCKHOLDERS' LIABILITY—RIGHTS OF RECEIVER—TRANSFER OF STOCK.

The receiver of an insolvent corporation can have no greater right than the corporation against the stockholders unless it is affirmatively shown that the rights of creditors existing at the time were prejudiced by a record in the minute book of the corporation of a transfer of their stock which had been fully paid for to the corporation and an agreement to subscribe for the same amount of stock which they had surrendered, all of which was done pursuant to the desire to release their right to vote a part of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2280½.]

2. EVIDENCE 🔑450(5)—ISSUE OF STOCK—PRESUMPTION.

Stock once issued carries a presumption that it is paid for, and to surrender stock seven years after its issuance and immediately subscribe and promise to pay for it is a transaction sufficiently clouded by ambiguity to warrant a resort to parol evidence to explain the transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2071.]

3. CORPORATIONS 🔑248 — RIGHT OF CREDITORS—ESTOPPEL.

Where stockholders in a corporation transferred their stock which had been fully paid for to the corporation and immediately subscribed for the same amount of stock as had been surrendered, a receiver of the corporation on its subsequent insolvency could not hold such stockholders as for unpaid subscriptions on the ground that the corporation gave statements to commercial agencies showing such subscriptions, and upon which credit was extended, since estoppel implies hurt or injury, or the doing of a thing which, but for the thing relied on, would not have been done, and it is inconceivable that complaining creditors would have extended credit on the faith of a subscription, and denied it on a representation that the stock was paid in full.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 998–1001.]

4. Corporations 🔑229 — Stockholders' Liability—Trust Fund Doctrine.

The doctrine which sustains the rights of a creditor to enforce the payment of a stock subscription is that of the trust fund, under which doctrine no stockholder may, by his own act, put it within the power of the corporation to hold out capital stock either paid up or subscribed when it is neither paid up nor subscribed, and a subscription contract can only be waived, canceled, or dissolved by the mutual consent of the subscriber, the other stockholders, and corporate creditors existing at the time of the cancellation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 876.]

5. Corporations 🔑248—Stockholders.

Where stockholders in a corporation transferred their paid-up stock to the corporation and subscribed for the same amount of stock which they had surrendered, they were stockholders with paid-up stock, and not liable at the suit of the receiver of the corporation upon its subsequent insolvency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 998–1001.]

6. Corporations 🔑83 — Stock Subscriptions — Cancellation of Agreement to Subscribe.

Where a stockholder agreed to subscribe for stock, and, being unable to pay for a part of it, in order to insure him the control of the corporation, it was agreed that other stockholders should turn into the treasury their specified shares, and a subsequent agreement canceled the agreement whereby the stockholders agreed to subscribe for the unpaid shares, "in its entirety, the same having been fulfilled and complied with to the best ability of both parties," the contention that the subsequent agreement was in effect no more than a cancellation of the agreement to subscribe, and not a cancellation of the actual subscription, was without merit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 328–336, 1407.]

7. Corporations 🔑240(1) — Liability of Stockholders—"Existing Creditor."

Where creditors of a corporation were wholesalers who had before and after an attempted cancellation of a stock subscription furnished goods from time to time as ordered, although the claim which they now assert accrued after the attempted cancellation, they are nevertheless "existing creditors" at the time of the cancellation, entitled to contest the validity of such cancellation to which they did not consent for the stock not paid for, since a publication of the amount of capital stock is a continued holding out to all the world, and creditors present as well as prospective, that the capital is paid or subscribed, and it would be an impeachment of the trust fund doctrine to hold that one who had opened a line of credit with a corporation, presumptively on the faith of its representations as to capital stock, and furnished goods from time to time, should be denied the status of an "existing creditor," and when relations are once assumed, the law ought to presume in the absence of evidence of notice that each transaction, if, in the aggregate, they possess the character of a course of dealing, is based on the faith established when the first account was opened.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1100½.

For other definitions, see Words and Phrases, First and Second Series, Existing Creditor.]

8. Corporations 🔑244(6) — Subscribers — Right of Subscriber to Sell—Liability of Purchaser.

Where the trust fund doctrine of liability of stockholders to creditors for the amount unpaid on stock subscriptions prevails, if a subscriber sells to another in good faith, the purchaser stands in the shoes of the first subscriber, who is thereby released from liability without injury to the stock, whether subscribed or paid up.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 968–971.]

9. Corporations 🔑88—Subscribers—Right of Corporation to Compromise Claim.

If a subscriber for corporate stock be insolvent, a corporation may compromise its claim, but it must be for a valuable consideration, and sustained on the theory that the money worth of the capital stock is not impaired, and that something is substituted for the promise of the subscriber.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337–364, 425–428.]

10. Corporations 🔑83 — Stockholders' Right to Sell Stock.

Where there was nothing to sustain an act of cancellation of a stock subscription except the cancellation itself, and there was no pretense of keeping the capital unimpaired, the cancellation was invalid, since a trade in stock which impairs the money worth of the stock is invalid; as stock or a live subscription must represent the money worth of the corporation up to the full extent of the authorized capital.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 328–336, 1407.]

11. Corporations 🔑229—Subscribers—Effect of Loan to Corporation.

The fact that a subscriber had advanced money for the benefit of the corporation and had indorsed a note made by it to its landlord in payment of its rent did not release such subscriber from his obligation as such, and he would, at the best, be a creditor of the corporation, with the privilege of asserting his claim to be paid pro rata with other creditors, although the rights of creditors in the assets of an insolvent corporation are superior to those of stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 876.]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Suit by John F. Murphy, as receiver of the John Panton Company, against John Panton and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions to enter a judgment for plaintiff as to the named defendant and affirmed as to other defendants.

Wettrick, Anderson & Wettrick, of Seattle, for appellant. Bogle, Graves, Merritt & Bogle and Hall & Cosgrove, all of Seattle, for respondents.

CHADWICK, J. This suit was brought to recover upon unpaid stock subscriptions. Respondents London, Atkinson, and Wolfe are charged as subscribers to the capital stock of the John Panton Company, formerly the Edwin London Company, and later the London-Panton Company, a corporation organized under the laws of this state.

Appellant contends that their liability rests primarily in the records of the company, and secondarily in the doctrine of estoppel. To make a prima facie case, counsel introduced the following record of date December 30, 1911, from the minute book of the company:

> "On motion of John Panton, seconded by H. H. Wolfe and carried, the secretary is instructed to cancel and reoffer for sale the following shares of capital stock of the company: (58) fifty-eight shares held by Edwin London; (41) forty-one shares held by H. H. Wolfe; and (16) sixteen shares held by Y. H. Atkinson. Reasons for same being canceled on account of not having been paid for."
>
> "On motion the company then offered the (115) one hundred and fifteen shares for sale at par. Edwin London offered to purchase (58) fifty-eight shares. H. H. Wolfe offered to purchase (41) forty-one shares, and Y. H. Atkinson offered to purchase (16) sixteen shares."
>
> "On motion of John Panton; seconded by H. H. Wolfe and carried, that the offers of Edwin London, H. H. Wolfe and Y. H. Atkinson for the (115) one hundred and fifteen shares of the capital stock be accepted and stock delivered to the parties as soon as paid for."

Over the objection of appellant, respondents were permitted to show that at the time the minute was made the capital stock of the Edwin London Company was $60,000, divided between Edwin London, J. H. Atkinson, H. H. Wolfe, and a nominal stockholder holding one share; that it was deemed wise to increase the capital stock of the corporation to $125,000; that John Panton was willing to take up the whole of the increase of $65,000; that Mr. Panton demanded that the name of the corporation should be changed to the John Panton Company; that he should have control of the corporation and be its general manager; that he was unable to pay more than $54,000 in cash; that in order to insure him the control of the corporation, it was agreed that the other parties should return into the treasury shares as follows: London, 58 shares; Y. H. Atkinson, 16 shares; and H. H. Wolfe, 41 shares—thus reducing the apparent holding of the parties by 115 shares, which at its par value of $11,500, would overcome the 110 shares for which Panton was unable to pay, which at its par value would amount to $11,000, and, that the interests of the three first named parties might be preserved, they subscribed for the same amount of the stock which they had surrendered. It was further shown that on February 11, 1913, an agreement was signed by all parties save the nominal stockholder canceling the agreement of December 30, 1911, "in its entirety, the same having been fulfilled and complied with to the best ability of both parties."

Appellant insists that the stock of London, Atkinson, and Wolfe had not been fully paid at the time the stock of the Edwin London Company was increased from $35,000 to $60,000. The court found otherwise, and, without reviewing the testimony, we are content to subscribe to his holding.

But, if this be true, appellant hopes to hold London, Atkinson, and Wolfe under the doctrine of estoppel: First, because the record shows an unqualified subscription upon which creditors had a legal right to rely; and, second, because the company gave statements to commercial agencies showing such subscriptions and upon which credit was extended.

[1] Addressing ourselves to the first ground of estoppel, we find no more than a clumsy attempt—the parties acted without counsel—to release their right to vote a part of their stock. The stock had been actually paid for. The parties could have successfully defended in an action brought by the corporation upon a call. The receiver can have no greater right than the corporation would have had, unless it is affirmatively shown that the rights of creditors existing at the time were prejudiced thereby. Walton Lumber Co. v. Commonwealth Lumber Co., 163 Pac. 762.

[2, 3] We have so far proceeded upon the theory that the minute relied on shows a subscription on its face. This may well be doubted. Stock once issued carries a presumption that it is paid for. To surrender stock some seven years after its issuance and to subscribe and promise to pay for it is a transaction sufficiently clouded by ambiguity to warrant a resort to parol evidence to explain the transaction. Nor do we think respondents London, Atkinson, and Wolfe can be held under the second plea of estoppel.

[4] The doctrine which sustains the right of a creditor to enforce the payment of a stock subscription is that of the trust fund. Under this doctrine no stockholder may, by his own act, put it within the power of the corporation to hold out a capital stock either paid up or subscribed when it is neither paid nor subscribed. A chain of circumstances or a course of conduct may make what would seem in law to be a maintaining of the capital stock, while it might not be so in fact. Although counsel seems to maintain otherwise, we had always understood that the main reliance of creditors of an insolvent corporation consisted in the right to inquire beyond the record made by the parties, to the end that the true fact might be revealed. It is upon this principle that creditors' bills are maintained. If this be the right of creditors, we can conceive of no valid objection to the right of the subscriber to reveal the true fact. The fact appearing in this case that the capital stock, in so far as the holdings of London Atkinson, and Wolfe are concerned, has been in no way impaired, that instead of a subscription, as appears on the minute book, and the statements given out by the company, the stock was fully paid, a creditor cannot urge an estoppel, for in law his position is the same whether the stock has been

paid for in cash or is subject to payment on call. Estoppel implies hurt or injury, the doing of a thing which, but for the thing relied on, would not have been done. It is inconceivable that the complaining creditors would have extended credit on the faith of a subscription, and denied it upon a representation that the stock was paid in full; yet such is the very premise to which we are driven if we are to hold London, Atkinson, and Wolfe liable as subscribers.

[5] The right of the receiver, in the absence of an estoppel, is to be measured by the relation of London, Atkinson, and Wolfe to the corporation. Notwithstanding the abortive attempt of the parties, we think they were stockholders with paid-up stock, and are not liable at the suit of the appellant.

We have not been able to satisfy ourselves that the Panton subscription can be thus disposed of. That it was Mr. Panton's intention to acquire control of the corporation, that he paid $54,000 in money; and that he subscribed for stock of the par value of $11,500, there can be no doubt. It is equally well established that he did not meet his subscription, and that all parties in interest agreed that his stock subscription should be canceled.

[6] We take no stock in the argument of counsel that the agreement of February 13, 1913, whereby all of the interested parties canceled the agreement of December 30, 1911, whereby Panton agreed to subscribe for the unpaid shares, was canceled "in its entirety, the same having been fulfilled and complied with to the best ability of both parties," was in legal effect no more than a cancellation of the agreement to subscribe, and not a cancellation of the actual subscription, which was made on February 28, 1912.

The intent of the parties was to relieve Panton of his obligation to pay for the stock. Wherefore it follows, if a corporation can cancel a stock subscription so as to avoid the obligation of the subscriber, Panton is not liable. If it cannot, he is.

Counsel for Mr. Panton plant themselves squarely upon the proposition that no creditors existing at the time the cancellation was made are now complaining, and that as to nonexistent creditors the corporation is free to act, if the rights of the stockholders, as between themselves, are not violated. The text of their brief is an unidentified quotation, viz.:

> "A subscription contract, like any other contract, may be waived, canceled, or dissolved by the mutual consent of the parties interested. The interested parties are the subscriber himself, the other stockholders, and the corporate creditors existing at the time of the cancellation."

This text assumes the trust fund doctrine of corporate stock, to which this court is firmly committed. Johns v. Clother, 78 Wash. 602, 139 Pac. 755; Kom v. Cody Detective Agency, 76 Wash. 540, 136 Pac. 1155, 50 L. R. A. (N. S.) 1073; National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446; Brenaman v. Whitehouse, 85 Wash. 355, 148 Pac. 24; Shaw v. Carr, 161 Pac. 345; Lantz v. Moeller, 76 Wash. 429, 136 Pac. 687, 50 L. R. A. (N. S.) 68. The earlier cases are noted in the authorities cited.

Under the trust fund doctrine, it seems that a subscriber may nevertheless be released, if he have the consent of all the subscribers and the rights of creditors are not involved. National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446.

In Manhattan Trust Co. v. Seattle Coal & Iron Co., 16 Wash. 499, 48 Pac. 333, a subscription to stock was held to be a part of the trust fund. The court said at page 518 of 16 Wash., at page 339 of 48 Pac.:

> "The unpaid subscriptions are a trust fund for the benefit of the creditors of the corporation. The presumption is that the subscribers to the capital stock of a corporation are solvent and that the amount of the capital stock can be realized. That property may be taken by agreement between the corporation and the stockholder in payment of his subscription is the settled doctrine of this court, and does not require any further discussion here. But such a contract between the corporation and stockholder must be an honest one. It must be free from any taint or suspicion of the avoidance on the part of the stockholder of a just payment of his subscription."

See, also, Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977.

[7] The demand of the statutes, as well as the logic of the cases, is that the working capital of a corporation is the amount named in its articles, and is, in theory, paid in full, either in cash or by the promise of a subscriber to whom the law will attach the presumption of solvency. Publication of the amount of capital stock is, and must be, a continued holding out to all the world, creditors present as well as prospective, that the capital is paid or subscribed. Such was our holding in Union Trust Co. v. Amery, 67 Wash. 1, 120 Pac. 539.

Counsel contends that all of the subscribers, as well as the only existing creditor, consented to the cancellation. The status of those fostering the receivership proceeding is that of wholesalers who had theretofore and after the attempted cancellation furnished goods from time to time as ordered. It is contended that the claims which they now assert accrued after the attempted cancellation, and that therefore they cannot complain.

We incline to the holding, although the rule contended for be admitted, if the proper facts pertain, that the complaining creditors are nevertheless existing creditors, within the meaning of the term as it is employed in cases of this kind.

It would be an impeachment of the trust fund doctrine to hold that one who had opened a line of credit with a corporation (presumptively on the faith of its representations as to capital stock) and who furnished goods from time to time, as the necessity of its customer required, should be denied the status of an existing creditor. To put one accustomed to dealing with a corporation to the hazard of testing its credit upon each transaction would be violative of that sound public policy which impresses a corporation's every act, but it would also put upon the corporation a bond that would be embarrassing, if not intolerable. Where relations are once assumed, the law ought to presume, in the absence of evidence of notice, that each transaction, if, in the aggregate, they possess the character of "a course of dealing," is based upon the faith established when the first account was opened. There is no testimony tending to show that the protesting creditors had any notice of the attempted cancellation. Upon either theory of the law, we find no escape from the holding that Mr. Panton is bound by his subscription.

[9-10] The contentions of respondent Panton that the cancellation of his stock subscription operates to release him as to subsequent creditors is unsound for another reason, or possibly it is the same reason expressed in another way. Where the trust fund doctrine prevails, all the cases holding that a subscription to corporate stock "may be waived, canceled, or dissolved" rest upon the legal assumption that the stock, whether subscribed or paid up, is not impaired by the withdrawal of the subscriber or stockholder. If the subscriber sell to another in good faith, as the court held in Walton Lumber Co. v. Commonwealth Lumber Co., supra, the purchaser stands in the shoes of the first subscriber. It is so if there be a sale or transfer of issued stock. If the subscriber be insolvent, a corporation may compromise its claim, but it must be for a valuable consideration, and is sustained upon the theory that the money worth of the capital stock is not impaired; that something is substituted for the promise of the subscriber. Stock or a live subscription must represent the money worth of a corporation up to the full extent of the authorized capital.

> "If a trade in the stock impairs the money worth of the stock, it is proscribed. If it does not, it is not an unlawful thing." Shaw v. Carr, 161 Pac. 345.

In the instant case there was no pretense of keeping the capital unimpaired. There was nothing to sustain the act of cancellation except the cancellation itself. This is not enough, for, in legal effect, there was an impairment to the extent of the cancellation. There remained neither an issue nor a subscription to cover the difference of $11,500.

[11] Counsel for Mr. Panton insist that there was a consideration for the cancellation, in that Panton had advanced money for the benefit of the corporation, and had indorsed a note made by it to the landlord in payment of its rent. This would not release Mr. Panton from his obligation as a subscriber to the stock. He would, at best, be a creditor of the corporation with the privilege of asserting his claim, to be paid pro rata with other creditors. We think the same question was passed upon by this court in the case of National Realty Co. v. Neilson, 73 Wash. 89, 131 Pac. 446, where a like claim was made, the court there saying that:

> The allowance of Neilson's claim "would be to permit a stockholder as such to share equally with the creditors in the application of the assets. There can be no question but that the rights of creditors in the assets of an insolvent corporation are superior to those of the stockholders."

If the right of a creditor is superior to that of a stockholder, it follows that they cannot be equal.

Affirmed as to London, Atkinson, and Wolfe. Reversed as to Panton, with directions to enter a judgment for the amount of his subscription.

ELLIS, C. J., and MOUNT, MAIN, and MORRIS, JJ., concur.

(97 Wash. 27)

COLBURN v. WINCHELL. (No. 13290.)

(Supreme Court of Washington. June 19, 1917.)

WATERS AND WATER COURSES ⇨7—APPROPRIATION—NONNAVIGABLE STREAMS—STATE SCHOOL LANDS.

Waters of a nonnavigable stream, on land granted by the United States to the state, and held by it for purpose of a school, being part and parcel of the soil, cannot be appropriated by a nonriparian owner; such lands, under Const. art. 16, §§ 1, 2, being held in trust for all the people, not to be disposed of, except by sale at auction, at not less than the price prescribed in the grant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 2.]

Department 2. Appeal from Superior Court, Klickitat County; R. H. Back, Judge.

On rehearing. Reversed and remanded for dismissal.

For former opinion, see 160 Pac. 1052.

Geo. F. Felts, of Portland, Or., and I. N. Smith, of Wallace, Idaho, for appellant. N. B. Brooks, of Goldendale, for respondent.

MAIN, J. After the opinion in this case had been filed (160 Pac. 1052), both parties presented petitions for rehearing. In the petition of the defendant and cross-appellant, our attention is called to an error in the statement of facts in the original opinion. It was there stated that the title to the land from which the appropriation of the water was made was in the federal government at the time of the appropriation. This was incorrect. It should have been stated that, at the time the appropriation was made, the land, which was crossed by the nonnavigable stream out of which the water was taken, was held by the state for the purpose of a scientific school. In the year 1895, the federal government granted to the state, together with other lands, the S. E. ¼ of section 11, township 4 N., range 10 E., W. M. Across this land flowed a nonnavigable stream, known as "Old Logging Camp creek." During the year 1903 the then owner of the N. W. ¼ of section 13 of the same township and range went upon section 11 and attempted to appropriate the water of Old Logging Camp creek for irrigation purposes, to be used upon section 13—nonriparian land.

This corrected statement of facts presents a question which was not decided in the original opinion, and that question is whether a nonriparian owner may appropriate water from a nonnavigable stream upon state land, which had been granted to the state for the establishment and maintenance of a scientific school. In Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, it is held that the right of a riparian owner to the waters of a nonnavigable stream is an incident to his estate, and is considered a part of the soil. It was there said:

> "It is held by practically all the better authorities that the right of the riparian owner to the natural flow of the stream by or across his land, in its accustomed channel, is an incident to his estate, and passes by a grant of the land, unless specially reserved. It is not an easement in, or an appurtenance to, the land, but, as Angell says, is as much a part of the soil as the stones scattered over it."

In Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D, 290, it was said:

> "We hold that the common law, as declared by the Supreme Court of the United States, so far as all unnavigable waters, whether in streams or lakes, are concerned, that is to say, waters not actually navigable, is the common law and rule of decision in this state. We know of nothing in the character of our institutions or in the state of our society militating against its application to all such waters. The declaration in our Constitution (section 1 of article 21) that 'the use of the waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use' was never intended to destroy riparian rights in unnavigable waters."

Therefore, under the law of this state, the waters of a nonnavigable stream are held to be a part and parcel of the soil over which it flows. Section 11 of the Enabling Act (Act Cong. Feb. 22, 1889, c. 180, 25 Stat. 676) provides that all lands "herein granted for educational purposes" shall be disposed of only at public sale, and at a price of not less than $10 per acre. In section 17 of that act there is granted to the state of Washington, "for the establishment and maintenance of a scientific school, one hundred thousand acres [of land]. * * * "As above stated, the land was selected under that provision of the act of Congress, and the title was in the state at the time the appropriation was made. Section 1 of article 16 of the Constitution of the state provides:

> "All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States."

Section 2 of the same article provides that:

> "None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder. * * *"

Under these provisions of the Constitution, it will be seen that the lands granted to the state for the purpose of a scientific school are held in trust for all the people, and that none of such lands, "nor any estate or interest therein," shall be disposed of except in the manner there provided.

It seems to us that the language of the Constitution is too plain for construction. If the water of a nonnavigable stream is to be considered as a part of the soil, and as an incident to the owner's estate in the land, a statute authorizing the appropriation by a nonriparian owner of the water of a nonnavigable stream upon state land, held for educational purposes, would not be in harmony with the constitutional mandate. If the Legislature can authorize the appropriation of water from a nonnavigable stream crossing land which the state holds in trust for the purpose of a scientific school, it could grant an estate or interest in the land without compensation, and in defiance of the constitutional provision which says that no estate or interest therein shall be disposed of, unless the full value of the estate or interest, to be ascertained in the manner provided by law, be paid or secured to the state. It is a matter of common knowledge that the waters of a nonnavigable stream crossing a certain tract of land may, and in certain instances do, constitute its chief value, because, without the water, the land would be barren and unproductive.

We therefore conclude that the appropriation of the water from Old Logging Camp creek by a nonriparian owner cannot be sustained under the Constitution of this state. The general acts of Congress relative to the appropriation of water upon government land can have no application after the title has passed from the federal government to the state. Neither are the decisions of other states in point, where the constitutional limitations are not the same as in this state. The conclusion we have reached upon the question here considered requires a different disposition of the case from that directed in the original opinion.

Upon the defendant's cross-appeal, the judgment will be reversed, and the cause remanded, with direction to the superior court to dismiss the action.

MORRIS, C. J., and HOLCOMB and PARKER, JJ., concur.

(97 Wash. 103)

PECK et al. v. LINNEY et al. (No. 13716.)

(Supreme Court of Washington. June 22, 1917.)

1. CORPORATIONS 🔑613(2) — DISSOLUTION — EFFECT.

Under Laws 1907, p. 271, § 7 (Rem. Code, § 3715), making it the duty of the secretary of the state to strike, from the records of his office, the names of corporations neglecting for two years to pay their annual license fees, and Laws Ex. Sess. 1909, p. 57, § 4 (Rem. Code, § 3715d), authorizing the secretary of state to enter a notation that the corporation is dissolved, unless it be reinstated within six months, the striking of a corporation's name from the records and the notation of its dissolution upon the records worked an actual dissolution of the corporation, and precluded the subsequent institution of any action against it.

2. CONSTITUTIONAL LAW 🔑306 — CORPORATIONS 🔑613(2) — DUE PROCESS — DISSOLUTION.

Laws Ex. Sess. 1909, p. 57, § 4, providing for the dissolution of corporations failing to pay their annual license fees, or to apply for reinstatement within a limited time, was not violative of the due process of law provision of the state or federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 928, 936, 939, 942–946, 948, 949.]

3. TIME 🔑9(1)—COMPUTATION.

In computing the time within which an act is to be done as prescribed by law, the first day should be excluded and the last day included.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-16, 24½, 32.]

4. CORPORATIONS 🔑613(2) — DISSOLUTION — VALIDITY.

That the secretary of state made a notation of the dissolution of a corporation pursuant to Laws Ex. Sess. 1909, p. 57, § 4, one day too soon, did not render the dissolution ineffective, where the notation was left on the records at and subsequent to the time when it ought to have been made.

5. CORPORATIONS 🔑630(1) — DISSOLUTION — SUBSEQUENT ACTION.

A corporation dissolved under Laws Ex. Sess. 1909, p. 57, § 4, before enactment of the Act of 1911 permitting a corporation whose name has been stricken from the records of the office of a Secretary of State to have its name reinstated upon the records at any time on payment of certain penalties, and in effect repealing the dissolution provisions of the Laws Ex. Sess. 1909, cannot be sued as a corporate entity by service upon its president, until its corporate existence has been revived and its name reinstated upon the records, assuming that such reinstatement is permissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482, 2483.]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by C. I. Peck and another, as stockholders of the Old Dominion Mining & Milling Company, against W. H. Linney and others. From a judgment of dismissal, plaintiffs appeal. Reversed and remanded.

Carey & Johnson, of Colville, for appellants. A. E. Gallagher, of Spokane, for respondents.

PARKER, J. The plaintiffs, as stockholders of the Old Dominion Mining & Milling Company, a corporation alleged to have been dissolved as the result of the failure to pay its annual license fees, seek a decree quieting title to certain mining claims in the trustees of that corporation as against the defendants and canceling the tax deed upon which the claim of title made by the defendants is rested. The action is prosecuted by the plaintiffs as stockholders because of the refusal of the trustees of the corporation to do so upon demand made therefor by the plaintiffs. Trial upon the merits in the superior court for Spokane county, to which court the cause was transferred by consent from the superior court for Stevens county, resulted in judgment of dismissal as against the plaintiffs, from which they have appealed to this court.

The facts determinative of the rights of the parties are not in dispute, and may be summarized as follows:

The Old Dominion Mining & Milling Company was duly incorporated under the laws of the state of Washington in the year 1897. It thereafter acquired title to the patented mining claims in question. It failed to pay to the state its annual license fees for several years prior to August 23, 1909, as required by section 6, c. 140, Laws 1907, being section 3714, Rem. Code. On that day, because of such failure to pay its license fees, the secretary of state struck from the records of his office its name in pursuance of the provisions of section 7, c. 140, Laws 1907, being section 3715, Rem. Code, and it not having made application for reinstatement upon the records of the office of the secretary of state as prescribed by chapter 19, Laws of the Extraordinary Session of the Legislature of 1909, as the secretary of state construed that act, he on February 23, 1910, entered upon the records of his office a notation that the Old Dominion Mining & Milling Company was dissolved. This, it will be noticed, was done just six months after striking the name of the corporation from the records of his office in pursuance of the provisions of the act of 1907, (section 3715, Rem. Code).

On November 5, 1914, respondent W. H. Linney was the owner of a delinquent tax certificate issued by the treasurer of Stevens county for delinquent taxes upon the mining claims in question. On that day he commenced an action in the superior court for that county against the Old Dominion Mining & Milling Company seeking foreclosure of his certificate of delinquency and the sale of the claims. That action resulted in judgment of foreclosure and order of sale on January 18, 1915. In pursuance thereof a sale was had of the mining claims and a tax deed issued by the county treasurer conveying the claims to respondent W. H. Linney on January 30, 1915. Thereafter appellant the Dominion Silver Lead Mining Company acquired by deeds of conveyance from Linney and wife whatever title to the claims they had acquired by virtue of the tax foreclosure and deed issued in pursuance thereof.

The service of the summons in the tax foreclosure proceeding was attempted to be made upon the Old Dominion Mining & Milling Company by serving the same upon G. B. Dennis as the president of that corporation and not otherwise. G. B. Dennis was the president of the corporation at the time the secretary of state noted upon the records of his office its dissolution. None of the trustees of the corporation were ever served with summons in the tax foreclosure proceeding, or made parties thereto, nor did any of them ever appear in that proceeding; so that whatever jurisdiction the court acquired therein was only such as could be acquired over the corporation as an entity, apart from its trustees and stockholders, after the secretary of state noted its dissolution upon his records.

It is conceded that appellants as stockholders of the Old Dominion Mining & Milling Company are in a position to maintain this action because of their demand upon the trustees of that corporation to prosecute it and the refusal of the trustees to accede to that demand. It is also conceded that the tax foreclosure proceeding, the judgment, the sale rendered thereon, and the tax deed issued in pursuance thereof to W. H. Linney vested title to the claims in him if the court acquired jurisdiction in that proceeding by service of summons upon G. B. Dennis as president of the corporation. In section 7, c. 140, Laws 1907 (section 3715, Rem. Code), we read:

> "It shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees."

This is the law in compliance with which the secretary of state struck the name of the Old Dominion Mining & Milling Company from the records of his office on August 23, 1909. This provision of the law has remained unchanged to the present time. Chapter 140, Laws 1907, made no provision for reinstatement of the name of a corporation upon the records in the office of the secretary of state which had been stricken as therein provided. Neither did that law tell us in terms what effect such striking of the name of a corporation had upon its life; that is, whether or not such striking of its name had the effect of dissolving it. Chapter 19, Laws of the Extraordinary Session of the Legislature of 1909, provided for reinstatement of a corporation's name upon the records of the office of the secretary of state within six months following the striking of it therefrom upon payment of certain penalties. Section 4 thereof reads:

> "If, however, within the period named within which a corporation may make application to be reinstated such corporation shall not have made such application, the secretary of state shall enter upon his records a notation that such corporation is dissolved, and it shall thereupon be dissolved and the trustees of such corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings."

This is the provision in pursuance of which the secretary of state noted upon his records the dissolution of the Old Dominion Mining & Milling Company on February 23, 1910, six months after he had stricken its name from his records. This section was embodied in Rem. Code as section 3715d, though, as we shall presently see, under a later law, chapter 41, Laws 1911, corporations are no longer dissolved in this manner. That law, however, was not passed until after the Old Dominion Mining & Milling Company had been dissolved under the law of 1909.

[1] It is contended in substance in respondents' behalf that the failure of a corporation to pay its annual license fees, the striking of its name from the records of the office of the secretary of state and the notation of its dissolution by the secretary of state upon his records did not under the act of 1909 actually work a dissolution of the corporation, but only constituted a cause for dissolution by appropriate court proceedings. This contention is answered by our decision in Hawley v. Bonanza Queen Mining Co., 61 Wash. 90, 111 Pac. 1073, where it was held that the notation of dissolution, when made in compliance with the law of 1909, did work a dissolution of the corporation, and that an action pending against the corporation at the time it was so dissolved would abate, unless the corporation's successors in interest, its trustees or possibly its receiver, were substituted as parties to the action in place of the corporation. Judge Rudkin in so holding, speaking for the court at page 93 of 61 Wash., at page 1074 of 111 Pac., said:

> "The appellant contends that this rule does not obtain in equity, but we apprehend that a defendant to proceed against is just as essential in one court as in another, except where the proceedings are strictly in rem. In actions to foreclose mortgages or liens on real property the owner of the property is a necessary party defendant, and if he dies during the pendency of the action his heirs or successors in interest must be brought in. The same rule applies of necessity to a defunct corporation. Had the receiver been served in this case, the action might have proceeded to judgment against him, notwithstanding the dissolution of the corporation; or the trustees, in whom title vests upon dissolution, might have been substituted as defendants, but nothing of that kind was done or attempted. The appellant persisted in his right to proceed against the corporation notwithstanding its dissolution, and the court had no alternative but to abate the action."

In the light of that decision, which we are not inclined to recede from, we see no escape from the conclusion that the Old Dominion Mining & Milling Company was dissolved upon the making of the notation of its dissolution by the secretary of state, assuming for the present that such notation was authorized by the facts and timely made. It seems to plainly follow that since a pending action against a corporation at the time of its dissolution in pursuance of the law of 1909 abated upon such dissolution unless its successors in interest be substituted in its place as parties thereto, it could not be sued and no process could reach it as a corporate entity giving a court jurisdiction over it or its property, which had passed to its trustees upon dissolution. Manifestly, if a pending case cannot proceed against a dissolved corporation one could not be instituted against such a corporation.

[2] It is further contended in behalf of respondents that the law of 1909 in so far as it provided for dissolution of corporations is unconstitutional as being in violation of the due process of law provisions of both the state and federal Constitutions. This contention is also answered by our decision in Hawley v. Bonanza Queen Mining Co., 61 Wash. 90, 111 Pac. 1073; Judge Rudkin, speaking for the court, observing:

> "It is next contended that the Acts of 1907 and 1909, supra, which provide for the dissolution of corporations failing to pay their annual license fees, or to apply for reinstatement within a limited time, are unconstitutional and void, because a forfeiture of corporate franchises can only be decreed by a court of competent jurisdiction. This position is untenable. A corporation is a mere creature of the law, and the privilege of being and acting as a corporation is contingent upon a compliance with the law. The appellant concedes that it was competent for the Legislature to provide for the dissolution of corporations failing to pay their annual license fees, but contends that the forfeiture can only be declared after a hearing in some court of competent jurisdiction. This question was ably reviewed in all its aspects by the Supreme Court of California in the recent case of Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341, where a similar act of that state was sustained."

In the light of these remarks made in the course of that decision we deem it unnecessary to further notice the constitutional question presented, and conclude that the dissolution provision of the law of 1909 was not unconstitutional.

It is further contended in respondents' behalf that the notation of the dissolution of the Old Dominion Mining & Milling Company as a corporation upon the records of the office of the secretary of state was a void and unauthorized act, and did not at the time it was made nor thereafter legally evidence the dissolution of that corporation. Counsel for respondents insist that the full six months' period prescribed by the law of 1909, above quoted, within which the Old Dominion Mining & Milling Company might have applied for reinstatement, had not expired at the time the notice of dissolution was made by the secretary of state.

[3, 4] The general rule that in computing time within which an act is to be done as prescribed by law the first day shall be excluded and the last day included is invoked in respondents' behalf. This rule does seem to lend support to the contention that the secretary of state made his notation of the dissolution of the corporation one day too soon, since it seems to have been made upon the last day of the six-month period prescribed, though looking to the language of the act of 1909 there is also room for arguing that the notation was not made a day too soon. However this may be, we are of the opinion that since on the following day the notation remained of record in the office of the secretary of state, which was of course with his knowledge, it then had all the effect as if made upon that date. The act of 1909 did not provide for any particular form of making the notation of dissolution, not even that it should be dated, nor was the making of it under that law to be the result of any hearing or determination of any fact outside the records of the secretary's office. His act of noting the dissolution of the corporation, we think, was purely ministerial under the law of 1909. It was not the notation which dissolved the corporation, though sometimes loosely so referred to. That was only the doing of an act the occurrence of which together with the fact of the corporation's default worked its dissolution. We think it can thus be differentiated from a decree of a court of equity dissolving a corporation. If, when the time for making the notation of dissolution arrived, assuming that such time had not arrived when this notation was physically made, the secretary had looked at his records and seen this notation thereon, and had then erased it and immediately rewritten it in the exact words, plainly it could not be contended that that was not a literal compliance with the act of 1909. We can see no difference in legal effect when the secretary knowingly leaves a notation on his records which may have been previously erroneously put there, though at the time he so leaves it it speaks correctly, except possibly as to the date when physically made. One could as well complain of a notation made by one of the secretary's clerks instead of himself, but plainly that would be in law the making of it by himself if done with his knowledge and under his direction. The leaving of the notation by him at a time when it ought to have been made, we think, was equally a compliance with the law of 1909 in view of the ministerial character of the act of making the notation.

After the dissolution of the Old Dominion Mining & Milling Company on February 23, 1910, the Legislature of 1911 passed an act amending the 1909 law so as to permit a corporation whose name had been stricken from the records of the office of the secretary of state to have its name reinstated upon the records at any time upon payment of certain penalties and in effect repealing the dissolution provisions of the law of 1909. Considering the effect of the act of 1911 touching its repealing effect upon the dissolution provision of the law of 1909, Judge Morris, speaking for the court in State ex rel. Preston Mill Co. v. Howell, 67 Wash. 377, 121 Pac. 861, said:

> "The act of 1907, being Rem. & Bal. Code, § 3715, provided, among other things, that the secretary of state should strike from the records of his office the names of all corporations which had neglected for two years to pay the annual license fees. The act of 1909, extra session, being Rem. & Bal. Code, § 3715a, provided that any corporation whose name had been stricken for failure to pay its annual license fee for two years might apply to the secretary of state for reinstatement, at any time within six months from the approval of the act or from the time its name had been stricken. Section 2 of the same act, being Rem. & Bal. Code, § 3715b, further provided that any corporation so applying should, in addition to all license fees and penalties then due, pay an additional penalty of $25, and upon such payment such corporation would be reinstated. Section 4 of the same act, being Rem. & Bal. Code, § 3715d, provided that any corporation failing to make application for reinstatement within the time provided for such reinstatement should be thereby dissolved, and the secretary of state should enter a notation to that effect upon his official records. Sections 3715a and 3715b were amended by the act of 1911, c. 41, p. 135, whereby the six months' limitation, in which reinstatement might be made, was made to read 'at any time after its name had been stricken,' and the penalty was increased from $25 to $100. So that the law, as it now reads, provides that a corporation failing to pay its annual license fees for two years shall be stricken from the records of the office of the secretary of state; that every corporation so stricken may apply at any time thereafter for reinstatement, and when so applying shall be reinstated upon payment of all license fees and penalties then due, together with an additional penalty of $100. It will be noted that section 3715d, providing for the dissolution of the corporation for failing to apply within the time in which application might be made for reinstatement, which time was six months as fixed in the act of 1909, has now no force, since the act of 1911 changed the time in which such application might be made from six months to 'any time after its name has been stricken from the records'; and, since the dissolution was to take effect at the expiration of the time fixed in which application for reinstatement might be made, and that time is now, under the amendment of 1911, any time after the striking of the name, there is now no time fixed for such dissolution. Section 3715a, as amended by the act of 1911, reads, 'any corporation stricken from the records and dissolved as provided in this chapter,' may hold meetings and pass resolutions necessary to close out its affairs and such resolution of such 'stricken and dissolved corporation' is validated and approved. There is no provision, however, in this chapter for the dissolution of such corporation, as to how or when it shall take place; the only penalty to the offending corporation provided for in the act being the striking of its name from the official records of the secretary of state. The framers of this act evidently had in mind the provisions of section 3715d, which made provision for dissolution under the act of 1909. But they failed to fix a time in which the provisions of that section could become operative. The result is there is now no time in which this section, the only one containing any provision for the dissolution of corporations for failure to pay license fees, can become operative. When, therefore, relator applied to the secretary of state to accept its license fee, he should have done so, as it had made full compliance with the law, and within the time provided by the law in force at the time the application was made."

[5] These observations suggest the possibility of corporations dissolved under the law of 1909 before the passage of the law of 1911, as well as those defaulting after the passage of the law of 1911, being entitled to reinstatement at any time under the law of 1911. However this may be, we think that in no event can a corporation dissolved under the act of 1909 before the act of 1911 was passed be sued as a corporate entity by service upon its president until its corporate existence is revived and its name reinstated upon the records of the office of the secretary of state as provided by the act of 1911, assuming for the sake of argument that a corporation dissolved under the act of 1909 before the passage of the act of 1911 can be so revived and its name reinstated upon the records of the office of the secretary of state. In Soderberg v. McRae, 70 Wash. 235, 126 Pac. 538, where there was involved the status of a corporation dissolved under the act of 1909 before the passage of the act of 1911, Judge Morris, again speaking for the court, said:

> "No question is raised by the corporation itself as to the effect of the act of the secretary of state in entering the order of dissolution on February 23, 1910. Nor is the corporation here seeking to reinstate itself by offering to pay arrears of license. So far as the dissolution of the corporation is concerned, it must be so regarded until, in some appropriate proceedings, it is decreed otherwise."

Without deciding the question of the status of a corporation dissolved under the act of 1909 before the passage of the act of 1911 as to its capability of being revived and reinstated upon the records of the office of the secretary of state, we are clearly of the opinion that while it remains in this at least dormant condition it cannot function as a corporate entity, that it cannot either sue or be sued as such, and that whatever litigation may be instituted seeking to affect its property must be in actions wherein its successors in interest, its trustees, or possibly its receiver, are parties.

We conclude that the tax foreclosure proceeding and the tax deed issued in pursuance thereof upon which the claimed title of respondents to these mining claims is rested is wholly void and of no effect for want of jurisdiction of the court in that proceeding over the Old Dominion Mining & Milling Company or over its successors in interest, to wit, its trustees. The judgment of the trial court must therefore be reversed, and the cause remanded to it for the rendering of such decree as appellants are entitled to under the views herein expressed.

We find at page 8 of the statement of facts that it was agreed between counsel during the trial that the respective rights of the parties growing out of the making of improvements upon the mining claims by respondents, which were claimed to have been made in good faith since the tax sale, should remain open and not be settled by the decree to be rendered in this case, indicating that the only purpose of all parties to this action was to test the validity of the tax foreclosure proceedings and respondents' claimed title thereto. The record before us also shows that at the time of the commencement of this action in the superior court appellants tendered $2,550, depositing the same in court, to reimburse respondents for moneys paid in procuring the certificate of delinquency and in taxes upon the claims. We think the superior court will be sufficiently advised as to the nature of the decree appellants are entitled to, both as to the reservation of the question of respondents' equities growing out of improvements claimed to have been made by them upon the mining claims, and as to to the amount of the $2,550 tendered by appellants and deposited in court which respondents are entitled to or as to whether or not respondents are entitled to more than that sum as a condition precedent to appellants being awarded a decree quieting their title to the mining claims as against respondents. This is about as definite directions as we are able to make to the trial court upon the record before us.

The judgment of dismissal is reversed, and the cause remanded to the superior court for further proceedings as herein indicated.

ELLIS, C. J., and HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

(97 Wash. 78)

FRYAR v. HAZELWOOD HOLSTEIN FARMS et al. (No. 13772.)

(Supreme Court of Washington. June 20, 1917.)

1. Sales 🔑38(1) — Misrepresentations — Promise to be Performed in the Future.

A statement that a certificate, showing that cattle sold had been tuberculin tested, would be given to the purchaser at a sale is not a misrepresentation of fact, but a promise to do something in the future.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65, 76.]

2. Receivers 🔑104—Receiver's Sale—Liability of Receiver for Misrepresentations.

Although a receiver's sale is a judicial sale and the doctrine caveat emptor applies, and, the sale being under the direction of the court, there is no warranty, where misrepresentations of fact are made by the receiver or his agent and they are relied upon by the purchaser to his damage, the rule of caveat emptor does not preclude the purchaser from any relief, and he may sue the receiver in his personal capacity or seek a timely rescission of the contract of sale, but he may not recover damages against the receiver as such.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 191.]

3. Corporations 🔑422(1)—Officers—Statements Made at Receiver's Sale—Liability of Corporation.

As the officers of a corporation have no authority to do anything in connection with a receiver's sale, it being a sale of property in custodia legis, such officers could not, by any statements made at the sale, change the terms and conditions prescribed by the court, or bind the corporation by any warranties made at such sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1685, 1687, 1691.]

4. Corporations 🔑559(2) — "Receivers" — Evidence—Admissibility.

In view of Rem. Code 1915, § 740, defining a receiver as a person appointed by a court or judicial officer to take charge of property during the pendency of a civil action, etc., and to manage and dispose of it as the court or officer may direct, as a receiver for a corporation was a statutory receiver and officer of the court no matter for what purpose he was appointed, evidence offered to prove that the corporation was not insolvent, offered to show that the receiver was only an agent of the parties, was properly rejected.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241, 2242.

For other definitions, see Words and Phrases, First and Second Series, Receiver.]

5. Receivers 🔑134—Sale—Notice.

Where a sale of cattle was advertised by a corporation, but was conducted by a receiver, the receiver was not required to proclaim the fact that it was a receiver's sale.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 230.]

6. Evidence 🔑83(1) — Presumption — Acts of Receiver.

A receiver presumably proceeds in accordance with the order of the court in making a sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105.]

7. Corporations 🔑560(3) — Liability for Acts of Receiver.

A corporation cannot be held liable for any fault or omission of a receiver in conducting the sale of its property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2256, 2262.]

8. Costs 🔑185—Knowledge of Witnesses—Power of Clerk to Correct Notation.

Where it was not contended that witnesses were allowed more mileage than they actually traveled, a contention that costs were taxed too high, in that more mileage was allowed certain witnesses than they had reported to the clerk, was without merit, since the clerk has the power to correct his original notation of mileage, if it was in fact too high or too low.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 739–743.]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by B. S. Fryar against the Hazelwood Holstein Farms and Arthur B. Lee as receiver thereof. Judgment for defendants, and plaintiff appeals. Affirmed.

Patrick C. Shine, of Spokane, and H. G. & Dix H. Rowland, of Tacoma, for appellant. Voorhees & Canfield and W. J. Matthews, all of Spokane, for respondents.

HOLCOMB, J. Appellant sued to recover damages for an alleged breach of warranties made at a receiver's sale. The evidence introduced by appellant tended to show that the Hazelwood Holstein Farms, Incorporated, one of respondents herein, by its trustees Smith and Mills, advertised that a certain sale of blooded Holstein cattle would be held in Spokane during the Interstate Fair. Subsequent to these advertisements, but prior to the sale, one Lee was appointed by the court as receiver of the Hazelwood Holstein Farms, Incorporated, and the sale was actually conducted by him in that capacity. At the sale the auctioneer stated that all the cattle to be sold were registered, and that purchasers would be furnished with registration and transfer papers. Smith also stated that the cattle offered for sale had recently been tuberculin tested, and that purchasers would be furnished with health certificates showing that such test had been made, and that the cattle were free from tuberculosis. Appellant attended this sale having no notice, as he claimed, that it was by a receiver, heard the representations so made, and purchased a young heifer for $539, and a bull calf for which he paid $85. Shortly afterwards the heifer died from tuberculosis, according to the statement of a veterinary who attended the heifer during her sickness. It also appears that the bull calf was not registered at the time of the sale, but his breeding was such that he was entitled to registration, and he was registered and the papers evidencing that fact were furnished appellant subsequent to the commencement of this action. Appellant then instituted this action against respondents Hazelwood Holstein Farms, Incorporated, and Lee as receiver, and alleged that, by reason of the failure of respondents to deliver the registration papers and health certificates, he had been greatly damaged, in that he had sold these cattle at an increased price, but was unable to make good on his representations to the purchasers, and that in the case of the bull calf he incurred a large damage by reason of being obliged to purchase his progeny from the party to whom he was sold since he had been bred to a number of thoroughbred cows; and further alleged that the animals without the registration and health certificates were worth only $190, and with them they were worth $1,000. At the conclusion of appellant's testimony the lower court sustained a challenge to the sufficiency of the evidence and directed a judgment of dismissal. From this disposition of the case appellant has appealed.

[1] From an examination of the facts it is noticed that the only misrepresentation made was that the bull calf was registered. There was no evidence showing that the animals had not been tuberculin tested, and the statement that a certificate showing such test would be given to the purchaser is not a misrepresentation of a fact, but a promise to do something in the future.

[2] In determining the legal principles involved in this appeal the liability of the receiver will first be considered. It is not seriously disputed that a receiver's sale is a judicial sale, and that in such cases the doctrine caveat emptor applies. Since the sale is made under the direction of the court there is no warranty. But where there is fraud or misrepresentation of fact made by the receiver or by his agents, as in this case, caveat emptor is not applicable, and the problem thus presented is whether the receiver has such authority in making warranties at a sale that he is liable to respond in damages as receiver for a breach of such warranties.

[3] The authorities are harmonious in declaring that the receiver has no authority to make warranties as to either the title or quality of goods sold at a receiver's sale, as the receiver is simply an officer, or agent, of the court and all the authority in him vested is simply what is derived from the court, which is only to sell the goods; and because there is no warranty by the court, there is nothing to go back on if the buyer takes nothing. Rorer on Judicial Sales (2d Ed.) § 174; The Monte Allegre, 9 Wheat. 616, 6 L. Ed. 174; Horner v. Continental, etc., Bank, 198 Fed. 832, 117 C. C. A. 474.

Where misrepresentations of fact are made by the receiver or his agent and they are relied on by the purchaser to his damage, this rule does not preclude the purchaser from any relief whatever, for in such cases the authorities are equally well settled that there are two courses that the purchaser may pursue: (1) He may sue the receiver in his personal capacity, as the warranty binds him personally and him only; (2) he may seek a timely rescission of the contract of sale. Rorer on Judicial Sales, 174, 175; Horner v. Continental, etc., Bank, supra. In the case at bar appellant pursued neither of these courses, but elected to sue the corporation and its receiver for damages. No cases are cited by appellant, nor are we able to discover any, that hold that such an action can be successfully waged against the receiver.

It is then urged by appellant that respondent corporation is liable on account of the misrepresentations made by Smith, and cite Scott v. Rainier P. & R. Co., 13 Wash. 108, 42 Pac. 531, to show that a company may be sued after a receiver has been appointed. Granting that this is true, a valid cause of action must arise before a cause of action can be maintained against a corporation for which a receiver has been appointed; and it is apparent that, if Smith made representations that a certificate evidencing the facts represented would be furnished the purchaser, he acted either as agent of the receiver or as trustee and manager of the respondent corporation. Obviously if he acted as agent of the receiver, he had not sufficient authority to make warranties that would be binding on any one, as the receiver himself had no such authority. Neither do we think he had sufficient power or authority by reason of his office in the corporation as trustee to bind the respondent corporation by his warranties made at receiver's sale, for the officers of the corporation have no authority to do anything in connection with the sale, since it is in the exclusive jurisdiction of the court. It was a sale of property in custodia legis; for example, in the order the court might authorize the sale on certain terms or conditions. It could not be seriously contended that the officers of the corporation could, by statements made at the sale, change the terms and conditions prescribed by the court. Whether Smith would be personally liable by reason of his statements made at the sale need not be considered as he was not made a party to the action.

[4] During the progress of the trial appellant offered to prove that the corporation was not insolvent, and that the only purpose of the receivership proceedings was to settle some property differences between Smith and Mills. This evidence was rejected by the trial court, and his action in so doing is now assigned as error. Appellant argues that, if this evidence had been admitted, it would show that the receiver was only an agent of the parties, and not an officer of the court, and therefore the rule that a receiver has no authority to make warranties at a sale is not applicable, as such rule is based on the premise that he is an officer of the court, and is vested with only such authority as he derived therefrom. In support of this theory appellant cites Kellar v. Williams, 3 Rob. (La.) 321, wherein it is held that, where it appears that a receiver was appointed with the consent of the parties for the purpose of adjusting property differences, the receiver will be deemed to be the agent of the parties, strictly speaking, and not an officer of the court. It does not appear that the receiver therein was appointed by virtue of a statute, and it does show that he was appointed by consent of the parties. In the case at bar we find no offer to prove that respondent Lee was appointed by consent of the parties, and in any event he was presumptively appointed by a court of competent jurisdiction by virtue of Rem. Code, § 740, which defines a receiver as follows:

> "A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein; and to manage and dispose of it as the court or officer may direct."

Respondent Lee was therefore a statutory receiver and an officer of the court no matter for what purpose he was appointed, and the court properly rejected the evidence tending to show such purpose.

[5-7] It is immaterial that appellant was not notified at the sale that it was being conducted by a receiver. There is no statute requiring proclamation of such fact by a receiver, and no order to that effect is shown. The receiver presumably proceeded in accordance with his order. The receiver is not sought to be held liable in his personal capacity. The corporation could not be held liable for any fault or omission of the receiver.

[8] Complaint is also made that the costs were taxed too high, in that more mileage was allowed certain witnesses than they had reported to the clerk. Since it is not contended that these witnesses were allowed costs for more mileage than they actually traveled, we think this argument without merit, as the clerk has power to correct his original notation of mileage if it was in fact too high or too low.

Judgment affirmed.

ELLIS, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

(97 Wash. 84)

PARKER et al. v. SEATTLE LAND & IMPROVEMENT CO. (No. 13853.)

(Supreme Court of Washington. June 20, 1917.)

1. **Brokers** 🔑86(1)—**Actions for Compensation—Weight of Evidence.**

Where a broker who sold lots to a school district for $9,500 had a right under its contract with the owners to sell them for $9,600, and its president testified that they were sold on his promise to make up the difference of $100 on subsequent sales, while the owners testified that they wanted $10,000, and consented to the sale on the broker's promise to waive its commission of $500, the broker's version of the matter will be accepted, as it could have compelled the sale by paying $100, and it was highly improbable that it agreed to waive its commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 117, 118.]

2. **Brokers** 🔑86(7)—**Actions for Compensation—Weight of Evidence.**

Owners of lots who had authorized a broker to sell them, sought to justify their refusal to recognize sales made by him on the ground that on a prior sale of a number of lots to the city for $30,000, the broker deceived them by stating that the sale was for only $25,000, and subsequently claimed that the additional $5,000 was used to bribe city officials and otherwise consummate the sale. The purchase was a matter of public notoriety, the title had been approved by the corporation counsel, and the price was paid by a warrant on the city treasury. The park board through whom the sale was made was composed of men of the highest reputation for probity and integrity, and the broker's president had the trust and confidence of the business world. *Held*, that the owners' claim was not believable, as the truth of the matters could have been ascertained with little difficulty.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116, 117.]

3. **Brokers** 🔑75—**Commissions—Right to Retain from Payments.**

Under a contract authorizing sales of lots by a broker who was to collect all deferred payments and account to the owners, and was to receive certain commissions which were not to be due or payable until it had made sales aggregating $40,000, the broker on making a sale that brought the aggregate to a sum in excess of $40,000 was not required to pay the money to the owners and receive back its commissions, and it was sufficient for it to pay the difference after deducting the earned commissions.

4. BROKERS ⚷10—RIGHT TO TERMINATE AGENCY—REFUSAL TO ACT.

A broker which was required to collect deferred payments and account to the owners was not guilty of a refusal to account justifying the owners in repudiating the contract because it refused to accept the owners' contentions that it had waived its commission on a certain sale and to account on that basis, where the dispute was not whimsical, but in good faith.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 11.]

5. BROKERS ⚷49(3)—PERFORMANCE OF SERVICES—DIFFERENCE BETWEEN CONTRACT AUTHORIZED AND THAT TENDERED.

Under a contract authorizing a broker to sell lots for cash or on deferred payments, and providing that no lots sold on deferred payments should be sold for less than $100 cash and $10 monthly, and that on a sale of more than one lot on one contract the same cash and monthly payment should be required for each lot, the owners were justified in refusing to execute a contract to a purchaser of a number of lots which provided for the execution of deeds to single lots when payments equaled a certain amount; this not being warranted by the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 72.]

6. BROKERS ⚷54—RIGHT TO COMMISSION—PROCURING PURCHASER.

Where, after the refusal to execute a contract to such purchaser, the broker procured and tendered the full cash price according to the prices fixed in the contract, it was entitled to its commissions on the sale as it procured a purchaser ready, able, and willing to take the property according to the terms on which it had the property for sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75–81.]

7. BROKERS ⚷63(5) — TENDER — KEEPING TENDER GOOD.

Where the broker tendered the full cash price of the lots, but the owners refused to execute a deed to the purchaser, the broker was not required to pay the money into court or deposit it in some public depositary for the owners' use in order to be entitled to its commissions, as the owners' failure to accept the tender at the time it was made or within a reasonable time thereafter made the default their own and relieved the broker of any further duty.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96.]

8. BROKERS ⚷51—RIGHT TO COMMISSIONS—NECESSITY OF PRODUCING PURCHASER.

Under a contract authorizing a broker to sell a number of lots, it was not required to bring the purchaser bodily into the presence of the owners to be entitled to its commissions, but earned such commissions when it brought and tendered to the owners its purchaser's money and demanded a deed in the name of the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 69.]

9. BROKERS ⚷63(5)—RIGHT TO COMMISSIONS—TENDER OF PURCHASE PRICE.

A broker authorized to sell lots at fixed prices and required to collect the deferred payments and account to the owners was not required to tender to the owners in connection with a sale which the owners had refused to recognize, more than the contract price of the lots involved, though it had money in its hands collected and not accounted for.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96.]

10. BROKERS ⚷27—DUTIES TO PRINCIPAL—ACCOUNTING.

Such broker on an accounting was not entitled to credit for an amount included in the aggregate total of sales made by it, but which had not been paid by the purchaser of a lot.

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Isaac Parker and another against the Seattle Land & Improvement Company. The named plaintiff died while the court held the cause under advisement, and I. C. Parker, the administrator of his estate, was substituted as party plaintiff in his stead. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with instructions to enter judgment in accordance with opinion.

Kerr & McCord, of Seattle, for appellant. Halverstadt & Clarke, of Seattle, for respondents.

FULLERTON, J. This is an action for an accounting. It was originally brought by Isaac Parker and Lydia G. Parker, his wife, against the Seattle Land & Improvement Company. After the issues had been framed and the evidence in the case taken and while the trial court held the cause under advisement, Isaac Parker died, and I. C. Parker, the administrator of his estate, was substituted as a party plaintiff in his stead. This appeal is by the defendant, the Seattle Land & Improvement Company, and for convenience we shall refer to the parties as appellant and respondents, as though no substitution had been made.

The facts giving rise to the controversy are in the main undisputed. On August 30, 1908, and for some years prior thereto, the respondents were the owners of a tract of land, ten acres in area, situated in that part of the city of Seattle formerly comprising the city of Ballard, which they had caused to be platted under the designation of Parker's addition to the city of Seattle. The appellant is a corporation engaged in the general real estate and brokerage business. On the date named the parties entered into a written contract by which the appellant undertook to sell for the respondents the real property mentioned, the material parts of the contract being as follows:

"1. The first parties hereby give and grant to the company until August 20, 1910, the sole and exclusive right to sell for them the following real estate lying and being in King county, Washington, to wit: Parker's addition to the city of Seattle.

"2. The company may sell said real estate, or any part thereof, for cash or on deferred payments, but no lot in block one (1) of said addition shall be sold for less than the sum of $300; no lot in blocks two (2) and three (3) of said addition shall be sold for less than the sum of

> $600.00; and no lot in block four (4) of said addition shall be sold for less than the sum of $300.00. No lot in said addition shall be sold on deferred payments for less than one hundred dollars ($100.00) cash upon execution and delivery of contract of sale, therefor, and ten dollars ($10.00) monthly thereafter until the full purchase price thereof shall be paid, with interest on deferred payments at the rate of seven (7) per cent. per annum, interest payable monthly. Should more than one lot be sold on the same contract, the same cash and monthly payment shall be required for each lot so sold.
>
> "3. The company shall advance to the first parties the sum of ten thousand dollars ($10,000), without interest, payable as follows: Five hundred dollars ($500) cash upon the execution and delivery of this agreement, the receipt whereof is hereby acknowledged, and nine thousand five hundred dollars ($9,500) within —— days after date hereof. Said sum shall be retained by the company out of the first moneys received by it hereunder.
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> "4. The first parties shall secure, at their own expense, and furnish to the company, one abstract of title to said real estate, certified to by some responsible abstract company doing business in the city of Seattle. The company shall, at its own cost, furnish such additional abstracts of title to said real estate as may be necessary.
>
> "5. The first parties shall execute and deliver to purchasers of said property deeds thereto when the purchase price thereof has been fully paid. They shall also execute and deliver to purchasers of said property sold on deferred payments contracts of sale therefor as the same is sold, but all such deeds and contracts shall be subject to taxes and assessments for local improvements which may become payable, or a lien on said property subsequent to date hereof.
>
> "6. The company shall hold the first parties and said property harmless from any and all taxes and assessments on said property which shall become a lien on the same, or payable, subsequent to date hereof and prior to full payment for said property.
>
> "7. All deferred payments shall be collected by the company and it shall account to the first parties on the first day of each and every month hereafter, in detail, for all sales and collections made by it during the preceding month.
>
> "8. The company shall receive as and for its full compensation for services rendered hereunder, and in full payment for any disbursements made by it hereunder, the following: Five per cent. (5%) of the first ten thousand dollars ($10,000.00) of the aggregate sale price of said property; two and one-half per cent. (2½%) of the balance of the aggregate sale price of said property up to forty thousand dollars ($40,000.00); and one-half (½) of the gross aggregate sale price of said property over forty thousand dollars ($40,000.00). No part of said commission or compensation shall be due or payable until the company shall have sold in the aggregate property to the extent of forty thousand dollars ($40,000.00), and shall be payable only out of moneys thereafter coming into its possession hereunder."

Acting under and in pursuance of the contract, the appellant found purchasers to whom deeds were issued by the respondents for all of the property save and except 11 lots in block 1 and one lot in block 4. Of the property so sold, 16 lots were sold to a school district of King county for the sum of $9,500, 48 lots to the city of Seattle for the sum of $30,000, and the remainder to individual purchasers; the total of such individual sales aggregating $2,550. The present action was begun after the time limit for selling the property fixed in the contract had expired. In their complaint the respondents alleged that the total sales aggregated the sum of $42,050; that the appellant had suffered taxes and assessments to accumulate on the unsold property in the sum of $837.47; that it had received $5,000 of the purchase money for which it had not accounted; that it had waived its commission on the first $10,000; that it was entitled to commissions on the remaining sales aggregating $1,775, and that there was due the respondents the sum of $4,037.47, with interest at the legal rate on $3,200 thereof from May 20, 1909, and interest on $837.47 thereof from the date of the commencement of the action. The appellant put in issue by denials the allegation that it had waived a part of its commission, and the allegations of the account as stated by the respondents. By way of an affirmative answer it alleged a sale of all of the property in accordance with the terms of the contract, the sales aggregating $45,650, on which it was entitled to a commission of $4,075; and that it had paid, after deducting the commissions, all that remained due the respondents except a balance of $422, which it tendered and paid into the registry of the court for the use of the respondents. The sales included a sale alleged to have been made to one Isabella Whyte of the 12 lots for which the respondents refused to issue a deed. For reply the respondents denied the affirmative allegations of the answer, and as a special defense to the allegation concerning the sale to Isabella Whyte, alleged that the appellant had prior to such alleged sale refused to account for moneys received by it from sales then made, and that the respondents had notified the appellant that they would not proceed further under the contract.

The cause was tried and submitted to the court on March 12, 1914. The court rendered its decision on June 28, 1916. The third finding of fact embodies the substance of the findings and reads as follows:

> "That at the time of signing said agreement, the defendant paid to the plaintiffs the sum of $500, but no more; that thereafter, during the time of said contract, the defendant sold all of said real estate, mentioned and described in said agreement, except lots 1 to 11, both inclusive, block 1, and lots 1 and 2, block 4, of said Parker's addition to the city of Seattle, for the sum of $42,050. That the last sale of said property was made on the 20th day of May, 1909. That defendant earned as its commission, according to the terms of said agreement, the sum of $2,275. That defendant received on account of the sales of said real estate the sum of $42,050, and has paid to the plaintiffs the sum of $37,050, and no more. That on the 20th day of August, 1910, the date of the expiration of said agreement, there were general taxes upon the portion of said Parker's addition not sold by the defendant, to wit, lots 1 and 2, block 4, and lots 1 to 11, both inclusive, block 1, the city of Seattle amounting to $456.85, no part of which the defendant has paid."

From the findings the court concluded that the respondents were entitled to recover from the appellant $2,225, with interest from May 20, 1909, and the sum of $507.54, with interest from August 20, 1910, together with the costs of the action, and rendered judgment accordingly.

[1] The evidence developed three principal controversies: (1) Whether the appellant had waived its commission on the first $10.000 of the sales; (2) whether it had wrongfully refused to account for the moneys received from the sales: and (3) whether respondents were in the wrong in refusing to recognize the sale made to Isabella Whyte. The first controversy arose out of the sale of the tract to the school district. The respondents testified that they wanted $10.000 for the lots comprised in this tract; that the school district offered and would pay but $9,500; and that they consented to the sale on the promise of the appellant that it would waive its commission which would equal the difference, namely, $500. The president of the appellant who had charge of the negotiations, one Fred E. Sander, denies these statements. He points out that the respondents had no right to exact $10,000 for the lots as a condition to making a deed thereto; that by the terms of the contract the appellant had the right to sell them for $9.600: and that the price for which they were sold was but $100 less than the contract price. His version of the matter is that the respondents consented to make the deed for the price at which they were sold on his promise to make up the difference of $100 on subsequent sales, which difference was made up by the subsequent sale to the city of Seattle; that sale being for $1,200 in excess of the price of the lots as listed in the contract. We are constrained to adopt the appellant's view of the matter. It could have compelled a deed to the property by paying the difference between the price for which the land was sold and the price at which, by the terms of the contract, it was at liberty to sell it. Since its interest in the matter was the commissions it was to receive, it is highly improbable that it would have sacrificed $400 for the sake of saving $100.

[2] The second controversy is material here only as it affects the third. If the appellant did wrongfully refuse to account for all of the money received from the sales as made, it may be that the respondents were justified in refusing to recognize the last of the sales made by the appellant. The controversy arises out of the sale to the city of Seattle. This was the last of the sales made for which deeds or contracts were executed. On its completion the appellant retained from the purchase price received the sum of $5,000. Mr. Sander testified that the sum was retained, under an express understanding and agreement with Isaac Parker, to be accounted for on the expiration of the terms of the contract. The respondents denied the agreement; testifying that the appellant undertook to deceive them, that it was first contended by Mr. Sander that $25,000 was the sum received for the property, and that he afterwards admitted that the sale was for $30,000, but claimed that the $5,000 had to be used for the purpose of consummating the sale, some of it being used to bribe certain of the officials representing the city. It seems to us that, measured by probabilities, the appellant's version of the transaction is the more rational and believable of the two. The city purchased the property for use as a park. In the transaction it was represented by its park board. The purchase was a matter of public notoriety. The title to the property had to be approved by the corporation counsel. The purchase price was paid by a warrant drawn on the city treasury. The park board was composed of men of the highest reputation for probity and integrity. Seemingly, in the light of these facts, no one would have supposed for a single instant that the densest ignorance could be imposed upon by so wild a tale. The record shows that the president of the appellant was possessed of such trust and confidence in the business world as to enable him to borrow on behalf of his company a large sum of money. Characters are not formed in a day, and it is almost beyond belief that a man having a reputation for integrity of this sort would even have attempted to deceive; much less is it believable that he would have attempted to deceive by false representations concerning matters the truth of which, if not already known, could have been ascertained with so little difficulty.

[3, 4] Again, it is not quite fair to assert that the appellant refused to account. This particular sale brought the aggregate sales of the property to a sum in excess of $40,000. By the terms of the contract (paragraph 8) the appellant was then entitled to collect for commissions. Nothing in the contract required it to pay the money over and then receive it back from the respondents. It was sufficient for it to pay the difference after deducting the earned commissions. This it offered to do, but when the account was attempted to be taken, the parties could not agree upon the amount due because of the differences concerning the commissions on the first sale, and no settlement could be reached. This however, does not amount to a refusal to account. The dispute was not whimsical, but was in good faith, and the fact that the appellant did not accede to the respondents' contentions could not be said to be a refusal to account, or to authorize the respondents to repudiate the contract.

[5, 6] As to the third contention, the evidence leaves no doubt in our minds that the appellant procured a purchaser for the remaining property. After procuring the purchaser, it prepared a contract of sale in the form of a time sale authorized by the contract and tendered it to the respondents for execution. The respondents refused to execute it, assigning two reasons: First, that

the contract was at an end because of the appellant's refusal to account for the money received by it; and, second, because the contract as prepared contained a clause requiring the execution of deeds to single lots when payments equaled a certain sum—a clause not warranted by the contract under which the appellant was empowered to sell. Later, and on the day before the contract expired by its own limitation, the appellant procured the cash price of the property, went to the home of the respondents where the business of the parties had been usually transacted, and, finding Lydia Parker alone in the house, tendered to her the full cash price of the property according to the prices fixed in the contract, and demanded a deed to its purchaser subject to the taxes and assessments then due thereon. It accompanied its tender also with the sum it admitted to be due on sales theretofore made after deducting its earned commissions. Mrs. Parker refused to accept the money, and the matter then rested. The first tender was properly refused for the second reason given for the refusal, but clearly the second tender was a valid tender timely made. Undoubtedly had the respondents accepted the tender they would have been entitled to a reasonable time in which to prepare, execute, and deliver a deed, and it may be that equity would have relieved them of their default had they within a reasonable time tendered a deed on consideration of receiving the money which had been tendered. But they did neither, and under the contract the appellant became entitled to its commissions on the sale; it produced a purchaser ready, able, and willing to take the property according to the terms on which it had the property for sale.

[7] The respondents argue in this connection that the tender became inoperative because not kept good. We do not know that we fully understand the purport of this. If it be meant that the appellant should have paid the money into the registry of the court on filing its answer, or should have deposited it in some public depositary, such as a bank, for the respondents' use, we cannot agree with the contention. On the refusal of the respondents to accept the tender when made, the default was theirs. As we have said, since they had a reasonable time in which to execute a deed equity might have relieved them from the default had they tendered the deed within a reasonable time after refusing the tender; but their failure to either accept at the time of the tender or within a reasonable time thereafter made the default their own and relieved the appellant of any further duty.

[8] It is said that the purchaser was not produced within the meaning of the rule laid down in Barnes v. German Savings & Loan Society, 21 Wash. 448, 58 Pac. 569. But, if we have correctly caught the drift of the contention, all that the appellant failed to do was to bring its purchaser bodily into the presence of the respondents. This it was not required to do in order to comply with its contract, and we cannot regard the case cited as so holding. It was enough when it brought and tendered to the respondents its purchaser's money and demanded a deed in the name of the purchaser.

[9] There is a dispute in the evidence as to the amount of cash actually tendered to Mrs. Parker on account of the sale to Isabella Whyte. It is conceded that the court was in error in its finding that 2 lots in block 4 remained unsold, and that the correct finding should have been that only one lot in that block remained unsold. These lots were priced in the contract at $300 each. The purchase price was therefore $3,600, and the testimony of Mr. Sander was that he tendered $3,972; the amount in excess of the purchase price of the lots being the amount he conceded the appellant had collected and not accounted for. Mrs. Parker on her cross-examination testified that she told her husband and son that the amount tendered was $3,972, but later on, in her direct examination, she testified that Mr. Sander told her the amount was $5,000; that the money was not counted out. As we view the record there was no necessity for a tender in excess of the contract price of the lots to entitle the appellant to a performance, and, as either amount is in excess of that sum, the exact amount tendered is not necessary to be determined.

[10] The respondents offered no testimony as to the amount the appellant had actually paid of the moneys received by it on the purchase price of the lots. Mr. Sander testified that the sum was $37,453. In addition to this he claimed a credit of $100 due from a Mr. Olson to the respondents on the purchase price of a lot sold under contract which had not then been paid. Adding to these credits the amount due the appellant as commissions and deducting the aggregate from the amount received from the sales would leave a balance of $422, the amount the appellant paid into the registry of the court. While the evidence is not very clear as to the $100 item, it seems to have been conceded elsewhere in the record by both parties that the sum of $2,550, received from the sales to the individual purchasers, was the aggregate total of the sales. If this be the fact, the item was included in that total and could not be charged as an additional credit merely because the sum had not been actually paid over. As the record stands, we think the item should not be allowed.

As we view the record, therefore, the respondents were entitled to a judgment against the appellant for the sum of $522, with the costs and disbursements of the action, on which should be credited the sum paid into court for their use. The judgment is reversed, and the cause remanded, with instructions to enter a judgment accordingly. The appellant will recover its costs in this court.

ELLIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(97 Wash. 122)

ENNIS v. NEW WORLD LIFE INS. CO.

(No. 13819.)

(Supreme Court of Washington. June 22, 1917.)

1. EVIDENCE 🔑434(11), 437—PAROL EVIDENCE—STOCK SUBSCRIPTION CONTRACT.

Where fraud or illegality inheres in a stock subscription contract, that fact may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2013, 2014, 2025–2029.]

2. CORPORATIONS 🔑30(1)—OPTIONAL STOCK SUBSCRIPTION OF INCORPORATORS.

An optional subscription contract by incorporators in the name of a trustee, entitling them to buy the stock at a fixed price, *held* void and unenforceable against the corporation, being a fraud on other subscribers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 97.]

3. TRUSTS 🔑339—CONTRACT BY TRUSTEE WITH HIMSELF.

A contract made by a trustee with himself in violation of his trust is always enforceable against him, because he will not be heard to assert its invalidity.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 500.]

4. CORPORATIONS 🔑30(2) — CONTRACTS BY INCORPORATORS WITH THEMSELVES.

Contracts by incorporators with themselves as individuals are closely scrutinized, and if it appears that they thereby gained an advantage over the corporation, the contract is voidable at the corporation's option, the good intentions and honesty of purpose of the incorporators not availing them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98.]

5. CORPORATIONS 🔑30(1) — PROMOTERS — FIDUCIARY RELATION.

Promoters of a corporation stand in a fiduciary relation to the corporation, and are bound by the principles governing persons in a fiduciary capacity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 97.]

6. CORPORATIONS 🔑90(1) — SUBSCRIPTIONS FOR STOCK—FRAUD.

One for whose benefit a fraudulent stock subscription was made could not enforce it against the corporation or its stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 383, 385–388.]

Department 2. Appeal from Superior Court, Spokane County; Frank H. Rudkin, Judge pro tem.

Action by Matt Ennis, administrator, against the New World Life Insurance Company. From judgment for defendant, plaintiff appeals. Affirmed.

Kenneth Durham and Oscar Cain, both of Spokane, for appellant. Thomas A. E. Lally and Graves, Kizer & Graves, all of Spokane, for respondent.

FULLERTON, J. Thomas J. Ennis was one of the promoters and incorporators, and a member of the directorate, of the Roman Catholic Life Insurance Company of America, the name of which was afterwards changed to the New World Life Insurance Company. Ennis, claiming under a subscription to corporate stock made in the name of E. J. Cannon as trustee, began an action to recover the difference between his subscription price of the stock and its market value on October 7, 1913, the date on which the subscription was repudiated by the corporation. From a judgment dismissing his action an appeal was taken. Pending appeal the plaintiff died, and his brother Matt Ennis as administrator was duly substituted as party plaintiff and appellant.

The appellant assigns as errors the action of the court (1) in admitting parol evidence to vary the terms of the stock subscription contract; and (2) in holding the subscription contract unenforceable. The insurance company was organized on February 26, 1910, with a capital stock of $2,000,000 divided into 200,000 shares. There were seven incorporators who subscribed to the stock. By agreement between them, E. J. Cannon, as trustee, subscribed for 20,000 shares in addition to their regular subscriptions which were to be held for the benefit of the incorporators. The subscription covered only 23,400 shares. The sale of the balance of 176,600 was to be promoted by the Columbia Finance Company, with which a contract to that effect was entered into by the insurance company. The incorporators, concluding afterwards that the company would not legally conduct business unless its full capital stock was subscribed, caused one of the incorporators, Thomas A. E. Lally, to make a pro forma subscription for the 176,600 shares which were to be handled by the finance company. The trust agreement between the incorporators was put into the following written form:

"This contract, made and entered into this 26th day of February, 1910, by and between Edward J. Cannon, party of the first part, and Thomas A. E. Lally, Thomas J. Ennis, Henry B. Luhn, John J. Cadigan, Edward J. O'Shea, and Edmund Burke, parties of the second part, all of both parties being the entire incorporators and founders of the Roman Catholic Insurance Company of America, witnesseth:

"1. That Edward J. Cannon, party of the first part, for and in consideration of the sum of $1 to him in hand paid by the parties of the second part, receipt of which is hereby acknowledged, and for and in consideration of the association of all the parties hereto, and their incorporating the Roman Catholic Life Insurance Company of America, agrees to be, and is hereby declared to be trustee of 20,000 shares of the capital stock of Roman Catholic Life Insurance Company of America, for and in behalf of himself and the parties of the second part, as set out in the contract between said company and the Columbia Finance Company, a copy of which is hereto attached and marked Exhibit A, and hereby made a part hereof.

"2. Said 20,000 shares is reserved out of the remainder of the stock on hand after the sale of the first, second and third and fourth series or assignment as set out in said contract above mentioned and hereto attached.

"3. The method of apportioning and distributing said 20,000 shares among the said seven incorporators of the Roman Catholic Life Insurance Company of America shall be as follows: The proportion which the amount of stock that each of the above seven incorporators has purchased and is holding for himself in said company, at the time the said first, second and third and fourth series or assignments are sold, bears to the total amount so purchased and held by all of said seven incorporators is the ratio and proportion in which said 20,000 shares shall be distributed among said seven incorporators.

"4. The distribution of said 20,000 shares among the said seven incorporators shall be at any time after the sale of said first, second and third and fourth series or assignments of stock, as set out in the above-mentioned contract hereto attached. A certificate of stock shall be issued to each incorporator for the amount of his proportionate part of said 20,000 shares immediately upon his payment to the Roman Catholic Life Insurance Company of America of the price of $12.50 per share for all of the stock to which he is so entitled.

"5. It is expressly understood that the right which each of said seven incorporators has, as beneficiary in this contract, cannot be assigned or disposed of to any one except to a member or members of the parties to this contract.

"6. That if any one of said seven incorporators disposes of all of his stock in the Roman Catholic Life Insurance Company of America before the sale of said first, second and third and fourth series or assignments shall have been completed, he loses all right and title to the benefit of this contract, and his interest so lost by him, shall revert to the remaining incorporators in proportion above mentioned; and if he shall have already assigned his interest and subsequent thereto disposed of all his stock in said company, before the sale of said first, second and third and fourth series or assignment shall have been completed, such assignment shall be of no effect whatever."

Later the board of directors of the insurance company, composed of all the original incorporators except Ennis, who had withdrawn from the board, entered into the following agreement with themselves as individuals:

"1. Whereas on the 26th day of February, 1910, one certain agreement was executed by E. J. Cannon, as party of the first part, and John J. Cadigan, Edmund Burke, Thomas J. Ennis, Henry B. Luhn, Edward J. O'Shea, and Thomas A. E. Lally, as parties of the second part; all of whom are parties to this agreement, and all of whom are incorporators of company, which said agreement of February 26, 1910, purported to set out the interests of the said parties in and to the said 20,000 shares of the capital stock of company subscribed for by E. J. Cannon, trustee for and on behalf of said incorporators.

"2. Whereas, the said E. J. Cannon wishes to be relieved and to resign as trustee of said 20,000 shares; and whereas, the parties hereto wish to have the rights and interests of each of them in said 20,000 shares definitely and correctly set out herein: Therefore, in consideration of the execution of this agreement by each party hereto, and in consideration of the sum of $1 paid by each party hereto to each of the other parties hereto, the receipt of which by each of whom is hereby acknowledged, and for other valuable and legal considerations, it is expressly understood and agreed:

"3. That this agreement is substituted for and supersedes in every respect said agreement of February 26, 1910; that the resignation of E. J. Cannon as trustee of said 20,000 shares is hereby accepted by the parties hereto, and in his stead and place is hereby substituted 'the National Bank of Commerce of Spokane,' a corporation, hereinafter called 'bank,' as hereinafter provided.

"4. It is agreed and understood that the said incorporators are entitled, subject to the terms of this agreement, to the following respective parts of said 20,000 shares: E. J. Cannon, five thousand shares (5,000); Thomas J. Ennis, five thousand eight hundred eighty-two shares (5,882); John J. Cadigan, two thousand nine hundred forty-two shares (2,942); Edmund Burke, one thousand one hundred seventy-six shares (1,176); Henry B. Luhn, two thousand nine hundred forty-two shares (2,942); Edward J. O'Shea, five hundred eighty-eight shares (588); Thomas A. E. Lally, one thousand four hundred seventy shares (1,470).

"5. There shall be issued by company seven certificates of its capital stock in the respective amounts and to the respective parties as in the last preceding paragraph set out, and all of which certificates shall be delivered by said company to bank, to be held by it in escrow for and on behalf of the parties hereto as herein provided, each one of said certificates shall be marked thusly: 'This certificate is issued in escrow for the benefit of the party named herein, and title does not pass to said party in and to any part of the shares named herein, and no part of the same is assignable unless the terms of one certain contract of option executed by said party are complied with.'

"6. At any time or times prior to September 1, 1916, any of said incorporators may pay to company, or to bank, for said company, $12.50 per share for any part or parts of at least 50 or more shares of his share of said 20,000 shares, at which time or times company shall issue to him a certificate, or certificates, for the amount or amounts so paid by him, and will cancel the certificate for his share of said 20,000 shares so held by bank, and will issue and deliver to bank a new certificate marked as was the original, of his share still unpaid, which last-mentioned certificate will be held by bank, as was the original certificate, and will be subject to the same provisions set out herein, until his share of said 20,000 shares shall have been fully issued to him: Provided, however, if any of said 20,000 shares remains unpaid after September 1, 1916, the certificate or certificates therefor shall be delivered to company by said bank, and the original incorporators shall thereupon forfeit any and all right to them which they may have in and to that part so unpaid on said date; it being further understood and agreed that no title shall pass from company to any of said incorporators in and to any part of said 20,000 shares unless and until said incorporators shall have fully performed the provisions of this agreement which by him should be performed.

"7. It is understood that this agreement is considered by company an option from it to the said respective incorporators to purchase their respective shares of said 20,000 shares, according to the terms hereof, and that this agreement is executed by company in consideration of the services rendered and to be rendered by said incorporators to it and as above set out.

"8. This agreement and option is executed by all of the parties hereto in nine copies, each one of which is in its terms exactly like this one, one of which shall be retained by each of said incorporators, one by bank, and one by company.

"9. It is understood and agreed that no part of said 20,000 shares shall be voted personally, or by proxy, at any corporate meeting of company, except that part which has been fully

> paid by any of the incorporators as herein provided, and it is further understood that the reasonable costs and expenses incurred in favor of bank by reason of its acting herein shall be paid by said original incorporators equally among themselves.
>
> "10. It is further understood and agreed that this contract and option is not affected, nor is its operation and effect to be affected, governed or changed in any manner, by the liability of any of said incorporators to company, because of subscriptions made by any of them, to the capital stock of company at any time prior or subsequent to the execution of this indenture."
>
> Dated September 9, 1911.

[1] At the trial respondent over the objection of appellant introduced the testimony of five of the parties to the trust subscription, for the purpose of showing that the contract was in fact an option, and not intended to impose an obligation on the subscribers. The court's ruling admitting the evidence was upon the ground that the whole matter was open to parol testimony, inasmuch as appellant was compelled to establish his interest in the subscription contract by parol. Whether or not parol was admissible on that ground, we think it was admissible on the issues raised by the pleadings that the subscription contract was fraudulent as to subsequent subscribers, and was violative of the statutes of this state respecting the organization of insurance companies. Where fraud or illegality inheres in a stock subscription contract, that fact may be shown by parol. Anderson v. Scott, 70 N. H. 350, 47 Atl. 607; Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa, 396, 107 N. W. 629, 119 Am. St. Rep. 564; Turner v. Grobe (Tex. Civ. App.) 44 S. W. 898; Collins v. Brick Co., 92 Ark. 504, 123 S. W. 652, 135 Am. St. Rep. 197, 19 Ann. Cas. 882; Commonwealth Bonding, etc., Co. v. Bomar (Tex. Civ. App.) 169 S. W. 1060.

[2] Respecting the illegality of the subscription, the evidence showed that for a period of 3½ years no payment was made on the subscription contract by its trustee, while all new subscribers to stock were required to pay up in full within 60 to 90 days after subscribing. By the terms of the agreement between the insurance company and the finance company, the trustee subscription was to be held in abeyance until 100,000 shares had been disposed of, which figure had not been reached on October 1, 1913, the date on which the respondent repudiated the trustee subscription. This repudiation was due to the fact that the state insurance commissioner had notified the company that the trust subscription agreement was a discrimination against the other purchasers of stock in favor of the directors of the company and a violation of the insurance code. That the incorporators of the company in making their trustee subscription, in addition to those made in their individual capacities, intended to subject themselves to a merely optional liability is clearly shown by their subsequent agreement attempting to fully define the arrangement as they understood it. In the agreement of September 9, 1911, they expressly declare:

> "It is understood that this agreement is considered by company an option from it to the said respective incorporators to purchase their respective shares of said 20,000 shares, according to the terms hereof, and that this agreement is executed by company in consideration of the services rendered and to be rendered by said incorporators to it and as above set out."

Under this agreement the cestuis que trust were given 5 years in which to have the privilege of exercising the option. The evidence shows that this block of stock was set aside for the benefit of the promoters, as a sort of perquisite to be availed of if the selling price of stock should go to a premium, but that otherwise no liability would attach on the subscription. Though prima facie a bona fide subscription, it was not such in fact, but was void as to subsequent subscribers; it was notice to the investing public that the 20,000 shares in question were actually subscribed, when they were not; and it provided for the reservation of a secret profit to the promoters to the exclusion of the other shareholders in the capital stock. At the time appellant brought his action, shares were selling at $7.50 in excess of cost price, which on 20,000 shares would amount to $150,000. On the basis of an advance of $12.50 in the value of shares, appellant claims his damages as amounting to $73,512.50. The mere statement of these figures indicates that the loss to other stockholders is no immaterial matter, and that the secret profit arranged by the promoters for their own benefit would have been considerable.

Without going into the details of all the evidence, which is voluminous, we think enough has been set out to stamp the transaction as one designed to obtain an unfair advantage over other stockholders. It was one made by the promoters of the corporation and ratified by themselves as the board of directors of the organization.

[3, 4] The cause was tried before Hon. Frank H. Rudkin, judge of the United States District Court for the Eastern District of Washington, who was called in as judge pro tem. for the purpose of the trial in the superior court of Spokane county. In dismissing the action, he wrote an opinion, which concisely analyzes the evidence and succinctly states the governing principles of law. From that opinion we quote as follows:

> "In my judgment the case might well be disposed of without considering any disputed questions of fact; but I will nevertheless refer briefly to some conflicts in the testimony. The plaintiff testified that the basis of apportioning the trust stock was agreed upon by all the incorporators before the subscription was actually made. In this he is not supported by the testimony of the other parties in interest. One of them testified that he was under the impression that an agreement or understanding of that kind existed; but he had no independent recollection of the facts or of anything that was said. On the other hand, the other five incorporators testified positively that the mode of distribution was never discussed or agreed upon until at or

about the time of the execution of the first written contract some months later, and that instrument, it will be recalled, distributes the stock on a slightly different basis. But as a matter of fact it is apparent from the record that little was said or thought about the trust subscription at the time it was made. The reason for this indifference is not far to seek. The parties were agreeing to pay 25 per cent. above par for the stock of a $2,000,000 corporation whose assets consisted in a corporate name, the right to exist, and an executory contract for the sale of its stock. Few, if any, of the incorporators knew or appreciated that they were incurring personal liability by reason of the trust subscription and the prospect of future gain was too remote to incite interest or even curiosity. Their view doubtless was that if the enterprise succeeded and the stock advanced beyond $12.50 per share they would profit to the extent of the increase; but the thought that they might or could suffer a loss never occurred to them. Whether their view of the law or of the obligation assumed was correct is another question. I am fully satisfied, therefore, that if the question of apportioning the trust stock came up for consideration at all it was only discussed between the plaintiff and one of the other incorporators, and was never agreed upon or assented to by all until at or about the time of the execution of the written contract. This question is perhaps of little moment inasmuch as the allegation of the complaint relating to the apportionment of the trust stock was not denied by the answer; but it none the less has some bearing upon the credibility of the witnesses and the weight of the testimony. Again the plaintiff testified that he had made all arrangements to take up and pay for his portion of the trust stock which would involve an outlay of upwards of $70,000, all or more than he was actually worth. This testimony seems utterly incredible. Why the plaintiff should expect or apprehend that the trustees of this corporation would make a call upon themselves for a quarter of a million dollars is incomprehensible to me. The probability, or even the possibility, that such a call would be made is rebutted by every fact and every circumstance in the case. It is conceded that each of the incorporators was solicited to make his individual subscription as large as possible, and that each of them did so; and if the trust subscription was made on the same terms and conditions, and subject to the same liabilities, well may we ask why was there a trust subscription at all. If the several incorporators were unable or unwilling to take more than 3,400 shares in the aggregate, why should they obligate themselves to take more than five times that number under the guise of a trust subscription? But these questions are answered by the record. The trust subscription was not made subject to the same terms and conditions as the individual subscriptions, and this fact was well understood. The agreement with the Finance Company, executed on the same day, reserved from the remainder of the stock, after the completion of the sale of the first, second, third and fourth assignments, the 20,000 shares of trust stock in question. This reservation shows very clearly that no one contemplated that the trust stock would be taken up or paid for until after the sale of 100,000 shares of the other stock, 10,000 shares at $12.50 per share, 10,000 shares at $15 per share, 30,000 shares at $17.50 per share, and 50,000 shares at not less than $17.50 per share. The agreement entered into some time late in 1910, but dated back to February 26th of that year, also provided that the trust stock should be distributed after the sale of the first four assignments. The last agreement of September 9, 1911, by its terms superseded all prior agreements on that subject and provided that the trust stock might be taken up at any time prior to September 1, 1916. As already stated, this latter agreement was a mere option imposing no obligation whatever upon the subscribers. Let us now examine briefly these different contracts and see if they gave the stockholders of the trust stock any advantage over other stockholders. While no formal call on the stockholders was ever made, it is admitted that the individual subscriptions of the incorporators were to be paid and the stock taken up immediately, or at least within a reasonable time, and that this was done. It is further admitted that the stock sold by the Finance Company was paid for in full within 90 days from the date of sale, one-fourth upon the day of sale, and the balance within 90 days thereafter. Let us compare the situation of these stockholders with the subscribers to the trust stock. When the contract of September 9, 1911 was entered into the stock of the company was selling readily at from $15 to $20 per share, and the plaintiff avers in his complaint that as early as October 17, 1913, it was of the reasonable value of $25 per share, yet the trustees of the corporation granted themselves an option to purchase the stock, extending over a period of three years, for $12.50 per share. The invalidity of this agreement, standing alone, is so apparent that the plaintiff does not attempt to uphold it, and I will not discuss it. True, he was not an officer of the corporation at that time, but the agreement simply carried out the details of arrangements made while he was an officer. The plaintiff, however, does not refer to or rely on this agreement. He plants himself squarely on the subscription contract and in effect says to the court, the contract is plain and free from ambiguity; it is enforceable against the subscribers, and therefore it may be enforced by them. In some respects his position is correct, and in others it is not. Possibly the subscription might be enforced against the subscribers; but that is at least a debatable question. Under the laws of this state a corporation cannot enforce subscriptions to its capital stock until the capital stock has been fully subscribed for. Denny Hotel Co. v. Schram, 6 Wash. 134 [32 Pac. 1002, 36 Am. St. Rep. 130].

"There was no bona fide subscription to the capital stock of this corporation outside the 23,400 shares, conceding that the trust subscription was a bona fide one, until long after the trust subscription was made. The subscription to the balance of the stock was merely formal to perfect the organization of the company, and that fact appears on the face of the subscription itself. Furthermore, the officer who made the formal subscription testified at the trial that he was not financially able to take care of even his small portion of the trust subscription. The first bona fide subscription to the stock was therefore made by the parties who purchased it through the Finance Company, and it may well be urged that the trust subscription could not be enforced until all the stock was subscribed and paid for at prices greatly in excess of $12.50 per share. But conceding that the subscription might be enforced against the trustee and his cestuis que trust, it does not follow that it may be enforced by them. A contract made by a trustee with himself, in violation of his trust, is always enforceable against him because he will not be heard to assert its invalidity; but it is almost universally held voidable at the instance of those whose rights are prejudiced thereby. Furthermore, the subscription in this case lacks many of the essential elements of the ordinary contract. The corporation could only act and speak through its authorized officers, and these officers were contracting and dealing with themselves. It is a universal rule of law that such contracts are closely scrutinized, and if it appears that the trustee gained an advantage over other parties for whom he was acting as trustee, the contract is voidable at their option. In executing this mortgage and thereby

> securing to themselves advantages which were not common to all the subscribers, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees. 'The directors are the trustees or managing partners, and the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy.' Koehler v. Black River Falls Iron Co., 2 Black, 715, 721 [17 L. Ed. 339]. But this rule of law is elementary and is supported by all the authorities, English and American, state and federal. Many cases are cited in the briefs; but the question involved is essentially one of fact. That question is, Did the trustees of this corporation, by their contracts, gain an advantage over other stockholders of the corporation? This question admits of but one answer. It is frankly conceded by the defendant that the trustees were guilty of no intentional wrong, and that concession is fully borne out by the testimony. They no doubt felt that they were hazarding their money in an enterprise which might fail, and that if the enterprise succeeded, they were entitled to some consideration for their efforts. But it must be remembered that other parties who purchased stock before the success of the enterprise became an assured fact took the same risk and were entitled to the same consideration. Conceding that the trustees were guilty of no moral wrong, yet they were plainly obtaining an advantage over other stockholders whose rights and property they held in trust, and their act in so doing is condemned by the law on grounds of public policy. Under such circumstances good intentions and honesty of purpose are of no avail. Perhaps it will be unnecessary to make any findings in view of the fact that there will be no affirmative judgment to support; but if the parties deem it necessary, the only finding I will make will be that the trust subscription and all subsequent contracts gave the trustees an advantage over other stockholders, and for that reason are nonenforceable. Let findings and judgment be submitted accordingly."

[5] We adopt the foregoing opinion of the learned judge as the proper rule for the decision of the action. It is settled law that the promoters of a corporation stand in a fiduciary relation to the corporation, and are bound by the principles governing persons acting in a fiduciary capacity. It has been held that the gratuitous issue of corporate stock by promoters to themselves is a fraud on existing stockholders. Hughes v. Cadena, etc., Mining Co., 13 Ariz. 52, 108 Pac. 231. While no stock was issued in the present case, nor was it the intention that it should be gratuitous, the promoters had arranged for its issuance at a profit to themselves which virtually made the issue gratuitous, sufficiently so at least to bring the transaction within the principles announced in the Hughes Case. See, also, Hinkley v. Pipe Line Co., 132 Iowa, 396, 107 N. W. 629, 119 Am. St. Rep. 564. In 1 Thompson on Corporations (2d Ed.) § 104, it is said:

> "From this fiduciary relation it follows that the promoters must deal with the persons who come into the organization as members or stockholders in the utmost good faith. * * * Neither will they be permitted, either by fraud or silence, to use their position for the purpose of speculation. The general rule conceded and adopted by the authorities is that under such circumstances promoters cannot take advantage of their position to make secret profits out of their transactions with or on behalf of the proposed corporation or the corporators. * * * 'Justice demands that the promoters of the company should not abuse the confidence placed in them by the stockholders, or derive any unjust advantage through their control over the organization or management of the company.' * * * If the promoters obtain secret profits out of any transactions, and either they themselves become members of the board of directors, or persons under their control are elected as such directors, and the board thus composed adopts and ratifies the voidable transaction—this, it has been held, will create no impediment to proceedings by stockholders for redress."

While the transaction involved in this action is not, strictly speaking, one falling within the class of cases usually dealing with what are called "secret profits," it comes within the principle of those cases for the reason that the subscription was made with the object in view of reaping a profit in the future at the expense of the other stockholders. See Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. 173; Yeiser v. U. S. Board, etc., Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; Davis v. Las Ovas Co., 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426; Chandler v. Bacon (C. C.) 30 Fed. 538; Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498; Pietsch v. Milbrath, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 68 L. R. A. 945, 107 Am. St. Rep. 1017; De la Motte v. N. W. Clearance Co., 126 Minn. 197, 148 N. W. 47; Torrey v. Cement Co., 158 Mich. 348, 122 N. W. 614; Tooker v. Refining Co., 80 N. J. Eq. 305, 84 Atl. 10; Parker v. Boyle, 178 Ind. 560, 99 N. E. 986.

[6] The optional subscription in the name of the trustee was made with no intention of enforcing it in case the company was not a success. It was held out to the public as a binding subscription, and thus a fraud on future subscribers who would in all probability subscribe on the strength of the optional subscription. One for whose benefit such a fraudulent subscription was made could not enforce it against the corporation or its stockholders. Getty v. Devlin, 54 N. Y. 403; White Mountains R. Co. v. Eastman, 34 N. H. 124. In the latter case Eastman subscribed for 30 shares of stock, with a secret agreement with the directors that he should have an option to reduce his subscription to 5 shares. In passing upon the character of the transaction, the court said:

> "It is the secret stipulation alone which operates in fraud of others, and upon that the law leaves the parties where they stand, declining to enforce it for the benefit of either; while, as to the other part of the contract [the stock subscription], to enforce it between the parties is what is necessary to defeat their fraudulent purpose as to other innocent persons. That the proceeding is a fraud upon third persons is clear from the relation in which subscribers for stock in a corporation of this kind stand toward each other. In the subscription of each person, every other subscriber has a direct interest. Their respective subscriptions are contributions or ad-

vancements for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what upon their face they purport to be.'

We think the findings and conclusions made by the trial court were supported by the evidence, and that there was no error in the admission of parol evidence designed to show the fraudulent character of the trustee's stock subscription.

The judgment dismissing the action is affirmed.

ELLIS, C. J., and HOLCOMB, MOUNT, and PARKER, JJ., concur.

(97 Wash. 144)

ORROCK v. SOUTH MORAN TP. et al. (No. 13911.)

(Supreme Court of Washington. June 22, 1917.)

1. HIGHWAYS ⚷188—DEFECTS—INJURIES TO PERSONS—LIABILITY OF TOWNSHIP.

Rem. Code 1915, § 950, authorizes an action at law by any county, incorporated town, or other public corporation of like character upon a statutory liability. Section 951 authorizes an action to be maintained against a county or other public corporation for an injury to individual rights arising from some act or omission. Const. art. 11, § 4, provides that the Legislature may by general laws provide for township organizations. Rem. Code 1915, §§ 9322–9438, provide for township organization and vests control of highways in the townships. *Held*, that the control of highways being vested in the township, it is charged with the duty of maintaining them and liable for injuries arising from failure to do so.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 480.]

2. HIGHWAYS ⚷189—DEFECTS—INJURIES TO PERSONS—LIABILITY OF TOWNSHIP.

In view of Const. art. 27, § 3, retaining all territorial laws not repugnant to the state Constitution, Rem. Code 1915, § 951, as to actions against counties and other public corporations is retained and authorizes suit against a township for injuries on defective roads.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 478–480, 483.]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by James Orrock against the South Moran Township and Spokane County. The action was dismissed as to the county, judgment ran for plaintiff, and defendants appeal. Affirmed.

John B. White, Wm. C. Meyer, and Fred J. Cunningham, all of Spokane, for appellants. Mark F. Mendenhall and Lloyd E. Gandy, both of Spokane, for respondent.

FULLERTON, J. The plaintiff James R. Orrock received personal injuries by reason of the defective condition of a public highway upon which he was traveling. The highway was outside of the corporate limits of any city or town but was within the corporate limits of South Moran township, Spokane county. He brought an action for damages, joining both the county and the township as defendants. The defendants filed separate demurrers, that of the township being overruled, and that of the county sustained, and the action dismissed as to the latter. By leave of court the defendant South Moran township was permitted to file a special demurrer, as follows:

> "Comes now the defendant South Moran township, a municipal corporation, and files a supplementary demurrer, specially demurring to the complaint of the plaintiff James R. Orrock on the grounds that the complaint does not state facts sufficient to constitute a cause of action against said defendant, for the reason that at common law a township corporation would not be liable for damages in such a cause of action, and could only be made liable therefor by the existence of some statute, and it will be contended upon the hearing of said demurrer that there is no statute of the state of Washington making the said defendant liable as in said complaint alleged."

This demurrer was overruled, and the parties went to trial, which resulted in a verdict and judgment in favor of plaintiff. The defendant appeals, assigning as error the overruling of the special demurrer. The statutes of this state, relating to actions by and against public corporations (Rem. Code), read as follows:

> "Sec. 950. An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases:
>
> "1. Upon a contract made with such public corporation;
>
> "2. Upon a liability prescribed by law in favor of such public corporation;
>
> "3. To recover a penalty or forfeiture given to such public corporation;
>
> "4. To recover damages for an injury to the corporate rights or property of such public corporation."
>
> "Sec. 951. An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

In Kirtley v. Spokane County, 20 Wash. 111, 54 Pac. 936, we held, overruling a decision of the territorial court to the contrary, that under these sections a county was liable for injuries caused a traveler on the public highway by reason of the defective condition of a bridge. The principle of the case has been since approved in numerous decisions. Lane v. Spokane Falls & N. Ry. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821; Rounds v. Whatcom County, 22 Wash. 106, 60 Pac. 139; Einseidler v. Whitman County, 22 Wash. 388, 60 Pac. 1122; Wendel v. Spokane County, 27 Wash. 121, 67 Pac. 576, 91 Am. St. Rep. 825; Lincoln County v. Fish, 38 Wash. 105, 80 Pac. 435; Redfield v. School District, 48 Wash. 85, 92 Pac. 770; Neel v. King County, 53 Wash. 490, 102 Pac. 396; Howard v. Tacoma School District, 88 Wash. 167, 152 Pac. 1004.

Township organization was not known in this jurisdiction until the adoption of the state Constitution. By section 4, art. 11, of that instrument, it is provided that the Legislature by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine. The Legislature first acted under the power in 1895. Laws 1895, p. 472. The act with the subsequent amendments is found in Rem. Code, at sections 9322–9438. Spokane county organized under the act in 1908. By the act each township when organized becomes a body corporate with power to sue and be sued, to raise such sums of money for the repairs and construction of roads and bridges as they deem necessary, to acquire land containing beds of gravel or quarries of stone needed by the township for road construction, to have the charge of all highways and bridges in the township and the care and supervision thereof, to establish new highways and bridges wholly within the township; and generally they are given such supervision over their internal domestic affairs as is usually conferred on public corporate municipalities.

[1] The foregoing, while not an enumeration of all of the powers conferred on township organizations, is enough to show that such organizations as minor units of the county are vested with full control of the highways within their jurisdictions to the exclusion of the county proper, with power to raise sufficient funds to keep such highways in repair. Being charged with the duty they are, of course, liable for injuries arising from a neglect of the duty, and the appellant township is holden for the injuries suffered by the respondent from the defective way, unless some special reason exists exempting it from liability. Here but one such reason is assigned.

[2] The appellant calls attention to the rule existing in this state, to the effect that the state, or a quasi municipal corporation of the state, is not liable for its torts unless the statute expressly makes it so liable, and contends that there is no such statute. It argues that the statute above cited has no application because it was enacted in territorial days, long prior to the enactment of the statute creating township organizations, and long prior even to the adoption of the Constitution which authorized such organizations. But without following the argument by which this contention is sought to be sustained, we think it untenable. By section 3, art. 27, of the Constitution, all laws in force in the territory of Washington which were not repugnant to that instrument remained in force until they expired by their own limitation or were altered or repealed by the Legislature. This statute was not repugnant to the Constitution, nor has it since expired by its own limitation, nor has it been altered or repealed by the Legislature. It is therefore a part of the existing statutes, as much so as it would have been had it been an enactment of the state Legislature. It is a well-settled rule "that a statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought by a subsequent statute." State v. Cleveland, 83 Ohio St. 61, 93 N. E. 467, 21 Ann. Cas. 1284; People v. Kriesel, 136 Mich. 80, 98 N. W. 850, 4 Ann. Cas. 5. And see notes to these cases in 21 Ann. Cas. 1284. and 4 Ann. Cas. 5. Endlich, in his work on the Interpretation of Statutes, at section 112, says:

> "Except in some few cases where a statute has fallen under the principle of excessively strict construction, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it."

There is no question that township organizations are a species of the genus municipal incorporations, existing and recognized by the Constitution and laws. As such it is liable under the statute for its torts.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

(19 Ariz. 104)

WARREN CO. v. WHITT. (No. 1540)

(Supreme Court of Arizona. June 23, 1917.)

1. Street Railroads ⇒99(2)—Maintenance of Road—Action for Injuries.

In an action against a street railroad company for personal injuries sustained on account of the overturning of plaintiff's automobile due to the defective condition of the track, evidence *held* to sustain a finding that plaintiff was not guilty of contributory negligence in driving at an excessive rate of speed.

2. Street Railroads ⇒110(2)—Action for Injury—Pleading.

In an action against a street railroad company for injuries due to overturning of plaintiff's automobile because of the defective condition of the track, that plaintiff was guilty of negligence in violating the speed ordinances would not be considered when not pleaded.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224.]

Appeal from Superior Court, Cochise County; A. G. McAlister, Judge.

Action by L. Willard Whitt, by Nancy M. Stone, guardian ad litem, against the Warren Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee, as plaintiff, commenced this action against the appellant to recover damages alleged to have been suffered by the plaintiff resulting from the negligent manner in which appellant maintained its street railroad tracks within the corporate limits of the city of Bisbee, in violation of the express terms of Ordinance No. 111 of the city of Bisbee. Said Ordinance No. 111 is the grant of the franchise to appellant to use the streets of the city corporation for the purposes of its street railroad tracks and cars, upon condition that it keep the rails and tracks of said street railway within the city of Bisbee constantly in repair, flush with the road or street, and in such manner that carriages and any other vehicles may easily and freely cross the same at all points and in all directions without obstruction.

On April 22, 1914, late at night, plaintiff was driving an automobile along a street upon which defendant maintained its street railroad. The automobile overturned, pinning plaintiff under it, and the injuries for which plaintiff claims damages were inflicted. The plaintiff claims that the defendant's failure to place its railroad track in the condition required by said ordinance was the proximate cause of the injuries, and the defendant contends that the injuries were caused from plaintiff's negligent driving of the automobile at a rate of speed prohibited by an ordinance of the city. The cause was submitted to the jury, and the jury returned a verdict for the plaintiff assessing his damages at $7,000. Judgment followed the verdict. From the judgment and from an order refusing a new trial, the defendant appeals.

Knapp & D'Autremont, of Bisbee, and H. E. Pickett, of Douglas, for appellant. Williams & Flanigan, of Bisbee, for appellee.

CUNNINGHAM, J. (after stating the facts as above). The appellant has assigned numerous errors, but the assignments so made, in effect, amount to an assignment that the verdict and judgment are not sustained by the evidence.

The appellant frankly admits that the assignments of error raise two principal contentions, viz.: (1) That plaintiff was guilty of contributory negligence in driving and operating his automobile; and (2) that plaintiff was driving the automobile at an excessive rate of speed in violation of Ordinance No. 183, and was therefore guilty of negligence precluding his recovery.

The defendant as special defenses to the action set forth that the plaintiff's negligence caused the injury and damages, and that the particular negligence so referred to consisted in this: That the automobile was "driven by plaintiff in a careless, negligent, improper, and unskillful manner, and at an unlawful, unreasonable, excessive, reckless, and dangerous rate of speed, to wit, at a rate of speed exceeding 15 miles per hour, in violation of Ordinance No. 183 of the City of Bisbee." A further defense of contributory negligence is set forth and alleged to consist of the same acts, viz. driving at a rate of speed in excess of 15 miles per hour in violation of said ordinance.

The charter duty of the defendant to keep its railroad track in a safe condition for use of carriages and like vehicles is not in dispute. The fact that defendant had failed to perform its said duty is likewise not in dispute. On the other hand, the parties seem to consider as a fact that the rails and ties of the track were exposed from the Bridge Road street crossing, near which the automobile came into contact with the railroad track, southerly along Tombstone Canyon street to the point where the automobile was found overturned, a distance of 178 feet.

The manner and means by which plaintiff came in contact with the dangerous track are in dispute, and the cause of the overturning of the automobile is a matter of controversy. Conflicting evidence supports either side of the controversies.

[1] The issue presented by the pleadings is whether the injuries resulted from plaintiff's driving the automobile at a rate of speed in excess of 15 miles per hour. The defendant offered evidence in support of its special defenses; that is, evidence tending to show that plaintiff was driving the automobile at a rate of speed from 20 to 25 miles per hour as the machine was approaching the Bridge Road street crossing near which crossing the automobile came into contact with defendant's railroad track. Such testimony was contradicted by a statement in writing signed and sworn to by the same witness made out of court a considerable period of time prior to the trial. On cross-examination of the plaintiff, he states that he may have been driving at the rate of 17 miles per hour at the point mentioned, but his best recollection and judgment was that he was not driving at a rate of speed to exceed 15 miles per hour. One witness testified that, from the time the automobile came into contact with the railroad track until it left the track, a distance traveled of about 100 feet, the time in which the distance of 100 feet was traveled was from 2 to 3 seconds. The defendant offered testimony tending to prove that the distance from the Bridge Road crossing to the point at which the automobile stopped overturned is 178 feet. Defendant contends that this evidence is not disputed, and conclusively shows that plaintiff was traveling at a rate exceeding 15 miles per hour from the Bridge Road crossing to the point of the injury. Conceding the correctness of the witness' estimate of the time required to make the distance of 178 feet, to wit, 3 seconds, then he was traveling at the rate of about 38 miles per hour. The plaintiff testified that, when he came into contact with the railroad track, he disengaged the power on his automobile and applied the

brakes. He only applied the power and released the brakes when he made efforts to steer the machine away from the railroad track. Such testimony conflicts with the testimony of defendant's said witness, for the reason common experience teaches that, if a vehicle is traveling at the rate of 25 miles per hour and turns on a curve onto a road where the two wheels on one side of the vehicle must run over exposed ties, the natural tendency will be to lessen the speed traveled; that when all the power is removed when the vehicle reaches a road such as is here described, and the brakes applied, the tendency is to lessen the speed to a much greater degree. Defendant's theory is that the speed was increased by the rough road and by the application of more power to the machine after the rough road was encountered. Hence the evidence was conflicting upon the question of speed. One other witness for defendant testified as to the noise the machine was making just prior to overturning. This noise awakened witness, and is described as a noise like an automobile makes when backing at a furious rate of speed. This is no evidence of the speed the automobile was traveling which the jury are bound to regard. The bumping of the machine over the exposed ties and rails may have been a satisfactory explanation of the noise concerning which the witness testified.

The vital fact, the speed at which plaintiff was driving at the time of the injury, remained to be determined by the jury from conflicting evidence. The jury have determined that question in favor of the plaintiff's evidence. Defendant had the burden of proof in maintaining its special defenses. The evidence, although conflicting, sustains the conclusions necessarily reached by the jury. If the jury believed from the evidence that the plaintiff was driving the automobile at a rate of speed equal to 15 miles per hour or less, then, of course, the finding of such to be the fact effectually and completely disposes of the defendant's special defenses of negligence and of contributory negligence, because such special defenses are based upon the allegations that plaintiff was at the time of the injury driving his automobile at a rate of speed in excess of 15 miles per hour. Whether the mere fact that plaintiff was violating the speed ordinance at the time of his injury would relieve the defendant of liability for its negligence in maintaining the dangerous track is not a question of law in this case. The effect of the jury's verdict is to determine that plaintiff was not in fact so violating said speed ordinance, and such determination has the support of substantial evidence.

[2] Appellant contends on this appeal that plaintiff was driving the automobile at a rate of speed in excess of six miles per hour, and he was therefore guilty of negligence because he was violating the said speed Ordinance No. 183. This contention would have a tendency to indicate that defendant abandoned its special defenses pleaded. However, such contention is suggested for the first time on appeal. Such matter was not made the grounds of any defense pleaded by defendant. Appellant cannot now predicate error on a state of facts which it failed to plead, and the assertion of such as a special defense is necessary to be of avail.

I find no reversible error in the record. The judgment must be affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(19 Ariz. 108)

MANNION v. MARSH. (No. 1539.)

(Supreme Court of Arizona. June 23, 1917.)

1. Ejectment ⇨9(4) — Necessity for Title in Plaintiff—Absence of Statute.

In the absence of statute, it is the universal rule that possession of real property is sufficient basis to authorize ejectment against mere strangers or intruders.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 19.]

2. Ejectment ⇨9(4)—Necessity for Title in Plaintiff—Construction of Statute—"Valid Subsisting Interest in Real Property."

Civ. Code 1913, par. 1628, providing that any person having "a valid subsisting interest in real property," and a right to immediate possession, "may recover same by action against any person acting as owner, landlord or tenant"; paragraph 1629, providing that plaintiff must recover on the strength of his own title and paragraph 1631, providing that complaint may state generally that plaintiff is entitled to possession, also "the quantity of his estate, and the extent of his interest therein, etc.," do not require more than a showing of mere possession to support ejectment against strangers.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 19.]

3. Ejectment ⇨23—Defense—Interest in Public Lands—"Duplicate Receiver's Receipt."

Defendant, having filed a homestead entry on public lands, was entitled to recover as against plaintiff in ejectment who merely held possession of a part of such lands, in view of Civ. Code 1913, par. 1747, providing that a certificate of purchase or of location or duplicate receiver's receipt of any land shall be prima facie evidence that the holder thereof is the owner, and entitled to possession of the land described therein as against every other person, except the United States, the "duplicate receiver's receipt" being intended to cover the initial step to secure title from the government.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 81-93.]

4. Public Lands ⇨23—Possessory Rights—Purpose of Statute.

Civ. Code 1913, par. 1747, was enacted for the purpose of aiding persons to secure possession of their lands before patents were issued, as without the aid of such statute the preemptor or homesteader was unable to dispossess occupants of his entries.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 30.]

Appeal from Superior Court, Santa Cruz County; Frank Baxter, Judge.

Ejectment by Theodora M. Marsh against Mary M. Mannion. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss complaint.

M. Marsteller, of Nogales, for appellant. Duffy & Purdum, of Nogales, for appellee.

ROSS, J. Prior to September 26, 1914, the S. E. ¼ of the S. E. ¼ and lot 6, section 17, and lots 1 and 2, section 20, township 20 south, range 14 east, Santa Cruz county, Ariz., was unappropriated public lands. On that day appellant entered it as a homestead by paying the legal filing fees to the proper land office and receiving therefrom "Notice of Allowance," which recited that application had been allowed subject to further compliance with law and regulations applicable thereto. At the time the land was unoccupied and unimproved, except 8.97 acres along its northern boundary. This piece of land was included in the inclosure of appellee, which extended over the quarter section line from lot 5 and the N. E. ¼ of the S. E. ¼, section 17. This small fraction had been fenced and used for pasturage by the appellee and her predecessors in interest for a number of years, under the belief of appellee that she was the owner thereof. In August, 1915, appellant constructed a barbed-wire fence around and along the exterior boundaries of her entire entry, and in doing so necessarily entered appellee's inclosure, and by her fence reduced the size of appellee's field 8.97 acres. In addition to fencing the land appellant made other acts of settlement upon the unoccupied portions of her entry, such as building a residence, digging a well, planting an orchard, etc. In February, 1916, the appellee brought an action in the nature of ejectment to recover from appellant the possession of the 8.97 acres. Appellee's cause of action is based solely upon possession and unlawful ouster by entry thereon by appellant "against plaintiff's will and without her consent." Appellant by her answer and evidence undertook to justify her conduct under her homestead entry. The case was tried to the court without a jury and at its conclusion the court made the following findings:

"(1) That the defendant duly made a homestead entry under the United States' land laws, on the 26th day of September, 1914, on the following described land: S. E. ¼ S. E. ¼, and lot 6, section 17, and lots 1 and 2, section 20, township 24 S. range 14 E. G. & S. R. M.—and that said entry embraced the land in controversy in this action, as described in the amended complaint herein.

"(2) That the said land in controversy at the date of said homestead entry, and for a long time prior thereto, to wit, since July, 1904, was occupied in good faith by the plaintiff, who was in possession of, and holding the same for her own use and benefit, and under a title which she, at that time, believed was good.

"(3) That the defendant, at the date of said homestead entry, knew that plaintiff claimed, was occupying, and was in possession of the land in controversy.

"(4) That under the law the said homestead entry is invalid as to the said land in controversy"

—and entered judgment thereon in favor of the appellee for her costs and for the restitution of possession of the premises.

The appellant demurred to the complaint, and now insists that the court erred in not sustaining the demurrer. The complaint, in effect, alleged that on a certain day the plaintiff was occupying and using said tract of land, and was in the possession of and entitled to the possession of the same; that the defendant entered upon said premises and took possession thereof against plaintiff's will and without her consent, and ejected plaintiff therefrom, and unlawfully withholds possession of same.

[1, 2] It is the contention of the appellant that mere possession of public lands does not give sufficient title to the possessor to maintain the statutory action in the nature of ejectment. She supports her contention by referring the court to section 1628, Civil Code 1913, which reads:

> "Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord or tenant of the property claimed."

Also section 1629:

> "The plaintiff must recover on the strength of his own title."

And section 1631:

> "The complaint may state generally that the plaintiff is entitled to the possession of the premises, describing them, also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the same. * * *"

It is said that the appellee fails to show by her complaint that she has "a valid subsisting interest" in the premises; that mere possession is not such an interest. In the absence of such a statute we think it is the universal rule that possession of real property is sufficient basis to authorize an action of ejectment against mere strangers or intruders upon such possession, and the provision of section 1629, to the effect that the plaintiff must recover on the strength of his own title, does not change that rule when applied to an action involving possessory rights. The rule is stated in 9 R. C. L. 850, § 20, as follows:

> "It is well established by the weight of authority that the general rule in actions of ejectment that the claimant must recover upon the strength of his own title does not operate to prohibit the acquisition of possessory rights which may be enforced in actions of ejectment between parties in cases where the true owner does not intervene, and that actual prior possession by the plaintiff or those under whom he claims is prima facie evidence of title sufficient to maintain ejectment against a mere naked trespasser or intruder, even where title may be shown to exist in another."

At page 854, § 22, Id., in speaking of statutes requiring that the plaintiff shall have "a valid subsisting interest" in the premises before he may maintain an action of ejectment, it is said:

> "In some jurisdictions express provision is made by statute to the effect that no person can recover in ejectment, unless he has at the time of commencing the action a valid subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial. Such a statute has been construed as making no exception, as to the proof of the right to recover possession, in the case of strangers or intruders, and as clearly stating a universal rule applicable in all cases of ouster."

Under this authority, which is well supported by the cases cited, we are of the opinion that the complaint states a good cause of action.

[3, 4] Appellant contends that, the government having permitted her to file on the several legal subdivisions described, she is, by virtue thereof, entitled to the possession of all of it, and that this action cannot be successfully maintained to dispossess her. In Balsz v. Liebenow, 4 Ariz. 227, 36 Pac. 209, decided in January, 1894, by the predecessor of this court, it was held that the holder of a duplicate receiver's receipt could not maintain an action of ejectment against the actual occupant of the land covered by her entry; such receipt not being any evidence of title or right of possession. In 1895, the Eighteenth Legislative Assembly of the territory, having in mind no doubt the Balsz-Liebenow decision and to correct what it conceived to be a defect of the law, enacted the following statute:

> "A certificate of purchase or of location or duplicate receiver's receipt of any land in this territory issued or made in pursuance of any law of the United States or of this territory, is and shall be prima facie evidence that the holder or assignee of such certificate or receipt is the owner of and entitled to the possession of the land described therein as against every other person, except the United States."

This statute was carried forward and now appears in the Civil Code as section 1747. The paper issued to appellant by the Land Department, as heretofore noted, is designated as "Notice of Allowance." It is also signed by the register and receiver. The question is whether such an instrument falls within the meaning of any of the terms used in the above-quoted statute. At the time that the statute was enacted there was issued to the homestead entryman a duplicate receiver's receipt, which was signed only by the receiver of the land office, reciting the fact of entry. It would seem that the "Notice of Allowance" now issued to the homestead entryman is in legal effect the same as the duplicate receiver's receipt formerly issued. Each is the inceptive or initiative step taken to acquire title from the government, and performs the same office, so far as the government and the homesteader are concerned. We, therefore, conclude that the term "duplicate receiver's receipt" was intended to cover this initial paper by whatever name it might be called, and that the holder of such is prima facie "the owner of and entitled to the possession of the land described therein as against every other person, except the United States."

This statute was passed for the purpose of aiding persons to secure possession of their lands before patents were issued, as without the aid of such statute the pre-emptor or homesteader was unable to dispossess occupants of his entry. California has similar statutes, and in that state may be found several cases upholding the rights of the holder of the designated evidence of title from the government to the posssession as against one merely occupying the land. Gragg v. Cooper, 150 Cal. 584, 89 Pac. 346; Wormouth v. Gardner, 105 Cal. 149, 38 Pac. 646; Whittaker v. Pendola, 78 Cal. 296, 20 Pac. 680; Haven v. Haws, 63 Cal. 514.

Under the statute appellant was prima facie entitled to the possession of the land described as against the appellee and therefore, in this kind of an action was entitled to judgment.

The judgment is reversed, with directions that the appellee's complaint be dismissed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(19 Ariz. 182)

SUPERIOR & PITTSBURG COPPER CO. v. TOMICH. (No. 1535.)

(Supreme Court of Arizona. July 2, 1917.)

1. Constitutional Law 🔑245, 301 — Master and Servant 🔑11—Employers' Liability Act—Validity.

Employers' liability law (Civ. Code 1913, tit. 14, c. 6), being a valid exercise of the state's police power, does not violate Const. U. S. Amend. 14, prohibiting any state from depriving any person of life, liberty, or property without due process of law or denying to any person the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 702, 848–850, 857.]

2. Constitutional Law 🔑55 — Employers' Liability Act—Validity.

Employers' liability law, does not conflict with Const. art. 18, § 5, providing that the defense of contributory negligence shall, in all cases be a question of fact, such constitutional provision merely requiring the submission of the question of contributory negligence in cases where such defense is allowed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58–69, 71, 80, 81, 83.]

3. Master and Servant 🔑11—Employers' Liability Act—Validity.

Employers' liability act is not invalid as violating Const. art. 18, § 7, commanding the Legislature to enact an employers' liability law, but limiting liability to all cases in which death or injury shall not have been caused by the negligence of the employé killed or injured, the statute by its terms allowing an apportionment of damages where the injured employé has been guilty of contributory negligence.

4. MASTER AND SERVANT ⊂⊃228(1)—EMPLOYERS' LIABILITY ACT—DEFENSES.

Since the employers' liability act provides that nothing less than the sole negligence of the employé injured will bar an action for damages, an answer, setting up plaintiff's contributory negligence as a complete and not a partial bar, constitutes no defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 670.]

5. DAMAGES ⊂⊃132(13)—PERSONAL INJURIES—EXCESSIVENESS.

$8,000 *held* not an excessive verdict under the employers' liability act, where the employé's hand was crushed, exposing the nerves and necessitating amputation of three fingers.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 384.]

6. APPEAL AND ERROR ⊂⊃1069(1)—REVIEW—HARMLESS ERROR.

In an action under the employers' liability act, the action of the court in allowing jurymen to question witnesses *held* harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4136.]

7. APPEAL AND ERROR ⊂⊃200—PRESERVATION OF EXCEPTIONS—FAILURE TO OBJECT.

In an action for personal injuries under the employers' liability act, failure to object to questions asked by the jurors as indicating prejudice precluded such matter from being urged on appeal.

Ross, J., dissenting.

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Action by Frank Tomich against the Superior & Pittsburg Copper Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee was employed by the appellant in the underground workings of its mines in Cochise county. The appellee's duties required him to load, push on a track, and unload ore cars. The place for the performance of such duties was on the 900-foot level of the mine. The track was laid through a drift from the point of loading the cars to a point of unloading the ores into a chute. The appellee was an experienced car man, accustomed to such work in other mines. When the car had received its load of about 2,000 pounds weight, the appellee was required to start the car moving on the track, and control its movements until the chute was reached. Timbers were so placed about the chute as to facilitate the unloading or dumping of the load. On November 9, 1914, and a few hours after appellee had first commenced his labors in the said drift, he started a loaded car from the point of loading along the track toward the chute, and, following the car with his right hand holding the top of the rear end of the car as it moved over the track by gravity, appellee stumbled over something on the floor or slipped on the track or on the ground, and was thrown to the ground, but continued to hold to the rear end of the ore car as it moved toward the chute. So holding to the car, the car struck the obstructions about the chute with such force that the fastenings on the doors of the car released, and the car ended over so that three fingers on appellee's right hand were caught between the rear end of the car which he was holding and a cross timber about the chute. The fingers were lacerated, crushed, and bruised so that they were amputated about the first joints of each finger. The said surgical operation was done at the appellant's hospital department, and when the wounds healed the nerves were left so exposed as to be sensitive and tender and causing suffering, and a further amputation of the fingers is required to relieve such condition. The appellee commenced this action to recover damages for his said injuries, basing his cause of action on the employers' liability law (chapter 6, tit. 14, Civil Code Ariz. 1913) and upon negligence. The cause of action founded upon negligence was expressly waived and abandoned by plaintiff upon the trial. The defendant demurred to the complaint upon the ground that the employers' liability law and the constitutional mandate, in obedience to which such statute was enacted, are both void because they are contrary to and contravene the Fourteenth Amendment to the Constitution of the United States, in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries suffered by its employés without any fault or negligence on its part, and because such statute attempts to give plaintiff the right to recover damages of defendant notwithstanding the injuries for which such damages are claimed were contributed to and in part caused by plaintiff's own negligence, and attempts to deprive the defendant of the right to wholly defeat this action by interposing the defense of contributory negligence. The defendant alleges that the damages, if any, resulted wholly from plaintiff's neglect and carelessness, and his failure to use any care or caution in his own behalf at the time and place of the alleged injury. The further defense is that the plaintiff contributed to the injury by his own negligence, in that at the time of its occurrence the plaintiff was giving no attention, or insufficient attention, to his duties, and failed to push the car in the proper manner or place his hands on the car in the proper position, and other like failures are alleged.

The court overruled the demurrers, and the cause was tried to a jury. The jury returned a verdict against the defendant for the sum of $8,000. Judgment followed the verdict. The defendant appeals from the judgment and from an order refusing a new trial.

Knapp & d'Autremont, of Bisbee, and H. E. Pickett, of Douglas, for appellant. Fred Sutter, of Bisbee, and J. T. Kingsbury, of Tombstone, for appellee.

CUNNINGHAM, J. (after stating the facts as above). The appellant assigns as error the overruling of its demurrers to the complaint for the reason both chapter 6, tit. 14, Revised Statutes of Arizona 1913, Civil Code, upon which the action is based, and the constitutional mandate, section 7 of article 18 of the state Constitution, in obedience to which said chapter 6 was enacted, violate section 1 of the fourteenth amendment to the Constitution of the United States, in that the employers' liability law, said chapter 6, tit. 14, attempts to deprive the defendant of its property without due process of law by imposing unlimited liability on it as an employer for personal injuries sustained by an employé while in its employ in cases where defendant has been guilty of no fault, want of care, or neglect of duty; and because the employers' liability law contravenes and is in violation of sections 5 and 7 of article 18 of the Constitution of the state of Arizona, in that said statute attempts to give plaintiff the right to recover judgment for personal injuries notwithstanding the injuries for which the judgment is sought were contributed to and in part caused by plaintiff's negligence, and attempts to deprive defendant of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by plaintiff's own negligence.

The questions of the constitutional validity of the employers' liability law are raised in a number of different objections. The defendant assigns as error the admission and rejection of evidence and misconduct of the trial judge during the trial of the cause, working a prejudice and resulting in an excessive verdict.

The appellant groups the assignments of error under four divisions covering the points of law raised in the cause: First, the employers' liability law, chapter 6, tit. 14, under which the action is brought, is unconstitutional and void; second, that the plaintiff failed to make out a case warranting recovery under the employers' liability law; third, error in admitting and excluding evidence and in giving instructions, and, fourth, an excessive verdict.

[1] Under the first division the case of Inspiration Consolidated Copper Co. v. Mendez, 19 Ariz. ——, 166 Pac. 278 (not yet officially reported) on the authority of New York C. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, holds to the opinion that the employers' liability law is valid within the police powers of the state, and does not come into conflict with the fourteenth amendment of the Constitution of the United States; and that such liability law is a valid, subsisting enactment and is a law of the state of Arizona.

[2] Appellant contends that chapter 6 of title 14 is void for the reason its terms conflict with sections 5 and 7 of article 18 of the state Constitution. Section 5 is that:

> "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

This section does not restrict the power of the Legislature to modify or abolish the defense of contributory negligence. The restriction contained in the section is clear that no law shall be enacted which attempts to make the defenses of contributory negligence or assumption of risk, when interposed, determinable by the courts as matters of law, but such defenses are made to depend upon facts when they are properly interposable, and, interposed, they are required to be established by a preponderance of the evidence to the satisfaction of the jury. Whether the plaintiff's negligence contributed to the wrong, or whether the plaintiff assumed the risk and danger from which the wrong arose, must be determined as a fact from the evidence by the jury.

[3] Section 7 commands the Legislature to enact an employers' liability law, by the terms of which any employer shall be liable for the death or injury of workmen employed in all hazardous occupations named, and any other industry designated by the Legislature, whenever such death or injury is caused by any accident due to a condition or conditions of such occupation, except when such death or injury has been caused by the negligence of the employé killed or injured. The only restriction placed upon the legislative power in carrying out said constitutional mandate found in the section of the Constitution is the exception, viz.:

> Liability is incurred "in all cases in which such death or injury of such employé shall not have been caused by the negligence of the employé killed or injured."

In all other cases the legislative power is unlimited by said section 7.

A careful examination of chapter 6 of title 14 discloses no violation of such limitation on the power of the Legislature. The exception is carefully preserved in paragraph 3154 of the statute. If the injury resulted from an accident arising out of and in the course of labor, service, and employment in a hazardous occupation, and was due to a condition, or conditions, of such occupation or employment, and was not caused by the negligence of the employé the liability to damages exists. If, however, the injury was caused by negligence to which the injured workmen contributed, the liability of the employer remains to an amount of the full damages, less the amount of damages attributable to the employé's negligence. In other words, the damages are to be apportioned to the parties, employer and employé, as the negligence attributable to the one is to the negligence attributable to the other. Paragraph 3159, Civil Code of Arizona 1913. "The fact [appearing] that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé," are the words of the statute. The statute is in full harmony with the constitutional mandate and with its restriction.

[4] The defendant set forth in its answer the contributory negligence of the plaintiff, consisting of the manner in which the plaintiff was performing his duties at the time of the accident, but defendant's answer does not set forth any claim for a reduction of damages by reason of such negligence, but claims such contributory negligence as a complete, not a partial, defense to the action. The answer is evidently interposed upon the theory of the common-law rule of contributory negligence in bar of the cause of action. Under the provisions of chapter 6, supra, nothing less than the sole negligence of the employé injured will bar an action based on the statute for damages. Negligence of the employé contributing to the injury may serve to reduce the amount of the recovery, but will not bar recovery.

The defendant, having in its answer admitted that its negligence in part was the cause of the damages, by setting forth a charge of contributory negligence against the plaintiff, authorized a verdict against defendant in any event. The matters left open for inquiry were the amount of the damages the plaintiff was entitled to recover as measured by the allegations of the complaint and the evidence, and whether the accident was due to a condition or conditions of the employment and such as is unavoidable.

[5] The appellant complains that the amount of damages found is excessive and out of all proportion to the nature, extent, and seriousness of the injury, to the loss of time, wages, or future earning capacity, to the amount necessary to effect a recovery, to his station in life, and to his pain and suffering. No complaint is made that the evidence does not sustain the verdict. The specific complaints are made that the jury asked questions of witnesses during the progress of the trial; and the members of the jury were permitted to and did examine the plaintiff's injured hand, and touched and pressed his wounded fingers, and the members of the jury were thereby prejudiced, which prejudice resulted in a verdict for excessive damages.

[6] With regard to the first complaint made, the abstract of record discloses that counsel for defendant invited the jury to ask questions of witness Massey. Thereafter the jurors freely asked questions of other witnesses. The record discloses no objection was offered by the defendant to any question asked by any juror of any witness. The practice of allowing attorneys, parties, the judge, and jurors to examine witnesses in a disorderly manner has a tendency to break down the decorum becoming the sanctity of a trial, and should be discouraged. The proper dignity of the court requires orderly procedure in a trial of a cause to be strictly observed. The liberty or property of litigants is involved in the result of every lawsuit, and the trial of such rights may result in tragedy to some interested human being. Certainly a tragedy results from error committed, never comedy. The purpose of a lawsuit is to determine the exact rights of the parties thereto and enforce such exact rights. The wisdom of ages of experience has served to teach our profession that the observance of the prescribed rules of procedure more nearly discover the exact rights of parties than haphazard, disorderly procedure. Not every departure from orderly trial procedure justifies a reviewing court in reversing a judgment because of irregular trial procedure. The irregular procedure must have prejudiced the rights of the party complaining before an appellate court is justified in disturbing a judgment. We must presume that no harm befell the defendant by reason of the many questions asked the witnesses on this trial, for the reason the defendant first invited the asking of the questions, and at no time during the trial objected to that form of procedure.

[7] The appellant contends that the questions asked the witnesses by the jurors conclusively indicate a prejudice against this defendant, inducing an excessive verdict for damages. The nature of the questions called for answers giving information covering a wide field of inquiry, and were not confined to testimony bearing upon the amount of damages. The questions were largely confined to detail matters connected with the knowledge of the witness with regard to which he had testified, the credibility of the witness, and his means of knowledge of the matter with respect to which he gave testimony. The jurors had a very good reason to test the witness' means of knowledge of these matters and the test given indicates no prejudice against defendant. This particular matter was not insisted upon as a ground for a new trial, and is first raised on this appeal. For that reason the objection must be overruled. The verdict does not conclusively appear to have been reached through prejudice and bias, nor induced by passion and prejudice.

The appellant contends that by permitting the jurors to examine plaintiff's wounded hand and fingers, and during such examination to squeeze and press his hand for the purpose of discovering the present sensitive condition of the fingers, was error, and resulted in causing the jury to return a verdict for excessive damages. The appellant nowhere contends that the evidence thus gained by the jury was false. If as a fact the plaintiff's wounds remained sensitive and prevented plaintiff from earning a living, and the jury ascertained that fact from personal physical examinations and by experimenting with the wound, no harm resulted to appellant simply by the use of the means complained of in arriving at the fact. Appellant did not object to the examinations when being made by the jury, and cannot now complain of the character of the evidence used to establish the fact.

While the record discloses many departures from the ideal trial of a lawsuit, these departures were consented to, acquiesced in, submitted to, or indulged, by appellant without objection, and do not appear affirmatively upon the record to have worked a prejudice to appellant's rights. The verdict returned is large in amount, but that matter lay with the jury. No question is made that the verdict is not sustained by substantial evidence.

Upon the whole case I am of the opinion the record contains no reversible error. Consequently the judgment must be affirmed.

FRANKLIN, C. J. (concurring). The demonstrations permitted before the jury in this case rather exceeded the limits defined in such matters, but here, as in predicating error on allowing the jurors to propound objectionable questions, appellant is estopped because a similar demonstration was made at the request of appellant. With regard to the excessiveness of the damages, where there is a personal injury permanent in its character, there is much difficulty in measuring compensation for it by strict and definite rules, and therefore it must be left largely to the sound judgment of a jury and the trial judge. As a result of this accident the index and second finger of plaintiff's hand were amputated at the first joint, and the third finger amputated just a little above the first joint, causing the nerves to be caught in the flesh and healed in the scar tissue, causing neuritis and resulting in severe and constant pain, to relieve which condition another operation under an anæsthetic would be necessary. The jury found a verdict for $8,000, which was upheld by the trial judge on motion for a new trial. The verdict appears somewhat large, but that it is larger than the appellate court would give, or that the appellate court would be better satisfied with a smaller verdict—these are not the criteria by which we are guided in reversing a case and ordering a new trial because of an excessive verdict. This court is restrained from so doing unless our minds are satisfied that from the large amount of the verdict the jury arrived at it because of passion, prejudice, partiality, or corruption on their part. In view of the principles which restrain the court in such a matter, and especially having the refusal of the trial court on motion for a new trial to interfere, I do not think this court is authorized or would be justified in reversing the case on that ground. See Ruck v. Milwaukee Brewery Co., 148 Wis. 222, 134 N. W. 914, Ann. Cas. 1913A, 1362.

Counsel for appellee does not oppose a remitter of some portion of the verdict which this court might deem excessive as a condition of denying a new trial, but I have not considered the power of this court to do so under section 578, Revised Statutes 1913, or the propriety of its exercise here, because appellant on argument expressly asked the court not to order a remitter if it was not of opinion that a new trial should be granted without such condition. I, therefore, concur in affirming the judgment.

ROSS, J., dissents. See 165 Pac. 1185.

(54 Mont. 17)

In re RILEY'S ESTATE.

RILEY v. MOUAT.

(No. 3778.)

(Supreme Court of Montana. June 16, 1917.)

1. Appeal and Error 🔑874(5)—Decisions Reviewable—New Trial—Jurisdiction.

Error in granting a new trial in probate proceedings cannot avail appellant, where she failed to appeal from the order, but appealed from orders granted on the new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481.]

2. Appeal and Error 🔑185(1)—Jurisdiction—Failure to Make Objection.

Appellant cannot on appeal object to jurisdiction of district court, because no pleading was filed as against appellant's application for letters of administration, where she failed to appeal from order granting new trial, participated in the new trial proceeding, and failed to make appropriate objection to jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1168, 1170–1176, 1375.]

3. Marriage 🔑11—Common Law—Public Assumption.

Where a man and woman were not joined by ceremonial marriage, their relations, begun when he had a living wife, were clandestine and of no force as a public assumption of the marriage relation.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 30.]

4. Appeal and Error 🔑1011(1)—Review—Conclusiveness of Findings—Conflicting Evidence.

Where the evidence is conflicting, the appellate court will not substitute its judgment for that of the judge who saw the witnesses and could form a first-hand opinion of their credibility.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

5. Appeal and Error 🔑1169(6)—"Verdict or Other Decision Against Law."

The trial of a matter to the court without a jury, resulting in findings of fact warranted by evidence, conclusions of law based upon findings, and a judgment following both, does not present "a verdict or other decision which is against law," for which reversal is authorized by Rev. Codes, § 6794.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4536.]

Appeal from District Court, Silver Bow County; Geo. B. Winston, Judge.

In the matter of the estate of Joseph P. Riley, deceased. From an order of the district court adjudging that she is not the widow of Joseph P. Riley, and ordering that letters of administration issue to Mary F. Mouat, Emma Riley appeals. Affirmed.

Edwin M. Lamb, of Butte, and W. A. Pennington, of Roundup, for appellant. Canning & Geagan, of Butte, and E. P. Riley, for respondent.

SANNER, J. Joseph P. Riley, of Butte, died leaving some estate but no will. His sister, Mary F. Mouat, filed, in the district court of Silver Bow county, her petition for letters of administration of his estate, alleging, among other things, that she and Mervin Riley, his minor son, are his heirs at law. A few days later Emma Riley, alleging herself to be the widow of Joseph P. Riley, filed a like petition, together with written objections to the appointment of Mrs. Mouat. Upon these representations the matter was brought on for hearing, which hearing resulted in an order granting the petition of Emma Riley and directing the issuance of letters to her. Thereupon Mrs. Mouat moved for a new trial, and this motion was heard and granted. The retrial was had, and its result was to adjudge that Emma Riley is not the widow of Joseph P. Riley, deceased, and to order that letters of administration issue to Mrs. Mouat. From this order Emma Riley appeals.

A reversal is sought upon these grounds: That error occurred in granting a new trial; that the adjudication appealed from is invalid because the court had no jurisdiction of the subject-matter after the order granting a new trial was made; that the adjudication is not warranted by the evidence presented; that the adjudication is against law.

[1] 1. It will suffice to answer the first of these to say that, if the granting of the new trial be viewed as error within jurisdiction, it cannot avail the appellant now; her remedy, which she failed to pursue, was by appeal from the order.

[2] 2. The contention that the court had no jurisdiction is based upon the assertion that there was no pleading of any kind filed as against the appellant's application for letters; therefore there was no issue of fact properly raised to be retried, and a new trial was not allowable under the decisions of this court in Re Antonioli's Estate, 42 Mont. 219, 111 Pac. 1033, and State ex rel. Culbertson Ferry Co. v. District Court, 49 Mont. 595, 144 Pac. 159. The appellant is not in position to urge this, because the record shows that she participated in the new trial proceeding, failed to appeal from the order granting a new trial, and failed to make in the court below any appropriate objection to the jurisdiction over the proceedings following the order. Jurisdiction in all matters of probate is vested in the district court by law (Rev. Codes, § 6275), and the appellant's conduct was tantamount to a voluntary appearance and waiver, so far as she was concerned, of the question of jurisdiction in the particular instance. In re Graye, 36 Mont. 394, 93 Pac. 266; In re Blackfeather's Estate (Okl.) 153 Pac. 839.

[3, 4] 3. No valuable purpose would be served by canvassing the evidence at length. The appellant and Joseph P. Riley were never joined by any ceremonial marriage; their relations began when Riley had a living wife, and were therefore clandestine, and of no force as a public assumption of the marriage relation; there was testimony from which the court could have concluded that, after the death of Mrs. Riley, the appellant and Joseph P. Riley did mutually and publicly assume the marriage relation, and there was testimony sufficiently contradictory to enable the court to say that they did not, within the decisions of this court in O'Malley v. O'Malley, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 662, and In re Huston's Estate, 48 Mont. 524, 139 Pac. 458. Such being the situation, we may not interfere and substitute our judgment for that of the judge who saw the witnesses and could form a first-hand opinion of their credibility; but we must hold that the evidence was sufficient.

[5] 4. Counsel for appellant does not indicate wherein the adjudication is "against law," other than as involved in the propositions above considered. In the statute that phrase has a specific application as specifying one of the grounds for a new trial (Rev. Codes, § 6794), reviewable only on appeal from an order denying a new trial. Certain it is that the trial of a matter to the court without a jury, resulting in findings of fact warranted by the evidence, conclusions of law based upon the findings, and a judgment following both, presents no example of "a verdict or other decision" which is "against law."

The order appealed from is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(54 Mont. 20)

STATE v. TUFFS. (No. 3927.)

(Supreme Court of Montana. June 18, 1917.)

1. SALES ⇨8—SALE DISTINGUISHED FROM AGENCY.

Where contract provides that consignee shall pay for all goods delivered to him, whether sold and delivered to his customers or not, and that he may sell or otherwise dispose of them to whom he will and at whatever price he will, the transaction is a sale whatever term is applied to it by the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18, 19.]

2. SALES ⇨7—SALE DISTINGUISHED FROM AGENCY—"DEL CREDERE AGREEMENT."

If title to goods remains in the consignor and undelivered goods are to be returned to it, the transaction is one of agency and not a sale, though the consignee may be responsible for payment of the price of goods delivered to customers, such relationship being substantially that of principal and agent to sell upon a del credere commission; the legal effect of a del credere agreement is that the agent for a consideration, when he sells the goods of his principal, becomes bound to pay the price at all events.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 16, 17.

For other definitions, see Words and Phrases, Del Credere.]

3. PRINCIPAL AND AGENT ⇨60—AGREEMENT SECURING PRINCIPAL AGAINST LOSS.

It is competent for a principal and his agent to agree that the principal shall be secured against loss on account of sales to irresponsible parties or on account of mistakes and dishonesty of the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 95.]

4. PRINCIPAL AND AGENT ⇨14(1)—EXISTENCE OF RELATIONSHIP—NECESSITY OF AUTHORITY TO INCUR OBLIGATION.

It is not essential to the existence of the relationship of principal and agent that the agent have authority to incur obligations in the principal's name, in view of Rev. Codes, § 5430, providing that an agent has such authority as the principal actually or ostensibly confers upon him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 26.]

5. HAWKERS AND PEDDLERS ⇨3(7)—VIOLATION OF LICENSE LAW—SALE BY ORDER—"ITINERANT VENDER"—"AGENT."

Defendant, who took orders for which he received commissions, and later delivered goods received by him from a company having a regular place of business, where title to the goods remained in the company until delivery was made to its customers, the company fixing the prices and defendant's interest extending no further than to his commission upon sales, and he being obliged to advance the price upon receipt of the goods, was not an "itinerant vender" within meaning of Laws 1911, c. 110, § 1, requiring a license from such persons and defining an itinerant vender as "every person who personally solicits orders for the future delivery of any goods, wares or merchandise, either by or without sample, including peddlers and hawkers," but defendant came within the exception provided by that section to "the representative of any corporation doing business at a fixed place of business and taking orders for the future delivery of any goods, wares or merchandise kept at or in connection with and handled through such fixed place of business, and defendant was an "agent," defined by Rev. Codes, § 5413, as "one who represents another called the principal in dealing with third persons."

[Ed. Note.—For other cases, see Hawkers and Peddlers, Cent. Dig. § 4.

For other definitions, see Words and Phrases, First and Second Series, Itinerant Vender; Agent.]

6. HAWKERS AND PEDDLERS ⇨4(1)—CONSTRUCTION OF LICENSE STATUTE—EXTENSION BY IMPLICATION.

Laws 1911, c. 110, providing for licensing of itinerant venders, being penal in character, is not to be extended by implication, and in order to subject a person to penalty therein provided, it must appear clearly that his acts were within the letter as well as the spirit of the law.

[Ed. Note.—For other cases, see Hawkers and Peddlers, Cent. Dig. § 7.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

F. A. Tuffs was convicted of violating Laws 1911, c. 110, relating to itinerant venders, and appeals. Reversed and remanded, with directions to discharge defendant.

J. D. Taylor, of Hamilton, for appellant. E. C. Kurtz, of Hamilton, S. C. Ford, of Helena, and Frank Woody, of Butte, for the State.

HOLLOWAY, J. This cause was submitted upon an agreed statement of facts. The defendant was found guilty, and appealed from the judgment and from an order denying him a new trial.

The prosecution was conducted under chapter 110, Laws of 1911. Section 1 of the act defines an itinerant vender, and that definition, so far as applicable here, follows:

> "Every person who personally solicits orders for the future delivery of any goods, wares or merchandise, either by or without sample, including peddlers and hawkers, is an itinerant vender within the meaning of this act: Provided, however, that this section shall not apply * * * to * * * the representative of any * * * corporation, doing business at a fixed place of business, and taking orders for the future delivery of any goods, wares or merchandise, kept at or in connection with and handled through such fixed place of business."

The acts of the defendant bring him within the inhibition of the statute unless he belongs to the class mentioned in the proviso, and the only question presented for solution is: Was the defendant the representative of a corporation doing business at a fixed place of business, and taking orders for the future delivery of goods kept by such corporation in connection with and handled through its fixed place of business? If he was such representative, the statute does not apply to him. If he was not, he was required to procure a license, and his failure to do so subjected him to the penalty prescribed by the statute.

The question for solution seems to be answered by the agreed statement of facts itself. It was agreed in the court below as follows: (1) The Grand Union Tea Company is a corporation engaged in mercantile business in this state, with a fixed place of business in Helena. (2) Defendant was in the employ of the company, soliciting orders from various persons in Ravalli county "for said Grand Union Tea Company" for coffee, tea, and spices kept by the company at its store in Helena. (3) The orders, when taken, were sent by mail to the company at Helena, and by it filled, and the goods then shipped to the company's order to Hamilton, in care of the defendant. A draft accompanied the bill of lading, and the carrier was instructed to deliver the goods to defendant upon receiving payment of the draft. (4) Upon receipt of the goods, defendant then delivered them "to the various customers of said Grand Union Tea Company who had previously ordered the same." "That all the goods delivered by Mr. Tuffs were previously ordered from the Grand Union Tea Company by the various customers to whom delivery was made." (5) The orders taken were not signed by the customers, and the names of the customers were not known to the company, but were kept by defendant subject to inspection by the company. (6) The company looks to the defendant for the price of the goods so shipped by it, except such portions as are not delivered. These to be returned to the company. (7) The defendant traveled about in a vehicle, soliciting the orders, but no goods were sold by him from his vehicle, and the only goods delivered by him were such as had previously been ordered, and each individual order filled by the company from its stock kept in Helena.

It is made plain by this agreed statement that the Grand Union Tea Company is engaged in mercantile pursuits at a fixed place of business in this state, and that the defendant was in its employ in soliciting orders for goods kept by the company in stock at its Helena store. He solicited orders, not for himself, but "for said Grand Union Tea Company." Each order was filled separately by the company from its stock in Helena, and the orders thus filled were delivered, not to the defendant's customers, but "to the various customers of said Grand Union Tea Company who had previously ordered the same." As if to make this fact more emphatic, the statement is repeated in substance:

> "All the goods delivered by Mr. Tuffs were previously ordered from the Grand Union Tea Company by the various customers to whom delivery was made."

Goods previously ordered by a customer, but for any reason not delivered to him, are returned to the company. These provisions seem to leave no doubt that the goods belong to the company until delivery is made to the customer, and that in soliciting the orders and making deliveries the defendant acted as the representative of the company; and this position is fortified by reference to defendant's contract of employment which is made a part of the agreement. That contract designates the company "employer" and the defendant "salesman," and provides: The Grand Union Tea Company agrees: (1) To pay to the salesman for his services 25 per cent. on sales of baking powder; 20 per cent. on tea, spices, extracts, and sundries, and 15 per cent. on coffee and soap. (2) To furnish a wagon and harness for the conduct of the business. (3) To pay freight on shipments of goods. The salesman agrees: (1) Not to sell or exchange fixtures or equipment supplied by the employer, without authority in writing. (2) Not to incur any obligations in the name of the employer. (3) Not to make repairs on equipment until first authorized by the employer. (4) Not to buy the route of another salesman nor sell his own route. (5) Not to sell any goods except those belonging to the company. Thus far the contract appears to be one of agency. "An agent is one who represents another, called the principal, in dealings with third persons." Section 5413, Rev. Codes.

[1, 2] There are, however, certain other provisions which at first blush seem to involve the transaction, as between the employer and the salesman, in doubt. The provision that the salesman shall pay for the goods upon their delivery to him, if standing alone, would seem to indicate that an absolute sale was contemplated, and that title to the goods passed to the salesman before they were delivered by him to the customers. In cases arising from the consignment of goods under special contract, it is often difficult to distinguish between a sale absolute and a contract of agency. Because of the mixed motives of the parties and the artless or artful framing of the contract it frequently contains provisions characteristic of each. If the contract provides that the consignee shall pay for all goods delivered to him, whether they are sold and delivered to the customers or not, and that he may sell or otherwise dispose of them to whom he will and at whatever price he will, the transaction is a sale, whatever term may be applied by the parties to describe it. On the other hand, if title to the goods remains in the consignor and undelivered goods are to be returned to it, the transaction is one of agency, even though the consignee may be held responsible for the payment of the purchase price of the goods delivered to the customers. 31 Cyc. 1200, 1201. The relationship is substantially that of principal and agent to sell upon a del credere commission. In Leverick v. Meigs, 1 Cow. (N. Y.) 645, it is said that the legal effect of a del credere agreement is that the agent, for a consideration, when he sells the goods of his principal, becomes bound to pay the price at all events. 2 Mechem on Agency, sec. 2534.

[3, 4] It is competent for a principal and his agent to agree that the principal shall be secured against loss on account of sales to irresponsible parties or on account of the mistakes or dishonesty of the agent. It is not essential to the existence of the relationship

of principal and agent that the agent be clothed with authority to incur obligations in the name of the principal. "An agent has such authority as the principal, actually or ostensibly confers upon him." Section 5430, Rev. Codes.

[5] Though it is extremely difficult to reconcile some of the conflicting averments which appear in the agreed statement (including the contract), we are led to the conclusion, from a consideration of all the provisions, that title to the goods remained in the Grand Union Tea Company until delivery was made to its customers; that the company fixed the prices at which the goods were sold; that defendant's interest extended no further than his commission upon the sales made by him; and that the obligation imposed upon him to advance the price upon receipt of the goods was intended merely to relieve the company from possible loss. Grand Union Tea Co. v. Evans (D. C.) 216 Fed. 791.

[6] The statute under which the prosecution is conducted is penal in character, and its provisions are not to be extended by implication. In re Wisner, 36 Mont. 298, 92 Pac. 958. In order to subject this appellant to the penalty of the statute, it must appear clearly that his acts were within the letter as well as the spirit of the act. McLaughlin v. Bardsen, 50 Mont. 177, 145 Pac. 954. We think it cannot be said that this appellant is an itinerant vender within the meaning of the statute in question.

Cases not directly in point, but illustrating in a measure the views herein expressed, are State v. Wells, 69 N. H. 424, 45 Atl. 143, 48 L. R. A. 99; State v. Bristow, 131 Iowa, 664, 109 N. W. 199.

The judgment and order are reversed, and the cause is remanded, with direction to discharge the defendant.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(54 Mont. 11)

BRUNSWICK-BALKE-COLLENDER CO. v. HIGGINS. (No. 3781.)

(Supreme Court of Montana. June 16, 1917.)

1. PLEDGES 🔑1—NATURE OF "PLEDGE."

To create a contract of pledge, there must be a delivery of personal property by the owner to the pledgee under an agreement that the latter shall hold it as security for the payment of a debt or the performance of some obligation, in view of Rev. Codes, § 5774, providing that a pledge is a deposit of personal property by way of security for the performance of another's act, and section 5775, providing that every contract by which the possession of personal property is transferred, as security only, is to be deemed a "pledge."

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 1, 4, 5.

For other definitions, see Words and Phrases, First and Second Series, Pledge.]

2. PLEDGES 🔑13—FORM—NECESSITY OF WRITING.

A contract of pledge need not be in writing, and may be express or implied, but the intention of the parties must be clear, in order to justify enforcement under Rev. Codes, § 5788, providing that, when performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 21.]

3. PLEDGES 🔑4—CHARACTER OF TRANSACTION.

Where purchaser of a bowling alley surrendered it to seller and landlord, seller agreeing to sell property to satisfy unpaid purchase price and accrued rent, although property when sold to a third person was left in landlord's building, landlord could not hold it as a pledge, since it was not delivered to him as security, and he depended, not upon it, but upon seller's agreement to pay him the rent from proceeds of sale.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 6–13, 30.]

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Action by the Brunswick-Balke-Collender Company against W. I. Higgins. From judgment for plaintiff and from order denying new trial, defendant appeals. Affirmed.

S. P. Wilson, of Deer Lodge, for appellant.

W. E. Keeley, of Deer Lodge, for respondent.

BRANTLY, C. J. Action in claim and delivery. The trial was by the court without a jury. Plaintiff had judgment. Defendant has appealed from the judgment and an order denying his motion for a new trial. The subject of the controversy is the right to the possession of property described in the complaint as "two bowling alleys complete with equipment, said equipment consisting of bowling pins, bowling balls, electric light fixtures, bumpers, score boards, floor lumber, railings, screws, gutters, and other property appurtenant to the successful use of said bowling alleys."

The complaint is in the usual form, alleging ownership by plaintiff and its right to immediate possession. The answer, admitting the general ownership of the property in plaintiff, put in issue the right of possession. The evidence does not present any substantial conflict. The merit of the appeals therefore is to be determined by a solution of the inquiry whether, upon the admitted facts appearing below, the defendant was entitled to retain possession of the property by virtue of a lien in his favor arising out of an agreement between him and the agents of plaintiff. The facts are these:

The defendant resides in Deer Lodge, Powell county. The plaintiff, a Montana corporation, conducts in the city of Butte the business of dealing in billiard and pool tables, bowling alleys, and other similar goods. On March 9, 1912, through one of its agents, it sold under a conditional sale contract the property described in the complaint to J. J. Arndt at Deer Lodge. The price agreed upon was $950, of which $500 was to be paid in cash, and the balance in ten equal monthly installments, with interest. The contract was in writing and filed with the county clerk, as required by the statute (Laws 1911, c. 52, p. 88). The property was installed in a building owned by the defendant, then held under a lease by Arndt for the purpose of conducting a bowling alley, at a monthly rental of $30. Arndt thereafter made payments upon the balance of the purchase price until it had been reduced to $275. The business not proving profitable, he had fallen in arrear in the payment of rent for the building to the amount of $125. Early in 1913 he surrendered the building to defendant, leaving the property therein as it was originally installed. This was the condition of affairs on May 16, 1913. In the meantime the defendant, not knowing that plaintiff held the title, was about to attach the property to enforce payments of the arrears of rent. The plaintiff did not desire to have the property taken from the building which would be the result if proceedings were begun. In conjunction with the defendant, it obtained the consent of Arndt to sell it upon such terms as would enable it to realize an amount sufficient to discharge the balance of the purchase price, and also the arrears of rent due defendant. Through D. J. Harrington, a salesman, on the date last mentioned, it effected a sale to George Gallagher and Walter Harnack, who undertook to conduct a bowling alley in the same building under the firm name of Gallagher & Harnack. The price agreed upon was $400, of which $50 was to be paid in cash and the balance in ten equal monthly installments, with interest; the contract being in the same form as that made with Arndt. Gallagher & Harnack were then permitted to take possession of the building and conduct the business. The business proving unprofitable, they defaulted in their payments under their contract with plaintiff and abandoned the building, leaving the property there. The sum of $400 was fixed as the price to Gallagher & Harnack to cover the amounts due both plaintiff and the defendant. This was so fixed because the defendant objected to allowing Gallagher & Harnack to occupy the building and to continue the business therein unless the agent of plaintiff would assume for it the obligation to pay the rent due to defendant from Arndt. There is some uncertainty in the evidence as to whether the negotiations were conducted for the plaintiff with Arndt, Gallagher & Harnack, and the defendant by Harrington, the salesman, or by James M. Reynolds, who was then the general manager of plaintiff. The evidence as a whole, however, justifies the inference that they were conducted by Harrington, and the result approved and confirmed by Reynolds. The following excerpt from the testimony of defendant shows what the result was:

> "Mr. Reynolds and I visited Mr. Arndt in regard to the alleys, and Mr. Arndt said that he could make no further payments and for us to take them and get our money out of them for the Brunswick-Balke-Collender people and myself, and we agreed to do that and Mr. Reynolds agreed to do that. Arndt turned them over to Reynolds and myself, Reynolds acting for the Brunswick-Balke people. This was over the shops, in the boiler shop, I think, across the river. The exact date I cannot remember, but after Mr. Arndt had turned the building over to me and I had locked it. The agreement between me and Mr. Reynolds was that he would sell those alleys, and Mr. Reynolds for the company was to retain a balance that was due them on the purchase price, and I was to get my money for the rent; that was the agreement. In the meantime the alleys were to remain in my building. And he did not want them taken up, for the reason that he thought they would [be] more valuable as they were; that he could sell them better while they were down. This never was paid to me, nor any part of it."

In another place in his testimony he stated that he relinquished his purpose to enforce payment of the rent due from Arndt by attachment proceedings, because of the agreement by Reynolds to protect him in the payment of it. He testified in effect also that he was to receive payment at once from plaintiff, and that, though he thereafter made several demands by letter and by telephone, payment was never made to him notwithstanding repeated promises. There was no agreement as to how long the property was to remain in the building, nor any agreement that Gallagher & Harnack were to hold the property for the benefit of defendant. It does not appear distinctly whether Arndt was released from his obligation to pay defendant. For present purposes it may be assumed that he was.

It was argued by counsel that, though the agreement was oral and informal, it created a pledge of the property to defendant to secure the payment of the rent due from Arndt, and hence that defendant was entitled to retain possession until plaintiff had made or tendered payment. This contention is without foundation in the facts.

[1] "Pledge is a deposit of personal property by way of security for the performance of another's act." Rev. Codes, § 5774. "Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge." Section 5775. The elements here made essential to the creation of a contract of pledge are (1) a delivery of personal property by the owner to the pledgee (2) under an agreement that the latter shall hold it as security for the payment of a debt or the performance of some obligation. Averill Machinery Co. v. Bain, 50 Mont. 512, 148 Pac. 334.

[2] The agreement need not be in writing. 31 Cyc. 796. It may be express or implied, but the property must be delivered and held in possession by the pledgee as security to which he may resort in order to enforce a

discharge of the debt or obligation assumed by the pledgor. Rev. Codes, § 5788. Whether the agreement is express or implied, the intention of the parties must be clear. In other words, the transfer must have been made with the intention by both parties that the property is to be held as a security. In 31 Cyc. at page 187, the elements of a pledge are stated thus:

> "The three elements necessary to constitute a contract one of pledge are: (1) The possession of the pledged property must pass from the pledgor to the pledgee or to some one for him; (2) the legal title to the pledged property must remain in the pledgor; (3) the pledgee must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgee or some other person. And every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. But the agreement that property is to be held as a pledge must be clearly expressed or implied, and a mere loose understanding, or statements by one party to which the other does not assent, are not sufficient to constitute a contract of pledge."

Mr. Jones in his work on Collateral Securities defines a pledge thus:

> "A pledge may be defined to be a deposit of personal property as security, with an implied power of sale upon default." Jones on Collateral Securities (3d Ed.) § 1.

To the same effect is the definition by Mr. Story (Story on Bailments [9th Ed.] § 286).

[3] Applying these definitions to the agreement between the plaintiff and the defendant and the disposition of the property in pursuance of it, we find that the result was not a pledge. In the first place, though at the time the agreement was made the property was technically in the possession of the defendant, it was delivered to Gallagher & Harnack when they began to occupy the building, not to be held by them as security for the defendant, but to be used in the conduct of their own business. They were not parties to the agreement between plaintiff and defendant, and so far as either was concerned they were at liberty at any time to pay the purchase price and remove the property. Their possession was therefore not that of the defendant, nor was it held for him. The defendant having expressly agreed that the plaintiff should effect a sale for the purpose of realizing enough money to pay the balance due it and to defendant, the conclusion is necessary that the plaintiff had the right to sell and deliver possession to the purchaser as it did. In the second place, according to defendant's own testimony, plaintiff promised to pay the amount due him at the time possession was delivered to Gallagher & Harnack. Thus he let go of the possession upon the faith of this promise, and chose to look solely to it for the amount due him. True, the property was to remain in the building, but the stipulation that the plaintiff was to effect the sale and retain a balance of the selling price to pay the Arndt rent is conclusive proof that the security he looked to was the promise of plaintiff, and not the property. The stipulation that the property was not to be removed was clearly for the sole benefit of the plaintiff. It was the consideration upon which it assumed to become bound to pay the Arndt rent. When it failed to make payment, defendant became entitled only to bring action against it as for a breach of contract to pay money.

We think the trial court reached the correct conclusion.

The judgment and order are therefore affirmed.

Affirmed.

SANNER and HOLLOWAY, JJ., concur.

(100 Kan. 593)

STATE ex rel. BRISTOW et al. v. LANDON et al. (No. 21053.)

(Supreme Court of Kansas. May 12, 1917. Rehearing Denied July 11, 1917.)

(Syllabus by the Court.)

1. GAS 🔑14(1)—RATES—CONSENT OF PUBLIC UTILITIES COMMISSION—STATUTE.

The receiver of the Kansas Natural Gas Company and the Olathe Gas Company have no right to change the rate, schedule of charges, rules, regulations or practice pertaining to the supply of natural gas to the patrons of the Olathe Gas Company without the consent of the Public Utilities Commission.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10.]

2. MANDAMUS 🔑133 — PUBLIC UTILITIES COMMISSION—CHANGE OF GAS RATES.

The suit recently decided by the United States District Court for the District of Kansas, 242 Fed. 658, while involving among other things the validity of the contract under which the Kansas Natural Gas Company and the Olathe Gas Company have for several years been supplying the customers of the latter company, has not yet resulted in any decision as to the validity of such contract, jurisdiction having been expressly reserved over the issues involved which are not covered by the recent decision. *Held*, that a writ requiring the defendant companies to continue according to the terms of the contract until such contract be duly and legally set aside or superseded will issue unless within a time named such consent to depart from the terms thereof be obtained from the Public Utilities Commission.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 268.]

3. COMMERCE 🔑10—INTERSTATE COMMERCE—SALE OF NATURAL GAS—CONTROL BY CONGRESS.

Notwithstanding the decision in the federal case referred to touching the interstate character of the business conducted by the receiver, we adhere to the decision in State ex rel. v. Flannelly, 96 Kan. 372, 152 Pac. 22, that when selling natural gas to consumers thereof in this state the receiver is not engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8.]

Original mandamus by the state of Kansas, on the relation of Joseph L. Bristow and others, as the Public Utilities Commission of the State of Kansas, and H. O. Caster, attorney for the Commission, against John M. Landon, receiver for the Kansas Natural Gas Company, and others. Peremptory writ issued conditionally.

H. O. Caster and F. S Jackson, both of Topeka, for plaintiffs. Chester I. Long, of Wichita, Jno. H. Atwood, of Kansas City, Mo., Stone & McDermott, of Topeka, W. F. Guthrie, of Kansas City, Mo., T. S. Salathiel, of Independence, and A. M. Cowan, of Wichita, for defendants.

WEST, J. In November, 1908, the Kansas Natural Gas Company entered into a written contract with the Olathe Gas Company by the terms of which the latter as agent of the former was to supply natural gas to its patrons on certain terms, a portion of which gas was to be furnished by the Natural Gas Company and a portion by the local company. This contract was considered in State ex rel. v. Litchfield, 97 Kan. 592, 155 Pac. 814, in which it was observed that the local company was operating under a franchise granted by the city authorizing a charge of 25 cents a thousand feet for one year and thereafter 30 cents. The principal question was whether the city or the Utilities Commission had control of the rate, and it was held that the company was in this respect subject to the jurisdiction and control of the Public Utilities Commission.

September 22, 1916, the commission brought this action in mandamus to compel the two companies to continue the supply and distribution of gas according to the terms of the contract. The allegation is that the defendant companies, without the consent of the commission, abandoned the contract and discontinued operations under it, and thereupon it was proposed that the Kansas Natural Gas Co. or its receiver discontinue its service to the distributing company, and that thereafter no gas would be delivered to it by the receiver except such as should be paid for at 18 cents a thousand at the gates of the city, substituting an entirely different service regulation and practice of delivering gas, and that the local company had unlawfully consented to the changes and had abandoned and discontinued the former service to the inhabitants of the city of Olathe and the surrounding community. The answer of the Olathe Gas Company closes a series of allegations with a denial of the jurisdiction of the Public Utilities Commission over its affairs.

The receiver of the Natural Gas Company in his return challenges the jurisdiction of this court, sets up that there was a prior suit pending in the United States District Court for the District of Kansas involving the matters in controversy here, and especially the right of the Natural Gas Company to depart from the rates provided in the contract already referred to, asserting that the federal court has assumed and is holding jurisdiction over all these matters, and asserting that by his submission to the federal court and his denial of the jurisdiction of this court he is exercising an authority granted him by the United States, and the Constitution and laws thereof. Further, that he had served notice on the plaintiffs herein and all other defendants in the case in federal court, that he would on October 11, 1916, apply thereto for relief and file a supplemental bill, a copy of which, marked Exhibit D, was set forth, and further alleging that the order already made by the federal court amounted to a judgment of a court of competent jurisdiction to which this court must give full faith and credit. This supplemental bill appears to name the Olathe Gas Company as a defendant, but no prayer for relief touching this company can be found therein. The order of the federal court referred to was to the effect that it had not been deemed necessary to determine the validity of the city ordinances, the contracts between the cities and the distributing companies, and the contracts between distributing companies and the Natural Gas Company, and the duties and obligations of the receiver thereunder, but "that this court reserves jurisdiction of the subject-matter of this application for an injunction, and of the parties thereto, and reserves its power and authority to add to, take from, modify or supplement the injunction hereby decreed, or any other provision of this decree, at any time during the pendency of this suit."

Two questions arise for determination: One, the duty of the defendant companies and the corresponding power of the Utilities Commission touching the change in rates or the regulation or practice pertaining to the service at Olathe; the other, one of jurisdiction as between this court and the federal court.

[1] As to the first it is clear that the defendant companies have assumed and intend to treat the former contract between them as abrogated, thereby working a material departure from the former rules and practice in the matter of furnishing natural gas to the citizens of Olathe, and in the rates to be charged therefor. Section 20 of the Public Utilities Act (chapter 238 of the Laws of 1911) provides that:

> "No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission. * * *"

That so marked and material a change in the rates, rules, regulations, or practices pertaining to the service or rates at Olathe cannot be made without consent of the commission is settled by State ex rel. v. Postal-Telegraph Co., 96 Kan. 298, 150 Pac. 544, and City of Scammon v. Gas Co., 98 Kan. 812, 160 Pac. 316.

[2, 3] As to the seeming or asserted conflict of jurisdiction it need only be said that as to all questions touching the validity of the contracts involved in the suit pending in federal court, that tribunal has full and

complete jurisdiction. While by Act March 4, 1913, c. 160, 37 Stat. 1013 (U. S. Comp. St. 1916, § 1243), Congress has provided that when a suit has been brought in federal court requiring an interpretation of a state statute, and before final hearing a suit shall be brought in a state court having jurisdiction thereof to enforce such statute or order, then upon certain conditions the proceeding in the federal court to restrain the execution of such statute or order shall be stayed pending the final determination in the state court, there is nothing in this controversy requiring recourse to that statute. In the recent decision of the federal case, Judge Booth said:

> "Further, even after the present suit had been begun in this court the defendants might (at any time before final submission upon the hearing for the preliminary injunction) by proper procedure under section 266 of the Judicial Code have taken action in the state court by mandamus or otherwise, and this court, upon being advised of such action, would have held the present suit in abeyance; but no such course was pursued."

The decision referred to expressly reserves jurisdiction over all matters not covered thereby, and these include the validity of the contract now under consideration.

The view taken of the interstate character of the business of furnishing natural gas to Kansas consumers set forth in the decision referred to has the effect of eliminating the Public Utilities Commission from this controversy. We adhere, however, to the opinion in State ex rel. v. Flannelly, 96 Kan. 372, 384, 386, 152 Pac. 22, 27, wherein it was said:

> "Granting for the moment that the sale of natural gas under the circumstances disclosed is interstate commerce, it is not national in its nature, it admits of no * * * uniform system of regulation, and it is not that kind of interstate commerce which requires exclusive legislation by Congress. It is therefore subject to state control until Congress acts. * * * Congress has not acted in this field, except to prohibit unfair methods of competition. We hold, therefore, that the receivers are not engaged in interstate commerce when selling natural gas to consumers thereof in this state."

With full recognition of the federal court's jurisdiction as indicated, it is ordered that unless within 60 days from the filing hereof with the clerk of this court the receiver and the Olathe Gas Company obtain from the Public Utilities Commission consent to depart from the rules, rates, and regulations touching the supply and price of gas to the consumers of the local company as required by the former contract between the Kansas Natural Gas Company and the Olathe Gas Company, a peremptory writ issue requiring such receiver and the Olathe Gas Company to continue in obedience to and in accordance with the terms of the contract until such contract be duly and lawfully set aside or superseded. All the Justices concurring, except DAWSON, J., who did not sit.

(25 Wyo. 143)

J. W. DENIO MILLING CO. v. MALIN.

(No. 894.)

(Supreme Court of Wyoming. June 27, 1917.)

1. SALES 🔑416(1)—EVIDENCE—ADMISSIBILITY.

In an action for damages for breach of a contract to sell flour, evidence that before each shipment of flour made under the contract, the buyer informed the seller that he desired a carload of flour, and specified the number of sacks of each weight he desired, and that his instructions were complied with, and that prior to the expiration of the time for the delivery of the balance the seller requested the buyer to furnish such specifications, which he neglected and refused to do, and that the defendant was ready and willing to deliver the balance of the flour upon receipt of such specifications, *held* competent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1171.]

2. EVIDENCE 🔑441(9)—PAROL EVIDENCE—ADMISSIBILITY.

In an action for damages for breach of a contract for the sale of flour, which provided, "Time of shipment one (1) car at a time—last car to be shipped on or before Feb. 1st, 1915," the price depending on the size of the sacks, evidence that prior to each shipment under the contract, the buyer had informed defendant of his desires, and that he neglected and refused to do so with regard to the balance of the order, did not vary the terms of the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1792.]

3. CONTRACTS 🔑169—CONSTRUCTION—LANGUAGE.

If the language of a written contract is susceptible of two constructions, the court will take into consideration the situation of the parties and the surrounding circumstances at the time the contract was entered into in order to arrive at the true intent of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752.]

4. CONTRACTS 🔑170(1)—CONSTRUCTION—INTERPRETATION BY THE PARTIES.

It is to be presumed that parties to a contract know what is meant by its terms, and whatever is done by the parties during the period of performance of the contract is done under its terms as they understood and intended it, since parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention than when subsequent differences have impelled them to resort to law, and one seeks a construction at variance with the practical construction they have placed upon it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753.]

5. SALES 🔑407—CONTRACTS—BREACH.

Where contract for the sale of flour provided, "Time of shipment one (1) car at a time—last car to be shipped on or before Feb. 1st, 1915," and "Flour 2.30, 2/48. 2.25, 1/98," if it be established in evidence that the plaintiff before each shipment made under the contract informed the defendant that he desired a carload of flour, and specified the number of sacks of each weight he desired, and that as to the flour not delivered, he neglected and refused to give such specifications, he would not be entitled to recover, since the fault was that of plaintiff in his failure to give the shipping directions.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1159.]

6. **Contracts** 🔑144—**Construction—Interpretation by the Parties.**

As a rule contracts are to be construed, and their validity and effect determined according to the law of the state where they are made, except where the contract is made in one state to be performed in another, in which case the law of the state of performance will govern, unless it clearly appear that the parties intended otherwise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724–727.]

7. **Sales** 🔑418(7) — **Breach by Seller — Measure of Damages.**

Where a seller failed to deliver flour pursuant to a contract, if the buyer could have purchased flour of the same grade and quality in the market, upon breach of the contract, it was his duty to do so in order to minimize his damages, and if he did not do so, he could not thereby enhance his damages beyond the difference between the contract price and the market price at the time of the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1188.]

8. **Sales** 🔑418(7) — **Breach by Seller — Measure of Damages.**

In an action for breach of a contract to sell flour, if plaintiff could have procured the flour either in the market or from the defendant at an advanced price, and had done so, the measure of damages would be the difference between the contract price and the price he was required to pay defendant or in the market.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1188.]

Error to District Court, Sheridan County; Charles E. Winter, Judge.

Action by J. M. Malin against the J. W. Denio Milling Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. E. Enterline, of Billings, Mont., and F. M. Downer, Jr., of Thermopolis, for plaintiff in error. Lonabaugh & Wenzell, of Sheridan, and E. E. Collins, of Billings, Mont., for defendant in error.

BEARD, J. This action was brought by defendant in error, J. M. Malin, against the plaintiff in error, J. W. Denio Milling Company, to recover damages for an alleged breach of a written contract. The plaintiff below recovered a verdict and judgment against the defendant below for $1,395 and costs. From that judgment, plaintiff in error brings error.

For convenience the parties will be referred to as plaintiff and defendant, as they appeared in the district court. The contract sued upon is as follows:

"Contract.

"Note.—This contract is forwarded at once to our general office. We immediately provide an equivalent amount of wheat for every barrel of flour sold you.

"Billings, Mont., 7/31, 1914.

"The J. W. Denio Milling Company, Sheridan, Wyoming, has this day sold to J. M. Malin, City, Billings; State, Montana—subject to the terms and conditions hereinafter mentioned, which are hereby agreed to. Terms—30 days net 5¢ 2/48—10 days. Delivery f. o. b. Billings, Mont. Either prepayment or proper allowance to be made by the seller to cover freight charges from Sheridan to Billings. Time of shipment one (1) car at time—last car to be shipped on or before Feb. 1st, 1915.

No.	Size.	Articles.	Price.	Per
5	Cars	Pride of Billings flour minimum 30,000#		
	75	sks of bran in each car at Billings prices—Flour	2.30	2/48
		"	2.25	1/98

"For delays in commencing shipment and making delivery occurring from fire, acts of the carriers and causes beyond the seller's control, seller is not responsible.

"These goods are sold at price, on terms, and time of shipment specified above, and are not subject to change or countermand without the written consent of both parties. Should either party refuse to fulfill their part of this transaction the other party shall buy or sell as the case may be, charging loss to the defaulting party.

"This contract is subject to confirmation by the J. W. Denio Milling Co. in their office in Sheridan, Wyoming.

"It is understood that this written and printed memorandum contains all the terms of the contract, and that no representations have been made by the seller or its agents not contained herein. [Signed] J. M. Malin.

"Accepted: J. W. Denio Milling Co.,
"By J. H. Johnston."

Said contract was confirmed in writing by the defendant at Sheridan, Wyo., August 1, 1914. There is no controversy as to the execution and confirmation of the contract, and it is admitted that on October 3, 1914, and November 19, 1914, respectively, defendant shipped to plaintiff one car of flour under said contract, which plaintiff received, accepted, and paid for. That the other three cars were not delivered by defendant. It was for the failure to deliver them that plaintiff claimed damages. Plaintiff alleged in his petition that the contract was a Montana contract, and pleaded certain statutes of that state with respect to the measure of damages.

For a first defense, defendant denied each and every allegation of the petition, except it admitted that it was a corporation doing business at Sheridan, Wyo.; that it entered into the contract and confirmation of the same; that it shipped two carloads of flour to plaintiff; and that plaintiff accepted and paid for said two carloads. For a second defense, defendant alleged that at the time of the execution and confirmation of said contract it was mutually understood and agreed between the parties that before the shipment of any car under the terms of the contract, plaintiff should give to defendant specifications of the weight of the sacks desired, whether 48 pound or 98 pound sacks, and the number of each; that plaintiff furnished such specifications when he ordered each of the two cars which were delivered, and that they were shipped accordingly by defendant, the first car being ordered September 22, 1914, and the second November 10, 1914; that plaintiff did not perform all of the conditions on his part to be kept and performed under the said terms of said contract and confirmation thereof, nor did he stand ready and willing to perform the conditions on his part to be performed under the terms specified in the said contract and confirmation thereof; that plaintiff never ordered or requested defendant to ship him any more flour than the two carloads during the time specified in the contract, nor did he give defendant any specifications of the weight and number of sacks desired for an additional shipment until February 6, 1915, when he ordered the third car shipped. For reply the plaintiff admitted that on October 3, 1914, and November 19, 1914, the defendant, under the terms of said contract, shipped to plaintiff the cars of flour mentioned in said answer, and that the same were, shortly thereafter, accepted and paid for by plaintiff, and denied the other allegations of the answer.

[1, 2] The foregoing, we think, sufficiently presents the issues on the questions involved. The defendant offered to introduce evidence, and offered to prove, that prior to the shipment of each of the two carloads of flour which were shipped, the plaintiff informed the defendant that he desired a carload of flour, and specified the number of sacks of each weight he desired, and that his instructions in those respects were complied with by defendant, and that prior to the expiration of the time for delivery of the balance of the flour defendant requested plaintiff to furnish such specifications, which he neglected and refused to do, and that defendant was ready and willing to deliver the balance of the flour upon receipt of such specifications. The plaintiff objected to all evidence offered to prove such facts on the ground that it was immaterial, irrelevant, and incompetent, being an attempt to vary the terms of a written agreement by a parol contemporaneous agreement. The court sustained the objection and excluded the evidence. The evidence was within the issues made by the pleadings. Plaintiff alleged that he had fully performed his part of the contract. That defendant denied and alleged, in substance and effect, that by the terms of the contract plaintiff was required to furnish specifications for each shipment, and that he had failed to do so. Nor was the evidence immaterial if competent, and that depends upon the correct construction of the contract. Plaintiff's counsel contend that the language, "Time of shipment one (1) car at a time—last car to be shipped on or before Feb. 1st. 1915," and, "Flour 2.30, $^2/_{48}$. 2.25, $^1/_{98}$" (which last quotation it is agreed means if the flour was to be in 98 pound sacks the price was $2.25 per sack, or if in two sacks of 48 pounds each the price was $2.30), gave defendant the option to deliver the flour at any time within the time limit of the contract, and in such weight sacks as it chose, provided only one car was delivered at a time. Defendant contends that the contract required plaintiff to give notice of the time for shipments and to furnish specifications.

[3] It is a settled rule of construction of written contracts that if the language employed is susceptible of two constructions the court will take into consideration the situation of the parties and surrounding circumstances at the time the contract was entered into in order to arrive at the true intent of the parties. Saunders v. Ducker, 116 Md. 474, 82 Atl. 154, Ann. Cas. 1913C, 817; Anderson v. Mutual Life Ins. Co., 164 Cal. 712, 130 Pac. 726, Ann. Cas. 1914B, 903; 6 R. C. L. p. 849; Balch et al. v. Arnold et al., 9 Wyo. 17, 27, 59 Pac. 434; 9 Cyc. 587; 35 Cyc. 97. Here plaintiff was a retail grocer and wanted the flour to supply his customers, and covering a period of five months, which fact was known to defendant. It is unreasonable, under such circumstances, to conclude that plaintiff intended that defendant had the option of shipping to him the entire five cars, one car each day immediately after the contract was entered into and thus require plaintiff to pay for all within 35 days; or that defendant could decline to deliver any of the flour until the last 5 days in January, 1915, and deliver one car a day during those 5 days. There is also a still stronger reason supporting the contention of defendant. It offered to prove facts showing the construction placed upon the contract by the parties before any controversy arose between them.

[4] Plaintiff's conduct in ordering the two cars and specifying the weight of sacks and the number of each, if that was the fact, would clearly indicate that he regarded that as his right under the contract; and defendant offered to prove its acquiescence in that construction of the contract and its understanding of the rights and duties of the respective parties thereunder. "It is to be assumed that the parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions." 6 R. C. L. p. 853, and cases cited in note; 9 Cyc. 588; 35 Cyc. 98. The evidence sought to be introduced by defendant would not have varied the terms of the writing. It would not have changed the terms of the contract that the flour was to be delivered

"one car at a time," or that it was to be contained in sacks of specified weight, and all to be delivered on or before February 1, 1915.

[5] We think the evidence was competent and should have been admitted; and if defendant had been permitted to introduce the evidence offered, and the same had been found sufficient to establish the facts which defendant offered and sought to prove, then the fault was that of plaintiff in his failure to give shipping directions, and he would not be entitled to recover.

[6, 7] On the question of the measure of damages the court instructed the jury that the contract was a Montana contract and governed by the laws of that state, to which defendant excepted. Considerable space in the briefs has been devoted to a discussion of that question, but it does not appear to be very material whether it be considered a Montana or a Wyoming contract. As a rule contracts are to be construed, and their validity and effect are to be determined according to the law of the place where made. To that rule there is the well-recognized exception that where a contract is made in one state to be performed in another, the law of the state of performance will govern unless it shall clearly appear that the parties intended otherwise. 9 Cyc. 669, and cases cited in note. By the terms of the contract under consideration, if defendant failed to deliver the flour, plaintiff was to buy, and the damages were fixed at the difference between the contract price and what the flour would have cost the plaintiff at the time and place it should have been delivered. By the statute of Montana, pleaded by plaintiff, the measure of damages in such cases "is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled." If plaintiff could have purchased flour of the same grade and quality in the market upon defendant's breach of the contract, it was his duty to do so in order to minimize his damages so far as he reasonably could, and if he did not do so he could not thereby enhance his damages beyond the difference between the contract price and the market price at the time of the breach.

[8] But it is contended, and plaintiff testified, that he could not procure the brand of flour contracted for except from defendant and at an advanced price, and that he was not required to so purchase from defendant; that to have done so would have been a waiver of his claim for damages. On that question the court instructed the jury that:

> "It was not the duty of plaintiff to purchase said flour from defendant at an advanced price over the contract price, in order to lessen the amount of defendant's liability."

We think the instruction was erroneous. If plaintiff could have procured the flour either in the market or from the defendant at an advanced price, and he had done so, it is clear that the measure of his damages would be the difference between the contract price and the price he was required to pay. It was so held in Lawrence v. Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167. To the same effect, see Willock v. Oil Co., 184 Pa. 245, 39 Atl. 77, N. B. Borden & Co. v. Vinegar Bend Lumber Co., 2 Ala. App. 354, 56 South. 775, and Deere et al. v. Lewis et al., 51 Ill. 254. The case of Campfield v. Sauer, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837, is cited by counsel as holding otherwise; but in that case the offer to furnish the property, after the breach of the contract, at an advanced price was upon the express condition that the buyer would waive the damages for the breach of the contract. The case in effect approves the rule as stated in Lawrence v. Porter, supra, when, as in this case, there is an unconditional offer to deliver the property at an advanced price. There was evidence to the effect that after the expiration of the contract and about February 6, 1915, plaintiff ordered a carload of flour, to which defendant replied by wire February 12, 1915:

> "Yours sixth just received your contract expired February 1st present values three ninety five f. o. b. Billings shall we ship car writing you fully."

Mr. Denio, a witness for defendant, testified on cross-examination that the market price of this flour f. o. b. Billings was about $3.65, or perhaps $3.70 per hundred, or 98-pound sack, thus bringing the case as to the measure of damages, if any, within the rule announced in the cases above cited. It is further argued by counsel for defendant that the statutes of Montana were not sufficiently proven to be admitted in evidence. But we think the evidence was sufficient: and in any event it is not material, as other evidence may be offered on another trial.

For the errors of the district court, above indicated, the judgment is reversed, and the cause remanded for a new trial.

Reversed.

POTTER, C. J., concurs.

(30 Idaho, 318)

ATHEY v. OREGON SHORT LINE R. CO.

(Supreme Court of Idaho. April 3, 1917. Rehearing Denied June 30, 1917.)

1. APPEAL AND ERROR 🔑337(2)—PERFECTION OF APPEAL—PREMATURE APPEAL.

Under the existing statute an appeal from the district court to the Supreme Court, taken prior to the entry of the judgment in the judgment book, does not confer jurisdiction upon the Supreme Court, and will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1877.]

2. Appeal and Error ⚿662(1)—Transcript—Verity.

The transcript containing the record on appeal imports verity, and is the conclusive evidence of the proceedings in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2850.]

3. Appeal and Error ⚿714(1)—Entry of Judgment—Memorandum.

Any memorandum of the date of entry of judgment made by the clerk of the district court without authority of law has no standing as evidence of the date of entry of judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958, 2959.]

4. Appeal and Error ⚿529(1) — Record — Entry of Judgment.

The memorandum in the judgment docket of the date of the entry of judgment being the only record thereof provided by law, and the judgment docket entries not being properly part of the record on appeal, there is no authentic evidence of the date of entry of judgment in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2389–2391, 2393.]

5. Evidence ⚿83(6) — Presumption — Official Acts—Statute.

It is the statutory duty of the clerk of the district court to enter the judgment in the judgment book and make up the judgment roll prior to making the entries in the judgment docket, and when it appears that the entries in the judgment docket have been made, a prima facie presumption arises that the clerk has done his duty, and that the judgment has actually been entered in the judgment book.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105.]

6. Evidence ⚿89—Presumptions—Rebuttal—Official Acts.

Neither the testimony of the clerk of the district court nor that of his deputy will be admissible to impeach the presumption of the regularity of their official acts; other evidence may be received for such purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 111.]

7. Appeal and Error ⚿22—Appellate Jurisdiction—Estoppel.

An appellate court can only derive its jurisdiction from the Constitution and statutes of the state, and therefore, in the absence of actual fraud, there can be no estoppel to deny its jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 98.]

8. Appeal and Error ⚿434 — Appellate Jurisdiction—Stipulation.

A stipulation between the attorneys made during the time which an appeal could properly have been taken, extending the time in which to file briefs, is not such an appearance as would confer jurisdiction upon the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2183.]

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by A. W. Athey against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Motion to dismiss on the ground that the appeal was taken prematurely sustained, and appeal dismissed.

H. B. Thompson, of Pocatello, and Karl Paine, of Boise, for appellant. V. P. Coffin and Harry Keyser, both of Boise, for respondent.

RICE, J. This action was brought in the district court of the Third judicial district in and for Ada county. The case was tried before a jury, and a verdict in favor of the plaintiff was rendered on February 10, 1916. The judgment was signed by the judge and filed with the clerk on the 11th day of February, 1916. On the 15th day of February, 1916, an appeal was taken and perfected. The matter comes up at this time on motion to dismiss the appeal.

[1] The grounds for dismissal are that the appeal was taken prior to the actual entry of judgment in the judgment book as required by section 4807, Rev. Codes, as amended by chapter 80, Sess. Laws 1915. In support of his motion to dismiss the appeal, the respondent has filed three affidavits of Thomas E. Powell, deputy clerk of the district court; also the affidavit of V. P. Coffin, attorney for respondent. In opposition to this motion the appellant has filed the affidavit of Karl Paine, an attorney for appellant; also affidavits of Otto F. Peterson and Cleo J. Schooler, senior deputy and deputy clerk of the district court.

Appellant does not admit that the judgment was entered subsequent to the appeal, and relies upon the entry in the judgment docket in the office of the clerk of the district court and upon the certified copy of the record of the judgment in the judgment book, which contains the following notation: "Entered February 11, 1916."

It must be taken as settled law in this state that an appeal taken prior to actual entry of the judgment in the judgment book must be dismissed. Vollmer v. Nez Perces County, 7 Idaho, 302, 62 Pac. 925; Santti v. Hartman, 29 Idaho, 490, 161 Pac. 249; Yeomans v. Lamberton, 29 Idaho, 801, 162 Pac. 674.

[2] The transcript containing the record filed for the purpose of appeal imports absolute verity. It is the sole, conclusive, and unimpeachable evidence of the proceedings in the lower court. Okl. Fire Ins. Co. v. Kimpel, 39 Okl. 339, 135 Pac. 6; 4 Corpus Juris, 512.

[3, 4] The question that concerns us here is not only the fact of the date of entry of judgment, but also the proper evidence of that fact. What constitutes the record on appeal from a final judgment is determined by Rev. Codes, § 4818, as amended by Sess. Laws 1911, p. 375, and section 4456, as amended by Sess. Laws 1909, p. 76. The law nowhere seems to provide for the authentic date of entry of judgment appearing upon any of the papers specified in these sections as constituting the record on appeal. Therefore any date appearing thereon purporting to be the date of entry of judgment is without au-

thority of law, and has no standing as evidence of that date. The law does, however, provide that the clerk must make the proper entries in the judgment docket, among which is specified the date of entry of the judgment. Rev. Codes, § 4457, as amended by Sess. Laws 1913, p. 91, and section 4458. The law does not provide that entries upon the judgment docket shall constitute any part of the record on appeal. Records and papers improperly included in a judgment roll on appeal will be stricken on motion. Williams v. Boise Basin Mining Co., 11 Idaho, 233, 81 Pac. 646.

[5] Sections 4450, 4454, and section 4456, as amended by Sess. Laws 1909, p. 76, and section 4457, as amended by Sess. Laws 1913, p. 91, and sections 4458 and 4459, Rev. Codes, determine the statutory duty of the clerk after rendition of a judgment or verdict. From these sections it appears that, after a judgment or verdict is rendered and filed, the clerk's first duty is to enter the judgment at length in the judgment book. Immediately after entry in the judgment book it is his duty to fasten together papers constituting the judgment roll. Immediately after making up the judgment roll, it is his duty to make proper entry in the judgment docket. When the entry in the judgment docket is made prior to the appeal, it will be presumed that the clerk has done his duty and judgment has been entered prior thereto, and the jurisdiction of the appellate court will be presumed. Smith v. Hawley, 11 S. D. 399, 78 N. W. 355. This, however, is only prima facie presumption, and may be overthrown by the proper evidence. Smith v. Hawley, supra.

When the jurisdiction of the appellate court is attacked, the question as to what is proper evidence of the fact of jurisdiction is for this court to consider. We have, on the one hand, an official entry in the judgment docket of the clerk to the effect that judgment was entered on February 11, 1916. On the other hand, we have the affidavit of the deputy to the effect that judgment was not entered before November 2, 1916.

[6] It has been held in this state that the evidence of a notary public is incompetent and inadmissible to impeach his own certificate of acknowledgment. Wilson v. Wilson, 6 Idaho, 597, 57 Pac. 708. Upon the same theory the affidavits of the clerk of the district court and his deputies are incompetent and inadmissible to impeach the regularity of their official acts. However, as the evidence of any one other than the notary who made the certificate is admissible to impeach its verity, so is the evidence of any one other than the clerk of the district court, or his deputies, competent and admissible to impeach the presumption of the regularity of the official acts of the clerk.

This rule is in no way in conflict with the rule that the record filed for the purpose of appeal imports absolute verity. The record on appeal, as has been shown, is not questioned. The only attack that has been made is upon the prima facie presumption that the judgment was entered prior to the time of taking the appeal. The affidavit of V. P. Coffin, being direct and certain to the effect that the judgment was not entered before November 2, 1916, and being undisputed, must be received as the best evidence of the actual date of the entry of judgment in the lower court.

It has been argued by appellant that the respondent in this case is estopped to deny jurisdiction of the court on the grounds that his conduct was fraudulent, in that it led the appellant to believe that the appeal was taken subsequent to the entry of judgment. This view cannot be sustained by the evidence. The attorney for the respondent was under no duty to the appellant to inform it of the date of the actual entry of the judgment. The notation of the date of the entry of judgment made in the judgment book was not made on the suggestion of the respondent, or his attorney, but was made according to the usages and custom of the deputy clerk of the district court. It appears that the notation in the judgment book that judgment was entered February 11, 1916, misled the attorneys for appellant, but it does not appear that the respondent or his attorneys were in any way responsible for that entry being made.

[7] An appellate court can only derive its jurisdiction from the Constitution and statutes of the state. Penny v. Nez Perces County, 4 Idaho, 642, 43 Pac. 570; People v. Walker, 132 Cal. 137, 64 Pac. 133; Estate of Campbell, 141 Cal. 72, 74 Pac. 550; Brooks v. Calderwood, 19 Cal. 125. Where a statute requires an appeal to be taken after entry of judgment, an appeal prior to entry of judgment will be dismissed, as the court has no jurisdiction to consider the same. Santti v. Hartman, supra; Yeomans v. Lamberton, supra. The fact that the aggrieved party has no other remedy is immaterial. Maxon v. Gates, 118 Wis. 238, 95 N. W. 92. Where the court otherwise is without jurisdiction, jurisdiction cannot be conferred by stipulation. Chamberlain v. Hedger, 10 S. D. 290, 73 N. W. 75. The acknowledgment of due service on a certain date does not waive the defect that the service was too late for the purposes of the appeal. Towdy v. Ellis, 22 Cal. 651. A respondent will not be estopped to deny jurisdiction of the court by his act of indorsing an admission of service of the notice of appeal. The acts of the parties cannot confer jurisdiction on the court in a case withheld by the law from its jurisdiction. Estate of Brewer, 156 Cal. 89, 103 Pac. 486.

[8] Appellant further contends that, the respondent having entered into stipulation for further time in which to file his brief in this case within the time that an appeal could lawfully be taken to this court, such stipulation was an appearance, and that, where

there is voluntary appearance, no service of notice of appeal is necessary. It has been held that a stipulation entered into between parties is not such an appearance as will confer jurisdiction upon the court. Washington County Land & Development Co. v. Weiser Nat. Bank, 26 Idaho, 717, 146 Pac. 116.

It appearing that this appeal was taken prior to the actual entry of judgment, and it being the law that an appeal taken prior to the entry of judgment confers no jurisdiction on this court, this appeal must be dismissed. Costs awarded to respondent.

MORGAN, J., concurs. BUDGE, C. J., sat at the hearing, but took no part in the decision.

(30 Idaho, 392)

LONG et al. v. BURLEY STATE BANK.

(Supreme Court of Idaho. May 3, 1917. Rehearing Denied June 30, 1917.)

1. MALICIOUS PROSECUTION ⚷14—RECOVERY FOR WRONGFUL ATTACHMENT—GROUNDS.

Before recovery can be had because of an attachment procured wrongfully, maliciously, and without probable cause, it must be shown that the property alleged to have been attached was actually levied upon in substantial conformity with section 4307, Rev. Codes (amended Sess. Laws 1911, c. 162, p. 559).

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 17.]

2. MALICIOUS PROSECUTION ⚷67 — WRONGFUL AND MALICIOUS ATTACHMENT—DAMAGES —LOSS OF PROFITS.

Loss of profits in business is an element of damage where the attachment was procured with malice and without probable cause, but may be recovered only upon the production of such evidence as will enable the jury to calculate, with a reasonable degree of certainty, the amount of damage resulting from such loss.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156.]

3. MALICIOUS PROSECUTION ⚷25(1), 32, 55—MALICE AND WANT OF PROBABLE CAUSE—ALLEGATION AND PROOF.

Malice and want of probable cause, if relied upon as an element of damage, must be alleged and proved. The jury may infer malice from the want of probable cause, but it may not infer want of probable cause alone from the fact that the suit in aid of which the attachment issued was decided against the party procuring it.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 56, 67, 68, 106–110.]

Appeal from District Court, Cassia County; Edward A. Walters, Judge.

Action by D. W. Long and A. W. Long against the Burley State Bank. Judgment for plaintiffs, and defendant appeals. Reversed.

J. C. Rogers and T. Bailey Lee, both of Burley, for appellant. S. T. Lowe, of Burley, for respondents.

MORGAN, J. The respondents instituted this action against the appellant to recover damages for an attachment alleged to have been procured to be levied against their property wrongfully, maliciously, and without probable cause. The attachment issued on July 28, 1911, and was dissolved on January 13, 1913. The suit in which the attachment was procured was decided in favor of respondents and against appellant. The property alleged to have been attached consisted of moneys, corporate stock, notes, real estate, and a motorcycle. Respondents claim damages on account of being deprived of the use of the property and on account of loss of credit and profits in their business as building contractors. The case was tried to a jury which returned a verdict in respondent's favor in the sum of $1,000. Judgment was entered accordingly, from which this appeal was prosecuted.

[1] Appellant contends that the evidence fails to show that the property was attached. This contention is sustained so far as it concerns the real estate and the motorcycle. The return of the sheriff was offered in evidence by respondents to show what property was attached, but such return is only prima facie evidence of the truth of the matters therein stated. Section 2026, Rev. Codes. According to the testimony of respondents, the sheriff went to their office and informed them that the motorcycle was attached, but left it with them upon promise that they would not use it. The sheriff testified that although he was about to attach the motorcycle, he decided, at the request of respondents and with the consent of the attorney for appellant, to not do so. Without discussing the conflict of evidence in this particular, we hold that, assuming respondents' testimony to be the truth in the matter, the sheriff did not levy upon the motorcycle in accordance with section 4307, Rev. Codes (amended Sess. Laws 1911, c. 162, p. 559), because he did not, at any time, take it into his custody or remove it from the custody of respondents. There is no levy under a writ of attachment unless the acts required by the statute are substantially performed. Bank v. Sonnelitner, 6 Idaho, 21, 51 Pac. 993. The uncontradicted testimony of the county recorder established the fact that no copy of the writ of attachment, or description of the real property alleged to have been attached, or notice of the attachment, was ever filed in his office. Such filing is absolutely necessary under the provisions of section 4307, supra, in order to constitute a lawful levy upon real estate. No action lies for an attachment procured maliciously and without probable cause unless the levy is complete. Maskell v. Barker, 99 Cal. 642, 34 Pac. 340.

The question of whether or not the real property was attached, and whether or not the notice and description and a copy of the writ of attachment were filed in the office of the county recorder, was submitted to the jury, but as there was no evidence to dispute the testimony of the county recorder, that question should not have been submitted.

[2] Appellant next contends that the evidence was insufficient to show any damage resulting from the alleged attachment. Respondents rely upon injury to their credit and loss of prospective profits in their business as contractors, which are elements of damage if the attachment was not merely wrongful, but malicious and without probable cause. Crymble v. Mulvaney, 21 Colo. 203, 40 Pac. 499; note to International Harvester Co. v. Iowa Hdw. Co., 29 L. R. A. (N. S.) 272; note to Tisdale v. Major, 68 Am. St. Rep. 263; note to Ailstock v. Moore Lime Co., 7 Ann. Cas. 545; 6 Corpus Juris, pp. 539 to 541, and cases in notes 76, 78, and 80; Shinn on Attachments and Garnishments, vol. 1, p. 693.

Assuming that the evidence in this case supports the allegations that the attachment was issued maliciously and without probable cause, loss of profits and credit could be considered by the jury in awarding damage, but only upon such evidence being submitted as would enable it to calculate, with reasonable certainty, the amount of damage resulting from such loss. In this connection respondents introduced testimony tending to show that during the year previous to the issuance of the attachment the volume of business obtained by them was large and the profits amounted to about $3,000; that immediately after the attachment was dissolved their business and profits were about the same in volume, but that during the time the property was attached they performed very little business and received little or no profits, although generally speaking, there was as much building in progress in the locality in which they operated during that time as there was prior to or after the time the attachment was in force. They testified that because their property was tied up by the attachment they could raise no money and could not obtain credit sufficient to enable them to advance the cost of material necessary to be used in construction work. They made no attempt to show that any certain contract for building could have been obtained by them had they been in a condition to perform it. The jury was left to infer from the fact that their business was of certain magnitude before and after the attachment, the volume during the time of attachment would have been the same. In the business of contracting, which is neither steady nor uniform, the profits received, or the amount of building done at one time is not a safe criterion by which to judge what might have been done at another had not the property of the contractor been attached. In case of a building contractor there is no such thing as uniformity in the volume of business. During one year he may have contracts for the construction of a few large buildings and during the next for many more, but smaller structures. If, however, respondents have shown that had they been able, financially, to handle them, they would have received certain building contracts, which they lost by reason of the attachment, then it would have been competent for them to show, upon the theory that the attachment was malicious and without probable cause, the cost of the labor and materials they would have used and the amount of the contract price, and thus furnish to the jury a safe and reasonable basis for the calculation of lost profits. "Past profits cannot be shown to enable a jury to conjecture what future profits would be." 13 Cyc. 57; Bierbach Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19. Where recovery by reason of loss of profits may be had there must be such evidence as will enable the jury, with some degree of certainty, to ascertain the amount of the profits alleged to have been lost. Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244; Zinn v. Rice, 161 Mass. 571, 37 N. E. 747.

[3] The final question to be decided is whether or not the evidence was sufficient to show malice and want of probable cause. As heretofore stated, although actual damage may be recovered where the attachment was merely wrongful, yet to sustain a judgment for damage for loss of credit and profits the attachment must be malicious and without probable cause. It is not alone sufficient that malice existed, nor is it sufficient that there is want of probable cause, but both these elements must be present. However, malice may be inferred by the jury, from the lack of probable cause. Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L. R. A. (N. S.) 120; note to Tisdale v. Major, supra. But the jury cannot infer want of probable cause from the mere fact that the action in which the attachment was issued was decided against the party procuring it. If the party suing out the writ of attachment had a reasonable belief in the existence of facts necessary to sustain the same, there was probable cause. 2 R. C. L. 899. It is said that the test is what would prudent business men have done under like circumstances. 2 R. C. L., supra. The burden is upon the party alleging malice and want of probable cause to prove the same. The evidence in this case shows that there was a dispute between the parties as to who was in debt to the other. Respondents had borrowed money from appellant and, on the other hand, were constructing a building for it. There was a dispute as to how much was due on the building. The books of appellant showed that respondents were in its debt to the extent of something over $1,000. There is no evidence tending to show malice or want of probable cause or, as a matter of fact, anything further than an honest mis-

understanding between the parties as to which one owed the other.

Judgment is reversed, and the cause is remanded for a new trial. Costs are awarded to appellant.

BUDGE, C. J., and RICE, J., concur.

(30 Idaho, 440)

KEYSER v. CITY OF BOISE.

(Supreme Court of Idaho. June 12, 1917.)

1. MUNICIPAL CORPORATIONS ⚿690—PERMIT TO OBSTRUCT STREET—REVOCATION.

The holder of a permit to install an obstruction in a public street or thoroughfare for private purposes acquires no property or contractual right by reason of the issuance to him of such permit, and, whenever the city authorities deem it necessary as a police regulation to vacate and revoke such permit, the holder thereof has no alternative, but must comply with the order of revocation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1490, 1491.]

2. MUNICIPAL CORPORATIONS ⚿690 — REVOCATION OF PERMIT—INJUNCTION—DEMURRER.

Held, that the action of the trial court in sustaining the demurrer to the complaint and dismissing the action was not error.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1490, 1491.]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Samuel Keyser, doing business under the name and style of the American Grocery Company, to enjoin the City of Boise from removing by force a gasoline pump, installed by appellant on a public street, under a permit issued to him by the City. Demurrer to complaint sustained and action dismissed, and plaintiff appeals. Affirmed.

Van W. Hasbrouck, of Homedale, for appellant. Chas. F. Reddoch, of Boise, for respondent.

BUDGE, C. J. The appellant filed a complaint in the district court, setting up the following facts: That he was conducting a grocery business in Boise City; that respondent is a municipality in Ada county; that on the 4th day of May, 1915, the council of said city passed a resolution, upon his application, permitting and authorizing him to install a gasoline tank for the purpose of selling gasoline to automobilists and others; that pursuant to this permit, and relying thereon, he purchased a gasoline tank and pump and employed a skilled plumber to install the same; that the installation thereof was completed on the 13th day of May, 1915, with the exception of replacing the cement of the sidewalk around it; that during the installation thereof two members of the city council were present and assisted him in lining up the pump with the walk; that one of the councilmen came to him and stated that he was authorized by the council to investigate the pump, which he did, and stated to appellant that he would report the matter to the council; that said councilman came back to appellant's place of business and stated that the council objected to the pump on account of its appearance and the long arm projecting from it; that appellant removed the arm and agreed with the council that he would not use the galvanized iron, which came with the pump, for covering the same, as the council considered it unsightly; that thereafter the council, without any notice to appellant, on the 14th day of May, 1915, held a special meeting and passed a resolution directing appellant to remove the pump, so installed, within two days from the date of said resolution, and that, in the event of his failure so to do, the street commissioner was directed and ordered to remove the pump and place the street in its previous condition, at the expense of appellant; that, unless restrained by this court, said resolution would be carried into effect, to the great wrong and injury of appellant, and in violation of his rights under said permit; that the action of the council in ordering the pump removed was without authority of law, was wholly null and void and in violation of appellant's constitutional rights, and deprived him of the right of due process of law; that he had no speedy or adequate remedy at law; that the purported resolution of May 14, 1915, did not state the correct state of facts, in that it purported to state that the council directed and instructed appellant not to install an inside pump of the type and character intended to be installed; that, on the contrary, the council never made any objection to the character or the type of pump not being an outside pump until their purported resolution of May 14, 1915; that appellant prior to said date had no notice from the council that the pump was not in accordance with the ordinance of the city or not a proper pump for said purpose; that, on the contrary, the pump and tank were inspected by the chief of the fire department of said city and by members of the city council; that the city and members of its council had ample opportunity to observe, and did observe, the almost complete installation of the tank and pump before the passing of said purported resolution on May 14, 1915, where and when appellant first received information, by his voluntary appearance at said council meeting, that the maintenance of the pump would not be permitted; that the council and city have authorized installations, and, under said authorizations, there have been installed in said city pumps of the same type and character as the pump installed by the appellant; that appellant had performed all the conditions on his part to be performed under said permit, and prayed for a temporary restraining order, restraining the city from the threatened acts, set forth in the complaint, and for an order to show cause why the temporary restraining order should not be made absolute.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Respondent demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, injunctive or otherwise. The demurrer was sustained, and, appellant refusing to plead further, judgment was entered dismissing the action. This is an appeal from the judgment.

Appellant assigns the following errors: That the court erred in sustaining the demurrer to the complaint, and in rendering judgment in favor of respondent. The only question for this court to determine is whether or not the complaint states a cause of action.

[1, 2] The authorities dealing with the question raised by the demurrer are conflicting, but we are of the opinion that the sounder rule, and the rule supported by the better reasoned cases, is to the effect that the streets, from side to side and end to end, belong to the public, and are held by the municipality in trust for the use of the public. The city is therefore without authority, in the absence of a legislative enactment expressly permitting it, to grant a private person or corporation a permit to erect or maintain a permanent obstruction in a public street or thoroughfare for a purely private purpose; we have no such statute in this state. It follows that any one obtaining a permit from the city, for the private use of a public street, as in this case, takes the same with notice that it is subject to revocation at the will of the city, and, indeed in this view, it matters not whether the use is made in accordance with a permit or without one, the use is merely permissive in either event, and revocable at any time without notice. If the person making such private use of a street goes to expense, he does so at his own risk, and he will not be heard to complain that his property is being taken without due process of law.

The holder of a permit to install an obstruction in a public street or thoroughfare, for a private purpose, acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities, in their discretion, deem it necessary, as a proper police measure, to vacate and revoke such permit, the holder of the same has no alternative, but must comply with the order of revocation. 3 McQuillin, Mun. Corp. § 1319; Elster v. City of Springfield, 49 Ohio St. 82, 30 N. E. 274; City of Denver v. Girard, 21 Colo. 447, 42 Pac. 562; Lacy v. Oskaloosa, 143 Iowa, 704, 121 N. W. 542, 31 L. R. A. (N. S.) 853; Hibbard v. Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; City of Tell City v. Bielefeld, 20 Ind. App. 1, 49 N. E. 1090; Winter v. City of Montgomery, 83 Ala. 589, 3 South. 235; Ainley v. Hackensack Imp. Commission, 64 N. J. Law, 504, 45 Atl. 807; Eddy v. Granger, 19 R. I. 105, 31 Atl. 831, 28 L. R. A. 517; South Highland L. & I. Co. v. Kansas City, 100 Mo. App. 518, 75 S. W. 383; City of New York v. United States Trust Co., 116 App. Div. 349, 101 N. Y. Supp. 574; Emerson v. Babcock, 66 Iowa, 257, 23 N. W. 656, 55 Am. Rep. 273; Norfolk v. Chamberlaine, 89 Va. 196, 16 S. E. 730; Ely v. Campbell, 59 How. Prac. (N. Y.) 333.

It may be that a different rule would apply if the municipality had been given the right to grant such a permit by statute. Some cases have gone to the extent of announcing a rule contrary to the one herein expressed, apparently upon the theory that a municipality has a right, in the absence of a statute authorizing it, to grant an irrevocable license or permit of a private use of the streets, so long as such use does not materially interfere with the use thereof by the public. 3 McQuillin, Mun. Corp. § 1319; City of Buffalo v. Chadeayne (Super. Buff.) 7 N. Y. Supp. 501; Spencer v. Andrew, 82 Iowa, 14, 47 N. W. 1007, 12 L. R. A. 115; First Nat. Bank v. City of Emmetsburg, 157 Iowa, 555, 138 N. W. 451–456, L. R. A. 1915A, 982; Smith v. City of Jefferson, 161 Iowa, 245, 142 N. W. 220, 45 L. R. A. (N. S.) 792, Ann. Cas. 1916A, 97.

While the latter view has some very plausible arguments in its favor, we are not in accord with it, for, as indicated above, the former view is supported by the weight of modern authority and by sound legal principle.

The complaint therefore does not state a cause of action, and the demurrer was properly sustained. The judgment is affirmed. Costs awarded to respondent.

MORGAN and RICE, JJ., concur.

(30 Idaho, 431)

CALLAHAN v. CALLAHAN.

(Supreme Court of Idaho. June 11, 1917.)

1. VENUE 🔑49(1) — PREJUDICE OF TRIAL JUDGE—MANDATORY DUTY.

When a motion for a change of venue, on the ground of the bias and prejudice of the trial judge, is supported by a sufficient showing, it is the duty of such judge to grant a change of venue, and such duty is mandatory and not discretionary.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 71.]

2. VENUE 🔑67—BIAS OF TRIAL JUDGE—SUFFICIENCY OF SHOWING.

A direct allegation of the fact of prejudice and bias on the part of a trial judge, based on the belief of affiant, and accompanied by a statement of the facts on which the belief is based, as complete as the nature of the case admits of, constitutes a sufficient showing of bias and prejudice, to sustain an order for a change of venue on that ground, and this is particularly true where the trial judge expressly finds that he is disqualified, and that sufficient grounds exist therefor.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 114–120.]

3. **Venue** 🔑75—**Change of Venue—Transfer.**

An order granting a change of venue in a cause pending in a district court should, in the absence of an agreement, transfer the cause to the nearest court, judicial district and county, "where the like objection or cause for making the order does not exist," and such order should not designate the judge before whom such cause should be tried.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 130–132, 137.]

4. **Order Granting Change of Venue.**

Held, order granting a change of venue affirmed, with directions to the trial court to amend same in conformity with the views herein expressed.

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Action for divorce by James F. Callahan against Helen Elizabeth Callahan, with cross-complaint by defendant. From an order granting a change of venue on the ground of the prejudice of the judge, plaintiff appeals. Affirmed, with directions to amend order.

Walter H. Hanson, of Wallace, for appellant. Harry H. Parsons, of Missoula, Mont., and Featherstone & Fox, of Wallace, for respondent.

BUDGE, C. J. Appellant instituted an action, in the district court for the First judicial district, in and for Shoshone county, for a decree of divorce from respondent. The respondent, after filing her answer and cross-complaint, made a motion for a change of venue, upon the ground that the Honorable William W. Woods, judge of said court, was disqualified, "because of the bias and prejudice of the said judge," and based her motion upon the records and files in the action, and upon her affidavit, in which she stated that she had been advised by certain residents of Shoshone county, and that she believed, and, therefore, alleged, that she could not have a fair and impartial trial before said judge, by reason of his friendship for appellant and prejudice against respondent; that appellant had on numerous occasions stated to her that he could win any case in which he was a party before said judge, because of their long friendship and the influence which appellant had over him; that in some actions decisions had been rendered favorable to him, by reason of such influence and friendship; that when decisions had been rendered against him he had lost solely on account of the misconduct of his counsel; that the judge had been for more than 30 years a close and intimate friend and political associate of appellant, and by reason thereof respondent could not have a fair and impartial trial; and that said judge was apprised of certain matters which had taken place between the parties to the action, looking to condonation and settlement, after the suit had been filed, and would be a material witness upon the trial.

At the hearing of the motion counter affidavits had not been filed, but the substance of the counter showing, thereafter made and filed, was stated to and considered by the court in making the following order, to wit:

> "* * * The court * * * being fully advised in the premises, and it satisfactorily appearing to the said judge that he is disqualified from trying the said cause, and that sufficient ground exists therefor: Now, therefore, it is ordered, a change of the place of trial of the said action be and the same hereby is granted, and that the said cause be and the same hereby is transferred to the district court of the Eighth judicial district of the state of Idaho, and to the Honorable Robert N. Dunn, one of the judges of the said district court."

[1, 2] On appeal from the above order, granting a change of the place of trial, appellant contends: First, that the showing made was insufficient to establish bias and prejudice; second, that if the showing was sufficient a change of venue should not have been granted, but that another district judge should have been called in to try the case; third, that if the showing was sufficient and the judge was within his rights in ordering a change of venue, that the order is void for insufficiency in that it should have specified the particular county to which the cause was transferred; fourth, that if the showing was sufficient the order was void for the reason that it designated the particular judge, there being two judges in the district to which it was transferred.

Upon the first proposition appellant relies mainly upon the decision of this court in Bell v. Bell, 18 Idaho, 636, 111 Pac. 1074, which reversed an order granting a change of venue under somewhat similar circumstances, upon the ground that the showing was insufficient in that it did not recite the facts which were relied upon to establish the existence of prejudice and bias on the part of the judge. In the instant case an examination of the affidavit discloses the facts relied upon to establish the existence of bias and prejudice on the part of the trial judge, which we think are sufficient. Booren v. McWilliams, 33 N. D. 339, 157 N. W. 117; Faivre v. Manderscheid, 117 Iowa, 724, 90 N. W. 76; Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976. In the latter case it was said:

> "But here there is a direct allegation of the fact of prejudice and bias on the part of the judge; and, though the allegation is based—as in most cases it must be based—merely on the belief of the affiant, yet it is accompanied by a statement of the facts on which the belief is based, as complete as the nature of the case admitted of; and this was all that could reasonably be required."

The latter case was quoted with approval in Bassford v. Earl, 162 Cal. 115, 121, 121 Pac. 395–398, wherein the order denying the motion for a change of venue was reversed for the reason that there was no affidavit of the trial judge opposing the movant's showing, the court saying:

"If such a statement was necessary in answer to the Bassford affidavit, and not only do we think it was, but from the affidavit of Mr. Wheeler it seems so to have been regarded by the respondents to that motion, the one person, who, with an informed mind, could make such a declaration, was the judge himself, and he does not do so."

The same rule was announced in Keating v. Keating, 169 Cal. 754, 147 Pac. 974; Jones v. American Cent. Ins. Co., 83 Kan. 44, 109 Pac. 1077. Not only did the trial judge, in the case at bar, make no such affidavit, but on the contrary he expressly finds in his order that he is disqualified, and that sufficient ground exists for a change of venue. The order, therefore, was properly granted. Again referring to the Bell Case, it will also be noted that that case was decided in 1910, and that section 4125, Rev. Codes, has been amended by chapter 96, Sess. Laws 1913, p. 385, to read as follows:

"The court *or judge must*, on motion, *when it appears by affidavit or other satisfactory proof*, change the place of trial in the following cases. * * *" (Italics ours.)

In this amendment "may" has been changed to "must," and the other italicized portion has been added. Just what the Legislature intended to include in the clause "other satisfactory proof" does not appear. But where the showing is such as appears in this record, and where the trial judge himself has expressly found that he was satisfied of his own disqualification and that sufficient grounds existed for a change of venue, it would not only be unjust to the parties litigant, but it would be an imposition upon the trial judge for this court to compel him to try the case under such circumstances.

[3, 4] The second point urged by appellant is equally without merit, in view of the language of section 4126, Rev. Codes, which provides that whenever the judge is disqualified in an action—

"it must be transferred for trial to such other court of competent jurisdiction as may be agreed upon by the parties by stipulation in writing in open court, and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist."

In other words, when a motion for a change of venue, on the ground of the bias and prejudice of the trial judge, is supported by a sufficient showing, it is the duty of such judge to grant a change of venue, and such duty is mandatory and not discretionary. Gordon v. Conor, 5 Idaho, 673, 51 Pac. 747.

Keeping the latter section in mind appellant's third and fourth objections are readily disposed of. It is clear that the parties did not agree by stipulation in writing, entered in the minutes, or otherwise, that the cause should be transferred to any other court, and, failing in this, the judge being disqualified, the statute fixes the ocurt to which the cause should be transferred, namely, to another district court and "to the nearest court where the like objection or cause for making the order does not exist." What is the nearest court is a fact of which both the trial court and this court take judicial notice.

The order should have transferred the cause to the district court of the Eighth Judicial district for Kootenai county, without designating what judge should try the case. That portion of the order which designated the particular judge must be regarded as mere surplusage, in view of section 3829, Rev. Codes, as amended by chapter 4, Sess. Laws 1911, p. 6, which provides that the senior judge shall apportion the business of such district among such judges as equally as may be.

The order appealed from is affirmed, and the trial judge who made the order is directed to amend the same in conformity with the views herein expressed. Costs awarded to respondent.

MORGAN and RICE, JJ., concur.

(30 Idaho, 464)

ANDERSON v. COUNCIL LUMBER CO.

(Supreme Court of Idaho. June 16. 1917.)

1. SALES 🔑363—QUANTITY OF LOGS DELIVERED—QUESTION FOR JURY.

The question of the number of logs delivered under an oral contract is a question of fact for the jury to determine under all of the facts and circumstances in evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064.]

2. SALES 🔑359(1) — QUANTITY DELIVERED — EVIDENCE.

Held, that the jury were justified under the evidence in this case in finding that respondent substantially complied with his part of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1056, 1057.]

3. SALES 🔑348(1)—BREACH OF CONTRACT—RECOVERY FOR LOGS DELIVERED.

A party who has failed to perform in full his part of a contract to deliver logs may recover compensation for the logs actually delivered according to the contract price, less damages, if any, occasioned by his failure to fully complete the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 973–978, 983–986.]

Appeal from District Court, Adams County; Ed. L. Bryan, Judge.

Action by Aaron Anderson against the Council Lumber Company. Judgment for defendant, motion for new trial overruled, and it appeals. Affirmed.

James A. Stinson, of Council, for appellant. L. L. Burtenshaw, of Council, for respondent.

BUDGE, C. J. This is an action brought by the respondent against the appellant, upon an oral contract, to recover a balance of $387.68 alleged to be due respondent thereunder. There were several causes of action pleaded in the complaint, but the only one at issue here is the first cause of action, involving the contract above mentioned, the other causes of action having been waived by the respondent.

It appears that respondent agreed to cut and haul a certain quantity of sawlogs for appellant, "the amount of logs to be the amount of timber purchased by the said defendant from the United States government," and to pile the brush. Appellant agreed to pay respondent therefor at the rate of $3 per 1,000 feet, board measure. The case was tried before the court and a jury, the jury returned a verdict in favor of respondent for $300, and judgment was entered thereon for respondent. This appeal is from the judgment and from the order of the trial court overruling appellant's motion for a new trial. There are several assignments of error which we do not deem necessary to set out in hæc verba.

[1, 2] The point mainly relied upon by appellant is that, respondent having agreed to cut and haul all of the timber, and having pleaded a complete performance on his part, and the evidence, as appellant contends, failing to show a complete performance on the part of respondent, appellant was entitled to a directed verdict. It is admitted by appellant that respondent "would have coming to him, under said agreement, the amount claimed, to wit, the sum of $387.68, if he had completed his agreement as alleged and agreed upon."

There is some conflict in the evidence as to just where the logs were to be hauled or delivered, and some conflict as to the number of logs which were not delivered. The evidence on the part of respondent is to the effect that all of the logs were properly delivered with the exception of three logs, aggregating a total of about 240 feet, board measure. All of the evidence shows that approximately 700,000 feet of logs were hauled and delivered by respondent under the contract. The evidence on the part of appellant is to the effect that some 15 or 18 logs were not delivered by respondent. The number of logs not delivered was a question for the jury to determine under all of the facts and circumstances in evidence. The jury were justified, under the evidence, in finding, as they must have done in order to have returned the verdict which they did return, a substantial compliance on the part of respondent.

[3] This court held in Huber v. Blackwell Lumber Co., 27 Idaho, 373, 148 Pac. 903, that:

> "A party who has failed to perform his contract in full to deliver logs may recover compensation for the logs delivered according to the contract price, less damages occasioned by his failure to complete the contract."

The questions involved in the case at bar are strictly analogous to those before the court in the Huber Case, wherein the authorities are reviewed at length and the rule above quoted announced, quoting with approval from Saunders v. Short, 86 Fed. 225, 30 C. C. A. 462. It is unnecessary in this opinion to again review the authorities which support the principle announced in the Huber Case. While the subject-matter involved in the Huber Case was the sale and delivery of personal property, and the subject-matter of the contract here is that of employment for the performance of certain services, yet the principles involved are precisely the same. Turner v. Goodman 90 Ill. App. 339; Buckwalter v. Bradley (Ky.) 104 S. W. 970.

We have reached the conclusion, after a careful examination of the record and briefs of counsel, that there is no reversible error in the record, and the judgment is accordingby affirmed. Costs are awarded to respondent.

MORGAN and RICE, JJ., concur.

(30 Idaho, 451)

NELSON v. McGOLDRICK LUMBER CO.

(Supreme Court of Idaho. June 13, 1917.)

1. JUDGMENT ⟹143(2)—VACATION—MISTAKE OR NEGLECT.

Where it clearly appears that a default was permitted to be entered through the carelessness and negligence of a party, or his counsel, for which no reasonable excuse is offered, it will not be vacated upon the theory that it was taken against him through his mistake, inadvertence, surprise, or excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 270.]

2. COSTS ⟹260(1) — APPEAL — DELAY — RULE OF COURT.

Under rule 44 (153 Pac. xiii) of the rules of practice in this court, damages may be allowed to respondent in an amount not to exceed 12 per cent. of the judgment, where it manifestly appears the appeal has been taken for delay.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983, 986, 996.]

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Action by J. P. Nelson against the McGoldrick Lumber Company. Default judgment for plaintiff, and from an order denying a motion to vacate the default, defendant appeals. Amended and affirmed.

Cullen, Lee & Matthews, of Spokane, Wash., and Featherstone & Fox, of Wallace, for appellant. Wm. D. Keeton and E. N. La Veine, both of St. Maries, for respondent.

MORGAN, J. This action was commenced on September 10, 1915. On October 7th appellant filed a demurrer to the complaint which was overruled on November 1st, and appellant was given 20 days in which to answer. By stipulation the time was extended to and including November 27th, and on December 2d, no answer having been filed, the default of appellant was entered. On December 15th, no other or further appearance having been made, respondent offered proof in support of the allegations of his complaint, and was awarded judgment in the sum of $523.43 and costs.

On January 19, 1916, appellant caused to be served upon counsel for respondent a motion and notice of motion to vacate the default and for permission to answer, together with an affidavit in support thereof and a proposed answer to the complaint. These papers were filed on January 31st, at which time the motion was heard and denied. This appeal is from the judgment and from the order denying the motion.

The assignments of error bring before us for review the showings made in support of and in opposition to the motion above mentioned and the action of the trial court thereon.

[1] It appears from the affidavit of W. J. Matthews, of counsel for appellant, that it was necessary, in order to ascertain the facts from which to prepare an answer, to confer with J. F. Armfield, appellant's codefendant; that some difficulty was encountered in locating Armfield, and that on November 13, it was found he was in Pullman, Wash.; that, although affiant communicated with him, both by telephone and letter, and offered to pay all expenses of the trip if he would go to Spokane, Wash., where affiant resided, in order to confer with counsel for appellant relative to the facts in the case, he declined to do so, and it was not until on or about November 29th that appellant received a letter from him purporting to give the necessary information; and that because of this fact it was impossible to file the answer at an earlier date. It further appears from this affidavit that the answer was actually prepared by affiant prior to November 27th, and that some delay was occasioned because it was desired that the verification thereto be made by Roy Lammers, manager of appellant, who was absent from Spokane, and who had knowledge of the matters therein alleged.

Aside from the contradictory statements contained in this affidavit, by reason of which it is not very persuasive, it does not state facts sufficient to invoke the benefits of section 4229, Rev. Codes, wherein it is provided:

> "The court may * * * relieve a party, or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

While the answer in this case was due on November 27th, it conclusively appears that no effort whatever was made to procure a further extension of time, nor was counsel for respondent communicated with upon the subject by counsel for appellant until December 6th, four days after the default had been entered, nor does any reason appear why such extension was not applied for. The record before us, taken as a whole, does not show that the default was permitted to be entered through the mistake, inadvertence, surprise, or excusable neglect of appellant, or of its counsel, but does disclose that it was due to carelessness and negligence for which no reasonable excuse was offered. The rule that defaults will not be vacated under such circumstances has long been well established in this state. Domer v. Stone, 27 Idaho, 279, 149 Pac. 505, and cases therein cited.

[2] From the facts disclosed in this record it manifestly appears that this appeal is entirely without merit and was taken for delay. Damages in the sum of $62.81, being 12 per cent. of the amount of the original judgment, exclusive of costs, will therefore be allowed to respondent under rule 44 of the rules of practice in this court. Wilds v. Brown, 27 Idaho, 218, 148 Pac. 469.

The trial court is hereby directed to amend the judgment by adding thereto the said sum of $62.81. The order appealed from and the judgment, so amended, are affirmed. Costs are awarded to respondent.

BUDGE, C. J., and RICE, J., concur.

(30 Idaho. 446)

NAMPA HIGHWAY DIST. v. CANYON COUNTY.

(Supreme Court of Idaho. June 13, 1917.)

1. COUNTIES ⟹192—POWER OF COUNTY COMMISSIONER — TAXATION FOR BRIDGE CONSTRUCTION.

The board of county commissioners has the power and authority to levy and collect taxes against all the taxable property within the county, including that within a highway district, for the payment of bonds, the proceeds whereof have been used for the construction of bridges within the county, but without the boundaries of the district.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300–302.]

2. BRIDGES ⟹10(1)—CONSTRUCTION—APPORTIONMENT OF COST—STATUTE.

The provisions of section 16, c. 55, Sess. Laws 1911, p. 129, *held* to not be applicable to the facts of this case.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 20.]

Appeal from District Court, Canyon County; Chas. P. McCarthy, Judge.

Action by the Nampa Highway District against the County of Canyon. Judgment for defendant, and plaintiff appeals. Affirmed.

F. A. Hagelin and A. L. Anderson, both of Nampa, and Richards & Haga, of Boise, for appellant. A. F. Stone, H. A. Griffiths, and Scatterday & Van Duyn, all of Caldwell, for respondent.

MORGAN, J. This action was commenced by appellant, a highway district, for the purpose of causing to be apportioned between it and Canyon county, the respondent, of which the district is an integral part, the cost of construction of three bridges situated in the county and outside of the district. Money with which to pay for building the bridges was procured by the issuance and sale of county bonds. It appears that a uniform tax has been levied upon all taxable property in the county for the purpose of raising money with which to pay the interest on the bonded indebtedness thus created, and that the sum of $573.75 has been collected for that purpose from the owners of property within the district.

It is appellant's contention that neither the inhabitants of the district nor the property situated therein are benefited by the construction or maintenance of the bridges, and it is sought in this action to procure a decree to that effect and to recover the money heretofore paid, as above mentioned.

A trial was had before the court without a jury, which resulted in a judgment in favor of defendant dismissing the action, from which this appeal has been taken.

[1] Appellant was created and is operating under and by virtue of chapter 55, Sess. Laws 1911, p. 121, the purpose of which act is to make possible the creation of highway districts with power to establish and maintain their own systems of roads, and, to that end, provision is made for the collection by the county wherein such a district is situated of taxes for road and bridge purposes and the payment of the money so collected, except a small percentage thereof, to the highway district.

The statutory enactments providing the means by which taxes levied for road and bridge purposes shall be collected and apportioned between the county and highway district have been fully discussed in case of Reinhart v. Canyon County, 22 Idaho, 348, 125 Pac. 791, wherein this same bond issue was called in question by a property owner of appellant, and the court there said that the principal question presented for determination was:

> "Has the board of county commissioners the power to bind the property and levy taxes against the property within a legally organized highway district for the payment of bonds issued by the county after the organization of such highway district, the proceeds to be used in the construction of a bridge within the county, but without the boundaries of such highway district?"

That question was answered by the court in the affirmative, and it said:

> "We think it is clear under the provisions of said highway district act and the statute concerning the issuance of bonds for the construction of bridges that in a case like the one at bar the board of county commissioners has the power and authority to levy the tax upon all of the property within the county for the payment of such bonds and the interest thereon."

[2] Appellant relies for its right to recover upon the provisions of section 16, c. 55, Sess. Laws 1911, p. 129, which is as follows:

> "In case the construction, maintenance, repair or improvement of any highway, or portion thereof, within a county and not included within a highway district in such county, would also be for the benefit of such highway district, and the cost of such construction, maintenance, repair or improvement would if borne wholly by such excluded portion, be an unjust or unreasonable burden thereon, or in case the construction, maintenance, repair or improvement of any highway, or portion thereof, within a highway district would also be for the benefit of a portion or portions of such county which are not included in such highway district, and the cost of such construction, maintenance, repair or improvement would, if borne wholly by such highway district, be an unjust or unreasonable burden thereon; in either of such cases the highway board on the one hand, and the board of county commissioners on the other, shall have power to contract each with the other for a division and apportionment of the cost of such construction, maintenance, repair or improvement. And in case they fail to agree an action may be maintained in the district court of the district, between such highway district and the county, and the district court shall render such judgment therein as shall be just and equitable in respect to such division and apportionment of cost; and all proceedings in such action shall be the same as in ordinary civil actions with the same right of appeal and other rights and remedies as in an ordinary civil action by or against a body politic or political subdivision."

A careful reading of the foregoing section will disclose that it does not apply to this case. That law is intended for the relief of the portion of a county not organized into a highway district in case road or bridge construction or improvement is undertaken outside the boundaries of the district, by providing that the district may contribute, or be required to do so, in a manner not otherwise provided by law toward the expense of such improvement; also that in the event such improvement be within the district, but beneficial to other portions of the county, and the cost thereof is such that it would be an unjust or an unreasonable burden upon the district, the county may likewise assist, or be required to do so, in a way it could not otherwise do.

Neither of these conditions presents itself here. The bridges for the construction of which this bonded indebtedness was created are outside the district, so that is not a case for contribution under the law from respondent in aid of appellant. The expense of construction is not claimed to be an unjust or unreasonable burden upon the county, and it is not asking for contribution from appellant.

Since, as held in Reinhart v. Canyon County, supra, the county commissioners have power and authority to levy a tax upon all taxable property within the county, including that within the highway district, for the payment of the bonds and the interest thereon, and since the provisions of section 16, supra, do not apply to this case, the action cannot be maintained.

The judgment of the trial court is affirmed. Costs are awarded to respondent.

BUDGE, C. J., and RICE, J., concur.

(30 Idaho, 1)

MARSH MINING CO. v. INLAND EMPIRE MIN. & MILL. CO.

(Supreme Court of Idaho. March 18, 1916. On Rehearing, June 30, 1917.)

1. EMINENT DOMAIN 🔑14 — EXERCISE OF POWER—REASONABLE NECESSITY.

If a reasonable, although not an absolute, necessity exists to take private property for a public use, the power of eminent domain may be invoked.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 54.]

2. EMINENT DOMAIN 🔑47(1)—PUBLIC USE—TAKING FOR SAME USE.

Property devoted to, or held for, a public use is subject to the power of eminent domain if the right to so take it is given by constitutional provision or legislative enactment, in express terms or by clear implication, but it cannot be taken to be used in the same manner and for the same purpose to which it is already being applied or for which it is, in good faith, being held if by so doing that purpose will be defeated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107, 109, 110, 116–120.]

3. EMINENT DOMAIN 🔑47(1)—PROPERTY SUBJECT—MINING USE.

The theory upon which the power of eminent domain is extended in aid of the mining industry is that public benefit will result from the application of private property to public use. It was not the intention of the framers of the Constitution, nor of the Legislature, that this power be so invoked that one mine will be developed and thereby another be destroyed, nor that one mine owner be enriched and another impoverished. The aid of eminent domain is extended to the industry, not to the individual.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107, 109, 110, 116–120.]

4. EMINENT DOMAIN 🔑33—MINING PROPERTY—STATUTE.

Chapter 3, tit. 8, of the Civil Code points out the occasions when, the conditions under which, and the methods and agencies whereby, the use of mining property may be appropriated in aid of the mining industry, and, the purposes for which it may be so appropriated having been specified, it follows that, unless it is being applied by its owner to or in good faith held for the same or a more necessary public use which will be defeated or seriously interfered with thereby, it may be taken in aid of that industry, under the power of eminent domain, for one or more of those designated purposes and none other.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 79.]

Sullivan, C. J., dissenting.

Appeal from District Court, Shoshone County; John M. Flynn, Judge.

Action by the Marsh Mining Company against the Inland Empire Mining & Milling Company to condemn a part of a patented mining claim for mining purposes. Judgment for plaintiff, and defendant appeals. Reversed.

Charles E. Miller and I. N. Smith, both of Wallace, for appellant. John P. Gray, of Cœur d'Alene, and Therrett Towles, of Wallace, for respondent.

MORGAN, J. Respondent is the owner of certain mining claims known as the "Marsh Group" situated in Leland mining district, Shoshone county. Appellant is the owner of a patented mining claim known as the "Never Sweat Lode," which contains between 11 and 12 acres. The land embraced within the Marsh group and all that embraced within the Never Sweat, except a small portion which is comparatively level, lying along a stream called Canyon creek, is situated upon steep mountain sides. This action was commenced by respondent in order to acquire for mining purposes, under the power of eminent domain, the surface of approximately 3⅓ acres of appellant's ground including all the level portion above mentioned. The level land sought to be condemned is occupied by certain persons who claim adversely to appellant by reason of occupancy, or otherwise, and who were made defendants in the action. The record discloses that while the respondent has never paid a dividend, it has done a great deal of development work, and has mined from its claims and marketed about $550,000 worth of ore; that it has discovered in said claims a valuable deposit of mineral; that in the development of its property its present facilities have become and are inadequate to meet its requirements; and that by reason of the topography of its ground it needs the level portion of appellant's land in order to facilitate its mining operations. It is alleged in the complaint that respondent needs this land for the purposes of constructing a tramway thereon, for terminal facilities for tracks, ground for ore bins, machine shops, ore sorting plant, sheds for timber, stullyards, land for dumping waste rock and for other necessary mining uses and purposes in connection with the operation and development of its property. The trial resulted in a judgment, decreeing that the use to which respondent desires to put the land is a public use, and awarding to it the right to condemn and appropriate said land under the power of eminent domain. This appeal is from the judgment.

[1] Appellant contends that the acquisition of the property is a matter of convenience and economy, only, on the part of respondent, and that no such necessity exists therefor as warrants the exercise of the right of eminent domain. While the record does not disclose that an absolute necessity exists for taking the land by respondent and does disclose that it may operate, to some extent, without it, we are convinced from a careful examination of the evidence that for the convenient and economical development and operation of its mine the use of the land is needed, and that a reasonable necessity exists for the taking. If a reasonable, although not an absolute, necessity exists to take property for a public use, it is sufficient.

City of Spokane v. Merriam, 80 Wash. 222, 141 Pac. 358; State ex rel. Skamania Boom Co. v. Superior Court, 47 Wash. 166, 91 Pac. 637; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Bennett v. City of Marion, 106 Iowa, 628, 76 N. W. 844; Cincinnati, etc., R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285; Mobile, etc., Co. v. Alabama, etc., R. Co., 87 Ala. 501, 6 South. 404; Butte, A. & P. Ry. Co. v. Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508.

It appears that appellant and its predecessors have expended about $20,000 in the development of the Never Sweat claim; that while ore in paying quantities has never been discovered, some ore has been found, and that appellant is still prospecting, in good faith, and expending its money in an effort to develop a mine, and also that if commercial ore in paying quantities is discovered in the Never Sweat claim, all the level ground sought to be condemned will be necessary to its owner in its development and operation for the same use to which respondent seeks to appropriate it. It further appears that the predecessors in interest of appellant, some years ago, used a portion of the level land in question for the purpose of piling or storing some mining timbers upon it, and also dumped thereon a small quantity of waste rock, and that no use has been made of it since for mining purposes; that at about the time this use was made of the land an injunction, which is still in force, was served upon appellant's predecessors, preventing such use of it, and that there is litigation now pending between appellant and others which has grown out of adverse claims to surface rights to the land.

Appellant contends, and the record discloses, that the property is owned and held by it for the same public use and purpose to which respondent desires to put it, to wit, mining purposes, and it insists that if it is deprived of this land, the development of the remaining portion of its property may as well cease, since without the level land the successful operation of its mine will be impossible.

[2] Property devoted to, or held for, a public use is subject to the power of eminent domain if the right to so take it is given by constitutional provision or legislative enactment, in express terms or by clear implication, but it cannot be taken to be used in the same manner and for the same purpose to which it is already being applied, or for which it is, in good faith, being held, if by so doing that purpose will be defeated. Lewis on Eminent Domain (3d Ed.) § 440; State ex rel. Skamania Boom Co. v. Superior Court, supra; Samish River Boom Co. v. Union Boom Co., supra; State ex rel. Harbor Boom Co. v. Superior Court, 65 Wash. 129, 117 Pac. 755; Atchison, T. & S. F. R. Co. v. Kansas City, M. & O. R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; So. Pac. R. Co. v. So. Cal. R. Co., 111 Cal. 221, 43 Pac. 602; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. R. Co., 76 Minn. 334, 79 N. W. 315; Oregon Short Line R. Co. v. Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663; Little Miami & Columbus & Xenia R. R. Co. v. City of Dayton, 23 Ohio St. 510.

[3] An examination of the Constitution and statutes of Idaho discloses that authority has not been granted, either expressly or by implication, to take, under the power of eminent domain, property already devoted to mining purposes for some of the uses to which it is sought to put the property of appellant. Section 14, art. 1, of the Constitution provides:

> "The necessary use of lands * * * for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development * * * is hereby declared to be a public use, and subject to the regulation and control of the state."

It will be observed that this section of the Constitution provides that the necessary use of lands for certain mining purposes is a public use, and is subject to the regulation and control of the state, but it must be remembered that the tract here in controversy is now held by appellant for those purposes, and the Constitution makes no reference to the taking of property held for, or devoted to, a public use for the purpose of applying it to the same or any other use.

The Supreme Court of Massachusetts, in Boston & Maine Railroad v. Lowell & Lawrence R. Co. 124 Mass. 368, said:

> "The general principle is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterwards taken for a like use, unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication." Baltimore & O. & C. R. R. Co. v. North, 103 Ind. 486, 3 N. E. 144; Atlanta, etc., Ry. Co. v. Atlanta, etc., Ry. Co., 124 Ga. 125, 52 S. E. 320; Matter of the City of Buffalo, 68 N. Y. 167; Portland Ry., Light & Power Co. v. City of Portland (C. C.) 181 Fed. 632.

Section 5210, Rev. Codes, provides:

> "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * 4. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter for mines; also, an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines."

It is provided in section 5212, Rev. Codes:

> "The private property which may be taken under this title includes: * * * 3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated"

—and section 5213 provides:

> "Before property can be taken, it must appear: * * * 3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

It is true the respondent's mine is more fully developed than is that of appellant, and that the former corporation is, by reason of its discovery of commercial ore in paying quantities, operating upon a larger scale than is the latter, but this is not the test to be applied in construing the foregoing sections of the Code. This court said in case of Portneuf Irrigating Co., Ltd., v. Budge, 16 Idaho, 116, 100 Pac. 1046, 18 Ann. Cas. 674, as follows:

> "Certainly the fact that the proposed canal will irrigate 20,000 acres, while the plaintiff's canal only irrigates 2,500 acres, does not make it a more necessary public use. Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 771; West River Bridge v. Dix, 6 How. (47 U. S.) 507, 12 L. Ed. 535; Chicago & N. W. Ry. Co. v. Chicago & E. R. R. Co., 112 Ill. 589. In other words, the necessity is not measured by the extent to which the use is applied. Butte, A. & P. Ry. Co. v. Montana U. R. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; Talbot v. Hudson, 16 Gray (Mass.) 417; Kettle River R. Co. v. Eastern Ry. Co., 41 Minn. 461, 43 N. W. 473, 6 L. R. A. 111; Hibernia R. Co. v. De Camp, 47 N. J. Law, 518, 4 Atl. 318, 54 Am. St. Rep. 197."

The theory upon which eminent domain, a power inherent in the state, is extended in aid of the mining industry is that public benefit will result from the application of private property to public use. The end sought to be attained is that mines be discovered, developed, and operated, and that thereby the wealth of the state and the prosperity of its inhabitants be augmented. The welfare of this state depends largely upon the development of its natural resources, and the discovery of mineral, in paying quantities, in an undeveloped mine, is of as vital importance to it and to its present and future inhabitants as is the successful operation of a mine now developed. It was not the intention of the framers of the Constitution, nor of the Legislature, that the power of eminent domain be so invoked that one mine will be developed and thereby another be destroyed, nor that one mine owner be enriched and another be impoverished. The aid of eminent domain is extended to the industry, not to the individual.

[4] Provision has been made whereby the owners of mines and mining claims, less advantageously located than those of others, cannot be excluded from their properties nor prevented from developing and operating them. Chapter 3, tit. 8, of the Civil Code points out the occasions when, the conditions under which, and the methods and agencies whereby, the use of mining property may be appropriated in aid of the mining industry, and sections 3223 and 3224 are as follows:

> "3223. The owner, locator, or occupant of a mining claim, whether patented under the laws of the United States or held by location or possession, may have and acquire a right of way for ingress and egress, when necessary in working such mining claim, over and across the lands or mining claims of others, whether patented or otherwise.
>
> "3224. When any mine or mining claim is so situated, that for the more convenient enjoyment of the same a road, railroad or tramway therefrom, or a ditch or canal to convey water thereto, or a ditch, flume, cut or tunnel to drain or convey the waters or tailings therefrom, or a tunnel or shaft, may be necessary for the better working thereof, which road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, may require the use or occupancy of lands or mining grounds, owned, occupied or possessed by others than the person or persons or body corporate, requiring an easement for any of the purposes described, the owner, claimant or occupant of the mine or mining claim first above mentioned, is entitled to a right of way, entry and possession for all the uses and privileges for such road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, in, upon, through and across such other lands or mining claims, upon compliance with the provisions of this chapter."

The succeeding sections of chapter 3, tit. 8, of the Code prescribe the procedure for acquiring such property by condemnation.

The purposes having been specified in sections 3223 and 3224, supra, for which property dedicated to mining may be appropriated, it follows that, unless it is being applied by its owner to, or in good faith held for, the same or a more necessary public use, which will be defeated or seriously interfered with thereby, it may be taken in aid of that industry under the power of eminent domain for one or more of these designated purposes and none other.

In this case the trial court decreed:

> "That it is necessary for the plaintiff to have the particular portions of said premises hereinafter described for the purpose of constructing, building and extending a tramway from the portal of the present Marsh adit tunnel to a point on the east side line of the Never Sweat lode mining claim for the purpose of protecting said tramway and for the reasonable use thereof and of the works connected therewith, for tunnel facilities, for tracks and the extension of railroad tracks, or in connection with railroad tracks across the same, for the construction of ore bins, machine shops, ore sorting plant, sheds for timber, stullyards, and land for other necessary mining uses and purposes in connection with the operation and development of the property of the plaintiff more fully set forth in the findings of fact."

The decree then awards to respondent the right to have the land condemned for said purposes without designating any specific portion of it to be taken for any or either purpose. No allegation appears in the complaint that respondent requires any of appellant's land for tunnel facilities, nor does the record contain any evidence tending to support the portion of the decree relating to that use.

It is entirely clear that the law grants to respondent a right to condemn sufficient of appellant's land for an easement for a tramway and a railroad, which, of course, contemplates the right to occupy sufficient ground to make the reasonable use thereof possible, and it is equally clear that there is no warrant of law for taking said property, or any part of it, for other purposes set out in the decree.

Since the portions of land necessary to be used for the purposes for which condemnation may be had have not been segregated and described separately from that which the trial court deemed necessary to be taken for purposes in behalf of which we have concluded the power of eminent domain cannot be invoked, it is impossible to modify the judgment, and it must therefore be reversed; and it is so ordered. Costs are awarded to appellant.

BUDGE, J., concurs.

SULLIVAN, C. J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. I am of the opinion that under the law and the facts the decision of the trial court ought to be affirmed, and not modified in any respect. The findings of fact made by the trial court are fully supported by the evidence.

The majority opinion proceeds upon the theory that a mining claim is already devoted to a public use, regardless of whether the owner is working or using it or not. The majority opinion states:

> "But it must be remembered that the tract here in controversy is now held by appellant for those purposes, and the Constitution makes no reference to the taking of property held for, or devoted to, a public use for the purpose of applying it to the same or any other use."

The record clearly shows, as the trial court found, that said land was not devoted to a public use. It was not being used by the owner for any purpose. The authorities cited by the appellant do not support the proposition that if property is held for a "prospective" public use, even in good faith, although not applied to such use, it cannot be taken under the right of eminent domain. In State ex rel. Harbor Boom Co. v. Superior Court, 65 Wash. 129, 117 Pac. 755, the court there quotes from the decision of Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 672, as follows:

> "There can be no doubt that property held by a corporation simply as a proprietor may be taken for a public use by another corporation having the right of eminent domain."

Simply because the appellant company owned the land sought to be condemned as a mining claim and held it for a prospective public use, that does not protect it from being condemned for a public use upon proper application.

Counsel for appellant do not contend that their client wants the property sought to be condemned at the present time, but that it may need it at some future time for the proper development of its mine. It is well settled that the mere possibility that land sought to be taken may, at some future time, become necessary in the operations of the appellant company does not exempt it from condemnation. See 15 Cyc. p. 614, and authorities there cited.

It was held in the condemnation case of the Colorado Eastern R. R. Co. v. Union Pac. R. R. Co. (C. C.) 41 Fed. 293, that both on reason and authority a mere prospective use of the defendant should yield to the more immediate necessities of the petitioner in that case. See 2 Lewis on Eminent Domain (3d Ed.) p. 754.

Property of a quasi public corporation not in use and not necessary for the exercise of its public franchise or discharge of its public duties may be taken under the general power to condemn property the same as though it belonged to a private individual. 2 Lewis on Eminent Domain (3d Ed.) p. 799.

The property sought to be condemned in this action is not being used by the defendant for any purpose whatever, and the mere prospective use of the defendant corporation should be compelled to yield to the more immediate necessities of the plaintiff in this case.

The judgment of the district court ought to be affirmed.

On Rehearing.

PER CURIAM. A petition for rehearing was granted in this case, and it has been again fully submitted and considered.

The conclusion of the court is that it adheres to the former decision.

(30 Idaho, 455)

BOISE CITY v. NATIONAL SURETY CO.

(Supreme Court of Idaho. June 15, 1917.)

1. DAMAGES 🔑121—MEASURE OF DAMAGES—BREACH OF CONSTRUCTION CONTRACT.

Where a party is damaged by breach of a construction contract by the failure of the contractor to complete it, the measure of damages is the cost necessarily and reasonably incurred in completing the contract, whether he does the work himself or employs others to do it for him.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 306–308.]

2. MUNICIPAL CORPORATIONS 🔑347(1)—CONTRACT — BREACH — RECOVERY UPON SURETY BOND.

Where sewers have been constructed for a municipality and accepted upon condition that the contractor would, upon notice, repair or relay any portion of said sewer should the same prove to be defective, and where thereafter a portion of the same is found to be defective, and notice thereof is duly given, and the municipality is compelled to repair and complete the system, it is entitled to recover upon the bond all amounts necessarily expended upon the portion of the work included in the notice for materials, labor, and salaries of regularly employed officials actually engaged upon such work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 876.]

3. MODIFICATION OF JUDGMENT.

Held, that the judgment in this case must be modified so as to include only such sums for cost of materials, labor, and salaries of regularly employed city officials actually engaged upon the work as were devoted to the portion of the work included in the notice.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action upon a surety bond brought by Boise City against the National Surety Company, as surety for the Reliance Construction Company. Judgment for plaintiff, and defendant appeals. Modified.

V. P. Coffin, of Boise, for appellant. S. L. Tipton, City Atty., and J. P. Pope, both of Boise, for respondent.

BUDGE, C. J. The Reliance Construction Company, of Portland, Or., between May, 1912, and June, 1913 under contract with the respondent constructed a sewer system in Boise which when completed was accepted conditionally by the city, the latter reserving the right, within a period of 12 months from date of the acceptance, upon 10 days' notice to the contractor, to require certain portions of said sewer system to be relaid or repaired. The acceptance was contained in a resolution of the city council which required the company to give a bond in the sum of $5,000 for the faithful performance of the repairs. This bond was given, with appellant as surety. The condition of the bond, so far as material, is as follows:

> "Whereas, the city council of Boise City, Idaho, on the 31st day of May, 1913, adopted Resolution No. 239 by which said sewer system was accepted conditionally to the effect that the contractor be required upon ten days' notice, within the period of twelve months, to do such further work in the relaying and repairing of said sewer system, so as to make the same acceptable to the council of said city."

On November 19, 1913, there was transmitted to the Reliance Construction Company a copy of a resolution of the city council requiring the city engineer to specify what was necessary to complete the system, and make it acceptable to the city, together with a letter from the engineer designating certain portions of the sewer as "needing to be recemented."

After this notice was duly given, the work specified in the letter was not done by the company to the satisfaction of the council, and the city performed the necessary work and brought this suit against the appellant upon the bond for reimbursement. A statement of the costs and expenses incurred by the city was in substance as follows:

1. Material		$ 298 84
2. Labor account		1,606 24
3. Salaries of salaried employés of the city during the time that they were engaged upon this work:		
A. M. Ashline	$609 60	
J. M. Hollister	85 35	
Robert Stevenson	156 35	
	$851 30	851 30
Total		$2,756 38

The case was tried before the court without a jury, and upon its findings of fact and conclusions of law judgment was rendered for the respondent in the sum of $1,536.25. From which judgment this appeal was taken. Appellant assigning the following errors:

> "(1) That the evidence relating to the item of $1,606.24, for labor is insufficient to support and does not authorize a judgment against the appellant on account of said labor in excess of 45 per cent. of said amount, or $722.81.
>
> "(2) That the evidence relating to the item of $851.30 for salaries of regular salaried employés of the city of Boise is insufficient to support and does not authorize a judgment against the appellant on account thereof in any sum of money whatever.
>
> "(3) That the evidence is insufficient to support and does not authorize a judgment against the appellant in excess of the following, to wit:

Material	$ 298 84
Labor	722 81
Total	$1,021 65"

The evidence shows that only 45 per cent. of the time and labor devoted to the work of completing the system was expended by the city upon the work specified in the notice contained in the letter from the city engineer to the Reliance Construction Company. This would reduce the labor account to the sum of $722.81. Appellant admits its liability for this amount, and for the amount specified for material, to wit, $298.84, but contends that the items totaling $851.30, included in the third subdivision of the statement above quoted, and covering salaries of salaried employés of the city during the time they were engaged upon the work, was improperly included in the expenses incurred by the city in making the repairs, and seeks to defeat the recovery of these items under the rule:

> "That a party injured by breach of contract is bound to use all reasonable means available to minimize the damage."

Appellant says in its brief:

> "Recognizing this rule, the city employed upon this work three of its regular salaried employés, and thus materially reduced the cost to it of making the repairs. We believe that this reduction in the cost to the city of doing this work should lawfully inure to the benefit of the appellant, and that therefore the salaries of these employés during the time they were engaged upon the work is not a lawful charge against appellant."

[1, 2] With this position we are not in accord. The theory upon which sums expended in an effort to minimize or mitigate damages are recoverable is that they are expended for the benefit of and in the interest of the party causing the damage. It is immaterial whether a party damaged by a breach of contract completes the work himself or employs others to complete it for him. The measure of his damages is the reasonable cost incurred in completing the work contracted to be done, according to the terms and provisions of the contract. And in this case the measure of damages would be the same whether the work was done by the employés of the city or by some third party under its direction. Newton v. Devlin, 134 Mass. 490; George A. Fuller Co. v. Doyle (C. C.) 87 Fed. 687-693; Owen v. Giles, 157 Fed. 825, 85 C. C. A. 189.

The use by the city of regularly salaried employés in completing this work and making the necessary repairs, so far as the same were included within the notice, may be likened to the situation of a party who does the necessary work in mitigation of damage himself rather than employ others to do it for him. There is no rule of law which requires one to do another's work for a less wage than would be required to employ some one else to do the same work in a like manner. The charge for salaries of these regular employés of the city was properly included as an item of expense. But, as has already been noted, according to the testimony on behalf of respondent, only 45 per cent. of the time was devoted to the work specified in the notice. Upon this basis respondent would only be entitled to include in this item 45 per cent. of the salary item, or $382.09. The sums then for which respondent was entitled to judgment are as follows:

1. Material	$ 298 84
2. Labor account	722 81
3. Salary account	383 09
Total	$1,404 74

[3] It is impossible to determine from the record or from the findings upon what theory the trial court arrived at the sum of $1,536.25, for which judgment was rendered. The findings are not specific.

The findings and judgment should be modified in accordance with the views herein expressed; and it is so ordered. Costs awarded to appellant.

MORGAN and RICE, JJ., concur.

ATCHISON, T. & S. F. RY. CO. et al. v. SUN DRILLING CO. (No. 8137.)

(Supreme Court of Oklahoma. Jan. 23, 1917. Rehearing Denied June 6, 1917.)

(Syllabus by the Court.)

1. CARRIERS 🔑105(1)—NEGLIGENT DELAY—MEASURE OF DAMAGES.

In an action against a common carrier for negligent delay in the carriage and delivery of machinery intended for use, the proper measure of damages, in the absence of special notice, is the usable value of the same during the period of delay, together with such reasonable expenses as may be incurred by the owner in searching therefor in an attempt to procure the delivery thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451, 454–457.]

2. CARRIERS 🔑186—NEGLIGENT DELAY—LIABILITY OF CONNECTING CARRIER.

The connecting carrier cannot be held liable for special damages accruing to the owner by virtue of the nondelivery of a shipment, where the notice or special instructions given by the shipper to the initial carrier have not been communicated to the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 790.]

3. STATES 🔑9—ADMISSION OF TERRITORY—LAW OF CONTRACTS MADE BEFORE STATEHOOD.

Where a contract of shipment arose in the Indian Territory before statehood, interest may be recovered upon the damages accruing to the shipper by reason of delay in the delivery thereof.

[Ed. Note.—For other cases, see States, Cent. Dig. § 4.]

4. CARRIERS 🔑176—NEGLIGENT DELAY—SPECIAL DAMAGES—PROXIMATE CAUSE.

Before a judgment can be rendered against the initial carrier for special damages on account of its failure to communicate a notice or special instructions to the connecting carrier, there must be some evidence tending to show that its failure to communicate said notice received by it from the shipper was the immediate cause of the delay, or, in other words, the delay must be the proximate result of the failure to deliver such notice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 766–774.]

5. NEGLIGENT DELAY OF CARRIER—SPECIAL DAMAGES—EVIDENCE.

Evidence examined, and same *held* insufficient to support a claim for special damage.

Commissioners' Opinion, Division No. 3. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by the Sun Drilling Company against the Atchison, Topeka & Santa Fé Railway Company and the St. Louis & San Francisco Railroad Company. Judgment against each defendant, and they bring error. Judgment against the St. Louis & San Francisco Railroad Company affirmed, and judgment against the Atchison, Topeka & Santa Fé Railway Company reversed, and cause remanded.

See, also, 41 Okl. 80, 135 Pac. 353, 48 L. R. A. (N. S.) 509.

Cottingham & Hayes and C. H. Wood, all of Oklahoma City, for plaintiff in error Atchison, T. & S. F. Ry. Co. R. A. Kleinschmidt and Fred E. Suits, all of Oklahoma City, for plaintiff in error St. Louis & S. F. R. Co. Montgomery & O'Meara, of Bartlesville, for defendant in error.

HOOKER, C. From the record here it appears that, on April 1, 1907, the Sun Drilling Company was engaged in the business of drilling oil and gas wells for hire, and that it owned certain machinery which it used for said purpose; and, in the operation of its business near Bristow, then Indian Territory, it became necessary for it to procure certain additional tools, and pending the procuring of the same it was compelled to, and did, suspend operations. That on April 1, 1907, it caused to be delivered to the Atchison, Topeka & Santa Fé Railway Company for shipment to it at Bristow certain tools and apparatus set forth in the record here, and that at the time of delivery it stated to the agent of the company at Bristow its business, and that pending the arrival of said articles at destination it was compelled to shut down its drilling outfit and suspend operations, and said articles were accepted by the Atchison, Topeka & Santa Fé Railway Company for shipment at Bartlesville to Bristow, and thereupon it issued to the company a through bill of lading; that said articles were loaded in order that a through shipment might be made thereof to Bristow without unloading, and said articles were delivered by the Santa Fé to the Frisco at Tulsa in the forenoon on April 3, 1907; that at the time of delivery of said articles by the Santa Fé to the Frisco, no communication was made to the Frisco by the Santa Fé relative to the facts and circumstances of the shipment, the importance of their immediate delivery and the necessity for prompt shipment as had been explained by the Sun Drilling Company to the Santa Fé at the time the contract of shipment was entered into. It appears from the evidence that two days was reasonable time for transportation of the articles from Bartlesville to Bristow, but that, part of said articles arrived at Bristow about the 10th of April, 1907, and the remainder thereof arrived about the 20th or 25th of May, 1907. As a result of this delay the lower court found from the evidence that the Sun Drilling Company was compelled to cease operations for a period of 35 days, and that the reasonable usable value of the tools thus delayed was $15 a day, and thereupon rendered judgment against the Frisco for the sum of $525 and interest thereon, and likewise found that the Santa Fé was liable to the Sun Drilling Company for special damages in the sum of $675, with interest, for which judgment was rendered.

[1] This court in M., O. & G. Ry. Co. v. Hazlett & Price, 35 Okl. 12, 128 Pac. 105, said:

> "In an action against a common carrier for negligent delay in the carriage and delivery of machinery intended for use, the proper measure of damages, in the absence of special notice is the usable or rentable value of the machinery during the period of delay, together with such reasonable expenses as may be incurred by plaintiff in searching for, recovering, or in endeavoring to secure, delivery."

Likewise this court, in C., R. I. & P. R. R. Co. v. Reid, 38 Okl. 214, 132 Pac. 812, followed the above case.

These authorities define the measure of damages in the state of facts above given. This is the law in Oklahoma. The court in its finding of fact fixes the usable value of these tools at $15 a day, and the evidence introduced by the Frisco also establishes such value at $15 a day. the judgment of the court being amply supported in this record.

[2] There cannot be any contention here that the Frisco had notice of any special claim or any knowledge of any special damages would accrue to the Sun Drilling Company by reason of the delay of the delivery of these tools; hence the measure of damages against the Frisco must be confined to usable value of the tools in question during the time of the delay. This the court by its judgment did, and we cannot see any error therein.

[3] Upon the question of interest, this case arose in Indian Territory prior to statehood. and in M., K. & T. R. R. Co. v. Truskett. 104 Fed. 728, 44 C. C. A. 179, the United States Circuit Court of Appeals for the Eighth Circuit said:

> "It is finally claimed that an error was committed by the trial court in allowing interest on the amount of the recovery from August 3, 1892, which. as we infer, was the date when a claim for damage was preferred, and that the Court of Appeals in the Indian Territory erred in adding a penalty of 10 per cent. upon the theory that the appeal was frivolous or vexatious. Concerning the penalty that was imposed by the Court of Appeals, it is quite sufficient to say that it was incumbent on that court to award the penalty on the affirmance of the judgment below, by virtue of section 1311, Mansf. Dig. (section 813, Ind. T. Ann. St. 1899), as this court held in Railroad Co. v. Elliott [42 C. C. A. 188] 102 Fed. 96. And, concerning the allowance of interest by the trial court, it is to be observed that, as this action was brought to recover damages for a breach of the implied contract of the carrier to transport the cattle over its road with reasonable celerity, we perceive no reason why the actual loss which was sustained by the shipper as far back as July, 1892, should not bear interest from the date when the claim for damage was preferred. Nothing short of the actual amount of such loss, and interest thereon from the time it was demanded, will fully compensate the shipper for the breach of the agreement, and he is entitled to full compensation. In an action against a common carrier for failure to transport property in accordance with its contract, the general rule is to allow as damages the value of the property, with interest upon such value from the time when it should have been delivered, if it is not delivered at all. Railroad Co. v. Estill, 147 U. S. 599, 622, 13 Sup. Ct. 444, 37 L. Ed. 292, and cases there cited. When the property is delivered by the carrier, but a loss has ensued to the shipper from a failure to deliver it within a reasonable time, no reason is perceived why interest on the amount of the loss may not also be allowed from the time compensation for the loss is demanded. In actions of pure tort, which do not sound in contract, as where the property of a third party is destroyed or injured through the negligence of a carrier, the usual practice is, as this court said in Eddy v. Lafayette, 4 U. S. App. 247, 252, 1 C. C. A. 441, 49 Fed. 807, to leave the allowance of interest on the damages which may be assessed to the sound discretion of the jury. But, as the case at bar is founded upon a breach of contract, it may well be distinguished from the case last cited."

This case was later affirmed by the Supreme Court of the United States in 186 U. S. 480, 22 Sup. Ct. 943, 46 L. Ed. 1259.

Under the authority above cited, the judgment here giving to the defendant in error interest upon its claim for damages must be affirmed.

[4, 5] This case has been before this court on a former appeal (41 Okl. 80, 135 Pac. 353. 48 L. R. A. [N. S.] 509), wherein it was held:

> "In an action against both the initial and terminal carrier for damages caused by negligent delay, although the initial carrier has notice of the importance of prompt delivery, and that loss of profits would result from delay, where all the

delay is shown to have been on the terminal line, then, in the absence of statute or contract to such effect, the initial carrier will not be held liable for any of the damages resulting, although it may have failed to deliver such special notice, unless it appears that such delay was the proximate result of the failure to deliver such notice. Damages, to be recoverable for negligence, must appear to be the proximate result of the negligence shown, and the question as to what is the proximate cause of an injury, or what is the immediate or proximate result of a given act, is generally one of fact for the jury. In an action against two carriers for damages, where it appears that each has been guilty of separate acts of negligence, and that plaintiff has sustained damages, but there is an issue of fact as to which carrier's negligence was the proximate cause of the injury, and where such fact can be determined only from the evidence and circumstances of the case, an instruction which takes such fact from the jury is erroneous."

Such is the law of this case, and before judgment can be rendered against the Atchison, Topeka & Santa Fé Railway Company for special damages, there must be some evidence tending to show that its failure to give to the terminal carrier notice of the special instructions received by it from the shipper was the immediate cause of the delay. In other words, the delay must be the proximate result of the failure to deliver such notice. This the evidence does not show. While it is true that the question as to what is the proximate cause of an injury or the proximate result of a given act is one for the jury, yet, before a jury or court can properly decide such question, there must be some evidence to support the verdict or finding.

As we view the record, there is in this case no evidence whatever to show that the failure of the Santa Fé to deliver the notice to the Frisco was the proximate cause of the delay, nor is there any evidence here establishing the claims of special damage, and in our opinion the judgment against the Santa Fé must be reversed.

It is therefore ordered that the judgment here as to the St. Louis & San Francisco Railroad Company be affirmed, and that as to the Atchison, Topeka & Santa Fé Railway Company be reversed, and the cause remanded for a new trial consistent with the facts herein expressed.

PER CURIAM. Adopted in whole.

REIRDON v. MORRISON. (No. 6515.)

(Supreme Court of Oklahoma. May 8, 1917. Rehearing Denied June 12, 1917).

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE 🔑166(5) — DISMISSAL OF APPEAL—EFFECT.

"Where a judgment is rendered by a justice court, said judgment appealed to the county court and said appeal dismissed, the judgment of the Justice Court becomes res judicata."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 645.]

2. JUSTICES OF THE PEACE 🔑166(5)—DISMISSAL OF APPEAL — RESTORATION OF JUDGMENT.

"Where an appeal is perfected from a judgment rendered by a justice court to the county court, and said appeal dismissed, the judgment rendered by the justice court is restored as if no appeal had been taken."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 645.]

Commissioners' Opinion, Division No. 1. Error from District Court, Marshall County; Jesse M. Hatchett, Judge.

Action by J. P. Reirdon against W. S. Morrison. Judgment for defendant, and plaintiff brings error. Affirmed.

Rider & Hurt, of Madill, for plaintiff in error. Geo. S. March, of Madill, for defendant in error.

COLLIER, C. This is an action brought by plaintiff in error against the defendant in error on a money demand. Hereinafter the parties will be designated as they were in the trial court.

This action was brought in a justice court and resulted in a judgment for plaintiff in the sum of $80.15. Garnishment proceedings were instituted, and the garnishee answered that he was indebted to the defendant in the sum of $33, which said sum the garnishee paid into court and was discharged. The defendant filed in said justice court his affidavit, in compliance with the statutes, claiming said $33 as exempt to him, and moved that the said $33 be delivered to him, which motion was tried by the court, and judgment rendered in favor of the defendant. From said judgment the plaintiff perfected an appeal to the county court of Marshall county, in which said court a motion to dismiss said appeal was filed, heard, and said appeal dismissed, and time fixed in which to settle and sign case-made, but an appeal to this court was not perfected. After the expiration of the time for perfecting an appeal to this court the clerk of the county court certified back to the justice court the order of the county court dismissing the said appeal.

Prior to the expiration of the 20 days given plaintiff in which to appeal to this court, the plaintiff had another garnishment summons issued to the original garnishee and to the justice with whom said fund had been deposited, seeking to reach said fund which had theretofore been adjudged to the defendant as his exempt earnings. The justice who originally tried the case having been succeeded in office by another justice of the peace, to whom the retiring justice delivered $27.33 of said $33, deposited in court by the garnishee, the successor of said justice being the father-in-law of the plaintiff, disqualified himself, and the plaintiff and defendant in open court agreed that William M. Franklin might hear said cause and make all orders of said court. Upon the hearing of said garnishment proceedings the same was dismissed at the cost of the plaintiff. Motion was then made by the plaintiff to require the said $27.33 to be turned over and credited on said judgment, which motion was heard by said William M. Franklin, who found for the defendant, which judgment "was O. K.'d and made a judgment of the court." From said judgment for the defendant the plaintiff perfected an appeal to the district court of Marshall county, Okl., and said $27.33, together with a transcript of the proceedings in the justice court, was filed with the clerk of the district court. The motion of the plaintiff, to subject the fund now in the hands of the district clerk of said court to a partial payment of the judgment rendered by the justice of the peace against said defendant was heard by said district court, and the motion overruled, and duly excepted to. Within statutory time the plaintiff filed his motion for new trial, which was overruled, duly excepted to, and this appeal perfected to this court.

The only error assigned and argued in the brief of plaintiff is that the judgment of the district court is contrary to law.

[1] It having been adjudged by the justice court that the amount sought to be reached by garnishment was not subject to the payment of the judgment rendered in this cause, and the said judgment of the justice having been appealed to the county court, and appeal dismissed in said court, and said dismissal duly certified to the justice court, the judgment of said justice court finding said money paid into court by the garnishee was exempt to the defendant became res judicata, and the justice court was without authority of law to issue the second garnishment for said money, or to entertain the motion to apply the money to the payment of said judgment. The appeal from the action of the justice court in refusing to apply the money to the payment of the judgment rendered to the district court was without merit, and the district court did not err in denying the motion made therein to have the money which had subsequently come into the hands of the clerk of said court applied to the payment of said judgment. In short, all of the proceedings of the plaintiff in the cause subsequent to the dismissal of the appeal in the county court, and the certification of the clerk of the county court to the justice court of such dismissal, were without authority of law. Section 5469, Revised Laws of Oklahoma 1910.

A judgment of the justice of the peace court in a case where the jurisdiction of the parties and subject-matter appears from the face of the proceedings, after the time for taking an appeal has passed, and no appeal taken from said judgment, such judgment is for every purpose as binding and conclusive between the parties as that of the highest court of the state. Black on Judgments, vol. 2, § 522, and authorities there cited.

[2] A final and effectual dismissal of an appeal from a judgment rendered by a justice of the peace court restores the judgment of the justice of the peace court, as if no appeal had been taken. 24 Cyc. 716e, and authorities there cited.

The judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

NATIONAL SURETY CO. et al. v. S. H. HANSON BUILDERS' SUPPLY CO. et al. (No. 6876.)

(Supreme Court of Oklahoma. May 15, 1917. Concurring Opinion, May 29, 1917. Rehearing Denied June 12, 1917.)

(Syllabus by the Court.)

1. COURTS 🔑1—"JURISDICTION" — DEFINITION.

"Jurisdiction" is the power to hear and determine the subject-matter in controversy between the parties to an action or in a statutory proceeding; to adjudicate or exercise any judicial power over them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1–4, 6–9, 91–106.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

2. JUDGMENT 🔑342(1)—VACATION — POWER OF TRIAL COURT.

Where the trial court, having jurisdiction both of the parties and the subject-matter, regularly renders a judgment, it is without power, after the expiration of the term, to set such judgment aside because of an error made in its rendition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 668.]

3. JUDGMENT 🔑660—CONCLUSIVENESS—MISTAKE OF FACT.

A judgment is no less conclusive because it is based upon a mistake of law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171.]

Error from District Court, Oklahoma County; George W. Clark, Judge.

Motions by the National Surety Company, W. A. Jones, and Will Dye to set aside a judgment rendered in a consolidated case entitled "S. H. Hanson Builders' Supply Company and Others v. School District No. 70, Oklahoma County, and Others." Motions denied, and movants bring error. Affirmed.

William F. Robertson, of Dallas, Tex., Carlisle & Edwards and Charles West, all of Oklahoma City, and H. H. Hagan, of Tulsa, for plaintiffs in error. Stuart & Cruce, John H. Halley, Keaton, Wells & Johnston, John A. Maupin, and Everest & Campbell, all of Oklahoma City, for defendants in error.

SHARP, C. J. October 11, 1911, in consolidated case, S. H. Hanson Builders' Supply Co. et al. v. School District No. 70, Oklahoma County, et al., personal judgment was rendered against W. A. Jones, contractor, one of the defendants in said action, in favor of the plaintiff company, and also in favor of other creditors of said contractor, who were parties to said action. The judgment declared a lien upon the school building of the district, and directed and commanded that the officers of the school district levy a tax in the manner provided by law for the payment of the sums found due by the contractor. The amount of the several judgments against Jones, and for which the liens were decreed, approximated $3,569.01. On the 23d day of July, 1912, the school district commenced its action against the National Surety Company on the contractor's bond given by Jones in favor of the school district on October 8, 1909. On December 5, 1912, the National Surety Company filed in the consolidated case, in which judgment had previously been rendered on October 11, 1911, its motion wherein it asked that the judgment of the latter date, in so far as it was adjudged and decreed by the court that the creditors of Jones had valid and subsisting liens upon the property of the school district to secure the payment of their respective judgments, and that a tax be levied upon the property subject to taxation within the district for the purpose of discharging said judgments, be canceled, annulled, and held for naught, on the ground that the judgment, in respects indicated, was against public policy, illegal, and void. On December 20, 1912, W. A. Jones, the defendant against whom personal judgments were rendered in said consolidated case, also filed in said case his motion to vacate and set aside the judgment, in so far as the same attempted to fix a lien upon the property of the school district, and to enjoin upon the officers thereof the levy of a tax in payment of the same. On January 17, 1913, Will Dye, a resident taxpayer of said district, filed in said action his motion to vacate and set aside that portion of the judgment already indicated in the motions of the other movants. From the judgment denying these motions, the movants therein seek a reversal by proceedings in error instituted in this court.

[1, 2] The only point relied upon at this time is that, as a mechanic's or materialman's lien cannot attach upon the public buildings of the state, or the subdivisions thereof, since such liens are contrary to public policy, the judgment declaring such lien is a mere nullity, and under section 7274, Rev. Laws 1910, may be set aside at any time on motion of a party or any person affected thereby. Assuming that each of the parties have such interest, or are so affected as to entitle them to prosecute the proceedings in the manner employed, the case presents the single issue of whether in fact the original judgment was void, or simply erroneous. No appeal was taken from the judgment in which the liens were adjudged, and which was subsequently attempted to be set aside by the surety company, Jones, and Dye. No claim is made that the court did not have jurisdiction of the parties or of the subject-matter, but it is said, as we understand, that the court did not have power to render the judgment that it did, whereby a public building was charged with a lien and an order made directing that a tax be levied in satisfaction thereof. This position is obviously erroneous, as it in effect concedes that, had the court rendered judgment denying the lien, it would be valid; in other words, that the power of a court of general jurisdiction to render a judgment in a class of actions, in which it has jurisdiction both of the parties and subject-matter, is dependent upon the character of relief granted, or in whose favor the judgment is entered. We know of no authorities sustaining this view of the law. The fact that the trial court, in view of the subsequent decision of this court in Hutchinson v. Krueger, 34 Okl. 23, 124 Pac. 591, 41 L. R. A. (N. S.) 315, Ann. Cas. 1914C, 98, erroneously rendered a judgment decreeing a lien upon the school building of the school district, does not make the judgment void. This, in principle, we decided in Parmenter v. Ray, County Judge, 158 Pac. 1183, where it was held that errors of law in making an order should not be confounded with the power of the court to make the order; that the latter only involved the jurisdiction—the former the exercise of jurisdiction. There we further said, quoting from Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. Ed. 1233:

> "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to the suit, to adjudicate or exercise any judicial power over them. The question is whether on the case before the court their action is judicial or extrajudicial; with or without authority of law to render judgment or decree upon the rights of the litigant parties. If the law confers the power to render judgment or decree, then the court has jurisdiction."

Also that the jurisdiction of the court can never depend upon its decision upon the merits of the case brought before it, but upon its right to hear and decide it at all. At the time that the court rendered the judgment complained of, this court had never passed upon the question of the right to enforce a materialman's lien upon a public building. The Supreme Court of Kansas, from which state our lien laws in the main were taken, had sustained the right to impose such liens, as is shown by Judge Brewer in his able opinion in Hutchinson v. Krueger, supra. The question for decision under the issues joined in the consolidated case was whether this court would follow the decisions of the Supreme Court of Kansas, or the rule that very generally prevailed in other jurisdictions, denying the right of materialmen to a lien on a public building. This was all. In the view adopted by this court in Hutchinson v. Krueger, had an appeal been prosecuted from the judgment of the district court to the Supreme Court, the judgment afterwards complained of would doubtless have been set aside, and the cause reversed. This was not done, and it will not do to say that, for the reasons urged, either a defendant in said suit, or a taxpayer of the district, or the surety on the contractor's bond, may, long after adjournment of the term, by motion procure either the vacation or modification of the judgment. The law points out the manner by which errors of law may be corrected. A wrong determination of the issues based upon a mistake of law, after final judgment has been rendered, can only be remedied and corrected on appeal; otherwise, there would be no end to litigation.

[3] A mistake of law on the part of the trial court affords no ground for the vacation of a judgment in the manner here attempted. The authorities sustaining this view are numerous, and, so far as we know, unanimous. Among them are People ex rel. Davis et al. v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Fisher v. Hepburn, 48 N. Y. 41; Martindale v. Battey, 73 Kan. 92, 84 Pac. 527; People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; People ex rel. Raymond v. Talmadge, 194 Ill. 67, 61 N. E. 1049; Elliott et al. v. Piersol, 1 Pet. 328, 7 L. Ed. 164; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264; Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005; American Express Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536. As stated in the latter case:

> "A judgment is conclusive as to all the media concludendi (U. S. v. California, etc., Land Co., 192 U. S. 355 [24 Sup. Ct. 266] 48 L. Ed. 476); and it needs no authority to show that it cannot be impeached, either in or out of the state, by showing that it was based upon a mistake of the law."

The rights of the creditors in whose favor liens were adjudged to enforce them, not being involved in the present inquiry, are not decided.

The judgment of the trial court is affirmed.

HARDY, TURNER, THACKER, and KANE, JJ., concur.

THACKER, J. In concurring in the decision and opinion of the court in this case, where the erroneous judicial decision in question did not necessarily involve nor appear to involve any element of an attempted exercise of executive or legislative power, but was wholly within the domain of judicial power, I do not think I am out of accord with the decision or with any statements made in the opinion in the case of Roth v. Union National Bank of Bartlesville, 160 Pac. 505, where the erroneous decision in question necessarily involved an attempted exercise of the legislative power to suspend or nullify the operation of unquestionably valid statutes, and thus included basic elements beyond the domain of judicial power, since the statutes in question were unambiguous and not open to construction in respect to the questions involved in that decision.

HADDOCK v. STICELBER & MONG.

(No. 7882.)

(Supreme Court of Oklahoma. May 8, 1917. Rehearing Denied June 12, 1917.)

(Syllabus by the Court.)

1. Statutory Definition — "Consideration for Promise."

"Any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consideration.]

2. Release 🔑13(5)—Consideration—Agreement.

Plaintiffs contracted with defendant and another to drill an oil and gas well to the shallow sand, and when, in the performance of such contract, the shallow sand was reached, the work on the well was stopped, and it was then agreed by plaintiffs and defendant that defendant would employ plaintiffs to drill such well deeper, and pay them therefor at the rate of 90 cents per foot, and that the plaintiffs would do such additional drilling and would release the defendant from liability for payment of the sum of $400, that being one-half of the sum due them for the former drilling, and look alone to the other for the payment of such sum. *Held*, that the agreement of the defendant to employ plaintiffs to do such additional drilling and to pay them therefor was sufficient consideration to support the promise of plaintiffs to release defendant from the payment of the said sum of $400.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 26.]

3. Trial 🔑142 — Directed Verdict — Evidence.

It is error to direct a verdict for the plaintiffs where, admitting the truth of all the evidence given in favor of defendant, together with such inferences and conclusions as may be reasonably drawn therefrom, there is enough competent evidence to reasonably sustain a verdict should the jury find for the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337.]

Commissioners' Opinion, Division No. 1. Error from District Court, Rogers County; W. J. Campbell, Judge.

Action by Sticelber & Mong against John Haddock. Judgment for plaintiffs, and defendant brings error. Reversed, and remanded for a new trial.

Adams & Wills, of Claremore, for plaintiff in error. Victor C. Mieher, of Tulsa, and A. C. Hough, of Oklahoma City, for defendants in error.

RUMMONS, C. This action was commenced in the district court of Rogers county by the defendants in error, hereinafter called plaintiffs, against the plaintiff in error, hereinafter called the defendant, to recover the sum of $1,118 for work and material furnished in drilling an oil and gas well and to foreclose a lien upon certain real estate in Rogers county to satisfy said debt. The defendant answered, admitting that the plaintiffs entered into parol contract with the defendant and the Westerly Oil Company and P. F. Daulgren to drill a well upon the premises described in the petition, one-half of the cost of the drilling said well to be paid by the Westerly Oil Company and P. F. Daulgren, and one-half by the defendant. Defendant further alleges that, when the well was drilled to the depth of 900 feet, the Westerly Oil Company and P. F. Daulgren ordered drilling stopped and declared the well to be a dry hole, at which time the defendant entered into an agreement with the plaintiffs that, if they would collect one-half of the amount due them for drilling said well 900 feet from the Westerly Oil Company and P. F. Daulgren, the defendant would enter into a new contract with plaintiffs for the drilling of said well to a greater depth, at which time the Westerly Oil Company and P. F. Daulgren agreed to pay plaintiffs the sum of $400 of the cost price of drilling said well to a depth of 900 feet, and the plaintiffs agreed to accept said Westerly Oil Company and P. F. Daulgren for said sum of $400, and defendant agreed to pay the balance of $410 for drilling said well. Defendant further alleged that upon the agreement aforesaid the defendant entered into a new contract with the plaintiffs by which he agreed to pay them the sum of 90 cents a foot to drill said well deeper until further orders from him, and alleges that at the depth of 1,220 feet he ordered plaintiffs to stop drilling after they had struck a gas well. Defendant admits that he is indebted to plaintiff in the sum of $410 under the original contract and the sum of $288 on the last contract and the sum of $20 for tubing, making a total of $718, and alleges payment thereon of the sum of $98, and tenders plaintiffs the sum of $620. Plaintiffs replied, denying generally each allegation contained in the answer, and admitting the payment by defendant of $98.

Defendant, as a witness in his own behalf, testified in substance that he and P. F. Daulgren, of the Westerly Oil Company, and Mr. Mong, one of the plaintiffs, had several conversations about drilling an oil and gas well, and that it was finally agreed between them that the plaintiffs should drill a well upon the premises of defendant to the shallow sand or about 900 feet in depth, and that the price for drilling said well should be 90 cents per foot, and that in the event they struck oil or gas the defendant should pay plaintiffs the amount due for drilling said well, and that in the event they had a dry hole and no oil or gas was struck defendant should pay plaintiffs one half of the drilling bill and Mr. Daulgren the other half; that, after plaintiffs had drilled the well to the depth of 900 feet, or to the shallow sand, Mr. Daulgren was unwilling to go any further and declared the well to be a dry hole. Defendant was anxious to drill to a greater depth, and proposed to the plaintiff Mong to settle up for the drilling of the well to the depth of 900 feet, defendant to pay $410, and plaintiffs to collect $400 from Mr. Daulgren, and proposed to enter into a new contract with the plaintiffs, upon such settlement being made, to drill to a greater depth at the price of 90 cents a foot. Defendant says that, when he told Mr. Mong that Mr. Daulgren said stop, Mr. Mong said it was all off and they would stop, and that upon his proposal to Mr. Mong that the plaintiffs take Mr. Daulgren for $400 of the bill and look to him for only $410 thereof and enter into a new contract for drilling the well further Mr. Mong proposed to talk to Mr. Daulgren over the telephone. Defendant and Mr. Mong went to defendant's house, and Mr. Mong talked with Daulgren over the telephone in the presence of defendant. After the conversation between Mong and Daulgren Mong told defendant that Daulgren agreed to pay the plaintiffs $400, and that plaintiffs would agree to take Daulgren for the $400; that the plaintiffs then continued to drill to an additional depth of 320 feet, when they struck gas. At the conclusion of the evidence plaintiffs demurred to the evidence of the defendant, which demurrer was sustained by the court, and the jury was instructed by the court to render a verdict for the plaintiffs against the defendant. The defendant, having saved proper exceptions to the sustaining of the demurrer and direction of the verdict, moved for a new trial, which motion was overruled. The defendant excepted, and brings error.

Under several assignments of error the defendant complains of the action of the trial court in sustaining the demurrer to his evidence and directing a verdict for the plaintiffs. From a reading of the briefs of both counsel for plaintiffs and defendant it seems that the trial court took the view that the defendant rested his defense upon a novation, but that his evidence failed to establish a valid contract of novation, and therefore plaintiffs were entitled to recover. We have reached the conclusion that the case of defendant does not depend alone upon the principles applicable to a contract of novation. The evidence of defendant, which for the purposes of this opinion may be taken as true, shows that plaintiffs and defendant and P. F. Daulgren entered into an agreement for the drilling of the well by plaintiffs and for the payment for such drilling in one contingency by defendant, and in another contingency for the payment of one-half by the defendant and one-half by P. F. Daulgren; that the latter contingency arose, and the defendant and P. F. Daulgren each became liable to plaintiffs for the cost of drilling the well. Defendant says in his testimony:

> "I have told you it was fairly understood that this agreement was a partnership matter for 900 feet, and there we had an agreement and he accepted the $400 from Mr. Daulgren and left me $410, and I would not go further until that agreement was made, because I did not think we had any necessity for having a dry hole and I was not willing to quit my part of it. I was willing to bet a little more money; if he quit and got out, and he went on down, I was willing to take my chances. It is fair enough to dissolve partnership when you quit."

It thus appears that the parties to this agreement understood that the defendant and P. F. Daulgren were partners in drilling this test well; that in the event the test developed a paying well the defendant, receiving the benefit, was to pay the whole of the cost of drilling; in the event it did not each was to pay one-half of the cost of drilling. The well at the depth to which it was agreed to drill produced nothing, and the defendant and P. F. Daulgren became liable to contribute to the payment of the cost of drilling the well. The defendant then proposed to the plaintiff to employ them to drill deeper if they would agree to look alone to P. F. Daulgren for the payment of half of the cost of drilling to the shallow sand. The plaintiffs advised defendant that Daulgren had agreed to pay the sum of $400 of the amount due for drilling, and told defendant that they would accept him for this amount and look to defendant for the balance of $410 and in consideration thereof the defendant employed the plaintiffs to continue the drilling, and they did so continue until at a depth of 1,220 feet they struck gas. It is urged by plaintiffs that the defendant's evidence fails to establish a novation, in that it does not appear that the three parties ever met and agreed that defendant should be released to the extent of $400, and that Daulgren should be released to the extent of $410, and that plaintiffs would look to Daulgren for the sum of $400. It is further urged by plaintiffs that the evidence does not disclose any consideration to support the agreement to release the defendant to the extent of $400.

We do not believe that this transaction falls within the principles applicable to a novation, for under the contract related by defendant in his testimony either the defendant and Daulgren were liable to plaintiffs as partners, and each therefore liable for the full amount of the debt, or they were each liable individually for one-half of the costs of the drilling, and no more. Upon the latter hypothesis the defendant is not liable to the plaintiffs for any sum greater than he tendered to them. Upon the former hypothesis it was clearly competent for the plaintiffs upon a sufficient consideration to release the defendant from one-half of his liability to them. It therefore does not matter whether or not Daulgren ever consented to the agreement which defendant said was subsequently entered into between him and the plaintiffs or whether or not Daulgren ever agreed after the well had been drilled to 900 feet to pay plaintiffs $400 of the drilling bill. Plaintiffs agreed to look to him for that sum and to release the defendant from that amount of liability.

[1, 2] The only question necessary to determine in this case is whether the evidence of the defendant discloses a sufficient consideration for such release by the plaintiffs. We think it does. When plaintiffs had drilled to the shallow sand and work was stopped and the well declared to be a dry hole the defendant was under no obligation to employ them any further. He, however, proposed to them that, if they would release him to the extent of $400 and look alone to Daulgren for that amount, he would employ them to drill further, and obligated himself to pay for such drilling at the rate of 90 cents a foot. It is argued by counsel for plaintiffs that the 90 cents a foot agreed to be paid by the defendant for the additional drilling was a consideration for such drilling alone, and that the additional drilling was the consideration for defendant's promise to pay, and therefore there remained no consideration for the promise of plaintiffs to release defendant to the extent of $400. We are unable to see the force of this reasoning. The plaintiffs were under no obligation to drill further upon the terms proposed by defendant and whether the price agreed to be paid by defendant for such drilling was profitable to the plaintiffs or not is entirely immaterial; the plaintiffs were at liberty to either accept or reject the proposal made by the defendant, and they were bound to accept it or reject it in all of its terms. They saw fit to accept the proposition made by the defendant, which embraced not only the additional drilling, but also the release of defendant from the payment of $400. The promise of defendant to pay for the additional drilling was sufficient consideration for the entire contract. Section 926, R. L. 1910, defines consideration as:

> "Any benefit conferred, or agreed to be conferred upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

The promise made by the defendant is clearly a good consideration within the terms of said section. The plaintiffs received the benefit of doing the additional drilling to which they were not lawfully entitled, and the defendant agreed to suffer the prejudice of paying therefor which he was not lawfully bound to suffer at the time of making the promise. We therefore conclude that the agreement entered into between plaintiffs and defendant for the additional drilling and for the release of defendant for the payment of the sum of $400 was supported by a sufficient consideration.

[3] This case having been determined upon a demurrer to the evidence of the defendant and upon a directed verdict, all facts and inferences in conflict with the evidence of the defendant must be eliminated entirely from consideration and entirely disregarded. In determining whether or not the trial court erred in directing a verdict we must consider only the evidence of the defendant and the inferences and conclusions to be drawn therefrom. Moore v. First National Bank, 30 Okl. 623, 121 Pac. 626, and cases there cited. We think that the evidence of the defendant so considered left a question to be determined by the jury. The trial court therefore erred in sustaining a demurrer to the evidence offered by defendant and in directing a verdict for plaintiff.

The judgment of the trial court should therefore be reversed, and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

MANGELSDORF BROS. CO. v. KOLP et al. (No. 5032.)

(Supreme Court of Oklahoma. May 1, 1917. Rehearing Denied June 6, 1917.)

(Syllabus by the Court.)

1. SALES ⇐218½—PASSING OF TITLE—QUESTION FOR JURY.

Where the question as to when title to personal property sold passed is in dispute, it is governed by the intention of the parties, and is generally a question of fact for the jury, under proper instructions; and should be taken from the jury only in cases where there is but one conclusion deducible from the evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587.]

2. EVIDENCE ⇐271(9)—SELF-SERVING ACTS—SUIT.

Where the vendee of personal property refuses to settle for the property purchased, but not actually delivered, and the vendor sues him for the purchase price, on the theory that though not delivered, title had passed, *held*, that the vendor cannot prove that after the vendee refused to settle for the property, he attached it as the property of the vendee; for the reason that the suit in attachment was the act of the vendor, not the vendee, and the vendee can in no way be bound by it. The vendee is bound by his own words and acts, but to permit the vendor to profit by his own independent act after the controversy had arisen would be, in effect, to countenance self-serving conduct, which the law will not permit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1078.]

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by the Mangelsdorf Bros. Company, a corporation, against E. R. Kolp and D. C. Kolp, copartners. Demurrer to plaintiff's evidence sustained, and judgment against plaintiff for costs, and it brings error. Reversed and remanded for new trial.

Z. E. Jackson, of Atchison, Kan., and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. Warren K. Snyder and Oliver C. Black, both of Oklahoma City, for defendants in error.

BRETT, J. This action was commenced in the district court of Oklahoma county by the plaintiff in error, a corporation, hereinafter called plaintiff, against the defendants in error, a copartnership, hereinafter called defendants, to recover the purchase price of two orders of cane seed, sold by plaintiff to the defendants, but never actually delivered, and for certain charges for the storage and insurance on these seed, and also some charges for turning or stirring the seed to prevent them from becoming heated while in the plaintiff's elevator. The plaintiff sued upon the theory that it had sold the seed to the defendants; that the contract of sale was an executed contract; that title had passed; that the defendants were the owners of the seed; and that plaintiff was therefore entitled to recover the contract price of the seed under section 2862, Revised Laws 1910, which provides:

> "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price."

While the defendants contended that the contract of the sale was only executory, that title had not passed, and that their liability, if any, was not the purchase price, but was fixed by section 2863, Revised Laws 1910, which provides:

> "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:
>
> "First. If the property has been resold, pursuant to section 3850, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or.
>
> "Second. If the property has not been resold in the manner prescribed by section 3850, the excess, if any, of the amount due from the buyer, under the contract over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

At the close of the plaintiff's evidence the the defendants demurred to the evidence, urging especially that the evidence failed to show that the contract of sale was executed, and that title had passed, but that, on the contrary, the evidence showed the contract to be executory, and that title had not passed, and the plaintiff was therefore not entitled to recover under its pleadings in this action. The demurrer was sustained, the jury discharged, and judgment rendered by the court against the plaintiff for the costs.

The principal question presented by this appeal is whether under the evidence the trial court erred in holding that the contract was executory; that title had not passed, and that the evidence therefore wholly failed to sustain the plaintiff's claim. The evidence is voluminous, and we will not undertake to go into a detailed statement of it, but will set out only such parts as are essential to a correct determination of the intention of the parties to this transaction. For, after all, the intention of the parties as to whether or not title should pass must, in this case, determine their legal status. The seed were purchased of the plaintiff by the defendants through the Merchants' Cheese & Brokerage Co., of Ft. Worth, Tex. The negotiations between the brokerage company and the defendants were oral, and plaintiff asked through the brokerage company that the sale be confirmed in writing, which request was communicated to the defendants by the brokerage company; and in response to this request the defendants replied by letter as follows:

> "Ft. Worth, Texas, Jan. 20, 1909.
>
> "Merchants' Cheese & Brokerage Co., Ft. Worth, Texas—Gentlemen: Answering your letter Jan. 19th, we find that we have purchased through you from Mangelsdorf Bros. Co. the following seeds:
>
> Jan. 5th. 70,000# recleaned amber, at $2.72½ cwt.
> 20,000# recleaned orange, at $2.72½ cwt.
> Delivered Group I our option.
> Jan. 7th. 70,000# recleaned amber, at $2.72½ cwt.
> 20,000# recleaned orange, at $2.72½ cwt.
> First half February shipment, shippers' option.
>
> "All of above seeds to be recleaned, sacked in heavy new bags and delivered basis Group I, destination weights to be guaranteed by shipper and seeds to be true to name and to be bright, sound and sweet. We trust this is what Messrs. Mangelsdorf want and you may submit it to them with our approval.
>
> "Yours very truly, E. R. and D. C. Kolp."

There is no contention on the part of the defendants that the plaintiff did not have the kind, character, and quality of seed specified in their letter of confirmation with which to fill their two orders. But the defendants who purchased the seed to sell to their customers were unable to sell them as readily as they had expected; and in response to urgent requests on the part of plaintiff that they move the seed, for the reason that the plaintiff's warehouse and elevator were crowded, defendants wired the plaintiff asking:

> "At what price can you sell for our account enough seed to relieve present congestion?"

In response to this the plaintiff, by wire, quoted a price at which they could sell a portion of the seed. To this the defendants replied:

> "We received your telegram this morning stating that you could sell 40,000# orange at $2.25, 50,000# amber at $2.20. We have not replied as this is at least 25c per cwt. under quotations from Kansas City, and we would rather pay you a little storage charges than to accept such ruinous prices at this time. You will understand our silence to mean that we do not care to sell at the above prices."

The plaintiff then wrote defendants, "We are paying storage on some of our own seed, crowded out of our warehouse by the seed we are holding for you," and stated that unless they could move the seed at once, they would have to pay storage on same. To which the defendants replied:

> "Your letter Feb. 22nd received. We wrote you yesterday in reference to selling cane seed at $2.25 and $2.20 respectively. We are working on this matter and have a man out all the time. Just as soon as there is any trade, we will commence ordering this seed forward. Until then we must ask you to favor us by holding same. We will pay you a reasonable charge for storage, if you desire, upon it, but 1½c per bushel for the first month is unreasonable. We presume we will have no difficulty in agreeing upon a reasonable basis of storage when this matter comes up to be settled.
>
> "Hoping we can give you shipping instructions in a very short time, we remain,
>
> "Yours very truly, E. R. & D. C. Kolp."

This is the trend of a long correspondence between the parties, involving numerous letters and telegrams; until June 18th, when the defendants say, "We doubt very much if any liability will attach to us;" and from then on they deny liability, but seek to compromise the matter; but the offer of compromise was refused by the plaintiff.

[1] Both the plaintiff and the defendants in their briefs cite and quote from many reported cases in support of their respective positions; the one to show that the contract was executed, and the other that it was executory. But it must be borne in mind that each of the cases cited rests upon a state of facts peculiar to itself. And besides, the principal question we are called upon to determine in the case at bar is whether or not there was any evidence reasonably tending to sustain the plaintiff's contention that this was an executed contract, and that title had passed. If there was, then it was the duty of the court to have submitted this evidence to the jury. In Kirkham v. Fullerton et al., 32 Okl. 461, 122 Pac. 652, in discussing the question now under consideration, it is said:

> "In contracts of this nature, when the dispute is between the parties to it, and no rights of other persons are involved, the question of the intention of the parties as to whether title to the property passed at the time of making the contract is often a controlling one, and is ordinarily a question for the jury. Haines v. McKinnon, 35 Or. 573, 57 Pac. 903; Sewell v. Eaton, 6 Wis. 490, 70 Am. Dec. 471; Barber v. Thomas, 66 Kan. 463, 71 Pac. 845; Rosenthal v. Kahn, 19 Or. 571, 24 Pac. 991; Ober v. Carson, 62 Mo. 213; Fletcher v. Ingram, 46 Wis. 191, 50 N. W. 424; Memory v. Niepert, 131 Ill. 623, 23 N. E. 431; Bill v. Fuller, 146 Cal. 50, 79 Pac. 592."

And we think it is the general rule that where the question as to when the title to personal property sold passed is in dispute, it is governed by the intention of the parties, and if there be any doubt as to what their intention was, it is a question of fact for the jury under proper instructions. Clark v. Shannon & Mott Co., 117 Iowa, 645, 91 N. W. 923; Carlson v. Crescent W. & B. Mfg. Co., 20 Idaho, 794, 120 Pac. 460; Johnson

v. Tabor, 101 Miss. 78, 57 South. 365; Cook & Laurie C. Co. v. Bell, 177 Ala. 618, 59 South. 273; Wesco Supply Co. v. Town of Allerton, 156 Iowa, 695, 137 N. W. 1046; Kendrick v. Hochradel, 167 Mich. 179, 132 N. W. 521; Seldomridge v. F. & M. Bank, 87 Neb. 531, 127 N. W. 871, 130 N. W. 848, 30 L. R. A. (N. S.) 337; Hoffman v. Gosline, 172 Fed. 113, 96 C. C. A. 318; Idaho Implement Co. v. Lambach, 16 Idaho, 497, 101 Pac. 951. In Carlson v. Crescent Woodenware & Box Mfg. Co., above cited, it is held:

> "The question of when the title to personal property passes on sale thereof will be governed by the intention of the parties, and is a question for the jury, under proper instructions."

In Idaho Implement Co. v. Lambach, supra, it is held:

> "In determining the question as to whether the title has or has not passed by the contract, the primary and first consideration is the intention and understanding of the parties as gathered from the contract and the circumstances surrounding the sale. If, under all the evidence, different minds might honestly reach different conclusions as to whether the sale was completed or merely an executory agreement to sell, then the question is one of fact, and should be left to the jury."

In Seldomridge v. Farmers' & Merchants' Bank et al., supra, it is held:

> "Where a specified quantity of grain identical in kind and uniform in value is sold from a mass, a separation is not necessary to vest title where the intention of the parties that title shall pass is clearly manifested. Whether title to personal property sold, but not actually delivered, passes to the vendee depends upon the intent of the parties to the transaction, and the question of intent is rather one of fact than of law."

In Hoffman v. Gosline et al., above cited, it is held:

> "The time of passing title to chattels sold depends on the intention of the parties." And "where an action for goods sold depended on whether the title passed, the court's failure to submit to the jury the precise lines of inquiry into the facts from which they were to determine such issue was prejudicial error."

But the defendants insist that this contract is plain and certain, and is in writing, and that it is not a question for the jury, and quote in support of their contention from Farmers' National Bank of Sheridan v. Coyner et al., 44 Ind. App. 335, 88 N. E. 856, as follows:

> "But, where upon a material point there is a failure of proof by the party having the burden, a court may, as a matter of law, instruct the jury in favor of the other party to the issue, and where the facts are admitted by the pleadings, or otherwise, or where the evidence is documentary, and its interpretation a matter for the court, and there is but one conclusion deducible therefrom, the court may, as a matter of law, direct a verdict in accordance with the fact."

This doctrine is unquestionably sound, but under it was the court justified in the case at bar in sustaining the demurrer and taking the evidence from the jury? In other words, while the evidence as to the intention of the parties in the case at bar was largely documentary, can it be said that there was but one conclusion deducible therefrom, and that that conclusion was that title had not passed? We think not. But, on the other hand, we think that the defendants' language and conduct, as revealed by the evidence, strongly indicate that they claimed title, and had assumed control of the property in question. The defendants having failed to sell through their local salesman, they seem to have made the plaintiff their agent to try to negotiate a sale for them for a part of the seed. They declined to accept the price which plaintiff was able to procure for them, and said they had rather pay storage than to sell at that time at such ruinous prices. They agreed to pay reasonable storage, and in another communication, not heretofore quoted in this opinion, they indicate that they had rather do this than to take the risk of having to pay demurrage on the seed at Ft. Worth, since their warehouse and elevator there were full, and they had no place in which to unload the seed, if it was shipped to them there.

Defendants also quote in their brief from the syllabus in Priest v. Hodges et al., 90 Ark. 131, 118 S. W. 253, which holds in part that:

> "Where, by the contract of sale, there remains something to be done as between the seller and buyer to ascertain the quantity or price of the article, the title does not pass; but, where it was the intention of the parties that the article should be considered as having been delivered, the intention will govern, though there remains something to be done to determine the quantity or value thereof. The fact that a seller has performed all he can do does not show a sale, but it is necessary to show that the buyer actually accepted the chattels, and, until the buyer does some act evincing an intention to accept, the title remains at the risk of the seller."

This is in harmony with all the authorities we have examined, and holds, in substance, that the intention of the parties shall govern, and that the intention of the buyer is to be gathered from his acts, and to be determined by whether or not he has evinced an intention to accept title. It would have been rather unusual, we think, for the defendants, in the case at bar, to have agreed to pay the plaintiff storage on what they considered was its own grain, stored in its own warehouse. But they did agree to pay storage on the grain in controversy. Besides, there are other circumstances, which not only indicate an intention on the part of the defendants to accept title, but that they considered that title had passed. And upon consideration of the entire record, it seems to us unreasonable to say that there is but one conclusion deducible from the conduct of the parties, and that that conclusion is that title had not passed. We think the court erred in sustaining the demurrer to the evidence.

[2] 2. The only other assignment urged is that the court erred in refusing to permit the plaintiff to prove that the seed in controversy, after defendants refused to settle for same, were attached by the plaintiff as the property of the defendants, under an

order of attachment. But in this ruling we think the court was right. That was the act of the plaintiff, not the defendants, and the defendants can in no way be bound by it. The defendants are bound by their own words, acts, and conduct, but to permit the plaintiff to profit by its own independent act, after the controversy had arisen, would be, in effect, to countenance self-serving conduct, which the law will not permit.

The judgment is reversed, and the cause remanded for a new trial. All the Justices concur.

KANSAS CITY, M. & O. RY. CO. et al. v. McDANIEL. (No. 7234.)

(Supreme Court of Oklahoma. June 12, 1917.)

(Syllabus by the Court.)

TRIAL 🔑253(3)—INJURY NEAR TRACK—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company to recover damages for personal injuries and damages to team, wagon, and harness, where the defense of contributory negligence is specially pleaded, and there is evidence tending to support it, an instruction setting forth a hypothetical statement of facts, which, if found to be true by the jury, would entitle the plaintiff to recover, without submitting the question of plaintiff's contributory negligence and without regard as to whether or not his negligence contributed to the accident, is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 616.]

Commissioners' Opinion, Division No. 1. Error from District Court, Major County; James W. Steen, Judge.

Action by William McDaniel against the Kansas City, Mexico & Orient Railway Company, a corporation, and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

John A. Eaton, Dudley W. Eaton, and Hyden J. Eaton, all of Kansas City, Mo., and F. W. Fischer, of Oklahoma City, for plaintiffs in error. Jno. V. Roberts and C. B. Wood, both of Fairview, for defendant in error.

RUMMONS, C. The defendant in error, plaintiff below, in this action seeks to recover from the plaintiffs in error, defendants below, damages for injuries inflicted upon him and upon his team, buggy, and harness in a railway crossing accident. Plaintiff in his petition charged that the defendants negligently operated their train over and across the highway upon which plaintiff was traveling without ringing the bell or blowing the whistle while approaching said crossing and at a high and dangerous rate of speed, and that, by reason of so negligently operating said train, it ran into the buggy driven by the plaintiff upon said crossing and inflicted the injuries for which plaintiff seeks damages. The defendants answered, denying generally the allegations of the petition, and pleading contributory negligence on the part of the plaintiff. Plaintiff had judgment, and defendants, having unsuccessfully moved for a new trial, bring this proceeding in error to reverse such judgment.

The issues presented to the jury upon the evidence in this case were the negligence of the defendant in failing to ring the bell or blow the whistle while approaching the crossing and the contributory negligence of the plaintiff in failing to stop, look, and listen for the approach of a train before driving across the railway track. The only error assigned by the defendants which we deem it necessary to consider complains of the giving of instruction No. 9 given by the court to the jury. Said instruction is as follows:

> "You are instructed that under the law of this state the defendant is bound by its servants to ring the bell or sound a whistle at a distance of at least 80 rods from the place where its railroad crossed the public highway. You are further instructed that, if you believe from the evidence that the defendant by its servants neglected to ring the bell or sound the whistle at a distance of at least 80 rods from the place where its railroad crossed the highway, at which it is alleged plaintiff was injured by collision with defendant's train, then and in that event the defendant would be guilty of negligence, and if you further find that such negligence was the proximate cause of plaintiff's injuries, then and in that case you should find for the plaintiff."

It is urged by the defendant that this instruction is erroneous in that it does not submit to the consideration of the jury the contributory negligence of the plaintiff, and that the omission to submit such issues to the jury is not cured by any other instruction given by the court. The only instructions given by the court upon the question of contributory negligence are instructions Nos. 6, 8, and 12, which are as follows:

> "(6) While it is incumbent upon the plaintiff to prove to your satisfaction by a preponderance of the evidence the allegations of his petition, he is not required to prove that he was free from negligence; that the defense of contributory negligence pleaded by the defendant must be proven to your satisfaction by a fair preponderance of the evidence to be valuable as a defense."
>
> "(8) You are further instructed that contributory negligence is negligence as hereinbefore defined on the part of the plaintiff which contributes to the accident or injuries complained of."
>
> "(12) You are instructed that as between the plaintiff and the train, by reason of the character and momentum of the train and the requirements of public transportation by means thereof, the train had the right of way at the railroad crossing where the accident occurred. It was the duty of the plaintiff before attempting to cross the railroad to use reasonable diligence by looking and listening to ascertain whether the train was approaching the crossing, and if he knew, or by the exercise of such diligence could have known, of its approach, it was his duty to not attempt to cross the railroad track until the train had passed, and you are further instructed that the engineer and fireman upon giving the proper signals and timely warning of the train's approach had the right to presume that the plaintiff was in possession of his natural faculties and senses, and that he would not omit to take the precaution imposed upon him by law."

The court in its instructions defines negligence and proximate cause, and also in instruction No. 8 defines contributory negligence, but nowhere in the instructions given by the court does the court advise the jury as to what their verdict should be in the event they found that the plaintiff was guilty of contributory negligence. In the case of Chicago, R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 Pac. 1146, this court says:

> "In an action for damages for personal injuries, where the defense of contributory negligence is interposed, and there is testimony fairly tending to establish such defense, instructions which wholly leave out of view the question of plaintiff's contributory negligence, and under which the jury, if they found certain facts to exist, would be bound to find for the plaintiff, although they might also believe the plaintiff by her negligence contributed directly to the accident, are erroneous, and constitute reversible error."

In Oklahoma Railway Company v. Milam, 45 Okl. 742, 147 Pac. 314, this court says:

> "In an action against a street railway company to recover damages for the death of a person killed by the railway company's car within the city limits, and wherein contributory negligence on the part of the deceased is pleaded as a defense, and there is evidence tending to sustain such defense, an instruction which ignores the defense of contributory negligence and tells the jury that the operation of defendant's car at a rate of speed exceeding the city speed limit is negligence per se, and, if such negligence is the proximate cause of the injury, the defendant will be liable, is reversible error."

It is further said in said case:

> "Such error was not cured by another instruction which tells the jury, in substance, the defendant would not be liable if the deceased was guilty of contributory negligence in going upon the defendant's car track in front of an approaching car, which struck him unless the doctrine of last clear chance applies. The two instructions are confusing, and it is uncertain which the jury will follow, and when the evidence is conflicting, a verdict and judgment for either party, under such conflicting instructions, should be reversed."

In Chicago, R. I. & P. Ry. Co. v. Clark, 46 Okl. 382, 148 Pac. 998, this court says:

> "In an action against a railroad company to recover damages for personal injuries, loss of team, and damages to wagon and harness, where the defense of contributory negligence is specially pleaded, and there is evidence tending to support it, an instruction setting forth a hypothetical statement of facts, which, if found to be true by the jury, would entitle the plaintiff to recover, without mentioning the question of plaintiff's contributory negligence, and without regard as to whether or not he directly contributed to the accident, is error, and is not cured by another instruction dealing with the question of plaintiff's contributory negligence; the two instructions being conflicting and confusing."

See Atchison, T. & S. F. Ry. Co. v. Jameson, 46 Okl. 609, 149 Pac. 195.

In the instant case the instruction complained of is more subject to criticism than the instructions are in Oklahoma Railway Co. v. Milam, supra, and Chicago, R. I. & P. Ry. Co. v. Clark, as in the instant case, the court did not tell the jury what effect contributory negligence would have upon the plaintiff's right to recover. The instruction complained of told the jury that, if they found that defendants neglected to ring the bell or blow the whistle while approaching the crossing as required by the statutes, the defendants were guilty of negligence, and that, if they found that such negligence was the proximate cause of the injuries sustained by the plaintiff, they must find for the plaintiff. The court did not in this instruction or in any other tell them what their verdict should be in the event they found that the negligence of plaintiff had contributed to the accident. In fact, nowhere in the instructions is the jury told that the contributory negligence of the plaintiff would be a defense to the action brought by him. The most that is said upon the subject by the court is that contributory negligence to be valuable as a defense must be proved by a preponderance of the evidence. There was evidence in the record from which the jury might have found that the plaintiff was negligent, and that such negligence contributed to the accident.

The giving of the instruction complained of constitutes reversible error, and the judgment of the court below should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

CITY OF COLLINSVILLE et al. v. WARD et al. (No. 8390.)

(Supreme Court of Oklahoma. Feb. 13, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS 🔑958—TAXATION—CHARTER PROVISIONS.

The provisions of the charter of the city of Collinsville, framed, adopted, and approved pursuant to the authority conferred by section 3a, art. 18, Williams' Ann. Const., and section 539, Rev. Laws 1910, regulating the method of levying and collecting taxes for purely municipal purposes, prevail over the general laws of the state in reference thereto in so far as said general laws are in conflict therewith.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023–2037.]

2. MUNICIPAL CORPORATIONS 🔑958—TAXATION—CHARTER PROVISIONS—GENERAL LAW.

Article 10, § 14, Williams' Ann. Const., which provides that "taxes shall be levied and collected by general laws and for public purposes only," was intended as a limitation upon the power of the Legislature in passing laws for the levy of taxes to the passage of general laws, as distinguished from local or special acts, and was not intended to prohibit cities from adopting charter provisions authorizing the levy and collection by such cities of taxes for purposes that are purely municipal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023–2037.]

3. TAXATION 🔑609—EQUITABLE RELIEF.

Where a party seeks equitable relief against an assessment of taxes of which he complains, he must offer to do equity by paying or offering to pay the amount of taxes properly chargeable against him under a proper assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1243.]

4. MUNICIPAL CORPORATIONS ⚷979—TAXATION — INJUNCTION — SUFFICIENCY OF PETITION.

Petition examined, and *held* not to state a cause of action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2120–2123.]

Error from District Court, Rogers County; W. J. Campbell, Judge.

Action for injunction by J. D. Ward, for and on behalf of himself and all the taxpayers in the city of Collinsville, Okl., and others. Judgment for plaintiff, motion to vacate judgment and to dissolve the injunction overruled, and defendants bring error. Reversed and remanded.

J. F. Orr, of Collinsville, and Randolph, Haver & Shirk, and Elton B. Hunt, all of Tulsa, for plaintiffs in error. Ertell & Hart and Adams & Wills, all of Claremore, for defendant in error.

HARDY, J. J. D. Ward, who will be referred to as plaintiff, on behalf of himself and all other taxpayers similarly situated, brought this action against the city of Collinsville, its board of commissioners, and business manager, who will be referred to as defendants, to restrain the collection of certain taxes levied for the year 1914, which the defendants were proceeding to collect in accordance with the charter provisions of said city. Demurrer was filed to the petition, which was overruled, and exceptions saved, and judgment rendered in favor of plaintiff, perpetually enjoining the collection of said taxes. Motion to vacate judgment and to dissolve the injunction was overruled, and defendants prosecute error.

The first error assigned is that the court erred in overruling the demurrer to plaintiff's petition, which alleged in substance that plaintiff was a resident and citizen of said city, and a property owner and taxpayer therein; that said city was a city of the first class, organized and existing under the laws of this state, and that the other defendants constituted the board of commissioners and business manager of said city; that during the year 1914 said city, by and through its agents, listed and assessed all of the real property located therein for the purpose of taxation and made a levy thereon, and thereafter, under and by virtue of said listing, assessment, and levy, was proceeding to collect said taxes so levied; that plaintiff, and those for whom he prosecutes this action, during said year owned a large amount of real property in the limits of said city, which was included in the listing, assessment, and levy complained of; that plaintiff, and those for whom he prosecutes this action, had neglected and refused to pay said taxes, for the reason that the actions of said city and its officers and agents were and are contrary to the Constitution and laws of the state of Oklahoma, and were and are without warrant or authority of law; that the said city had no authority or power to list and assess plaintiff's property, or the property of any other person, or to levy and collect a tax thereon; and that said defendant had caused notice to be given that plaintiff's property, and other property similarly situated, upon which taxes had been levied as aforesaid, would be sold, and, unless restrained, would proceed with said sale, to plaintiff's great and irreparable injury.

[1, 2] The principal question argued by both sides is whether the city of Collinsville had the authority, under the Constitution and laws of this state, to provide in its charter for the assessment, levy, and collection of municipal taxes in a manner different from or through instrumentalities other than those provided by the general laws of the state for the collection of state and county taxes. In compliance with the provisions of section 3a of article 18, Williams' Ann. Const., the city of Collinsville did on the 9th day of January, 1914, adopt what is known and designated as "the charter of the city of Collinsville, Oklahoma," which charter was duly approved by the Governor of this state on January 19, 1914, and said city was operating under said freeholders' charter, by the provisions of which power is conferred upon it to levy and collect such general and special assessments and license and occupation taxes as may be necessary for the general operative expenses of the city and for the purpose of accumulations to the sinking and interest funds required by law; and it is further provided that said city shall have the power and is authorized annually to levy and collect taxes for general revenue purposes not to exceed 8 mills on the dollar on the assessed value of all real, mixed, and personal property in the city, not exempt from taxation by the Constitution and laws of the state. Power is conferred upon the board of commissioners to provide by ordinance for the prompt collection of taxes assessed, levied, and imposed under said charter provisions, and full power and authority is conferred upon them to sell or cause to be sold all kinds of property, real and personal, and they are also authorized to make such rules and regulations and ordain and pass all ordinances deemed necessary to the levying, laying, imposing, assessing, and collecting of any taxes provided for in said charter.

On behalf of the defendants it is contended that by the adoption of this charter under the provisions of section 3a, art. 18, Williams' Const., full power and authority is conferred upon the city, through its board of commissioners, to levy and collect all taxes for municipal purposes independent of the general revenue laws of the state, while plaintiff contends that the matter of taxation and revenue is one of general public concern, which the Legislature may lawfully regulate, even though the taxes involved be for purely municipal purposes. In support of this view, plaintiffs call our attention to various provisions of the Constitution regulating taxation, and particularly to article 10 of section 14, which provides:

> "Taxes shall be levied and collected by general laws, and for public purposes only. * * *"

In Kansas City v. Johnson, 78 Mo. 661, it was held that section 3, art. 10, of the Constitution of Missouri, which declared that all taxes should be levied by general laws, was intended to restrict the powers of the Legislature in passing laws for the levy of taxes to the passage of general laws, as distinguished from local or special laws, and that said provisions did not repeal the provisions of the charter of Kansas City authorizing said city to levy taxes. The clear import of this holding is that provisions of a charter, adopted in conformity with the laws of that state conferring upon charter cities the power to levy taxes for municipal purposes, supersede the general laws of that state regulating the levy and collection of such taxes. This court has heretofore approved the rule adopted in Missouri with reference to the effect of charters framed and adopted by cities of that state, where the provisions of such charters conflict with the general laws relating to municipal matters, and has applied the same rule in the construction of charters adopted by cities of this state under the authority conferred in section 3a of article 18. Lackey v. State, 29 Okl. 255, 116 Pac. 913; State v. Linn, 153 Pac. 826. Following the rule announced in Kansas City v. Johnson, supra, we hold that article 10, § 14, Williams' Const., was intended as a limitation upon the power of the Legislature in passing laws for the levy of taxes to the passage of general laws, as distinguished from local and special acts, and that said section does not prohibit cities from adopting a charter containing provisions authorizing the levy and collection of taxes by such cities for purposes that are merely municipal.

Plaintiff sets out in great detail the general revenue laws regulating the levy and collection of taxes by the state and its various municipal subdivisions, and calls our attention to the language in sections 7378 and 7384, Rev. Laws 1910, making said laws applicable to cities, whether having a charter form of government or not, and insists that it was within the power of and was the intention of the Legislature to require all taxes for municipal purposes to be levied and collected in accordance with said general provisions, and that the charter provisions of the defendant city regulating the levy and collection of taxes therein, being in conflict with said general statutes, must give way. Section 539, Rev. Laws 1910, provides:

> "When a charter for any city of this state shall have been framed, adopted and approved according to the provisions of this article, and any provisions of such charter shall be in conflict with any law or laws relating to cities in force at the time of the adoption and approval of such charter, the provisions of such charter shall prevail and be in full force, notwithstanding such conflict, and shall operate as a repeal or suspension of such state law or laws to the extent of such conflict; and such state law or laws shall not thereafter be operative in so far as they are in conflict with such charter. Provided, that such charter shall be consistent with and subject to the provisions of the Constitution, and not in conflict with the provisions of the Constitution, and laws relating to the exercise of the initiative and referendum, and other general laws of the state not relative to cities of the first class."

The effect of a provision in a charter, which has been duly framed, adopted, and approved by the Governor, where the same is in conflict with the laws of this state, has been considered in a number of cases, and the uniform holding has been that such charter provisions become the organic law of the municipality, and supersede the laws of the state in conflict therewith, in so far as such general laws attempt to regulate merely municipal matters. Owen v. Tulsa, 27 Okl. 264, 111 Pac. 320; Lackey v. State, supra; Mitchell v. Carter, 31 Okl. 592, 122 Pac. 691; Okl. Ry. Co. v. Powell, 33 Okl. 737, 127 Pac. 1080; In re Simmons, 4 Okl. Cr. 662, 112 Pac. 951; State v. Linn, supra. In Lackey v. State, the effect of section 3a, art. 18, of the Constitution, and section 539, Rev. Laws 1910, were considered in connection with the provisions of a charter adopted by Oklahoma City regulating the election of municipal officers, and in the opinion it was said:

> "By this section the people of the state, in the exercise of their sovereign power and by means of their organic law, have delegated to the inhabitants of cities having a population of more than 2,000 the power, to be exercised by such inhabitants at their option, to frame a charter for their own local government, which is to become the organic law of such government, and to supersede the laws of the state in conflict therewith, in so far only as they attempt to regulate merely municipal affairs."

And after calling attention to the fact that similar provisions were found in the Constitutions of several of the states, no two of which appeared to be identical, and noting the conflict in the decisions, construing such provisions, this court approved the construction given by the Supreme Court of Missouri to section 16, art. 9, of the Constitution of that state, authorizing cities of more than 100,000 population to frame a charter for their own government, consistent with and subject to the Constitution, and laws of that state, and, after rejecting the contention that the provisions of such charter must give way, where in conflict with the laws of the state in reference to matters that are purely municipal, the court continued:

> "It is clear that the foregoing statute intends to provide that, wherever a freeholders' charter has been adopted under the provisions of the Constitution, and conflicts with any law of the state relating to municipal matters of cities of the first class, that the provisions of such charter shall prevail. * * *"

The question, then, is whether the provisions of the charter of the defendant city authorizing the levy and collection of taxes would come within the rule stated, and would prevail in case of conflict with the general revenue laws of the state, in so far as they relate to merely municipal matters. Section 20, art. 10, Williams' Ann. Const., is as follows:

> "*Local Taxation to be Levied and Collected by Local Authorities.* The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the própe̍r authorities thereof, respectively, the power to assess and collect such taxes."

This provision was construed in Thurston v. Caldwell, 40 Okl. 206, 137 Pac. 683, where plaintiff sought to enjoin certain taxes imposed or attempted to be imposed upon certain real estate for city, town, school district, and county purposes under the general revenue laws of the state. A portion of the taxes involved were levied for the city of Purcell during a period of time when said city was operating under a charter form of government. The principal contention was that the general revenue laws, being the same as here involved, were unconstitutional in so far as they related to counties, cities, and townships, because they were repugnant to section 20, art. 10, supra. This contention was denied, and it was held that said section did not constitute a limitation upon the power of the Legislature to impose taxes for purposes in which the state has a sovereign interest, although of a municipal character, such as taxation for police protection, for streets, highways, and bridges, for the purpose of establishing and maintaining a public school system, etc., but applied to purely municipal affairs. This decision has been followed, and the rule therein stated, applied, in the following cases: Thurston v. Frank et al., 40 Okl. 463, 139 Pac. 124; Thurston v. Hine, 40 Okl. 465, 139 Pac. 125; St. L. & S. F. R. R. Co. v. Amend, 44 Okl. 602, 145 Pac. 1117; St. L. & S. F. R. R. Co. v. Hawort, 149 Pac. 1086.

The decision in the Thurston Case determined the proposition that the general revenue laws apply and govern in the levy and assessment of taxes of that charter in which the state has a sovereign interest, and by inference at least held that such laws do not apply to taxes which are purely municipal, and because the petition did not specifically show that the taxes sought to be enjoined were imposed for purely municipal purposes, or that plaintiffs had tendered the amount due for such taxes as were legally imposed, it was held the petition did not state a cause of action, and that the demurrer in the trial court should have been sustained, and the judgment enjoining the collection of said taxes was accordingly reversed, and the cause remanded.

If it be held that the general laws apply to all taxes that may be levied and collected in a municipality, whether for purposes in which the state has a sovereign interest or for purely municipal purposes, then section 20, art. 10, would be without meaning or effect, and left without a field for its operation. That the framers of the Constitution in writing said provision, and the people by adopting it, intended that it should be given effect and should have operation in some sphere, cannot be doubted. Other provisions of the Constitution indicate that the people recognized the right of the municipality in matters of purely local or municipal concern to levy taxes, as is shown by section 19, art. 9, which declares that every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body levying a tax, shall specify distinctly the purpose for which said tax is levied, and by section 28, art. 10, requiring such municipality to levy sufficient additional revenue to create a sinking fund to be used for the purposes required by law. Gray's Lim. of Taxing Power and Public Indebtedness, § 677 (a), p. 335.

[3, 4] We think, following the previous holdings of this court in reference to the effect of the charter provisions relating to municipal affairs which conflict with the general laws of the state relating to matters of that character, that the provisions of the charter of the city of Collinsville regulating the method of levying and collecting taxes for purposes which are purely municipal should prevail, and inasmuch as the plaintiff's petition seeks to enjoin the collection of all taxes levied within said city, without pointing out those taxes which are municipal in their character and those which should be levied under the general revenue law, and has failed and refused to tender the amount due for such taxes as were legally imposed, it was error to overrule the demurrer thereto. In all matters pertaining to taxation, a party, who seeks equitable relief against an assessment of which he complains, must himself offer to do equity by offering to pay the amount of taxes which the facts show would be properly chargeable against him under a proper assessment. Thurston v. Caldwell.

The judgment of the court below is therefore reversed, and the cause remanded.

HARRIS et al. v. GRAY et al. (No. 7549.)

(Supreme Court of Oklahoma. May 22, 1917.)

(Syllabus by the Court.)

1. ANIMALS ⚿97—TRESPASS BY CATTLE—LIABILITY.

Where one without authority turns his cattle into the field of another, and said cattle trespass thereon and damage the property, a judgment exonerating the owner of said cattle from liability is contrary to the law and the evidence, and cannot be sustained.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 338–343.]

2. ANIMALS 🔑100(8) — TRESPASS — NOMINAL DAMAGES.

In such a case nominal damages, if no more, may be recovered.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 361, 384, 413.]

3. ANIMALS 🔑100(4)—TRESPASS—PUNITIVE DAMAGES—DEFENSES.

The good faith of the party who permitted his cattle to trespass upon the land of another may be shown in order to relieve him from punitive damages, and to this end he may show that he relied upon a contract with a third party as to his right to turn his cattle into said premises, provided he acted upon the belief that said third party had the right to make said contract.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 358–360, 383, 412.]

4. ANIMALS 🔑100(8) — TRESPASS — MEASURE OF DAMAGES—REALTY.

The measure of damages for injury to real estate is correctly defined in Enid v. Wiley, 14 Okl. 318, 78 Pac. 96.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 361, 384, 413.]

Commissioners' Opinion, Division No. 3. Error from County Court, Jefferson County; Ben F. Saye, Judge.

Suit by W. R. Harris, Sr., and another against John Gray and others. Judgment for defendants, and plaintiffs bring error. Reversed, and cause remanded.

D. F. Spradling, of Ringling, and Jay G. Clift, of Sapulpa, for plaintiffs in error. Bridges & Vertrees, of Waurika, for defendants in error.

HOOKER, C. The facts here show that the real estate in question was owned in the early part of 1913 by one Howard, who on the 20th day of February, 1913, leased the same to the defendant in error Gibson under a written lease of that date by the terms of which the said Gibson agreed not to pasture any cattle on said premises except his own work horses and milk cows, and then not until crops were all gathered, nor should he transfer the contract or sublet the premises without the written consent of the said Howard or his legal representative. After the execution of this lease Howard sold the property to the defendants in error Hammon and one Dulaney, subject to the Gibson lease, and about the 1st of October Hammon and Dulaney sold the same to the plaintiffs in error, subject to the Gibson lease. After the plaintiffs in error purchased the property, by consent of Gibson they went upon the property for the purpose of building some houses in which to live, and it is a disputed question here as to the character of possession they were permitted to have over said property until the 1st of January, 1914. Anyway, they improved the property and moved some kaffir corn hay and other property upon the premises preparatory to occupying the same and cultivating the property for the 1914 crop.

About December 1, 1913, Hammon and Carter, who were more or less engaged in the cattle business, through Carter leased this property from Gibson for pasture until January 1, 1914, for which Gibson received $20. It is claimed by plaintiffs in error that the cattle of Hammon and Carter destroyed certain feed of the value of $35, tramping the ground so that they could not cultivate it properly in the year 1914, thereby damaging them, for which this suit is instituted, together with punitive damages. It is claimed by the defendants in error that other cattle were permitted upon this land, and that the plaintiffs in error had no right to the possession thereof until January 1, 1914, inasmuch as the same was under the control of Gibson under his lease until that time.

[1-3] It is a disputed question here whether the plaintiffs in error were entitled to the possession of this property until January 1, 1914; for, while it is admitted that Gibson did give his consent for them to go upon the property and perform certain work, yet he denies that he gave them the exclusive possession thereof, while they contend he did. Be that as it may, they were the owners of the real estate, and if any damage was caused thereto by the cattle of the defendants in error in December, 1913, they would be entitled to recover therefor. Under the lease held by Gibson upon this property, he could not give to Hammon and Carter, or any one else, the right to pasture this property, for his lease expressly denies him that privilege. It must therefore follow that the defendants in error acquired no right to turn their cattle into this property, and the permission granted them by Gibson did not confer upon them the authority nor the right so to do. They therefore were trespassers when they did so. However, it would be competent for defendants in error to show they leased from Gibson, as a circumstance bearing upon the recovery of punitive damages against them. Conceding that the plaintiffs in error had no right to store the provender upon this property or to occupy the same until the 1st of January, 1914, it did not give to Gibson the right to sublet the property, nor to Hammon and Carter the right to turn their cattle into said property, and while it might give to Gibson the right, if they occupied the same without his permission, to recover for the rental value thereof, it did not deprive them of the right to have their property protected against trespass or injury from the cattle of others.

It is an admitted fact that over 100 head of cattle belonging to Hammon and Carter were turned onto this property, and the only positive evidence as to the destruction of the provender establishes that the cattle of the defendant in error destroyed the same, and it must be conceded that these cattle did tramp the ground, and, inasmuch as they were there without any authority, and without permission of the owner of the property, it follows that the judgment in this case is not supported by the law or the evidence. Under any state of this case plaintiffs in error are entitled to nominal damages.

[4] As to the question of damages to the real estate, the authorities are not by any means harmonious as to what is the proper measure of damages, but, whatever the rule may be in other states, the question has been settled here by our court in the case of Enid v. Wiley, 14 Okl. 318, 78 Pac. 96, and the rule announced there seems to be supported by the greater weight of authority and to be reasonable, just, and equitable. And, under the authority of the case above cited, we must hold that the measure of damages to the real estate here, if any, is the cost of restoring the land to its former condition with compensation for the loss of the use of the land or its impaired use, provided these two are less than the diminution in value of the land; for, if the cost of repairing or restoring the land to its former condition, plus the loss of the usable value, is greater than the diminution in the market value of the land, then the diminution in the market value of the land must be the true measure of damages in this case.

Under our statute, amply supported by authorities of this state, punitive damages may be recovered for the breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed. This, however, is a question of fact to be submitted to the jury under proper instruction of the court.

For the reason indicated, the judgment of the lower court is reversed, and this cause remanded.

PER CURIAM. Adopted in whole.

KELLY v. ROETZEL. (No. 5394.)

(Supreme Court of Oklahoma. May 8, 1917. Rehearing Denied June 6, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR 🔑185(3)—REVIEW—QUALIFICATION OF SPECIAL JUDGE.
Where an action is tried before a special judge selected by agreement of the parties in accordance with the statute and no question is raised in the trial court as to his power or authority to hear and determine the case or as to the regularity of his selection, such question cannot be urged for the first time in the Supreme Court on appeal.

2. LIBEL AND SLANDER 🔑33—SPECIAL DAMAGES—ALLEGATION.
Where in an action for libel the article published is libelous per se, it is not necessary for plaintiff to allege or prove special damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 112, 277.]

3. LIBEL AND SLANDER 🔑19—CONSTRUCTION OF ALLEGED LIBEL.
In construing an article claimed to be libelous, it is the duty of the court to construe the words used in their most natural and obvious sense, and give them that meaning which would most naturally be ascribed thereto by those to whom the article was addressed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99.]

4. LIBEL AND SLANDER 🔑123(2)—LANGUAGE LIBELOUS PER SE—INSTRUCTION.
Where the language used is obviously libelous per se, it is the duty of the court to so instruct the jury as a matter of law.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 357.]

5. LIBEL AND SLANDER 🔑121(1)—VERDICT—STATUTE.
Section 4961, Rev. Laws 1910, declaring that when verdict is for plaintiff the verdict shall in no case be less than $100, authorizes a minimum verdict in plaintiff's favor in each suit or action, and not for each act or instance of libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 353.]

6. CONSTITUTIONAL LAW 🔑46(1)—CONSTITUTIONALITY OF STATUTE—DETERMINATION.
The Supreme Court will not pass upon the constitutionality of an act of the Legislature until there is presented a proper case in which it is made to appear that the person complaining has, by reason thereof, been or is about to be deprived of some right or privilege to which he was lawfully entitled, or who is about to be subjected to some of its burdens and penalties.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 43.]

Error from District Court, Blaine County; John F. Curran, Special Judge.

Action by Joseph P. Roetzel against W. R. Kelly. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

Ed Baker, R. C. Brown, and Seymour Foose, all of Watonga, for plaintiff in error. A. L. Emery, of Watonga, and Burwell, Crockett & Johnson, of Oklahoma City, for defendant in error.

HARDY, J. This was an action for damages brought by Joseph P. Roetzel, who will be referred to as plaintiff, against W. R. Kelly, who will be referred to as defendant. Verdict was for plaintiff, and defendant appeals.

[1] Defendant filed application for disqualification of the presiding judge of the district court of Blaine county on the alleged ground of prejudice in favor of plaintiff. This application was denied, whereupon the court announced that he would retire from the bench if counsel could agree on another judge to try the case. By agreement of counsel for both parties, John F. Curran, of Enid, was selected as special judge, before whom the trial proceeded, and defendant withdrew his application for a change of judge. No objection was made before or at the trial to the authority of the special judge to try the case, and the question is presented for the first time in briefs of counsel.

It is contended that, inasmuch as the regular judge was not disqualified or in any way shown to be incompetent to preside during the trial, there was no authority of law for the parties to agree upon a special judge to sit in the trial of the case, and it is further claimed that the parties were coerced into agreeing upon the special judge selected. As to the latter question, it is sufficient to say that defendant had the right to reserve an exception to the ruling denying his application for a change of judge, but did not see fit to do this. Upon the court indicating a willingness to retire from the bench in the event counsel could agree upon a special judge, defendant entered into such an agreement, and withdrew his application and tried the case before the special judge without objection. In Bradley et al. v. Chestnutt-Gibbon Gro. Co., 35 Okl. 165, 128 Pac. 498, it was held:

> "Where an action is tried in the trial court before a judge pro tem., elected by the members of the bar under the provisions of the statute for the election of judges pro tem., and no question is there raised as to the power or authority of such judge pro tem., to hear and determine the case, or as to the regularity of his election, and all the parties proceed to trial without objection or exception thereto, the regularity of his election and his authority to hear and determine the case cannot be questioned for the first time in this court on appeal."

It is a general rule that objections to the authority of a special or substitute judge may be waived by the act or omission of a party, and ordinarily such objections are waived when they are not promptly made. The objection should be made at or before the trial, and cannot be made for the first time upon appeal; and, if not made in the trial court, are deemed to have been waived. 23 Cyc. 616; 15 R. C. L. 516, § 6; Tillman v. State, 58 Fla. 113, 50 South. 675, 138 Am. St. Rep. 100, 19 Ann. Cas. 91; Higby v. Ayres, 14 Kan. 331; Mo. Pac. Ry. Co. v. Preston, 63 Kan. 819, 66 Pac. 1050; 11 Enc. Pl. & Pr. 793. Many decisions are cited in support of the text in 23 Cyc. 616, and an extensive note is found appended to the case of Tillman v. State, 19 Ann. Cas. 91, from which it is clearly made to appear that the great weight of authority is in favor of the rule above stated. Higby v. Ayres, 14 Kan. 331, is directly in point. In that case it was said:

> "This case was tried before a judge pro tem. But whether such judge was duly elected and qualified does not appear. It does appear, however, that all the parties consented to try the case before him. It also appears that there were 'no statutory provisions disqualifying the regular judge from presiding at the trial.' From this we suppose that the regular judge was not sick, absent, interested, related to either of the parties, or otherwise disqualified from hearing and determining the case. But suppose the regular judge was present, and competent to hear and determine the case, still he did not do it, but allowed a judge pro tem. to do so. The district court was in session. No question is raised as to the jurisdiction of the court over the subject-matter of the action and the parties to the suit. The case came regularly on for trial; a judge pro tem. tried it; the Constitution and laws recognize such an officer; and whether this judge pro tem. was regularly and legally filling the office or not, still he did fill the office and was therefore an officer de facto; and his acts were therefore not void, but, like the acts and proceedings of all other officers de facto, are valid and binding. * * * But attempt is now made to attack them directly by petition in error. This may be done where the question was raised in the court below and proper exceptions taken. But unfortunately for the plaintiffs in error, the question was not raised in the court below. Neither party objected to trying this case before said pro tem. judge, but all the parties consented thereto. The question of whether said pro tem. judge could legally try this case is now raised for the first time in this court, and we think the question is raised too late. See Hunter's Adm'r v. Ferguson's Adm'r, 13 Kan. 462, 473, and cases there cited."

Section 9, art. 7, of the Constitution authorizes the parties to a suit in the event any judge is disqualified for any reason from trying the same, to agree upon a judge pro tempore, and section 5813, Rev. Laws 1910, contains a similar provision. The office of judge pro tempore is thus recognized both by the Constitution and the statutes of this state, and when the parties below consented that the Hon. John F. Curran should sit as special judge upon the trial of this cause, and he did in fact preside during the trial thereof, he became a de facto judge, and, no objection having been made thereto at or during the trial, his authority cannot be questioned for the first time in this court. The case of Apple et al. v. Ellis, 150 Pac. 1057, is in conflict with the views here expressed. That case overlooks the opinion in Bradley v. Chestnutt Gibbon Gro. Co., supra, and in so far as it and later decisions following it are in conflict with the views herein expressed, they are overruled. Litigants should not be permitted to try a case without objection before a special judge, taking chances upon the outcome of the trial, with the intention of availing themselves of the benefits incident to a favorable result, and at the same time be accorded the right to question the validity of such proceedings should an adverse verdict be rendered.

The alleged libel is based upon the publication of five certain articles in the Watonga Herald, a weekly newspaper published in the town of Watonga, Blaine county, of which the defendant was editor, which the plaintiff alleges were false, scandalous, defamatory, and libelous, and were maliciously published of and concerning plaintiff. The article upon which the first count was based was as follows:

> "To Joe and Tom: Moral—Time wasted in making nigger evidence is worse than fixing a grand jury or making affidavits. That the grand jury system is a farce and at times can be used by unscrupulous men and crooked politicians to get even with a supposed enemy, was clearly demonstrated during last week's court. Upon investigating the minutes it was discovered that two politicians had given crooked evidence before the grand jury, that they could not substantiate in court. Their names appeared on no indictment and they denied having testi-

> fied until confronted with the evidence. These crooked politicians had to come out and admit their guilt—that they were responsible for causing the cost to this county of $5,000 or $6,000 in order to try to get even with someone through the medium of the grand jury."

That set out in the second count was as follows:

> "Nutty Tom is afraid that Black Pete has something to tell on someone, like he told about his purchase of nigger votes. He might tell Tom whether you and Joe gave the nigger witnesses anything to appear with yourselves before the grand jury to commit perjury. Or perhaps he might let the niggers divulge that themselves. Or he might tell about the letter written to Guthrie to send a judge over here to stick people regardless of guilt or innocence."

That set out in the third count is as follows:

> "Lost,—One idiotic featured, broken down, would be politician—commonly known as Grand Jury Joe. Found—Sneaking around the basement of the court house looking for grand jury to lie to—the above described monstrosity."

That set out in the fourth count is as follows:

> "A Fit Subject. Affidavit Tom, last issue, clearly indicates that he should be sent to the bug house, the crazy house, the foolish house, the bat house, the looney house, the mad house, the nutty house. If he is not a fit subject for it he would not be accusing his associates before the grand jury, W. B. Piper, of procuring a deed from Estella Tyler. Piper, the man who approached white men and niggers to procure them to lie, should be supported by his chum, Nutty Tom, instead of going back on him. The next thing in order for Nutty to do will be to relate how his companion in arms, Grand Jury Joe, according to the county treasurer's books, kept about a thousand dollars of the county's money for the past five years. 'When rogues fall out, honest men get their dues.'"

That set out in the fifth count is as follows:

> "Because Grand Jury Joe and Nutty Tom could not elect city officials to suit them and stand their crooked work, the former requested the Governor to have the State Examiner and Inspector make an investigation. Haskell tells him that there is no law for such investigation and tells him that if he knows of anything wrong, he can file information against the offenders with the county attorney. But he says: 'No, I want a place where I can lie a little and try to get even with someone. I want to go before a grand jury picked out by myself where Nutty Tom and I can lie as much as we please.' Such a pair as Nutty Tom and Grand Jury Joe are worse than any pair of black hand assassins Italy every furnished. They would stab a man in the back at the first opportunity, if they knew they would not be apprehended; a pair of cowardly curs who will not come out in the open and fight like men, but always want to try and trump up something to jab someone through the courts. People of this class are a detriment to any town or community, and everyone who has any regard for manhood, looks upon them as the worst kind of nuisances. Watonga had an investigation of her books of the council last spring by five of the leading business men of the town, who found everything in good shape and made a thorough report."

[2] After declaring on each of the articles as above set out, plaintiff, by way of innuendo, ascribed thereto the meaning thereof as charged by him, and prayed damages. After demurrer to the petition and to each count thereof, defendant answered by way of general denial, and alleged the truth of the matters contained in the articles complained of. Objection was made to the introduction of any evidence under the petition, and at the close of plaintiff's case, demurrer was interposed to the testimony, which was overruled. Defendant urges that the petition did not state a cause of action because the matters alleged are not libelous per se, and because plaintiff did not allege or prove any special damages. Where the article published is not libelous per se, the plaintiff must allege in his petition facts showing wherein he has sustained special damages. McKenney v. Carpenter et al., 42 Okl. 410, 141 Pac. 779; N. S. Sherman Machinery Co. v. Dun, 28 Okl. 447, 114 Pac. 617. On the contrary, where the words used in the publication are libelous per se, it is not necessary to make such allegations, but plaintiff may allege general damages only. 25 Cyc. 453.

[3] To determine whether the language used in the articles was libelous per se, it was the duty of the court to construe the words used, in their most natural and obvious sense, and give them that meaning which would be ascribed thereto by those to whom they were addressed and which would be understood by them. Bodine v. Times Journal Pub. Co., 26 Okl. 135, 110 Pac. 1096, 31 L. R. A. (N. S.) 147; Hubbard v. Cowling, 36 Okl. 603, 129 Pac. 714; Spencer v. Minnick, 41 Okl. 613, 139 Pac. 130.

It is urged that because plaintiff used innuendo to ascribe a meaning to the articles published, he is estopped to claim that said articles were libelous per se. In 25 Cyc. 452, it is stated:

> "The innuendo may be treated as surplusage when it is used in connection with words which are unequivocal and actionable per se; and it is held that where plaintiff, in an action bad by innuendo, put a meaning upon the alleged defamatory publication which is not supported by its language or by proof, the court may nevertheless submit the case to the jury if the publication is defamatory per se."

[4] Adopting defendant's theory that the publication pleaded must be judged as to whether it is libelous per se, without the aid of the innuendo, or extrinsic and explanatory circumstances, but by reference to the language of the publications alone, each and all of the articles were libelous per se, and the court did not err in so declaring. Spencer v. Minnick; Bodine v. Times Journal Co.; McKenney v. Carpenter. Section 4956, Rev. Laws 1910, defines libel as follows:

> "Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation. * * *"

The jury found that each of these articles were published of and concerning plaintiff, and that they were understood by persons who read the same as referring to plaintiff;

and, construing the language used in its most natural and obvious sense and giving it that meaning which would most naturally be ascribed thereto by those to whom it was addressed, it seems clear that the statements used in each and all of them, if believed, would undoubtedly tend to deprive plaintiff of public confidence and esteem and expose him to public hatred, contempt, ridicule, or obloquy. This being true, it was libelous under the statute and was actionable, and it was not necessary for plaintiff to allege or prove special damages.

[5] The court instructed the jury that in the event they should find in favor of the plaintiff upon any count set forth in the petition, the verdict thereon should not be less than $100. This instruction was based upon section 4961, Rev. Laws 1910, which is as follows:

> "If there be a verdict by a jury or finding by the court in favor of the plaintiff, the verdict and judgment shall in no case be less than $100 and costs, and may be for a greater sum if the proof justifies the same. And if there be a verdict in favor of the defendant, and the jury shall find that the action was malicious or without reasonable provocation, judgment shall be rendered against the plaintiff and in favor of the defendant for his costs, including an attorney's fee of $100."

It is the contention of defendant that the instruction given was erroneous, and that the statute should be construed as authorizing a minimum verdict in each case or action and not for each instance or act of libel proven. We are unable to find any cases construing a libel statute containing the provision set out, but think the following cases analogous upon principle: In Place v. Norwich & N. Y. Transportation Co., 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134, the Supreme Court construed the words "in no case," found in section 4283 of the United States Statutes, which declared that the liability of the owner of any vessel (for various acts and things mentioned) should "in no case" exceed the value of his interest in the vessel and her freight then pending. It was held that the "case" in which the principle of limited liability was to be applied meant every voyage, and that the fair inference to be drawn from the section was that the voyage defined the limit and boundaries of the cases to which the law was to be applied, and not each particular act. In Theisen v. Johns, 72 Mich. 285, 40 N. W. 727, the Supreme Court of Michigan had under consideration, section 2268, How. St., which provided that any person selling liquor to a minor under the age of 18 years should be liable for actual and exemplary damages to the parent "in such sum, not less than $50 in each case as the court or jury shall determine." It was held that the intention of the statute was to award a recovery in each action or suit, and not for each sale. In the opinion it was said:

> "The only remaining question which we need to discuss arises upon the charge of the court. It is claimed by plaintiff's counsel that the statute is to be construed as fixing the amount of recovery at $50 for each sale. The court construed it as meaning for each trial. It is evident that 'in each case' means in each particular instance or cause. * * * It cannot be said that the Legislature, in fixing the minimum of recovery to be had for the violation of this statute, intended to make the penalty for each sale the sum of $50"

—and attention was called to the fact that in another section of the statute provision was made for the recovery of damages in all cases provided for, together with costs of the suit in an action of trespass on the case before any court of competent jurisdiction. By statute, we are required to give words used in any statute their ordinary interpretation, unless defined by statute. Rev. Laws 1910, § 2194. "Case" is defined in Black's Law Dictionary as:

> "A general term for an action, cause, suit or controversy at law or in equity; a question contested before a court or justice; an aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice." Anderson Dict. of Law; 6 Cyc. 679.

Giving the word "case" the meaning ascribed thereto in the authorities cited, the statute should be construed to mean that a minimum recovery of $100 may be had in each action or suit. This does not prevent a plaintiff from recovering any actual damages that may be proven and such exemplary damages as may be awarded by the jury for each act of libel, and is merely a recognition of the fact by law that in cases where the libel has been proven some damage has been suffered, and fixing the minimum amount of a plaintiff's recovery in an action brought to recover such damages. It was error to give the instruction complained of. That such a statute is constitutional was determined by the Supreme Court of Michigan in Cramer v. Danielson, 99 Mich. 531, 58 N. W. 476, where it was held that the act which authorized a minimum recovery in each case for an unlawful sale of intoxicating liquors to minors in that state was valid.

[6] The defendant attacks the statute as being unconstitutional and void and in violation of various provisions of the state and federal Constitution, because provision is made in the latter part of said section for the recovery of an attorney's fee by defendant in certain prescribed instances. The trial resulted in a verdict in favor of plaintiff, and defendant is not in a position to raise this question. The Supreme Court will not pass upon the constitutionality of an act of the Legislature until there is presented a proper case in which it is made to appear that the person complaining has, by reason thereof, been, or is about to be, deprived of some right or privilege to which he was lawfully entitled, or who is about to be subjected to some of its burdens and penalties. Ins. Co. of North America v. Welch, 154 Pac. 48; Black v. Geissler, 159 Pac. 1124.

In their verdict the jury assessed the damages separately upon each cause of action fixing the amount thereof upon the first and second counts at $100 each and upon the third at $150; upon the fourth at $250, and upon the fifth at $400. From this it appears that the recovery upon the first and second counts was arbitrarily fixed at $100 each in compliance with the instructions of the court, which directed the jury to award the plaintiff, in case they found the publication was made by defendant concerning the plaintiff, a minimum recovery upon each count of $100, irrespective of what the actual damages shown by the evidence might be. They were not permitted to award exemplary damages, and we must presume that the amount allowed upon the first and second counts was because of the instructions of the court, and therefore prejudice has resulted to the defendant by reason of the giving of said instruction. However, we will not reverse the case, if plaintiff will, within ——— days remit the sum of $200, in which event the judgment will be affirmed; otherwise the cause will be reversed and remanded for a new trial. All the Justices concur.

ABRAHAM et al. v. HARRY. (No. 7224.)

(Supreme Court of Oklahoma. May 8, 1917. Rehearing Denied June 12, 1917.)

(Syllabus by the Court.)

1. Guardian and Ward ⟹182(4)—Action on Bond—Joinder of Sureties.

Where a guardian, in addition to the bond given when he was appointed, gave two other bonds, as additional security for the performance of his duties as guardian, all of the sureties on the several bonds could be joined in one suit to recover the amount due from the guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 640–643.]

2. Interest ⟹22(7)—Judgment—Accounting by Guardian.

When a guardian on final account is found liable to his ward, the amount of interest for which he is liable is 6 per cent. per annum, and a judgment fixing the amount of such interest at 10 per cent. per annum is without authority of law.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 50.]

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by Frazier Harry, a minor, suing by his guardian, H. M. Ausmus, against Joe Abraham and others. Judgment for plaintiff, and defendants bring error. Modified and affirmed.

Wm. L. Cheatham, of Bristow, for plaintiffs in error. Burke & Harrison, of Sapulpa, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error against the plaintiffs in error to recover for the breach of two bonds given by a guardian. Hereinafter the parties will be designated as they were in the trial court.

The material allegations of the petition are that Wheaton Harry was duly appointed guardian of the plaintiff in the county court of Creek county, Okl., and soon thereafter qualified, and entered upon the discharge of his duties, and that he executed a bond, conditioned as required by law, with the defendants Henry Lowrance and Wash Sanders as his sureties; that thereafter, in pursuance of an order of the county court, the said Wheaton Harry, as guardian, executed an additional bond for the sale of real estate, in the penal sum of $500, with Joe Abraham and J. W. Gaywood as his sureties; thereafter the said Wheaton Harry tendered his resignation as guardian of said plaintiff, which was accepted, and made his final report, which said final report was approved, finding said guardian due plaintiff the amount shown due by his final report, $368.28, "with interest at the rate of 10 per cent. per annum from the 10th day of July, 1913"; that demand had been made on said Wheaton Harry to pay said sum with interest, and that he failed to pay said sum; that like demand had been made on the bondsmen, and they had failed to pay said sum.

To the petition the defendants interposed a demurrer upon the following grounds:

> "First. Plaintiff had no legal capacity to sue these defendants.
>
> "Second. That there is a defect of parties plaintiff.
>
> "Third. That there are several causes of action improperly joined.
>
> "Fourth. That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant."

The court overruled the demurrer, and the defendants refusing to plead further, and electing to stand upon their demurrer, judgment was rendered for the plaintiff in said sum of $368.28, with interest from the 10th day of July, 1913, at the rate of 10 per cent. per annum, to which action of the court the defendants duly excepted, and prosecute this appeal upon transcript.

[1] The material errors argued in the brief of the defendants are that several causes of action are improperly joined, and that the charge of interest at the rate of 10 per cent. per annum from date of judgment is unlawful.

We think there is no merit in the first, second, and fourth grounds of the demurrer.

The material question involved in this appeal is not an open one in this jurisdiction, it having been held in People's Bank & Trust Co. v. Nelson, 37 Okl. 500, 132 Pac. 493, upon a state of facts parallel to those in the instant case, that all of the sureties upon the several bonds executed by a guardian can be joined in one suit to recover the amount due from the guardian to the ward. In the body of the opinion it is said:

"Plaintiff in error contends that the actions upon the several bonds could not be joined. The various bonds were [for] the same duty. The sureties were cosureties. The action was a single cause of action to recover the amount for which the guardian was in default, and all who had guaranteed the performance of 'the same duty,' whether by the same or separate instruments, were proper parties defendant. The same cause of action affected all of the parties to the action. Dugger v. Wright, 51 Ark. 232 [11 S. W. 213] 14 Am. St. Rep. 48; Matthews v. Maudlin, 142 Ala. 434, 38 South. 849, 4 Ann. Cas. 344; Powell v. Powell, 48 Cal. 234; State v. Parker, 8 Baxt. [Tenn.] 495; Sievers v. Havens, 5 Ky. Law Rep. 857. The same rule was announced in the case of Singer Mfg. Co. v. Ponder, 82 Tex. 653 [18 S. W. 152]. In that case an agent for the Singer Manufacturing Company gave two bonds. The first bond was for the performance of his duties as such agent, and the second was given as additional security for the same thing. It was held that both sets of sureties could be joined in one action."

It is true that the authorities are not entirely harmonious upon the question involved, but we think that the weight of authority and best-considered opinions are in strict accord with the holding of the People's Bank & Trust Co. v. Nelson, supra.

We are of the opinion, and so hold, that the court did not err in overruling the demurrer to the petition.

[2] We have not been cited to nor are we advised under what authority the court rendered judgment for 10 per cent. interest from the time of the approval of the guardian's account, showing the indebtedness to the ward, and we are of the opinion, and so hold, that the charge of 10 per cent. per annum interest is without authority of law, and it is hereby ordered that said judgment rendered by the trial court be so modified as to read: That the plaintiff have and recover of said defendants Wheaton Harry, Henry Lowrance, Wash Sanders, Joe Abraham, and J. W. Gaywood the sum of $432.79, with interest thereon at the rate of 6 per cent. per annum from the 14th day of September, 1914, and the cost of this action—and that the judgment so modified be affirmed.

PER CURIAM. Adopted in whole.

ABRAHAM et al. v. HARRY. (No. 7223.)

(Supreme Court of Oklahoma. May 8, 1917. Rehearing Denied June 12, 1917.)

(Syllabus by the Court.)

BREACH OF GUARDIAN'S BOND.

The syllabus in this case is the same as in the case of Joe Abraham et al. v. Frazier Harry et al. (No. 7224) 165 Pac. 1154, not yet officially reported.

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by William Harry, a minor, suing by his guardian, H. M. Ausmus, against Joe Abraham and others. Judgment for plaintiff, and defendants bring error. Modified and affirmed.

Wm. L. Cheatham, of Bristow, for plaintiffs in error. Burke & Harrison, of Sapulpa, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error against the plaintiffs in error to recover for the breach of two bonds given by a guardian. Hereinafter the parties will be designated as they were in the trial court.

The questions involved in this case are identical with those involved in the case of Joe Abraham et al. v. Frazier Harry et al. (No. 7224) 165 Pac. 1154, this day decided by this court, but not yet officially reported, both of said cases being submitted upon the same briefs.

Judgment was rendered in favor of the plaintiff, and against the defendants in the sum of $739.29, which is excessive by reason of the unlawful charge of 10 per cent. interest per annum on $574.75, the amount found by the county court as due by said guardian on the 13th day of October, 1911.

Under the authority of Joe Abraham v. Frazier Harry, supra, the said judgment rendered is modified so as to read: That the plaintiff have and recover of and from said defendants, Wheaton Harry, Henry Lowrance, Wash Sanders, Joe Abraham, and Ed. Abraham, the sum of $574.75, with interest from the 13th day of October, 1911, at 6 per cent. per annum—and as so modified the judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

(13 Okl. Cr. 585)

PADEN v. STATE. (No. A-2521.)*

(Criminal Court of Appeals of Oklahoma. July 7, 1917.)

(Syllabus by the Court.)

1. HOMICIDE 🔑203(1)—DYING DECLARATION—ADMISSIBILITY.

When all the facts and circumstances disclosed by the record establish the fact that a dying declaration was made at a time when deceased realized that death was impending, it is entitled to be admitted in evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 430.]

2. CRIMINAL LAW 🔑1172(1)—APPEAL—REVERSAL—INSTRUCTIONS.

A judgment of conviction will not be reversed by this court on account of inaccuracies in the instructions, when it clearly appears that no harm did or could have resulted to the accused by reason thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154.]

Appeal from District Court, Cherokee County; John H. Pitchford, Judge.

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*Rehearing denied September 25, 1917.

Van Paden was convicted of manslaughter in the first degree, and he appeals. Affirmed.

J. I. Coursey, of Tahlequah, and S. A. Horton, of Oklahoma City, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Van Paden was tried in the district court of Cherokee county in February, 1915, on an information charging him with the murder of W. P. Sword, and convicted of manslaughter in the first degree. His punishment was fixed by the jury at imprisonment in the state penitentiary for a term of 18 years.

The following is a fair résumé of the testimony:

G. W. McGowan, on behalf of the state, says that he is 40 years old, and lives at Park Hill, Cherokee county, Okl., about 300 yards southwest of Johnson's store; that he knew the deceased, W. P. Sword, in his lifetime; that he saw him at Johnson's store on the night of December 22d, and when he got to him he said he was shot; that he assisted in carrying him home; that C. W. Johnson was the only one at the store when he got there; Sword was sitting up on the porch, his feet hanging off; that it was a cold night; that he was about 175 yards away when the shots were fired; that Leslie Peace arrived immediately after he reached the scene.

A. A. Beard testified that he was a practicing physician located at Park Hill, in Cherokee county; that he knew W. P. Sword and was called to attend him at Johnson's store on the night of December 22d; that it was cold and damp at the store, and deceased was carried home before he gave him treatment; that an examination disclosed a gunshot wound in the body and one in the thigh; the bullet which entered the thigh came out, the other one did not; that he probed the wound for an hour or more, but could not locate the bullet; that it had entered the abdominal cavity and was sufficient to and did produce death; that this bullet entered about two inches above the hip bone and about two inches toward the median line on the left side; that he attended the patient again the following morning in company with Dr. Duckworth, and again about 12 o'clock; that he informed the deceased that he did not know how serious his wounds were; that he had not been able to trace the bullet.

J. F. Duckworth testified that he was a practicing physician residing at Tahlequah; that he was called to attend W. P. Sword on the 23d day of December, and described the wounds the same as Dr. Beard; judging from the wounds, the parties changed positions during the time of the shooting; that the wound in the bowels entered the abdominal cavity and was sufficient to produce death.

Claud Sword testified that he was a son of the deceased and lived about 100 yards south of Johnson's store in Park Hill; that he had been hauling wood and got home about 5 o'clock; that he and his father went to the store; that he took some groceries home and went back after others, and was returning the second time with his father when they met Van Paden and Jim and Tom Miller; that his father asked Paden to pay what he owed his boys for cutting wood; that Paden replied that he would pay them when he got damned good and ready and shot his father twice; that he went after Mr. Johnson, who had gone home, and when they returned to the store his father had climbed upon the porch and was sitting down; that he went for a doctor then, and when he got back his father was lying on the porch, and the neighbors carried him home; that he was 16 years old and had never been a witness before; that as he ran for Mr. Johnson he looked back, and his father was standing where he was shot; that Paden and the Millers were met near the house of J. S. Smith; that his father had a gallon of syrup in his right hand when he was shot; that two shots were fired; that his father did nothing to Paden except ask him to pay the debt.

G. W. Johnson, for the state, said: I am a merchant and live at Park Hill, Okl., about 80 yards south of J. S. Smith. I know W. P. Sword and saw him in the store on the night of December 22d. That he left the store about 6:30 and went away with some merchandise. That deceased's boy ran to his house and told him that his father was shot and wanted him to come, and that he went and found him sitting on the porch at his store. That he ran up to him, and said, "What is the matter, Mr. Sword? Are you hurt very bad?" That deceased replied, "Yes, I am killed." He unbuttoned his clothes and laid him down on the porch, and as soon as other neighbors gathered in they carried him home on a cot. Deceased said he asked Van Paden what he was going to do about paying his boys, and Paden said he could not do it right then and shot him. This statement was made a very short time after the shooting. That he did not find out where the wounds entered the body until they reached the home of the deceased. He searched his clothes and found no arms of any kind. That the overcoat worn by the deceased was buttoned up, and his dress coat was also buttoned up.

J. S. Smith testified that he lived at Park Hill, and that he knew G. W. Johnson and lived about 80 feet from him; that he knew W. P. Sword during his lifetime; that about dark on December 22d he heard two shots close together, and at once opened the door, and some persons ran past the house going north; that he did not see, but heard them; the moon was shining some; that in a few minutes Mr. Sword's boy came and told him that his father was shot, and he went down in front of Johnson's store and found the deceased; that he was in a bad condition, and Johnson was holding him up, and his head was hanging limp; that he put his knees against his back and held him up and told Johnson to go and phone the officers, and Mr. McGowan came; that deceased then fainted away, and seemed not to be breathing, and Mr. Peace felt his pulse and thought he was dead; witness also thought he was dead, but after considerable struggling he rallied and was carried home; witness had not at this time heard how the difficulty arose; that early the next morning, before anybody passed, he examined the tracks where the tragedy occurred and found no blood.

Luther Jones, for the state, testified: That he was cashier of the bank at Park Hill; and that he knew the deceased in his lifetime, and saw him on December 22d, and was at his house when he gave the dying statement which was taken in his presence and identified by him. That Mr. Peace wrote it down at his request. That they asked questions, and Peace wrote the answers and then read them. This was about 11 o'clock at night. Some of the older men in the community wanted witness to go down and take this statement, and they asked deceased if he wanted to make a statement, and he said he did, and would give it to them if he could. That he was suffering great pain, and at times said he could not stand it. That Mr. Peace and Mr. Latta were present when the statement was made and signed.

Mrs. Sword testified that she was the wife of deceased and lived at Park Hill on December 22d; that the deceased went to town about 4 o'clock, and got some groceries and did not come back until he was brought back fatally wounded; that he had on an overcoat and a brown suit; that his clothes had been kept by her and were in the same condition at the time she was giving her testimony that they were when deceased was killed; that deceased lived until the next day until 2 or 3 o'clock; that the clothing was examined by a number of neighbors at the time of the homicide; that her husband never carried arms, and was not armed on the night of December 22d when he was shot.

Mrs. Nettie C. Smith, for the state, testified that she lived at Park Hill and knew the deceased during his lifetime; that she went to the window on hearing two shots, looked out, and saw a man running towards Johnson's store; that she then saw two parties running past her window and out of sight; that she saw them coming down first, and then they turned and went back, and she did not see them do anything when they went back, and when they came by they were running towards town; that on going back they just walked, and after they turned they ran; that she got to the window as quick as she could after hearing the shots; that it was only two or three steps.

The dying statement of the deceased was also introduced in evidence, objected to by the defense, and admitted by the court. It is as follows:

"Park Hill, Okl. 12—22—1914.

"The affidavit of W. P. Sword taken at his residence in Park Hill, Okl.

"The affidavit of W. P. Sword, states that he had been up in town and had started home and met Van Paden between J. S. Smith's residence and Johnson's store, and I asked him when he was going to pay my boys for that wood cutting, and he said I will pay it when I get ready, then he stepped back and got his gun and began shooting at me. I did not attempt to hurt him in any way. I had my arms full of groceries. The first shot he hit me I was facing him and when he shot me I wheeled and he shot me in the leg from behind me. He then ran off up the road. I then staggered on down the road to Johnson's store and lay down on the porch, until I was removed home by my neighbors. I had never had any trouble with Paden heretofore. It was so dark I could not see the pistol with which he shot me.

his
"W. P. X Sword.
mark

"Witness to mark: Lester Peace.

"Attest: T. F. Latta, Witness to Attest.

"Subscribed and sworn to before me a notary public, in and for said county of Cherokee and state of Oklahoma, this 22d day of December, 1914.

"[Seal.] L. H. Jones, Notary Public.
"Commission expires Feb. 7, 1917."

On behalf of the defendant, Jim Miller was first called, and testified: That he lived at Park Hill with his grandfather, Jeff Paden, and that Van Paden was his uncle. That he was present at the trouble on December 22d. That he and his brother Tom and his Uncle Van Paden had started to the show. That near Johnson's store they met Sword and passed him about the southeast corner of Mr. Smith's garden; and that Sword called his Uncle Van Paden and asked him when in the hell he was going to pay the kids for cutting wood; and that his Uncle Van said, "I have told them all along I was going to pay them," and then he said when in the hell was that going to be, and his Uncle Van said when he sold his cotton, and then Sword says, "By God, when is that going to be?" And his Uncle Van said, "When I get ready." Then Sword hit him with his fist, knocked him down, and his hat fell off. He fell to his knees, and Sword stepped towards him, and his Uncle Van shot him twice, and he walked off. When Sword struck his Uncle Van, Claud ran off. That his brother and he were standing north of Paden at that time, and after the shooting they did not run, but just walked up the road. He did not see anybody as he passed Mr. Smith's house. That it was a dark, cold night, and no moon. That there was a little snow on the ground. That his uncle was still on his knees when he fired the shot that killed deceased. That he thought deceased struck Paden on the right side of the head. That none of them went back to the place where Sword was after the shooting. That Sword had something in his hand, but he did not know what it was.

Tom Miller says that he is 13 years old, and testified almost verbatim to the facts detailed by Jim Miller.

Van Paden, in his own behalf, testified: That the boys of the deceased came to him and asked to cut wood, and he let them have the job. That, after they had completed the job, he looked it over, and the wood was cut and ricked up in such a manner that he could not use it. That he finally told them he would pay them for it as soon as he could sell some cotton. That he brought in his cotton the day before the killing and had it under the shed that night, but had not sold it. That he was going to town with the Miller boys, and he met the deceased and did not recognize him until after they had passed each other. That, when they got about five steps apart, deceased called to him, and he walked back, and deceased came on meeting him. That he had a bundle of something in his right hand. That he asked him if he did not think it was about time to pay the kids for the wood. That he replied to him that he had told them last night that he was going to pay them as soon as he sold his cotton. That the deceased then asked, "When in the hell are you going to do it?" He said when he sold his cotton, and then deceased said, when in the hell would that be, and he said when he got ready. "Sword then struck me with his left hand on the shoulder, and I fell east." As he was getting up, he saw Sword coming at him again, and he began to shoot. He had his pistol in his overcoat pocket. He shot twice as fast as he could. After it was over, he walked back and got his hat and went away, walking fast up the road. At the time of the shooting, he knew of other trouble and difficulties Sword had had. He had trouble with one man named Whitaker, and with Roland Ross, and with Earnest Ferrell. Had seen Ferrell the next day after the difficulty. His hand was bound up. He said his leg was hurt, and he was limping, and he was in a pretty critical condition; his face was skinned in a very ugly manner, and he had his hand in a sling; and heard Ferrell talk about it the next day. Deceased said that if the Ross boy had not knocked him off he would have killed Ferrell, and he said if ever he got to the Ross boy he would "stomp the liver" out of him. He said he would show these people around here some things. Ferrell was about 21 years old, and the Ross boy was about 18. That he regarded deceased as a turbulent man, and shot him because he knew he was in the habit of knocking people down. That he was a large man, and he knew that he would have had no show in a fight with him, and that his only recourse was foul means. That he shot him because he thought he was coming on him with his feet. That he had a gun belonging to Wat Duncan. That he had borrowed it to serve as a special officer in August. That he had a special deputyship for one day. That Duncan had asked him for the pistol two or three times. That he had heard several people, among them Fulton Goodrich and John Carlisle, say that Sword was a dangerous man. That there was snow on the ground that night. That he was cool and collected in the difficulty and never saw a man that he was afraid of. That he fired with his left hand, and then walked back to get his hat. That when he fired he was about 3 feet from deceased on his hands and knees. That deceased's boy was standing by him when his father struck the blow prior to the shots being fired. That he next saw the boy going around towards Johnson's store. That deceased had had some trouble with John Whitaker over wood the boys had cut for him. That he was not in the least mad when he met Sword. That J. S. Smith's house was about 30 steps from where the shooting occurred. That the deceased was 6 feet tall and weighed 200 pounds, and that he weighed about 135 pounds.

John Collins, for the defense, testified: That he heard deceased talk the day after he had the trouble with Red Ferrell, and that he was also mad at the Ross boy for hitting him with a rock the night before, and said he was going to "stomp the guts" out of these boys, and that he just wanted to "learn the boys in this country something." That he heard the deceased say that the defendant had not paid his children for the wood they had cut for him; that it was about time he was doing it; that he was going to whip the water out of him if he did not do it right away; that he was living on Mr. Paden's place. That their last conversation was in December. That he saw the difficulty between the deceased and the Ferrell boy, and was present when John Whitaker came along. Deceased had a bad reputation as a dangerous man. That he was at Sword's house when his son Claud came in and said they were fighting down there, and "I told Sword to go down there, and I went with him, about 100 yards from his house, and he knocked the Ferrell boy down and stomped him. The Ross boy is the son of Mrs. Ross, who has testified. He made the statement to me that he had heard Bob Looney say that the deceased was a bad man."

Earnest Ferrell said that he saw Van Paden the day after he had the difficulty, but did not show Paden his hand or leg.

Roland Ross said that he saw the difficulty between Sword and Ferrell, and that he knocked Sword off of him.

W. E. Duncan testified that Sword's character was bad as a dangerous man; that he had loaned Paden a pistol to arrest a man as an officer; had asked him for it several different times, and had not got it; that he is a distant relative and friend of Paden's.

Will Ivans, Lester Lissen, and R. W. King testified that Sword was a dangerous man.

Ira Treet, in rebuttal, on behalf of the state testified that he knew deceased; that his character as a law-abiding citizen was good.

Witness G. W. Johnson testified that deceased just slapped the Ferrell boy, and that the boy was out the next day playing baseball; that Whitaker had accused deceased of stealing coal, and he was about to slap Whitaker's jaws; that he never heard of him having any difficulty with anybody else; that Whitaker talked to him about his trouble himself; and that he ran a pool hall.

George Coke, Mark Wain, and J. R. Jones, and T. F. Latta, postmaster, and Price Matthis, merchant, all testified that the deceased's character as a law-abiding citizen was good. There are only two errors of consequence insisted upon.

[1] The first is that the court erred in admitting the dying declaration of the deceased. This contention is based upon the proposition that proof on behalf of the state fails to disclose the fact that the deceased realized that death was impending at the time the statement was made. This question has been decided contrary to the plaintiff in error's contention. In the case of Morris v. State, 6 Okl. Cr. 29, 115 Pac. 1030, we said:

> "It is essential to the admissibility of dying declarations, and is a preliminary fact to be proved by the prosecution, that they were made under a sense of impending death. This may be made to appear from what the injured person said, or where, from the nature and extent of his injuries it is evident that he must have known that he could not survive. It is sufficient if it satisfactorily appears that they were made under the sense of impending death, whether it be directly proven by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical attendants, stated to him, or from other circumstances of the case, such as the length of time elapsing between the making of the declaration and his death, and the fact that the declarant was so weak that he could not sign his name and so affixed his mark, all of which are resorted to, in order to ascertain the state of declarant's mind."

The facts in the case under consideration show clearly that deceased realized that death was near; he so stated when he was first approached and immediately thereafter fainted, revived after a hard struggle, and was carried home. It is clearly apparent that while suffering great pain deceased made the statement from time to time as his condition would permit, until it was concluded. There is no doubt that the dying declaration was made at a time when the deceased realized that death was near, and was entitled to be admitted in evidence. See Addington v. State, 8 Okl. Cr. 712, 130 Pac. 311; Mulkey v. State, 5 Okl. Cr. 78, 113 Pac. 532. In the Mulkey Case the deceased said, "Oh, my God! I am killed." The court held that the dying declaration was properly admitted. See, also, Nelson v. State, 3 Okl. Cr. 473, 106 Pac. 647; Hawkins v. U. S., 3 Okl. Cr. 656, 108 Pac. 561; Blair v. State, 4 Okl. Cr. 365, 111 Pac. 1003; Smith v. State, 5 Okl. Cr. 289, 114 Pac. 350; Offitt v. State, 5 Okl. Cr. 55, 113 Pac. 554.

[2] The next assignment of error is based upon the proposition that the court's instruction on self-defense was erroneous. That instruction is as follows:

> "You are further instructed, as a matter of law, that the bare fear of an assault upon the defendant by the deceased would not justify the defendant in killing the deceased; nor will the mere fear of the defendant that the deceased was about to commit an assault upon him (the defendant) amounting to a felony justify the defendant in killing the deceased unless the defendant, as a reasonable man, believed from all the circumstances as they appeared to him at the time, that he was in imminent danger of an assault being made upon him by the deceased, and from which apprehended assault he had reasonable cause to believe, and he did honestly believe, that he would lose his life thereby or suffer great bodily harm from such apprehended assault, as viewed from the standpoint of the defendant as a reasonable man. If you believe and find from the evidence that the defendant committed the homicide through mere fear of an assault from the deceased, and such fear was not founded upon reasonable apprehension of danger, from all the circumstances in the case, then, and in that event, the plea of self-defense will not avail, and you should find the defendant guilty, under the instructions therein given."

There was no exception saved to this instruction. The principal argument against the same is based upon the proposition that the instruction required the defendant, as a reasonable man, to believe from all the circumstances as they appeared to him, at the time, etc., before he would be entitled to act. The burden of complaint is against requiring the jury to find the defendant, as a reasonable man, to believe, etc. Under the facts and circumstances discussed by the record in this case, there is absolutely no prejudice in this provision in the instruction. The defense was not that of lunacy, intoxication, or incapacity. The plaintiff in error testified that he was cool and collected during the fatal difficulty and never saw a man in his life that he was afraid of. Upon his own statement of the circumstances and of the immediate facts, he is guilty of manslaughter in the first degree and offered no defense whatever to a charge of that character.

Other errors assigned and argued in the brief are based upon theoretical propositions pertaining to the law of murder. The jury convicted of manslaughter in the first degree, and only errors which are calculated to affect the substantial rights of the plaintiff in error in connection with the crime for which he was convicted will be considered. As an abstract proposition, some of the criticisms of the instruction under certain circumstances would be entitled to consideration if the conviction had been for murder instead of manslaughter.

Finding no substantial error in the record, the judgment of the trial court is affirmed.

(13 Okl. Cr. 576)

BALDRIDGE v. STATE. (No. A-2587.)

(Criminal Court of Appeals of Oklahoma. July 2, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW 🔑1160—APPEAL—QUESTION OF FACT.

Where there is evidence in the record to support the verdict, and the verdict has been approved by the trial court, this court will not review the evidence to determine its weight or sufficiency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084.]

Appeal from County Court, Craig County; E. M. Probasco, Judge.

Algie Baldridge was convicted of violating the prohibitory law, and he appeals. Affirmed.

Wm. P. Thompson, of Vinita, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error was convicted in the county court of Craig county on an information charging that he did have possession of seven pints of alcohol with the unlawful intent of selling the same, and was sentenced to serve a term of 30 days in the county jail, and to pay a fine of $50 and the costs. From this judgment an appeal was properly perfected. We have carefully examined the record, and our conclusion is there is no merit in the assignments of error.

Three witnesses for the state testified that they went to the rooming house conducted by plaintiff in error, and there found in one of the rooms about 100 empty bottles and 7 pint bottles of alcohol, and he was in the room at the time.

As a witness in his own behalf the defendant testified that his name was "Algie Baldwin." His explanation about the alcohol was as follows:

> "I was standing there in the kitchen that night, and a fellow came in the door and asked me for a drink of water, and he said, 'Can I go out the back door?' and I said, 'Yes;' and he stepped out the back door and brought this whisky in. I asked him, 'What do you mean?' and he just stood there and looked at me. I said, 'You take this out.' He walked right out and left it there. His name was Lynn Wallace." That Wallace was rooming there at the time.

Where there is evidence in the record to support the verdict, and the same has been approved by the trial court, this court will not review the evidence to determine its weight or sufficiency. The jury no doubt in determining the truth of the defendant's testimony took into consideration the other criminating circumstances.

Finding no error in the record, the judgment is affirmed. Mandate forthwith.

ARMSTRONG and MATSON, JJ., concur.

(13 Okl. Cr. 580)

PACE v. STATE. (No. A-2050.)

(Criminal Court of Appeals of Oklahoma. July 7, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW 🔑1144(½, 10)—APPEAL—PRESUMPTION OF REGULARITY.

In the absence of any affirmative showing to the contrary, it will be presumed on appeal that all proceedings in the lower court were regular, and that all persons appearing in the rôle of public officers were duly authorized so to do as provided by law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2737, 2741, 2749, 2756, 2901, 3026, 3028.]

2. BURGLARY 🔑24 — BURGLARY IN THE NIGHTTIME—INFORMATION.

An information which charges the burglarious breaking and entry of a dwelling in the nighttime with intent to commit larceny therein is good as against demurrer.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 34.]

3. CRIMINAL LAW 🔑1159(2)—APPEAL—SUFFICIENCY OF EVIDENCE.

When the evidence tends reasonably to support a finding of the jury, a judgment of guilty will not be reversed by this court on the ground that the same is contrary to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

4. CRIMINAL LAW 🔑1028—APPEAL—ASSIGNMENT OF ERROR.

An assignment of error based upon a proposition not properly preserved in the trial court and not supported by any legal showing cannot avail on appeal, and will not be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620.]

Appeal from District Court, Washita County; James R. Tolbert, Judge.

Frank Pace was convicted of burglary, and he appeals. Affirmed.

Smith, Smith & Smith, of Cordell, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Frank Pace was convicted in the district court of Washita county on a charge of burglary, and his punishment fixed at imprisonment in the state penitentiary for a period of two years.

The information charges Pace and two others with having burglarized the residence of M. T. Bonny on the night of October 26, 1909. It appears that the plaintiff in error left the country immediately after the offense was committed and was for a long time a fugitive from justice; that he was arrested at Amarillo, Tex., and escaped from the officers, but was later captured and returned to Oklahoma for trial. M. T. Bonny and his family live on a farm about 18 miles west of Cordell, in Washita county, Okl. On the night of October 26, 1909, Bonny and his family went to prayer meeting at the neighborhood church and on return discovered that the house had been entered and ran-sacked. Screens were cut from the windows and the glass broken out. The glass was also broken from the doors. The dresser drawers, wherein Bonny kept his valuable papers, had been plundered and a number of important documents carried away. A bed had been ripped open with a sharp instrument, and the contents piled up on the floor, and, as stated by one of the witnesses, everything was "topsy turvy." A small amount of money was taken from a clock on the mantel. Every apparent place for the concealment of money or valuables was searched. Bonny had sold several bales of cotton for which he had received some $600 or $700 in cash. The burglars were evidently searching for this money, and were defeated in the effort to steal the same because he had secreted it on his person instead of in his home. Certain household articles were carried away, but most of them were recovered.

Frank Pace, John Pruitt, and Buck Spradlin were seen in the neighborhood driving a team to an open buggy. Buggy tracks and mule tracks answering the description of those driven by these parties were found at the Bonny place. Three or four different witnesses saw these parties driving along the highway. They seem to have engaged in a general disturbance of the neighborhood. having stopped at two or three places in the community and discharged firearms, and were fired on by one or two men in the neighborhood. These and many other circumstances conclusively point to the guilt of Pace and his associates. The defendant did not testify in his own behalf, and offered no witnesses or proof of any kind in his defense.

The preliminary complaint was filed before one Coker, justice of the peace, in November, 1911, and approved by R. Brett, special county attorney. An amended complaint was filed on the 3d day of February, 1912. charging Pace with the crime and setting forth the fact that he had been a fugitive from justice for more than a year since October 26, 1909, and was at the time a fugitive from justice. A preliminary trial was held on the 3d day of February, 1912, and Pace was bound over to await the action of the district court. Before the information was filed in the district court, the complaint lodged with the justice of the peace was lost and a copy was filed with the clerk and certified to by the justice of the peace as being the complaint upon which the hearing was had and the order made holding Pace to the district court for trial.

[1] It is urged on behalf of plaintiff in error that there was no valid complaint filed, and that R. Brett was not legally appointed special county attorney to act in the premises. A motion to quash the information on this ground, among others, was filed and overruled by the trial court. A demurrer was filed to the information, which was also overruled by the trial court. There is nothing in the record to indicate that R. Brett was acting without authority and proper appointment from the district court of Washita county. At the hearing on the motion to set aside the information, no proof upon this point is disclosed in our search of the record, and no reference is made to any in the brief of counsel. In the absence of any showing to the contrary, it will be presumed on appeal that all proceedings in the lower court were regular, and all persons appearing as public officers were duly authorized so to do as provided by law. Besides, the lawful county attorney filed the information in the district court, thereby adopting and approving the proceedings theretofore had.

[2] The charging part of the information is as follows:

> "Did then and there unlawfully, willfully and feloniously in the nighttime break and enter into a certain building and structure, to wit, the residence and dwelling of M. T. Bonny in which there was no human being at said time of breaking; the said building being then and there the property of and under the control of the said M. T. Bonny, and there being then and there property kept in said building, to wit, household goods, money and other effects, a more particular description of which is to the county attorney unknown, the said property being then and there the property of the said M. T. Bonny. The said Frank Pace, Buck Spradlin, and John Pruitt did then and there, with felonious intent to steal, take and carry away by fraud and stealth said property so kept in said building, break into and enter said building in the nighttime as aforesaid, the manner of said breaking being by the county attorney unknown, with felonious intent to then and there take, steal and carry away said property as aforesaid, and to deprive the said M. T. Bonny of same and the value thereof, without the consent of the said M. T. Bonny, and to convert the same to the use and benefit of them, the said Frank Pace, Buck Spradlin, and John Pruitt, contrary to the form of the statutes in such cases made and provided, and against the dignity of said state. That the said Frank Pace has been a fugitive from justice and absent from the state of Oklahoma for more than one year since the 26th day of October."

A demurrer was filed to this information, and is as follows:

> "Comes now the defendant above named and demurs to the information filed herein for the reason that the said information does not contain facts which constitute an offense against the laws of the state of Oklahoma."

The demurrer was overruled by the trial court. In our judgment, this information sufficiently charges the burglarious breaking and entry of the building with the felonious intent to commit larceny therein. It therefore follows that the demurrer was properly overruled.

[3, 4] Counsel next contend that the verdict of the jury is contrary to the evidence, and that the jurors based the verdict on the fact that the plaintiff in error failed to testify in his own behalf. These assignments are wholly without merit. The jury made no mistake. The question of whether or not the jury discussed the fact that the plain-

tiff in error failed to testify in his own behalf is not raised by any legal showing.

A careful examination of the record discloses no prejudicial error. The judgment of the trial court is therefore in all things affirmed.

(13 Okl. Cr. 569)

MUNSON v. STATE. (No. 2471.)

(Criminal Court of Appeals of Oklahoma. July 2, 1917.)

(Syllabus by the Court.)

1. Criminal Law 🔑1114(1)—Trial Errors—Record.

Alleged errors occurring during the trial must appear from, and be supported by, the record as certified by the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2918.]

2. Criminal Law 🔑1114(1)—Appeal—Trial Errors—Record.

Where the record does not support such alleged errors, this court is without authority to decide questions of law involved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2918.]

3 Burglary 🔑47—Sufficency of Verdict—Judgment.

The information charged "burglary in the first degree." The jury returned the following verdict: "We, the jury, impaneled and sworn to try the issues in the above-entitled cause, do upon our oaths find the defendant, Roy Munson, guilty as charged in the information and assess his punishment at the minimum of seven years in the state's prison." *Held*, said verdict is sufficiently definite and certain to authorize the trial court to pronounce a judgment of conviction of burglary in the first degree.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 121.]

4. Criminal Law 🔑786(2)—Instructions—Credibility of Witnesses.

The general instruction on the credibility of witnesses is a sufficient rule for the guidance of the jury. Trial courts should adhere to such an instruction to the exclusion of any that may direct the attention of the jury to any particular witness in the case, although the rule laid down be the same as that applicable to all witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1896, 1960, 1984.]

5. Criminal Law 🔑823(14)—Instruction—Weight of Defendant's Testimony.

Where the court in a separate instruction specifically told the jury that it had "no right to disregard the testimony of the defendant from mere caprice or on the ground alone that he is the defendant and is interested in the event of the suit, or that he stands charged with crime, * * * but that his evidence should be weighed and measured in the same manner as the testimony of other witnesses in the case," and in a subsequent instruction the court lays down the general rule by which the jury may be guided in determining the credibility of witnesses and the weight to be given their testimony, *held*, that said separate instruction did not amount to an adverse or prejudicial comment upon the defendant's interest in the result of the action, nor was it a comment by the court on the weight to be given defendant's testimony. The instructions considered together placed the defendant upon the same plane with the other witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158.]

6. Reversal of Conviction—Express Statutory Provision.

This court is not allowed to reverse a judgment of conviction on account of the misdirection of the jury unless after an examination of the entire record it clearly appears that there has been a miscarriage of justice, or that the defendant has been deprived of some constitutional or statutory right. Section 6005, Revised Laws 1910.

Error from District Court, Woodward County; James B. Cullison, Judge.

Roy Munson was convicted of the crime of burglary, and he brings error. Judgment affirmed.

W. A. Briggs, of Woodward, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. In view of the fact that certain alleged errors relied upon for reversal of this judgment were not preserved in the trial court, it is proper in this opinion to state that counsel who represented the plaintiff in error in this court did not represent him in the trial court. It is unnecessary to discuss the sufficiency of the evidence to sustain the conviction. While the evidence is conflicting the testimony of the prosecuting witness, Elsie Derr, is sufficient to make out the crime of burglary in the first degree.

[1, 2] The first alleged error relied upon for a reversal is that the prosecuting attorney made certain prejudicial remarks in the presence and hearing of the jury at the time the jury returned an incomplete and insufficient verdict. It appears from the record that the jury first returned into court a verdict in the following form:

> "We, the jury, duly impaneled and sworn to try the issues of the above-entitled cause, do upon our oaths find the defendant, Roy Munson, guilty as charged in the information and assess his penalty and punishment at the minimum."

Which verdict was signed by the foreman of the jury and handed to the clerk to read. After it was read it is alleged that a controversy arose as to whether the verdict was sufficient in form at which time, it is contended by counsel for plaintiff in error, that the prosecuting attorney made the remark that he supposed the jury intended to fix the punishment at seven years, which said remarks were excepted to by counsel for plaintiff in error. However, it nowhere appears from the record that any such remarks were made by the prosecuting attorney; the entire record on this subject being as follows:

> "The Court: Gentlemen of the jury, the court directs you to return to your jury room and return your verdict so as to make it more definite and certain as to time. You may now follow your bailiff:
>
> "By a Juror: May I speak a word? It will not take us over ten minutes to fix it right, I think.
>
> "The Court: We will wait until you return, gentlemen; we don't care to have any discussion about it."

Therefore it is apparent that if the prosecuting attorney made any such remark as alleged no record of the same was preserved, and this court is bound by the record as made and certified to by the trial judge. It is the duty of the plaintiff in error, and the burden is upon him to clearly show that error was committed during the trial. Every presumption is in favor of the regularity of the proceedings in the trial court, and unless prejudicial error is clearly made to appear, where the question is not jurisdictional, this court is without power to consider the same.

[3] It is also contended that the verdict as amended is not sufficient to confer jurisdiction upon the court to pronounce judgment in this case. Said verdict reads as follows:

> "We, the jury, impaneled and sworn to try the issues in the above-entitled cause, do upon our oaths finds the defendant, Roy Munson, guilty as charged in the information and assess his punishment at the minimum of seven years in the state's prison."

Which verdict was properly signed by the foreman of the jury. The contention is here made that burglary being a crime divided into degrees, and the jury having been instructed upon first and second degree burglary, the verdict is therefore so indefinite and uncertain as to authorize the court to pronounce a judgment of conviction of the degree of which the jury intended to convict. This question has already been passed upon adversely to the contention of counsel for plaintiff in error in the case of Bowlegs v. State, 9 Okl. Cr. 69, 130 Pac. 824, wherein it was held:

> "The provision of Procedure Criminal (section 6874, Comp. Laws 1909 (section 5922, Rev. Laws), that 'whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty,' must be construed in connection with other provisions; i. e., section 6873, authorizing a general verdict of 'guilty' or 'not guilty,' and declaring that such verdict 'imports a conviction or acquittal of the offense charged,' and section 6878, providing that the court may direct informal verdicts to be reconsidered, and 'rendered in some form from which it can be clearly understood what is the intent of the jury,' also section 2028 of the Penal Code, providing that the jury shall 'assess and declare the punishment in their verdict.'"

We hold, therefore, that it is clearly evident from the verdict returned in this case that it was the intention of the jury to find the defendant guilty of burglary in the first degree, and that the court did not err in pronouncing judgment to that effect.

[4, 5] It is also contended that the court erred in giving the following instruction:

> "The jury are instructed that under the laws of this state a person accused of crime has a right to be a witness in his own behalf, and in this case the defendant having been a witness and having testified in his own behalf, the jury have no right to disregard his testimony from mere caprice or on the ground alone that he is the defendant and is interested in the event of the suit, or that he stands charged with crime; but you are instructed that his testimony ought to be received and considered by the jury in connection with all the other evidence in the case, and should be weighed and measured by the jury in the same manner as the testimony of other witnesses in the case."

It is contended that this instruction is erroneous and prejudicial to the substantial rights of the defendant in that it singles out the defendant and calls the jury's attention to the fact that he is an interested witness in the case. It is true that this court has held in numerous cases that it is erroneous for the court to call the jury's attention to the fact that the defendant is an interested witness, and that the jury may consider such fact in arriving at its verdict. The instructions condemned by this court, and held to be prejudicially erroneous, were much more drastic than the foregoing instruction given in this case. The instructions condemned were those in which the court specifically told the jury that it was its duty, in arriving at the verdict, to consider the fact that the defendant was an interested witness in his own behalf. The instruction given in this case was a precautionary one. The jury being specifically told that it had "no right to disregard his testimony from mere caprice or on the ground alone that he is the defendant and is interested in the event of the suit, or that he stands charged with crime, * * * but that his evidence should be weighed and measured in the same manner as the testimony of other witnesses in the case." While this instruction perhaps tended to single the defendant out, we cannot see wherein its effect was to prejudice his testimony. It was intended by the court for his protection to place him on the same footing with the other witnesses, and being a part of the law of the case the jury was bound so to receive it. By such instruction the jury was cautioned and prohibited from disregarding the testimony of the defendant from mere caprice, or upon the ground alone that he was the defendant. In addition the jury was told that it should consider the evidence of the defendant in the same manner and weigh the same as it would that of any other witness. Certainly this was all the defendant was entitled to. The jury is entitled to consider the interest that any witness has in the result of the trial, and when the defendant is placed upon the same plane with any other witness who testifies it is unreasonable to say that he was prejudiced just because the jury was told of that fact in a separate instruction.

[6] This court is not allowed to reverse a judgment of conviction on account of the misdirection of the jury, unless after an examination of the entire record it clearly appears that there has been a miscarriage of justice, or that the defendant has been deprived of some constitutional or statutory right. Section 6005, Revised Laws 1910.

To hold that the foregoing instruction amounts to an adverse or prejudicial comment upon the defendant's interest in the result of the action, or is a comment by the court on the weight of his testimony, is, in our opinion, illogical and unreasonable.

Instructions of this kind should not be given unless requested by defendant. The general instruction on the credibility of witnesses answers every purpose, and the trial courts should adhere to such an instruction to the exclusion of any that may direct the attention of the jury to the testimony of any particular witness. This court, however, is only authorized to reverse a judgment of conviction on account of a misdirection of the jury where it is clearly evident that, by reason of the giving of or refusal to give instructions, the defendant has been prejudiced to the extent that there has been a miscarriage of justice, or that he has been deprived of some constitutional or statutory right.

After a careful consideration of the entire record, it is our opinion that the judgment should be affirmed; and it is so ordered.

DOYLE, P. J., and ARMSTRONG, J., concur.

(85 Or. 434)

In re WEYERHAEUSER LAND CO.*

(Supreme Court of Oregon. June 26, 1917.)

1. TAXATION ⚷493(7) — EXCESSIVE VALUATION—EVIDENCE—SUFFICIENCY.

In an appeal from a decision of the board of equalization refusing to lower a tax on petitioner's timber land, *held* under evidence that petitioner failed to establish that the estimates upon which the assessment was based were incorrect or that the land was assessed for more than its cash value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 881.]

2. TAXATION ⚷493(8)—ASSESSMENT—REVIEW BY COURT.

To warrant a reduction of an assessment upon appeal to this court, it must be shown that the means adopted by the assessor were wrong and that the result arrived at was greater than the actual cash value of the property assessed, in view of Laws 1913, p. 325, § 8, providing that, if the court finds that the assessment was made fairly and in good faith at actual cash value, the assessment shall be approved.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 882.]

3. TAXATION ⚷446—ASSESSMENT—REVIEW.

The valuation placed upon property by the assessor for the purpose of taxation is prima facie correct, and a party assailing an assessment as excessive must make it appear that the assessment does not represent the fair value of the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 784–786.]

Department 2. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Petition by the Weyerhaeuser Land Company to the Board of Equalization of Clackamas County for the reduction of certain assessments. Relief was denied, and petitioner appealed to the circuit court, where the assessments were lowered. From the decree rendered, the county appeals. Reversed.

On September 19, 1914, the Weyerhaeuser Land Company filed with the board of equalization of Clackamas county, Or., its petition for the reduction of the assessment of certain lands for the purpose of taxation. It is specifically set forth therein, in substance: That all the property described was assessed at more than its true cash value on March 1, 1914. That the assessment was based on a certain cruise and estimate of the timber on said lands for the county which was incorrect:

Description of Property.				Assessor's Valuation.	Cash Value Alleged.	Should be Assessed Valuation.
	Sec.	Tp.	R.			
All of	12	5 S	4 E	$28530	$14500	$ 8700
All of	14	5 S	4 E	33250	15500	9300
E ½ S E ¼ of S W ¼	20	5 S	4 E	33085	13000	7800
All of	24	5 S	4 E	35350	19500	11700
All of	20	6 S	4 E	17025	15500	9300
N ½	26	6 S	4 E	9120	5500	3300
All of	28	6 S	4 E	15930	15000	9000
Lots 1, 2, 3, 4 and E ½ of W ½	30	6 S	4 E	15255	13000	7800

That the assessment should be 60 per cent. of the cash value in accordance with the taxation of other timber land in that county and with the uniform system adopted by the assessor. The assessment was made upon the following basis, to wit: One dollar per acre for the real property exclusive of timber; 50 cents per 1,000 for merchantable yellow fir, red fir, spruce, cedar, larch, and pine timber on such real property; and 30 cents per 1,000 for the merchantable hemlock timber standing upon the lands. The assessment and valuation of the properties was made all in accordance with the amount thereof shown by a pretended cruise and report. Upon a reduction being denied by the board of equalization an appeal was taken by the Weyerhaeuser Land Company to the circuit court where, upon a hearing, findings of fact were made and, with the exception of two parcels, the value of the land was adjusted as prayed for in the petition as follows:

Description of Property.				Valuation.
	Sec.	Tp.	R.	
All of	12	5 S	4 E	$16170.00
All of	14	5 S	4 E	13777.00
E ½, S E ¼ S W ¼	20	5 S	4 E	17630.00
All of	24	5 S	4 E	22673.50
All of	20	6 S	4 E	16824.00
N ½	26	6 S	4 E	5428.00
All of	28	6 S	4 E	15930.00
Lots 1, 2. 3, 4, and E ½, W ½	30	6 S	4 E	15255.00

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 19, 1917.

From a decree rendered accordingly, the county appeals, assigning error in so reducing the assessment.

On November 23, 1912, the county court of Clackamas county made a contract with M. G. Nease to make a careful cruise and estimate of the timber lands of that county. A bond for the faithful performance of such duty was required and given. Thereafter experienced timber cruisers employed by him cruised the timber on such lands, including the property in controversy. With a view to contesting the assessment, the Weyerhaeuser Land Company engaged expert cruisers and had the timber on the lands estimated. These men were witnesses in the case and supported their respective cruises by their sworn evidence. Other witnesses also testified in the case. The cruisers for the county qualified as witnesses and testified as to the merchantable timber on the lands in accordance with the following table:

	Stoddard.	Hart.	Olinger.	Clark.
All of Sec. 12 Tp. 5 S R 4 E	50,700,000 feet 8,300,000 feet			
All of Sec. 14 Tp. 5 S R 4 E	44,400,000 feet 34,700,000 feet			
E ½, S E ¼ of S W ¼ of Sec. 20 Tp. 5 S R 4 E		65,734,000 feet 400,000 feet		
All of Sec. 24 Tp. 5 S R 4 E		68,350,000 feet 3,750,000 feet		
All of Sec. 20 Tp. 6 S R 4 E			31,250,000 feet 2,535,000 feet	
N ½ of Sec. 26 Tp. 6 S R 4 E				18,700,000 feet
All of Sec. 28 Tp. 6 S R 4 E			28,600,000 feet 3,300,000 feet	
Lots 1, 2, 3, 4, and E ½ of W ½ of Sec. 30 Tp. 6 S R 4 E			27,400,000 feet 6,875,000 feet	

The gist of the testimony of the witnesses for the company, who qualified as expert cruisers, as to the merchantable timber upon the premises, is shown by the following tabulation:

	McCutcheon.	Smith.	Williams.	Hamilton.	McDonald.
All of Sec. 12 Tp. 5 S R 4 E	Fir 15,871,000 ft. Hemlock 1,465,000	30,000,000 ft. 1,775,000 ft.	30,528,000 ft. not seg.		
All of Sec. 14 Tp. 5 S R 4 E	12,594,000 ft. 6,520,000 ft.	22,145,000 ft. 6,885,000 ft.	21,721,000 ft. 8,000,000 ft.		
E ½. S E ¼ of S W ¼ of Sec. 20 Tp. 5 S R 4 E	15,321,000 ft. 368,000 ft.	34,540,000 ft.	31,405,000 ft.		
All of Sec. 24 Tp. 5 S R 4 E		43,675,000 ft. 665,000 ft.	45,375,000 ft.		
All of Sec. 20 Tp. 6 S R 4 E				30,304,000 ft. 3,245,000 ft.	22,030,000 ft. 2,430,000 ft.
N ½ of Sec. 26 Tp. 6 S R 4 E	5,292,000 ft. 685,000 ft.			8,5[illegible],000 ft. 2,135,000 ft.	8,130,000 ft. 670,000 ft.
All of Sec. 28 Tp. 6 S R 4 E	18,450,000 ft. 2,365,000 ft.			29,103,000 ft. 4,155,000 ft.	26,885,000 ft. 3,695,000 ft.
Lots 1, 2, 3, 4, and E ½ W ½ Sec. 30 Tp. 6 S R 4 E	12,542,600 ft. 3,830,000 ft.			13,806,000 ft. 8,550,000 ft.	15,485,000 ft. 4,325,000 ft.

The different cruisers made notes of the kind and character of the timber, whether thrifty, sound, or defective, and an examination of the logging conditions. They also made a map of the different tracts showing to a certain extent the topography of the country, the different elevations, the streams, etc., and the location of areas where the timber was burned off or for any reason was lacking thereon.

Gilbert L. Hedges, of Oregon City (Wilbur, Spencer & Beckett, of Portland, on the brief), for appellant. E. V. Littlefield and C. L. Starr, both of Portland (Littlefield & Maguire, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It appears from the evidence that the assessor, who had had four or five years' experience in office, after obtaining the best information that he could, fixed the value of the timber on the lands involved at 50 cents per 1,000 for merchantable timber, except hemlock, which he valued at 30 cents. Some timber in that locality closer in to market he placed at a greater value. His good faith in the matter is not questioned by the taxpayer. While there is little contention here as to the value of the timber per 1,000, there was considerable evidence introduced on behalf of the property owner to the effect that in the opinion of its experts the timber had no actual, but only a chance or speculative, value on account of its location. With this claim we are unable to agree.

The following shows the trend of the evidence as to value: For the petitioner evidence was adduced in effect as follows: Mr. W. L. Smith testified that it was a very cheap stumpage and would have to be held for a long time; that he would not want to say it was worth 50 cents per 1,000. George Williams' testimony is in substance that the timber and ground were rough. The opinion of J. A. Hamilton was shown by his saying that he "would not recommend any man to purchase that amount of timber regardless of price," because the country was rough and hard to log; that in section 20 the cost of logging would more than overbalance the value of the timber; that as to sections 20 and 26 the sum of $9,400 each was more than they were worth; that the latter section in his opinion had no present market value; that no timber on the Molalla river (in the vicinity of which the timber in question is located) had any commercial value at the time he looked at it; that he "would not recommend to any man to put a two-bit piece in that country in any section that I cruised." Alex McDonald stated that to transport the timber probably 20 miles of railroad would have to be built from Molalla; that "the first 9 miles is right through the valley and very easy to build"; that up the river it was rocky, and there was a 1,200-foot grade to overcome; that $12 or $14 an acre was enough for the land. Other witnesses testified to the same purport. We note this evidence for the purpose of demonstrating that there was a tendency to cry down the worth of the timber. This is only natural, as it is to be expected that a property owner will endeavor to have his property assessed as low as possible. We believe from this that agents of the owner who were working for the purpose of assailing the assessment would naturally be inclined in the selection of merchantable timber and in estimating the amount thereof to minimize the same.

On the other hand, on behalf of the county the following is an example of the testimony: Mr. M. F. McCowan, a cruiser, testifying in regard to the timber on section 12, stated that it was of a good quality, worth $1 per thousand, and some of it was old but not very defective. In regard to section 14, the witness said: That the elevation was high; that "the fir is not very good. The lower part, on the creeks, is better. But the larch is of a good quality." That the logging conditions were "not as good as they were on 12, but not bad. That it was a downhill pull to Clear creek, and a good grade. That the timber was worth $1 per 1,000; that as to section 25 the hemlock and spruce were worth $1 per 1,000 and the fir $2. That the logging was good for hauling the timber to Canyon creek.

It is shown that the county cruisers, with the exception of Mr. Hart, who went through a 40-acre tract twice, cruised the timber by what is termed the "square method," going through once and measuring and counting the trees on 8 acres of the 40. The cruisers for the company made a "four-time cruise" going through a 40 four times thus dividing it into 10-acre strips. Much stress is laid upon this method by petitioner as being more accurate. It is explained on behalf of the county that a four-time cruise is better if there is a great distinction in the different kinds of timber, but that it is no better if the timber is even.

[1] From a careful study of all the evidence and the above tables, it does not appear that the difference in the manner of cruising would account for, or cause, the radical variation in the amount of timber cruised as between the cruisers for the county and those for the company; nor is it shown that the estimates upon which the assessment was based were incorrect or that the value of the land, of which the timber was an important ingredient or factor in fixing its value, was more than the actual cash value or more than a fair valuation for the assessment as made in that county. The petitioner undertook to prove that the rating of the kinds of timber mentioned at 50 and 30 cents per 1,000 was too great. In this it failed. It was incumbent upon it to show that the amount of timber which was the basis of a large part of the assessed value as shown by the cruise made on behalf of the county was too large. This it endeavored to do, but in this it also failed.

[2] It is not enough to show that some method other than that adopted by the assessor in making the assessment would be better. In such case, it must be shown that the means adopted by that official, are wrong, and that the result arrived at is greater than the actual cash value of the property assessed. Leaving out of the question the burden of proof as to the value of the property, we believe from the evidence that the county's cruise is a fairly accurate estimate conscientiously made by competent men, who testified in support thereof, thereby authenticating the count; and that it was fairly and judicially adopted by the assessor who placed a conservative value thereon which, added to the small sum of $1 per acre for the land, constituted a valid assessment which has not been successfully assailed by the taxpayer. We are wholly governed by the evidence in this matter. To a large extent an assessment depends upon one's judgment. If the method by which the assessor arrived at the value of the property was correct and the assessment was in good faith fairly made, we are not

permitted, under the statute as we read it, to pit our judgment as to the value against that of the assessor, although other men of equal ability and fairness might differ in estimating the value of the property. Injecting another estimate into the consideration of the case would inevitably change the method or system and tend to destroy the approximate uniformity. The assessor acts judicially, yet his finding as to the valuation is much the same as the verdict of the jury upon a question of fact.

As to the law, the important question involved is largely governed by chapter 184, Laws 1913, p. 325, section 8 of which in part directs thus upon an appeal from the action of the board of equalization:

> "If, upon hearing, the court finds the amount at which the property was finally assessed by the board of equalization is its actual full cash value, and the assessment was made fairly and in good faith, it shall approve such assessment; but if it finds that the assessment was made at a greater or less sum than the actual full cash value of the property, or if the same was not fairly or in good faith made, it shall set aside such assessment and determine such value."

[3] It appears to be a firmly established rule that the valuation placed upon property by the assessor for the purpose of taxation is prima facie correct, and a party assailing such an assessment as excessive must make it clearly appear that the assessment does not represent the fair value of the property assessed. Steel v. Fell, 29 Or. 272, 45 Pac. 794; Oregon Coal Co. v. Coos County, 30 Or. 308, 310, 47 Pac. 851; So. Oregon Co. v. Coos Co., 39 Or. 185, 64 Pac. 646; Elmore Packing Co. v. Tillamook County, 55 Or. 218, 222, 105 Pac. 898; No. Pac. Ry. Co. v. Clatsop Co., 74 Or. 250, 256, 145 Pac. 271; People v. Davenport, 91 N. Y. 581; 37 Cyc. 1069, 1104, et seq.

Some clerical errors are mentioned by the assessor in his evidence which should be corrected. It follows that the judgment of the trial court must be reversed, and the assessment as made by the assessor of Clackamas county, after correcting the errors named, and as equalized by the board of equalization of that county, is approved.

MOORE, BURNETT, and McCAMANT, JJ., concur.

(84 Or. 627)

SHANE v. GORDON.

(Supreme Court of Oregon. June 26, 1917.)

MORTGAGES 🔑319(3)—AGREEMENT TO SURRENDER MORTGAGE AND NOTE—SUFFICIENCY OF EVIDENCE.

In suit to cancel a note and mortgage, evidence *held* sufficient to sustain finding that defendant agreed to surrender the note and mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 863, 875, 913, 1366.]

Department 1. Appeal from Circuit Court, Washington County; Geo. R. Bagley, Judge.

Suit by J. C. Shane against J. D. Gordon. From a decree for plaintiff, defendant appeals. Decree affirmed.

This is a suit to cancel a note and mortgage. J. D. Gordon owned 16 acres of land in Yamhill county; and on May 20, 1912, he agreed in writing to sell the premises to John G. Shane, F. A. Shane, and M. Z. Shane for $5,028. The contract recites that $1,000 was paid at the time of the execution of the writing, and that the remainder of the purchase price was payable on or before 3 years after May 20, 1912, with interest at the rate of 6 per cent. per annum. No cash was paid to Gordon, but on the day of the execution of the contract John G. Shane and Johanna C. Shane gave their note for $1,000, payable on or before 3 years after date, with interest at 6 per cent. per annum, to the order of J. D. Gordon. The note was secured by a mortgage executed by Johanna C. Shane on 79 acres of land owned by her in Washington county. Johanna C. Shane was not interested in the Yamhill county land, and she only signed the note and gave the mortgage to accommodate her brother John G. Shane and her sisters F. A. Shane and M. Z. Shane. John G. Shane and M. Z. Shane took possession of the Yamhill county land soon after May 20, 1912, and resided there until about June 1, 1914, when they vacated the premises. The Shanes paid all the interest due on May 20, 1913, amounting to $301.68, and on May 20, 1914, interest on the note, amounting to $60 was paid, but no other payments were made. Gordon entered into possession of the property immediately after it was vacated by the Shanes. Within 60 days from June 1, 1914, Gordon exchanged the 16 acres in Yamhill county for land in Lane county. Gordon says that the Lane county land was valued at $7,500, but it was incumbered with a $2,500 mortgage; and, therefore, if the valuation placed upon the Lane county land is taken as the standard, the Yamhill county property was worth $5,000 in 1914, as well as in 1912, when the Shanes contracted to purchase. The plaintiff claims that her brother and sisters vacated the property and relinquished all their rights to it with an agreement on the part of Gordon that he would surrender the note and mortgage whenever he sold or disposed of the property. The defendant denies that he agreed to surrender the note and mortgage. Gordon refused to cancel the note and mortgage, and the plaintiff then commenced this suit. The trial court decreed the cancellation of the note and mortgage, and the defendant appealed.

E. C. Bronaugh, of Portland (Bronaugh & Bronaugh, of Portland, on the brief), for appellant. Wm. G. Hare, of Hillsboro, for respondent.

HARRIS, J. (after stating the facts as above). The only question involved in this suit is whether Gordon agreed to surrender the note and mortgage. The evidence for the defendant contradicts the evidence for the plaintiff, and it is impossible to harmonize the version of one party with that of the other. If the occurrences were as narrated by John G. Shane and one of his sisters, the conclusion is inevitable that Gordon agreed to surrender the note and mortgage; but, on the other hand, the plaintiff must fail if John G. Shane did no more than merely to tell Gordon that:

> "He had just been to the doctor, and the doctor advised him he would have to give up, and he was not able to farm any more, and he would have to give up, and he said consequently he would have to give up the place; he couldn't work it."

John G. Shane was in Gordon's office on the morning of May 20, 1914. Gordon says that John G. Shane was in the office twice that morning, and he is corroborated by a witness who was present on both occasions. Gordon says that John G. Shane did not visit his office again that day, while Shane says that he met Gordon in his office that evening, about 7:30 o'clock, and at that time they agreed that the Shanes would surrender the property, and that Gordon would surrender the note and mortgage. If the agreement was made at all it was made in the evening when no persons were present in the office except Gordon and John G. Shane and while a sister of the latter was outside sitting in a buggy. The version of one party cannot be harmonized with the other. The trial judge had the advantage of seeing and hearing the witnesses, and he concluded that the preponderance of the evidence was with the plaintiff. S. W. Childers testified that Gordon's reputation for veracity was bad, and another witness swore that some people said Gordon's reputation was bad. Eliminating the testimony of Childers, because he was unfriendly to Gordon, and ignoring what was said by the other witness mentioned, there is nevertheless testimony given by J. D. Crater impeaching the veracity of the defendant. The subsequent conduct of John G. Shane and his sisters rather indicates that they understood, at least, that Gordon had agreed to surrender the note and mortgage. Presumably the land was worth $5,000 because the Shanes agreed to pay that sum for it, and Gordon subsequently traded it for that valuation; and if the land was worth $5,000 it is reasonable to suppose that Shane would have attempted to save all or a part of the note and mortgage rather than make no attempt whatever, especially when he could have compelled Gordon to foreclose the contract. Notwithstanding the fact that Gordon was engaged in the real estate business, he would not give an estimate of the rental value of the land; and it is fair to assume that the interest received by him was in excess of a reasonable rental value. A complete review of all the evidence would serve no good purpose; and it is sufficient to say that the entire record has been carefully examined by more than a single member of this court, with the result that, while the testimony is conflicting, nevertheless following the rule in Scott v. Hubbard, 67 Or. 498, 505, 136 Pac. 653, we take it as true that the evidence preponderates in favor of the plaintiff, since the trial court found for the plaintiff. Goff v. Kelsey, 78 Or. 337, 348, 153 Pac. 103.

The decree is affirmed.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur. McCAMANT, J., took no part in the consideration of this case.

(84 Or. 624)

BUSTER v. MARION COUNTY.

(Supreme Court of Oregon. June 26, 1917.)

INFANTS ⚷12½, New, vol. 17 Key-No. Series — MOTHER'S PENSION — DEPENDENCY OF CHILDREN.

Under Mothers' Pension Act, Laws 1913, p. 75, § 4, providing that the act shall not apply to a child having property of its own sufficient for its support, and L. O. L. § 1346, providing for sale of minors' real estate when necessary for their support, where children were left by their father 80 acres of uncultivated land subject to their mother's dower interest, she was not entitled to benefits of the pension act until such land had been disposed of according to law and the proceeds exhausted in caring for the children.

In Banc. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Application by Grace E. Buster for widow's pension against the County of Marion, State of Oregon. From an order for plaintiff, defendant appeals. Reversed and rendered.

The juvenile court of Marion county made an order allowing plaintiff a pension of $10 a month for the support of herself and two children, both under the age of 16 years, under the provisions of what is known as the Mothers' Pension Act, chapter 42, Laws 1913, as amended by chapter 90, Laws 1915. From this order plaintiff appealed to the circuit court, contending that the juvenile court erred in finding that the children were not wholly dependent upon the labor of the mother for their support by reason of the fact that she owned a half acre tract of land about three miles east of Salem with a dwelling house and other buildings thereon and, in addition to a vegetable garden, kept chickens. Upon a trial in the circuit court, a decree was entered allowing plaintiff a pension of $17.50 per month, dating from May 4, 1916, the date of her first application, and the county appeals.

Max Gehlhar, Dist. Atty., and Jas. G. Heltzel, both of Salem, for appellant. Frank A. Turner, of Salem, for respondent.

BENSON, J. (after stating the facts as above). From the application filed by the mother, it appears that her husband died January 7, 1914, leaving an estate consisting of $1,288 in money derived from life insurance, and 80 acres of uncultivated land in Lincoln county; that $800 of this was expended by the widow in paying her husband's debts, and with the remainder she purchased the one-half acre upon which she resides. From the testimony given upon the trial in the circuit court, it appears that the 80-acre tract was incumbered with a mortgage of $250 for borrowed money which was one of the debts paid by the widow; the land being now free from liens. This tract of land is the property of the children subject to the mother's dower interest. No effort has been made to convert this land into money. Section 4 of the statute involved reads thus:

> "The provisions of this act shall not apply to any child which has property of its own sufficient for its support, nor to any child which does not reside with its mother." Chapter 42, Laws 1913.

Section 1346, L. O. L., provides for the sale of real estate belonging to minors when necessary for their support. The record does not disclose the market value of the land owned by the children in this case; but, until it is disposed of according to law and the proceeds exhausted in caring for the children, the plaintiff is not entitled to the benefits of the pension act.

The decree of the circuit court must therefore be reversed, ad one entered here dismissing the application.

BURNETT and MOORE, JJ., took no part in the consideration of this case.

(85 Or. 68)

STEWART v. MANN et al.

(Supreme Court of Oregon. July 10, 1917.)

VENDOR AND PURCHASER 🔑337 — FORECLOSURE OF VENDEE'S LIEN—EFFECT OF DENIAL OF LIABILITY.

Where vendor had absolutely denied any liability under and repudiated contract with vendee in proceedings for foreclosure of vendee's lien, vendor could not claim vendee's failure to cultivate premises as agreed upon.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985–990.]

Department No. 2. Appeal from Circuit Court, Washington County; Geo. R. Bagley, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 165 Pac. 590.

Geo. Arthur Brown, of Portland (Ray B. Compton, of Portland, on the brief), for appellant. Leroy Lomax, of Portland, for respondents.

BURNETT, J. The defendant's petition for rehearing would be very persuasive if it were founded upon a correct premise. It charges in substance that the plaintiff sought to compel the admission from the defendant that both he and his predecessor in interest had violated the terms of the contract under which the plaintiff was to purchase the property in that they had not cultivated the orchard on the premises in the manner prescribed. This, however, is not the ground upon which the defendant placed his return of the money and his abjuration of the contract.

It will be remembered that Stewart protested at the time he made the last payment and claimed that the defendant and the company had failed to comply with the stipulations of the contract for the cultivation and establishment of the orchard, and that there should be an abatement of the purchase price to cover the default. As showing the position which the defendant took it is only necessary to quote his letter dated July 14, 1914, addressed to the plaintiff, saying:

> "Inclosed herewith I hand you check $79.15 which you sent me July 2d. I also inclose a certified check for the sum of one hundred and sixty dollars and sixty cents, being the amount of the payments made by you to me heretofore on your contract with Chehalem Mountain Orchard Company on account of tracts fifty-four and part of tract fifty-three, as provided in your contract. You are certainly very much mistaken in your conclusion in this matter. When I purchased the land from the trustees in bankruptcy, I by no means assumed the payment of the debts of the bankrupt, and you have no right to believe or think so, from anything I have ever said or done. I gave you to understand that I was willing to assume your contract as a separate individual contract and deal between ourselves; that is, I was willing to deed you the land making you a good title upon the payment to me of the balance due under your contract. I could sell the land for more money than is due under your contract, or think I could do so, but I was willing to let you have the land for the amount yet due under your contract, but I certainly did not assume the debt of the bankrupt. You can readily see that one would be very foolish to do such a thing, and you have no right to expect such a thing from me. You say in your letter that you intend to institute suit against me to recover money which you paid the Chehalem Mountain Orchards Company under your contract. You should have presented any claim you had against the company to the referee in bankruptcy, as no one assumed those liabilities, and you never heard of any one assuming the liabilities of a bankrupt in purchasing the assets of one who has gone into bankruptcy. Because of your misunderstanding of the matter I am returning the money to you, and I certainly would not let you have the land for the amount yet due under your contract with the bankrupt, and in addition to that make good any amounts you had lost on the bankrupt.
>
> "Yours respectfully,
>
> "[Signed] S. M. Mann."

It will be recalled that the land was sold by the trustee in bankruptcy subject to the contract, and that the defendant accepted a deed containing the condition to the effect that he himself expressly agreed to assume as part of the purchase price the incumbrances upon the property, including the contract in question. His letter above quoted constitutes a repudiation of his covenant.

He did not justify his course at that time by the assertion that he and his predecessor had complied with the contract, but proceeded on the basis of there being no liability whatever on his part. Whatever his reason may be he committed a breach of the contract in his renunciation of it. He cannot at this time mend his hold and take up the question of whether or not the orchard was cultivated as agreed upon. Having denied any liability in any event he must abide by his position thus assumed. The deed he had taken made him liable, and when he disavowed that liability the plaintiff was entitled to consider it as a breach, and to proceed in foreclosure of his vendee's lien upon the premises.

The petition for rehearing is denied.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(84 Or. 610)

MARMENI v. BELLARTS.

(Supreme Court of Oregon. June 26, 1917.)

Department 1. Appeal from Circuit Court, Multnomah County; H. H. Belt, Judge.

On rehearing.

For former opinion, see 164 Pac. 955.

Henry M. Kimball, of Portland, for appellant. E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for respondent.

BENSON, J. In support of his motion for rehearing counsel for appellant urges that the former opinion herein must have been hasty and ill-considered by reason of the fact that the opinion discusses certain allegations of the affirmative answer in regard to which there is no evidence in the record. By some inadvertence it is true that the writer of the former opinion did refer to such portion of the answer upon the theory that it was not denied in the reply, and this is error. However, we have again read the testimony line by line, considering every suggestion made by counsel, and are unable to discover any good reason for changing the conclusion reached in the former opinion.

The rehearing is therefore denied.

McBRIDE, C. J., and BURNETT, J., concur.

HARRIS, J. (concurring). The plaintiff earnestly insists that the conclusions expressed in the original opinion are not sustained by the evidence, and that a rehearing should be granted. In the original opinion it is stated that:

> "In 1912 property values were elevated. When Marmeni purchased there was talk of the construction of a bridge which would have materially benefited the property, but at the fall election the proposal to build the bridge was defeated. With the year 1914 came financial depression and marked reductions in realty values. The property was amply worth the price in 1912, but it was not worth the price in 1914."

When checking over the pleadings, as printed in the abstract of record, paragraphs XI and XII of the answer and cross-complaint were treated as admitted by reason of the supposed failure of the plaintiff to deny them, but a re-examination of the abstract discloses that those two paragraphs were denied; and hence the quoted statements are not fully justified by the record, although the subject of the bridge and the decrease in realty values received more than passing notice at the time of the hearing. While there was no evidence concerning the bridge, for the reason that the court sustained an objection to an offer of the defendant to show the facts regarding the bridge, nevertheless there was enough evidence to warrant the inference that the property was worth the purchase price in 1912. Deluchi, who was "in the real estate business," said that at first Bellarts asked $4,000 for the property, but he consented to sell for $3,750. Deluchi considered the selling price was the fair value of the land, for in the language of his testimony:

> "I thought that was a fair purchase price. I told Mr. Bellarts, 'You know a real estate man tries to compromise, that is, wants to do the fair thing for both.'"

However, it is not essential, and perhaps not even important, to know the difference between the values in 1912 and in 1914, although evidence of a material reduction in value, if competent at all, might tend to throw light upon the motives actuating Marmeni. In some jurisdictions the courts have taken judicial notice of a general depression in values of real estate (7 Ency. of Ev. 934); but we shall assume, without deciding, that by reason of the language in section 729, L. O. L., courts cannot take judicial notice of a general financial depression; and therefore not only what was said in the original opinion about the bridge, but also what was said concerning the value of the premises in 1914, as well as all of the discussion about the bridge and values at the time of the hearing, will be laid out of the case.

Deluchi received a letter from J. Landigan on July 22 or 23, 1913. Deluchi immediately informed Marmeni of the letter, and while the original opinion is not accurate in declaring that Marmeni "consulted with Montrezza" about this letter, it is nevertheless accurate to say that Montrezza was notified of the claim made in the Landigan letter, for, according to the testimony of Montrezza, "Mr. Deluchi brought it to my attention himself."

The petition for a rehearing questions the correctness of the statements made in the original opinion about the preparation of the $40 receipt. Montrezza had not yet been admitted to practice as an attorney at law when Marmeni purchased the property, and on that account Montrezza was unusually painstaking. He explained that he was very careful when examining the papers in Strowbridge's office, and he said that he was likewise careful in the preparation of the receipt, for he testified thus:

> "I remember being naturally, you may say, waiting to be an attorney, and as an attorney to be at the time I was careful what I was doing, as I had quite a large Italian practice at the time, before I was admitted."

The plaintiff urges that Montrezza inserted the description of the property in the receipt at the time of the payment of the $40. The description may have been written in the receipt at the time Bellarts signed it; and yet the fact remains that Marmeni testified that "Mr. Montrezza drew that up before we went to Mr. Bellarts." No witness testified that the description was inserted after Marmeni, Deluchi, and Montrezza visited the premises. The receipt was not produced; but the evidence overwhelmingly shows that the receipt mentioned the premises. Montrezza testified thus:

> "I don't remember whether I had the number of the lot or block, or the dimensions, or location of the property."

Whether Montrezza obtained the description or dimensions of the property before or at the time Bellarts signed the receipt is not material, because the ultimate fact is that he had "something connected with the dimensions or location of the property." While Montrezza testified that "Mr. Marmeni paid me something for looking over the premises," and Marmeni swore that "I didn't pay him anything," nevertheless Marmeni is confronted with the indisputable facts that Montrezza prepared the receipt, was present when Bellarts signed it, was also present when the final papers were signed and passed, and was acting for and in behalf of Marmeni. Montrezza knew what property was being sold, because he wrote the receipt. Montrezza was the agent of Marmeni, and his knowledge was the knowledge of Marmeni.

When a witness for the plaintiff, Deluchi said that, while he did not measure the distance from "the front to the back, between the two fences," he was "positive it was over 100," but that it appeared "fully over 100 feet," and that "anybody could see that." In his printed brief Marmeni says that he "examined the premises and observed the boundaries, but did not appreciate the distance." If Marmeni is to be judged by his own evidence, it will become reasonably certain that he has at least a fair idea of measurements and distances. When asked about his estimate of the dimensions of the house and after protesting that "I am a poor judge about that," he said that the house "must be more than 45 by 50; must be about 45 by 60, something like that; I am just guessing."

If Bellarts is liable at all, it is because of what Marmeni says that Deluchi told him. It is true that Marmeni testified that Bellarts told him when the receipt was signed that "everything Deluchi showed me inside the fence was all mine," but it is also true that Bellarts denied this, and, although present on the occasion mentioned, neither Montrezza nor Deluchi undertook to corroborate Marmeni.

While Bellarts is responsible for whatever Deluchi said, by the same token Marmeni is chargeable with whatever he himself knew, and also with whatever Montrezza learned when acting as his agent. When speaking of the knowledge with which Marmeni was chargeable, the circuit judge who saw the witnesses and heard them testify remarked that:

> "A man who was so diligent as Mr. Marmeni in accumulating money in his business with which to buy property, it seems to me he would ascertain how many feet there were in the lot. I believe that Marmeni knew the dimensions of that lot after the examination of the abstract, because an attorney could not help by the reading of the abstract know that the lot was 45 feet frontage and 81.8 feet deep; that is the property which he was buying."

The evidence shows that Marmeni knew or must be deemed to have known that it was more than 100 feet from the front fence to the rear fence, which, he says, was pointed out to him as the boundary of the premises. He knew or must be deemed to have known that the property described in the receipt and deed delivered to him and in the mortgage signed by him was only 81.8 feet in length; and consequently he is in no position to claim that he was defrauded, especially, after the long delay which followed the Landigan letter in 1913. The transcript of the testimony was read twice before the preparation of the original opinion, and a third reading has only confirmed the conclusion there expressed.

A petition for a rehearing should be denied.

(84 Or. 631)

SMITH v. DIRECTOR et al.

(Supreme Court of Oregon. June 26, 1917.)

Appeal and Error ⚷597(3) — Proof of Service of Notice of Appeal.

Presence in the transcript of proof of service of notice of appeal is jurisdictional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2364.]

In Banc. Appeal from Circuit Court, Multnomah County; Geo. N. Davis, Judge.

Action by H. C. Smith against N. Director and others. From judgment for defendants, plaintiff appeals. Appeal dismissed.

S. J. Silverman, of Portland, for appellant. Morris A. Goldstein, of Portland, for respondents.

BENSON, J. The transcript discloses that the notice of appeal was filed February 14, 1917, but does not contain any proof of service thereof. Appellant has filed his affidavit

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to the effect that he did serve the notice of appeal and file proof thereof, but that such proof was lost or mislaid in the clerk's office. Since the presence of such proof in the transcript is jurisdictional (Wolf v. Smith, 6 Or. 73), the motion must be allowed, and the appeal is dismissed.

(84 Or. 637)

ROBERTS v. BODLEY.

(Supreme Court of Oregon. June 26, 1917.)

EVIDENCE 🔑269(1)—MENTAL STATE AS ISSUABLE FACT—DECLARATION AS EVIDENCE.

In suit to recover the price of a mare which plaintiff claimed he sold and delivered to defendant, where plaintiff took the mare to defendant's farm for trial, and claimed that defendant worked her, said she would answer, and promised to pay for her, but defendant contended that when plaintiff went away, they agreed that he would give the mare a further trial, and return her if she proved unsatisfactory, testimony that after plaintiff went away the witness said to defendant: "Are you going to take the animal?" and he answered: "I am not perfectly satisfied with her. As soon as I get the kale in I will work her on the hay"—was competent as tending to show defendant's state of mind as to whether the mare suited him, there being nothing to show that defendant's remark was other than a perfectly natural and spontaneous expression indicating the state of his mind.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1063.]

In banc. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by William P. Roberts against Donald Bodley. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff sues to recover from the defendant $150 alleged to be the reasonable and agreed price to be paid for a mare which the plaintiff says he sold and delivered to the defendant. The answer denies the whole complaint and avers in substance that the plaintiff offered to sell the mare to the defendant and the latter took her on trial, agreeing to purchase her if she proved satisfactory, but after testing her she proved to be unsatisfactory to him, whereupon he returned her to the plaintiff who has ever since then had possession of her. No reply appears in the abstract. It seems, however, that the case was heard as though issue had been joined on the new matter in the answer.

The only assignment of error argued in the brief is grounded upon the following: It seems that the plaintiff took the animal to the defendant's farm for trial. The contention of Roberts is that the defendant worked her, said she would answer every purpose, and promised to pay for her on the following Saturday or Sunday whereupon the plaintiff left. Bodley maintained that when Roberts went away it was agreed between them that he would give her a further trial and return her if she proved unsatisfactory. The defendant called a witness named Kelliker, who testified that he was present on that occasion, and while the defendant was driving the mare hitched with another horse to a disc harrow the witness said to Roberts, "That is a pretty fair animal." Roberts answered, "It is gentle, but has not been worked for some time." He then testified that the defendant drove up, and when the witness asked him, "Are you going to take the mare?" Bodley replied, "Well, I will have to try her out, and if she proves satisfactory to me I might then." All this conversation took place in the presence of the plaintiff, and no objection was made to that, but the court allowed the witness further to testify about what was said after Roberts had gone away: "Then I went on helping to plant kale, and Don [meaning Bodley] went on around a few more times and Mr. Roberts went away, and I said to Don, 'Do you think you will take the animal?'" The objection to the testimony as narration of something said in the absence of the plaintiff having been overruled, the witness continued: "So Mr. Roberts went away and I said to Don, 'Are you going to take the animal?' and he said: 'I am not perfectly satisfied with her. As soon as I get the kale in I will work her on the hay.'" The admission in evidence of Bodley's answer to Kelliker's query propounded in the absence of Roberts constitutes the only fault urged by the plaintiff against the proceedings at the trial. The jury returned a verdict for the defendant. The plaintiff appeals from the resulting judgment.

C. D. Purcell and B. N. Hicks, both of Portland, for appellant. George Tazwell, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). It was in issue before the jury whether the mare suited the defendant. This involved the state of his mind on that subject, and the question is whether the declarations of the defendant to the witness Kelliker are competent for the proof of that matter. The plaintiff cites in support of his attack upon the ruling of the court Sullivan v. O. R. & N. Co., 12 Or. 392, 7 Pac. 508, 53 Am. Rep. 364, and Fredenthal v. Brown, 52 Or. 33, 95 Pac. 1114. In the Sullivan Case the plaintiff sued to recover damages for a hurt received by him when ejected from one of the defendant's trains. After having testified to the matter in question himself he called a witness, who stated in substance that two or three minutes after the train in question had passed he heard some one call out, and on going to the spot he found the plaintiff, who said in effect, answering an inquiry of the witness about what was the matter, that the conductor pushed him off or threw him off the train. This court rejected that testimony as not being part of the res gestæ. In the Fredenthal Case the plaintiff was hurt by the fall of a sling load of lumber during the loading of a ship upon which he was working as a stevedore. As imputing blame to the defendant the plaintiff offered the statement of the engineer in charge of the donkey engine used in handling the lumber in purport that he could not hold the load with the machine then in use. In both these cases the effort was to prove the principal fact in dispute by testimony which was not part of the res gestæ. An act apparent to the senses and capable of description was the subject of inquiry in each of those cases. The subsequent declarations were not part of that act, and lacked the spontaneity necessary to make them so. Here the fact sought to be established, although vital to the defendant's case, is the state of mind of the defendant, whether of satisfaction or dissatisfaction with the mare alleged to have been sold to him. The phenomena by which mental conditions are usually ascertained are the words and actions of the individual whose mind is under consideration. Indeed there is but little else available as primary proof in such a case. If what he says is spontaneous and devoid of malingery, it is received as original evidence to aid the jury in ascertaining the ultimate fact in dispute which, in this instance, was the state of Bodley's mind, whether satisfied or not with the quality of the animal. Much depends on the circumstances of each case. The trial judge is vested with discretion in the premises to reject as self-serving those expressions uttered so remotely as to give them the flavor of being manufactured for the occasion and to receive those manifestly spontaneous as indicative of the true mental situation under scrutiny.

The matter of the admissibility of the declarations of one whose attitude of mind at the time is being considered was exhaustively treated by Mr. Justice Harris, a writer of one of the majority opinions in State v. Farnam, 82 Or. 211, 161 Pac. 417. The defendant there was accused of murdering Edna Morgan. It was necessary to prove that she met him and went with him to a barn where her dead body was afterwards found. Witnesses were permitted to state that during the afternoon before her disappearance she refused to go home with them because, as she said "she could not, as she thought Roy [meaning the defendant] was coming down." This testimony was assailed by the defendant on the ground that it was hearsay, not part of the res gestæ, and that the declaration of the girl was made not in his presence. After an extended review of the authorities on that side of the question the discussion is summed up thus:

> "If the doing of an act is a material question, then the existence of a design or plan to do that specific act is relevant to show that the act was probably done; and, considering the plan or design as a condition of the mind, a person's own statements of a present existing state of mind, when made in a natural manner and under circumstances dispelling suspicion and containing no suggestion of sinister motives, only reflect the mental state, and therefore are competent to prove the condition of the mind, or, in other words, the plan or design."

In the instant case the talk between Kelliker and the defendant was virtually a continuance of the conversation begun in the presence of the plaintiff, although at the moment he had left the scene. There is nothing to show that it was other than a perfectly natural and spontaneous expression on the part of the defendant indicating the state of his mind on the subject of whether he was satisfied with the animal. On the hypothesis that the doctrine elucidated by Mr. Justice Harris is sound law in a case where the lifelong liberty of the defendant was involved, it is controlling in a horse trade where the plaintiff still has the horse and the defendant retains the purchase money.

The judgment is affirmed.

(85 Or. 78)

THARP v. JACKSON.

(Supreme Court of Oregon. July 10, 1917.)

1. Executors and Administrators 🔑431(2) —Action on Claim—Condition Precedent —Presentation.

An action at law on a claim against an estate must be based on the same claim as that presented to deceased's personal representative.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819.]

2. Executors and Administrators 🔑431(2) — Action on Claim — Previous Presentation.

Where plaintiff's action against an estate for personal services was for the same amount and services as her claim presented to the administratrix, it was not defeated by the fact that evidence on which she relied was not stated in the claim.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819.]

Department No. 2. Appeal from Circuit Court, Douglas County; James W. Hamilton, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 165 Pac. 585.

Neuner & Wimberly, of Roseburg, for appellant. John T. Long, of Roseburg, H. T. Bagley, of Hillsboro, and Arthur Langguth, of Portland, for respondent.

McCAMANT, J. Appellant's petition for rehearing reargues the matters determined in the former opinion (165 Pac. 585), and presents with much force a question which was passed upon by us only inferentially. The claim presented to the administratrix does not set out the agreement testified to by plaintiff to the effect that she was not to be paid for her services until five years after she entered the office of the deceased. It is contended that the failure to mention this agreement in the claim precludes its assertion by plaintiff in this action. It has been held that if the claim presented shows on its face that claimant has no cause of action, the claim cannot be the basis of a successful litigation with the executor. Wilkes v. Cornelius, 21 Or. 348, 352, 28 Pac. 135; McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466, 468.

[1] The action at law must be based on the same claim as that presented to the personal representatives of the deceased. Wilkes v. Cornelius and McGrath v. Carroll, supra; Etchas v. Orena, 127 Cal. 588, 60 Pac. 45.

[2] Within the rule announced by these authorities we think that plaintiff's claim presented to the administratrix is sufficient to sustain the judgment she has recovered. It was held by this court in Wilkes v. Cornelius, 21 Or. 348, 350-351, 28 Pac. 135, 136, that:

> "The facts constituting the claim need not be stated with the same particularity required in a pleading in an action at law, but may be asserted in general terms; and however informal the claim may be, if it show a substantial liability in favor of the claimant and against the estate, it will be sufficient."

The claim demands the same sum as that for which this action is brought. Like this action it is based on a quantum meruit for services rendered, and the services are specified in the claim as they are specified in the verified statement of plaintiff's account furnished the defendant on demand. The claim does not appear to be barred by the statute of limitations; on the contrary, nearly all the services rendered are alleged to have been performed within six years prior to the death of defendant's decedent. It was not necessary for plaintiff to set up in her claim the evidence on which she relied to support it. The former opinion is adhered to, and the petition for a rehearing is denied.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(85 Or. 251)

REICHERT v. SOOY-SMITH.*

(Supreme Court of Oregon. June 26, 1917.)

1. Mortgages 🔑603—Mortgagee in Possession—Compensation for Improvements.

Purchaser of an orchard at mortgage foreclosure sale cannot, after the debtor has redeemed the property, recover his expenses and the value of his servies in attempting to eradicate pear blight from the orchard, since, under L. O. L. § 248, as to manner of redemption, debtor is not required to pay such purchaser the moneys necessarily expended by him in preserving the estate from loss and injury.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1783-1785.]

2. Mortgages 🔑602—Redemption—Use and Occupation.

Redemptor may recover of purchaser at foreclosure sale the reasonable value of the use and occupation of the premises during the time they were in his possession, without regard to what purchaser may have realized therefrom.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1778-1782.]

3. Mortgages 🔑603—Use and Occupation—Set-Off.

Purchaser of land at foreclosure sale may set off against reasonable value of use and occupation of premises during time they were in his possession money spent in care and cultivation of property and in protecting it from deterioration, together with reasonable value of his own services in such work.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1783-1785.]

Department 1. Appeal from Circuit Court, Jackson County; Frank M. Calkins, Judge.

Action by S. F. Reichert against Josephine Sooy-Smith. Judgment for plaintiff, from which both parties appeal. Reversed on appeal of defendant, and remanded.

A mortgage upon a certain orchard of 19 acres having been foreclosed in the regular way, one F. L. Tou Velle became the purchaser at execution sale, and thereafter the plaintiff bought from Tou Velle all of his interest in the premises. Plaintiff entered into possession of the property, cultivated, pruned, sprayed, and otherwise cared for the fruit trees for nearly a year, and, having harvested the crop, received therefor the gross sum of $166.89. A few days before the expiration of the year following the confirmation of the sale the defendant redeemed the property by paying the amount of the purchase price with 10 per cent. interest and resumed possession of the premises. Thereafter plaintiff began this action to recover the expenditures and services in caring for the orchard during the time that he was in possession as such purchaser. The portions of the complaint deemed important in the consideration of the case are as follows:

> "That said premises and the whole thereof constitute an orchard tract, and at the time of said sale, and ever since said time, have had, and now have, growing thereon, certain pear, apple, peach, plum, and cherry trees, most of which are now in bearing, producing fruit of a commercial nature, character, and quality, and of the age of from 6 to 18 years.
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> "That at the time the plaintiff entered into possession of said premises herein described, and sold upon foreclosure sale as aforesaid, said orchard and fruit trees growing thereon were in a very bad, decayed, misused, neglected, wasted, run-down, and dilapidated condition, and many of said fruit trees in said orchard and upon said premises were affected and afflicted with a disease commonly known as 'pear blight'; that said disease was and is very destructive and injurious to fruit trees, and in order to eradicate, cope with, and get rid of the same it is and was necessary to cut out part of the limb or tree so affected.
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> "That at the time said plaintiff took possession of said premises said fruit trees were badly in need of spraying, the ground in said orchard was badly in need of cultivation, and said fruit trees, said ground in said orchard, and said orchard were badly in need of various cares and practices necessary in the offices of good husbandry. * * *
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> "That during the time of the plaintiff's possession of said property, and on or about March 25, 1914, he was notified by one Elmer Oatman, who at said time was a fruit inspector of Jackson county, Or., that certain fruit trees situated upon said premises herein described were affect-

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*For opinion on motion for rehearing, see 165 Pac. 1184.

> ed and afflicted with said 'pear blight,' and were a menace to the community, and that steps must be taken by the plaintiff to eradicate said evil, to wit, said 'pear blight,' either by taking out the trees or cutting out and off the limbs or other parts of those trees so affected, and upon failure upon the part of the plaintiff so to do, he, the said fruit inspector, would take these necessary and proper steps himself, and the cost of the same would thereby become a lien and charge against said property.
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> "That the plaintiff immediately complied with said order and said instructions, and began to cut out said 'pear blight' wherever and whenever he found the same in said orchard, and in said fruit trees, and attempted to eradicate the same as well as possible.
>
> "That from said March 21, 1914, the date when plaintiff entered into possession of said premises, and up to March 26, 1915, the date when he surrendered the possession thereof to the redemptioner, said defendant herein, plaintiff was forced to expend, and did expend, in cultivating, taking care of said fruit trees and said orchard, and in eradicating and cutting out said blight, as aforesaid, and in the purchase of materials for use upon and which were used upon said fruit trees, and upon said orchard, spraying, etc., the full sum of $574.45; that the real and reasonable value of plaintiff's own services in cutting out said blight, cultivating, taking care of said orchard and fruit trees, spraying, etc., was and is the sum of $500; that each, every, and all of said services so rendered and performed, whether by the plaintiff himself, or whether performed by some one else, for which he paid, and said material so used, were necessary, proper, and needful in the care and management of said orchard and said fruit trees and said premises, and were and are in accord with the practice of good husbandry, and greatly and materially assisted and benefited said orchard, said premises, and said fruit trees, and without the same said orchard and fruit trees would now be practically worthless and of no value as a commercial orchard or otherwise; that the plaintiff received from the sale of fruit taken from said orchard, and said fruit trees growing thereon the full sum of $166.89, leaving a balance in the sum of $907.56 due plaintiff for his work, labor, services so rendered and performed, and amount expended in the care, cultivation, cutting out blight, spraying, and for materials furnished and provided as aforesaid.
>
> "That no part of said sum of $907.56 has ever been paid, but the whole amount of which is due and owing unto the plaintiff herein from said defendant Josephine Sooy-Smith, and which should be paid by the said defendant Josephine Sooy-Smith."

Defendant demurred to the complaint upon the ground that it does not state a cause of action. The demurrer being overruled, an answer was filed consisting of admissions and denials and a counterclaim of $1,000 for the use and occupation of the premises. Plaintiff demurred to the counterclaim, and, although the demurrer was not directly passed upon, the court sustained objections to the admissibility of any evidence in support thereof. A reply having been filed, a trial to a jury was had, resulting in a verdict and judgment for plaintiff in the sum of $418.72, and both parties appealed.

Lincoln McCormack, of Medford, for appellant. George M. Roberts, of Medford, for respondent.

BENSON, J. (after stating the facts as above). [1] We shall first consider the demurrer to the complaint, the overruling of which is assigned as error. This pleading was evidently framed and the cause was tried upon the theory that the purchaser of real property at an execution sale stands in the shoes of a mortgagee in possession, and is therefore entitled to recover from a redemptor the moneys necessarily expended by him in preserving the estate from loss and injury. If this theory were correct, we might hold the complaint sufficient to justify an accounting and recovery of such moneys as had been necessarily expended in the preservation of the estate; but, unfortunately, the purchaser at an execution sale does not bear such relation to the property, except in the sense that he may retain possession thereof until the redemptor has paid the sums specified in the statute. The true doctrine is thus expressed in 2 Jones on Mortgages (6th Ed.) § 1051b:

> "If the purchaser at a foreclosure sale has paid the purchase money and there is a subsequent redemption, his rights are determined by treating him as a mortgagee in possession to the extent of the price paid by him with interest, and must account for the rents and profits."

The statute relating to redemption reads thus:

> "The judgment debtor, or his successor in interest, may, at any time prior to confirmation of sale, and also within one year after the confirmation of sale, redeem the property on paying the amount of the purchase money, with interest thereon at the rate of ten per centum per annum from the date of sale, together with the amount of any taxes the purchaser may have been required to pay thereon." Section 248, L. O. L.

The case of Higgs v. McDuffie, 81 Or. 256, 157 Pac. 794, 158 Pac. 953, makes it clear that such redemption is not from the mortgage, but from the sale. If there were no statute, there could be no redemption. In Doerhoefer v. Farrell, 29 Or. 304, 45 Pac. 797, Mr. Chief Justice Bean says:

> "The right to redeem from an execution sale is a statutory right, and the court can neither increase nor lessen the burden of the redemptioner."

We have been unable to find any authority in conflict with this doctrine. We conclude, therefore, that the demurrer should have been sustained. If this works an injustice, and we think it does, the remedy lies with the Legislature, and not with the courts.

[2] Considering defendant's cross-appeal, we observe that the answer pleads a counterclaim of $1,000 as the reasonable value of the use and occupation of the premises during the time they were in the possession of the plaintiff. Under this plea defendant offered evidence which was excluded by the trial court, which ruling was assigned as error. It is stipulated that $166.89 was received by the plaintiff from the sale of fruit, but it does not appear from the stipulation that this is all that was received or that it is all that should have been received for the products of the orchard. Under this state of the record it was error to exclude the evidence offered.

2 Jones on Mortgages (6th Ed.) § 1122, contains the following statement of the correct practice:

> "If a mortgagee himself occupies the premises, especially if they consist of a farm under cultivation, upon which labor and money must be bestowed to produce annual crops, he will be charged with such sums as will be a fair rent of the premises, without regard to what he may realize as profits from the use of it."

[3] Of course, the plaintiff should be allowed to offset against such charge such sums as he may have expended in the care and cultivation of the property and moneys expended in protecting it from deterioration, together with the reasonable value of his own services in such work.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent herewith.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

(85 Or. 206)

SOUTHWESTERN SURETY INS. CO. v. FOSTER et al. *

(Supreme Court of Oregon. July 3, 1917.)

APPEAL AND ERROR ⟹424—NOTICE OF APPEAL—NECESSARY PARTY.

In suit by surety on contractor's bond to determine to whom it should pay, where judgment was rendered against the surety, and against one of the contractors and the administrator of the other contractor, the administrator was a necessary party on appeal by written notice under L. O. L. § 550, as amended by Laws 1913, p. 617; the judgment debtors presumably having the right of contribution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2152-2154.]

In Banc. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Suit by the Southwestern Surety Insurance Company against William Foster and others. From the decree rendered, Foster appeals, and the defendant School District No. 1 of Multnomah County moves to dismiss the appeal. Appeal dismissed.

Jas. E. Craib, Thomas A. Hayes, and A. G. Thompson, all of Portland, for appellant. Fulton & Bowerman, H. B. Nicholas, and Newton McCoy, all of Portland, for defendant School Dist. No. 1. Chester V. Dolph, of Portland, for respondent.

PER CURIAM. William Foster and C. A. Bartz, composing a firm doing business as Foster & Co., engaged to build a schoolhouse for school district No. 1 of Multnomah county, Or. The Southwestern Surety Insurance Company, the plaintiff here, underwrote the bond required of the contractors by the statute. Various creditors of the firm instituted actions against it and garnished the money due it from the school district, about which time the partnership abandoned the work. Actions were then commenced in the name of the school district against the plaintiff here for the benefit of sundry persons furnishing labor and materials used in the structure. At this juncture the plaintiff surety company began this suit against the contractors, the school district, and the beneficiaries of the litigation mentioned, in order to ascertain what was due to each, so that its liability on its undertaking for Foster & Co. could be definitely determined. After a hearing the court rendered a decree for the district for the recovery of a certain amount of money from the plaintiff and the defendants Foster and the administrator of Bartz, who had died pendente lite, and further providing to the effect that all the tools, implements, and supplies left by the contractors in the possession of the school district should be delivered to the plaintiff to be sold by it and applied to its demands against its principals, the contractors, and that, should there be any surplus of $1,700 retained by the school district to satisfy the attachments and garnishments after applying it to that purpose, the same should be paid to the surety company. A notice of appeal on behalf of the defendant Foster was filed containing an admission of service by the attorney for the school district and having appended thereto this writing:

> "State of Oregon, County of Multnomah—ss.:
>
> "I, Thomas A. Hayes, do hereby certify that I am one of the attorneys for appellant, William Foster; that I served the within notice of appeal on Chester V. Dolph, attorney for plaintiff, Southwestern Surety Insurance Company, this 4th day of October, 1916; that said Chester V. Dolph refused to accept service of said notice of appeal by signing acceptance.
>
> "[Signed] Thomas A. Hayes."

The school district now moves to dismiss the appeal, inter alia, "for the further reason that G. S. Breitling, administrator of C. A. Bartz, deceased, did not join in the appeal herein and no notice of appeal was served on said administrator." The decree being against the plaintiff, the defendant Foster, and the administrator of Bartz, presumably the right of contribution would exist between the partners. The Bartz estate being liable for the payment of the decree, the administrator would be interested in retaining the right to compel Foster to pay his part of the established liability. If, however, the latter succeeded in overturning the decree or modifying it in some particular as to himself, it would remain a charge against the surety and the estate who have not appealed with the right of contribution gone.

This subject was treated by Mr. Justice Bean in Templeton v. Morrison, 66 Or. 493, 131 Pac. 319, 135 Pac. 95, wherein he concludes that a person jointly liable with the appellant is an adverse party upon whom notice of appeal must be served. Where written notice of appeal is adopted as the means of bringing a case before this court for review, the statute requires it to be serv-

*Rehearing denied July 24, 1917.

ed upon all adverse parties who have appeared in the action or suit. Laws 1913, c. 319, amending section 550, L. O. L. In the present instance there was quite as much reason to serve notice upon the administrator as upon the plaintiff, because the estate was equally bound by the decree. It is unnecessary to consider the other reasons upon which the motion is grounded.

On the authority of Templeton v. Morrison, therefore, the appeal must be dismissed.

(85 Or. 37)

STATE v. MARASTONI.

(Supreme Court of Oregon. July 3, 1917.)

1. INTOXICATING LIQUORS 🔑137—PROHIBITION STATUTE—CONSTRUCTION—"MANUFACTURE."

One who presses juice from grapes, puts it in a vat and permits it to ferment by natural process with intent to use part of it in the state as a beverage for himself and family, manufactures wine in violation of Gen. Laws 1915, p. 150.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 147.

For other definitions, see Words and Phrases, First and Second Series, Manufacture.]

2. INTOXICATING LIQUORS 🔑137—PROHIBITION STATUTE—"MANUFACTURE."

Where "manufacture," as used in Gen. Laws 1915, p. 151, § 5, means to make, irrespective of quantity produced or use to which it is to be put.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 147.]

3. CONSTITUTIONAL LAW 🔑295—INTOXICATING LIQUORS 🔑17—PROHIBITING MANUFACTURE—CONSTITUTIONALITY.

Const. Or. art. 1, § 36, as amended (see Laws 1915, p. 12), forbidding the manufacture of intoxicating wine for the maker's own use, does not violate Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 841; Intoxicating Liquors, Cent. Dig. §§ 21–23.]

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Joe Marastoni was found guilty of violating Laws 1915, p. 150, relating to manufacture of intoxicating liquors, and appeals. Affirmed.

The defendant was complained against in the municipal court of the city of Portland for a violation of chapter 141 of the General Laws of 1915, relating to the manufacture of intoxicating liquor. The complaint is as follows:

"The said Joe Marastoni, on the 27th day of September, A. D. 1916, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and willfully keep and maintain as a common nuisance that certain place known and described as 344 Second street, in the city of Portland, in the county and state aforesaid, by then and there at said place manufacturing and keeping for sale, barter, and delivery, in violation of law, certain intoxicating liquors, to wit, wine, and by then and there keeping and using in said place certain intoxicating liquors, bottles, kegs, barrels, syphons, and other vessels containing intoxicating liquors, and other property, for the purpose of keeping and maintaining said place above described as a common nuisance, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Oregon."

That portion of the Constitution bearing upon the matters here discussed is section 36, article 1 (see Laws 1915, p. 12), in effect January 1, 1916, and is as follows:

"From and after January 1, 1916, no intoxicating liquors shall be manufactured, or sold, within this state, except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes. * * *"

The statute of 1915, so far as it relates to this subject, is as follows:

"Section 1. This entire act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace and morals, and all of its provisions shall be liberally construed for the attainment of that purpose.

"Sec. 2. The words 'intoxicating liquor,' as used in this act shall be construed to embrace all spirituous, malt, vinous, fermented or other intoxicating liquors; and all mixtures or preparations reasonably likely or intended to be used as a beverage, which shall contain in excess of one half of one per centum of alcohol by volume, shall be deemed to be embraced within such term, independently of any other test of their intoxicating character; and all mixtures, compounds or preparations, whether liquid or not, which are intended, when mixed with water or otherwise, to produce, by fermentation or otherwise, an intoxicating liquor, shall also be deemed to be embraced within such term."

That part of section 6 relating to the manufacture of intoxicating liquor provides:

"The provisions of this act shall not be construed to prevent any one from manufacturing, for his own use, unfermented wine or nonintoxicating cider, or wine for sacramental purposes, or to prevent the manufacture, from fruit grown exclusively within the state, of vinegar or nonintoxicating cider for use and sale, or to prevent the sale at wholesale only to druggists of ethyl alcohol for medicinal, pharmaceutical, scientific, and mechanical purposes, and for external use and application."

Section 15 prescribes:

"All premises, buildings, vehicles, boats, and all other places where intoxicating liquors are manufactured, sold, bartered or given away, in violation of law, or where persons are permitted to resort for the drinking of intoxicating liquor as a beverage, or where intoxicating liquors are kept for sale, barter or delivery, in violation of law, and all intoxicating liquors, bottles, glasses, kegs, pumps, bars, and other property kept in and used in maintaining such premises, buildings, vehicles, boats, or other places, are hereby declared to be common nuisances: Provided, that nothing in this act shall be construed to interfere with the rights of seagoing vessels to keep liquor thereon, provided they comply with all the provisions of this act; and every person who maintains or assists in maintaining such common nuisance shall be held guilty of a misdemeanor, and upon conviction shall be punished for each offense as provided in section 36 hereof for offenses under this act."

The defendant was convicted in the municipal court and appealed to the circuit court. The case was there tried before the court without a jury upon a stipulated state of facts, which stipulation we quote:

"That Joe Marastoni, the defendant above named, in the county of Multnomah, and state of Oregon, on or about the 21st day of September, 1916, had in his possession at his private dwelling house, located at 344 Second street, Portland, said county and state, about one-third of a ton of grapes, which he then and there crushed, and from which he squeezed the juice into a container, thereby making for his own personal use and for the use of his family fifty gallons of wine, containing at the said time less than one-half of one per centum of alcohol by volume; that thereafter, no act or thing was done by the said defendant, and the said wine was allowed to remain in said container to ferment, and the same did, by the natural process of nature alone, on the 27th day of September, 1916, become fermented wine containing in excess of one-half of one per centum of alcohol by volume, and on said date was in the possession of the said defendant in the county of Multnomah and state of Oregon, who was then and there keeping the same for the following purposes: The greater portion thereof was to be used by the defendant and his family as a beverage and as a food with their meals as a part thereof, and for culinary purposes, and was not manufactured or kept for the purpose of sale, barter, or delivery. The remaining portion of the same was to be allowed to become vinegar by the further process of nature, and to be used by the defendant and his family for culinary purposes and table use, and not as a beverage."

The court upon these facts adjudged the defendant guilty, and imposed a fine of $50, from which judgment he appeals.

Albert B. Ferrera and Jos. H. Page, both of Portland, for appellant. Charles C. Hindman, of Portland (Walter H. Evans, Dist. Atty., of Portland, on the brief), for the State.

McBRIDE, C. J. (after stating the facts as above). [1] The principal question in this case is whether the defendant "manufactured" the wine which he kept on the premises. That he pressed the juice from the grapes, put it in a vat, and permitted it to ferment by the usual natural process, with the intent to use part of it in that state as a beverage for himself and family, is admitted. As to this portion of the liquid we are of the opinion that he is guilty of a violation of the statute. Webster's Dictionary defines the word "manufacture" to mean, "To make (wares, machinery, or other products) by hand, by machinery, or by other agency." In Murphy v. Arnson, 96 U. S. 131, 24 L. Ed. 773, it is observed:

> "Beer may well be said to be manufactured from malt and other ingredients, whisky from corn, or cider from apples. The fact that the identity of the original article or articles is lost, and that a new form or a new character is assumed, is not material in determining whether, within the popular idea, as embodied in the customs act, the article in question is a manufacture from its original elements."

[2] We are of the opinion that the word "manufacture," as used in section 5 of the act referred to, means to "make" irrespective of the quantity produced, or the use to which it is to be put. This is made clear by section 6, which provides that the provisions of the act shall not be construed to prevent any one from manufacturing for his own use unfermented wine or nonintoxicating cider, wine for sacramental purposes, or to prevent the manufacture of vinegar or nonintoxicating cider for sale. In this case the exception proves the rule as to those things not excepted. Section 5 is general and applies to all intoxicating liquors. Section 6 out of caution excepts wine manufactured for sacramental purposes and unfermented wine manufactured for the use of the maker, and the framer aware of the fact that cider or grape juice must become intoxicating in the process of becoming vinegar permits these processes to be carried on until the vinous fermentation has passed and the acetous fermentation has begun. The section last referred to makes plain the sense in which the word "manufacture" is employed in the act. It permits the "manufacture" of unfermented wines and wine for sacramental purposes, which indicates clearly that that term is used as a synonym for "make."

It is claimed that because the defendant did no affirmative act to produce fermentation, but simply put the grape juice into a vat and "let nature take its course," he did not manufacture the wine; but this contention is unsound. Under such a construction no wine ever has been or ever will be made by human agency. The stipulation admits, in substance, that defendant placed the juice in the vat, and there allowed it to ferment, and that his intent was to use the greater portion as a beverage for himself and family as food with their meals, and to allow the remainder to become vinegar. He but pursued the usual process of making wine. The well-known action of the air and the germs therefrom which produce fermentation were utilized and intended to be utilized in the process of manufacture. Some of the most important compounds known to commerce and medicine are manufactured by bringing two or more substances in contact and allowing the chemical forces of nature to produce a new compound or substance. Murphy v. Arnson, supra.

[3] It is also claimed that if section 36, art. 1, of our Constitution should be construed so as to prevent the manufacture of intoxicating wine for the maker's own use, it is violative of the Fourteenth Amendment to the national Constitution. This contention is not new, and is disposed of in Mugler v. Kansas, 123 U. S. 653, 8 Sup. Ct. 297, 31 L. Ed. 205, wherein Mr. Justice Harlan, speaking of the attitude of the courts toward legislation of this character, observes:

> "If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a

fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare."

No doubt, to many of our citizens accustomed to the use of wine as a table beverage to the same extent that others have used tea or coffee or milk, such extreme legislation may seem drastic and harsh. It certainly seems so to the writer, but whatever may be our individual opinions they must yield to the mandates of the law.

The question is not as to the policy of the law, but as to the power to enact it, and this being found to exist, the judgment will be affirmed.

MOORE, BEAN, and McCAMANT, JJ., concur.

(85 Or. 45)

STATE v. FETSCH et al.

(Supreme Court of Oregon. July 3, 1917.)

1. CRIMINAL LAW 🔑1032(4) — APPEAL AND ERROR—HARMLESS ERROR.

In the absence of objection, failure to make an entry of an order showing that a person accused of assault and battery stated that the name under which he was tried was his own, as required by L. O. L. § 1466, *held* harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2627.]

2. CRIMINAL LAW 🔑260(12) — JURISDICTION OF COURT'S SENTENCE.

Under L. O. L. § 1924, as amended by Laws 1911, p. 179, providing that, if any person not armed with a dangerous weapon shall assault another or shall commit an assault and battery, he may be fined not less than $50 or more than $500, if tried in the circuit court, or not less than $5 or more than $50 if tried before a justice of the peace, a circuit court has jurisdiction to impose a fine of $150 in a prosecution commenced in the court of a justice of the peace wherein a fine of only $20 was imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 569–571, 592–597.]

Department 2. Appeal from Circuit Court, Multnomah County; George H. Davis, Judge.

August Fetsch and T. F. Ward were convicted of assault and battery before a justice of the peace. From a conviction in the circuit court, they appeal. Affirmed.

H. K. Sargent, of Portland, for appellants. C. C. Hindman, Deputy Dist. Atty., of Portland (Walter H. Evans, Dist. Atty., of Portland, on the brief), for the State.

BEAN, J. The defendants, August Fetsch and T. F. Ward, were complained against under fictitious names in the justice's court for the district of Portland for the crime of assault and battery and were arrested. They entered pleas of not guilty, and upon being tried were convicted and fined $20 each. An appeal was taken to the circuit court, where the defendants were found guilty by the verdict of a jury, and a fine of $150 each was imposed by the court. An appeal was prosecuted to this court.

[1] It is assigned as error that the complaint is insufficient for the reason that the true names of the defendants, which appear in the title of the cause, are not inserted in the body of the complaint, and that there is nothing in the record to show that an order was made by the court directing that an entry of the fact that the defendants each stated that another name than that in the complaint was his true name be entered in the journal as provided in section 1466, L. O. L. Fictitious names of the defendants are in the body of the complaint, and the names under which they pleaded appear to have been inserted in the title of the cause. All the later proceedings in the case were had against them under their true names substantially in conformity with section 1441 and the one just referred to, and evidently so by order of the court. The failure, if any, of the proper entry of any order made would only be a matter of correcting the journal of the court to show the true proceeding taken. At the most, the court having jurisdiction of the subject-matter and of the persons of the defendants, it was only an irregularity which affected no substantial rights of the defendants. The matter was not called to the attention of either justice's or circuit court. Defendants' undertaking of bail and notice of appeal, presumably prepared by their counsel, both state the true names of the defendants and nothing more. If there was any error in this respect in the circuit court, the defendants invited it, and they cannot be heard to complain. The complaint charged, and they fully understood, the offense for which they were to answer. We review only the action of the trial court. This infor-

mality was not made the subject of inquiry there. It is now too late for the defendants to complain of that which did not prejudice their case.

[2] It is contended on behalf of defendants that the circuit court upon the trial of the cause was exercising appellate jurisdiction and could impose no greater fine than that authorized to be adjudged by the justice's court. Section 2411, L. O. L., confers jurisdiction upon a justice's court of the crime of assault, and assault and battery, not charged to have been committed with intent to commit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties. Section 1924, L. O. L., as amended by Gen. Laws 1911, p. 179, enacts:

> "If any person not being armed with a dangerous weapon, shall assault another or shall commit any assault and battery upon another such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine not less than $50 nor more than $500: Provided, that in any case in which any person shall be accused in a court of a justice of the peace shall, on motion of the district attorney, at any time before trial, either proceed to examine and dispose of the case as committing magistrate, either discharging the defendant or holding him to answer the charge before the circuit court, or proceed with the trial of the case as in other cases over which a justice's court has jurisdiction but if the defendant is convicted, the justice cannot impose upon such defendant any other or greater punishment than a fine of not less than $5.00 nor more than $50."

Under these sections a justice's court has concurrent jurisdiction with the circuit court in certain cases of assault and battery. Nevertheless the justice's court is authorized to impose upon the defendants no other or greater punishment than a fine of not less than $5 nor more than $50. According to the clear mandate of the statute, in any case of assault, or assault and battery, by any person not being armed with a dangerous weapon, the only penalty that can be inflicted is imprisonment in the county jail not less than three months nor more than one year, or a fine of not less than $50 nor more than $500, upon conviction in any court other than a justice's court. Ex parte Martin (D. C.) 46 Fed. 482. This statute is the only authority the circuit court had to exercise in the cause, and there was no error in complying with the enactment. In effect, the lawmakers have said that in any case of assault or assault and battery of sufficient importance for the circuit court to take cognizance of the punishment, if imposed, shall be greater than in thoses cases of a like nature where the law is administered by a justice's court. It may seem anomalous, but the regulation of the sentence is for the legislative department of the state. In its wisdom it has seen fit to place considerable discretion in the district attorney as to the interests of the state in such cases. Upon appeal to the circuit court from a judgment of a justice of the peace in a civil action a trial de novo is had. After an appeal is perfected the action is deemed pending and for trial therein as if originally commenced in the circuit court. L. O. L. § 2463. Under section 2509, L. O. L., as amended by Laws of 1913, p. 507, an appeal is taken in a criminal action in the same manner as in a civil action, except as to the mode of service of the notice and the giving of an undertaking for costs. In a note to section 1924 Ex parte Martin, supra, is recognized by Hon. W. P. Lord, the annotator, a former justice of this court, as authority for the construction of section 1924, L. O. L., to the effect that the circuit court cannot impose a fine of less than $50. Any change in the long-established rule should be made by legislative enactment.

The trial court had authority to impose the fine mentioned, and the judgment is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(85 Or. 26)

RANZAU v. DAVIS et al.

(Supreme Court of Oregon. July 3, 1917.)

1. TRUSTS ⟹134—CONSTRUCTION — INTEREST OF TRUSTEE.

Evidence *held* to show that in conveying property to a daughter-in-law in trust for grandchild it was the intention of the settlor that trustee and her husband should have a beneficial interest in the property during their son's minority.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177.]

2. TRUSTS ⟹225—TRUSTEE'S RIGHT TO DISBURSEMENTS—GENERAL RULE.

It is a general rule that disbursements which will be allowed a trustee will depend much upon the character of the trust and the directions given by the instrument of trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 322.]

3. TRUSTS ⟹225—TRUSTEE'S RIGHT TO DISBURSEMENTS—UPKEEP OF PREMISES.

If a trustee has the power of managing the estate, he will be entitled to all the expenses of keeping it up, such as hire of servants, salaries, taxes, costs of repairs, rebuilding farm houses, manuring, draining, fencing, and other like expenses.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 322.]

4. TRUSTS ⟹211—EXPENDITURES FOR WHICH ESTATE IS LIABLE.

To create a liability against a trust estate in favor of a third person, there must be more than the mere personal engagement of the trustee, for the expenses of properly administering a trust, although a lien on behalf of the trustee on the estate in his hands, are not so as to a person employed by him, and in such cases the only remedy is against the trustee personally unless he is insolvent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 297½.]

5. **Trusts** 🔑114—**Construction—Interest of Trustee — Deed to Mother for Son's Benefit.**

A deed to a mother as trustee, if executed for the benefit of the son when he shall reach majority, clothes her with an executory trust, which does not become executed until the son reaches majority.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 164.]

6. **Trusts** 🔑140(1)—**Executory—Vested Title in Beneficiary.**

So long as a trust is executory the legal title cannot vest in the beneficiary.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 183.]

7. **Trusts** 🔑182—**Management of Property—Operation of Farm.**

Where funds which were given to a daughter-in-law in trust for her son with the intention that she and her husband should have the benefit thereof until the son's majority were invested in a farm, the trustee and her husband had authority to operate the farm so as to yield an income for the purposes of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 236.]

8. **Trusts** 🔑211—**Necessary Expenditures —Liability of Estate.**

A trust estate was liable for services necessary for cultivating the property and caring for crops raised thereon which was in the interests of the beneficiary and for the benefit of the estate, since the trustee now insolvent had she paid such expenses would have had a just claim against the estate therefor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 297½.]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by Arthur J. Ranzau, by Dorothea V. Ranzau, his guardian ad litem, against J. C. Davis and another. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 158 Pac. 279.

Chas. E. Lenon, of Portland and John H. McNary, of Salem (Chas. L. McNary, of Salem, on the brief), for appellant. W. C. Winslow, of Salem, for respondents.

BEAN, J. This suit involves the question as to whether or not the farm described in the complaint is subject to an execution upon a judgment in favor of defendant Davis obtained for services performed, boarding help, and expenses incurred raising and harvesting a crop of hops on the land. The trial court held that the property was liable for the debt, and plaintiff appealed.

The plaintiffs assert that the real estate is the property of Arthur J. Ranzau, a minor; that the same is held in trust by Dorothea V. Ranzau, his mother. The circumstances relating thereto are about as follows: The grandfather of the alleged beneficiary, John P. Ranzau, at different dates advanced money to his daughter-in-law. She testifies that in 1897 she and her husband borrowed $1,100 to pay off hop pickers; that at one time her father-in-law advanced $500 for the purchase of an organ and a team of horses for her husband; that in 1908 he purchased town property in Grants Pass of the value of $3,000, taking a deed in the name of his daughter-in-law, and furnished a home for them; that about 1900 he advanced $1,400 which was used to redeem property belonging to her mother-in-law; that in 1901 he supplied $1,100 for a hophouse and the purchase of 160 acres of adjoining land. According to Mrs. Ranzau's testimony, a short time before the death of her father-in-law he told her to destroy the book in which the memorandum of the money loaned and expended had been kept, to put this money aside for his grandchild, and to invest it in real estate when he became 21 years of age. She states that in the meantime "I and my husband was to have the benefit," and he said "for me to put in trust for my son." The Ranzaus resided for a time in Grants Pass. On selling the property there they went to Woodburn, where Mrs. Ranzau invested in real estate. Selling out in the latter place, they went to Portland, where they again invested in property which they sold. After that they purchased the farm in question in Marion county in 1909, paying down about $4,000 or $5,000, and having between $500 and $1,000 of their funds remaining. The deed was executed to "Dorothea V. Ranzau, trustee, and her successors and assigns." In 1911 they purchased an adjoining farm. The property was all adapted to raising hops, and they carried on the business, keeping a bank account in different banks in the name of Dorothea V. Ranzau, trustee, where deposits were made of considerable sums, at one time depositing $5,000, the proceeds of the sale of hops. Mrs. Ranzau also gave notes to the bank signed as trustee. In 1914 the defendant Davis performed the services and advanced money for the expenses mentioned in the cultivation of the hops and in picking and caring for the same. He was paid for his work mostly in checks by Mrs. Ranzau as trustee, that is, up to July. From then until December of that year his labor and the expenditures made by him were not liquidated.

There is considerable controversy in regard to whether the deed was executed to Mrs. Ranzau, as trustee, for the benefit of her son, or for the purpose of avoiding the payment of indebtedness. She claims that she stated to Mr. Davis that the property belonged to her son, and yet in her testimony she refers to the fact of having given a mortgage for $8,000 on her farm, the one in question, to the Portland Trust Company of Oregon. Considering the property as held in trust, the directions given by the settlor when he attempted to make the gift were oral, and it is not perfectly clear what his desires were.

[1] Taking the most favorable view of the facts as claimed by the plaintiff, we understand that the grandfather was desirous of assisting his son and daughter-in-law. On

account of the son's habits he preferred to advance the money and convey the property to his daughter-in-law with the request that when the granchild arrived at the age of majority it should be invested for him. The purchase of a home in Grants Pass for his son and his wife, and also the loan to pay the hop pickers were concrete examples of the manner in which they should use the property. His acts speak with greater clearness than his words. It seems that Mrs. Ranzau has managed the property and the funds derived therefrom with a view to carrying out his intentions, sometimes making losses and sometimes gains. It therefore appears that the trustee and her husband have a beneficial interest in the property as long as their son is a minor.

[2, 3] It is a general rule that the disbursements that would be allowed a trustee would depend very much upon the character of the trust and the directions given by the instrument of trust. If a trustee has the power of managing an estate, he will be entitled to all the expenses of keeping it up, such as the hire of servants, salaries, taxes, costs of repairing, rebuilding farmhouses, manuring, draining, fencing, and other expenses of that kind. 2 Perry on Trusts, § 913. It is stated in 28 Am. & E. Enc. of Law, at page 942:

> "The estate is not liable for obligations assumed by the trustee in excess of his authority; but the estate will be liable if the trustees are acting within the limits of their stated powers or with implied authority. Thus trust property which has been embarked in business, under a power, is primarily liable to creditors for debts incurred in conducting the same"—citing, among others, North Am. Coal Co. v. Dyett, 7 Paige (N. Y.) 9; Mathews v. Stephenson, 6 Pa. 496; Woddrop v. Weed, 154 Pa. 307, 26 Atl. 375, 35 Am. St. Rep. 832.

[4] A transaction to create a liability against the estate in favor of a third party must be more than the personal engagement of the trustee; for, while the expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands, this right against the estate, unless in exceptional cases, does not extend to the person employed by him. In general their only remedy or compensation is against the trustee personally unless he is insolvent. In a case in Iowa, however, it was held that, where a claim against the estate is adjudicated with all parties interested before the court, and the amount found due is adjudged to be made from the trust property, the trustee cannot complain because the judgment was not rendered against him personally. Smith v. Walker, 49 Iowa, 289.

[5, 6] The deed to the mother, as trustee, if executed for the benefit of the son when he shall reach the age of majority, clothes her with an executory trust which does not become executed while the son is a minor, and so long as a trust is executory the legal title cannot vest in the beneficiary. Boyd v. England, 56 Ga. 598; Sanders v. Houston, etc., Co., 107 Ga. 49, 53, 32 S. E. 610.

[7] It appears that the settlor, John P. Ranzau, Sr., placed the property in the hands of the daughter-in-law with the intention that she and her husband should have the benefit thereof at least until the son was of age. A portion of the funds derived from the alleged gift were invested in the two farms, which were naturally adapted only to agricultural purposes. It was therefore the duty of the trustee, and she necessarily had implied authority in order to carry out the wish of the settlor, to assume the management and control of the property for the benefit of the usees whomsoever they might be. There was as much reason and authority for the trustee with the assistance of her husband to operate the farm herself as to lease it out to others for the purpose of cultivation. We think it was her manifest duty to make such use of the property as would cause it to yield an income for the purpose and benefit of those for whom it was contemplated by the grandfather.

[8] The debt therefore contracted by her as trustee, which was necessary in the cultivation of the farm and in carrying on the business, is a debt which is created for the benefit of the estate within the contemplation of the law. Sanders v. Houston, etc., Co., supra; 28 Am. & Eng. Enc. of Law, 942, notes.

The answer expressly alleges, and the unquestioned proof shows, that the services performed by Davis and the expenditures made by him were necessary and indispensable for the purpose of cultivating and caring for the crop of hops raised on the farm for the enhancement of the interest of the beneficiary. The trust property is subject to the debt so incurred. See authorities cited above. It appears from the evidence that at one time the sum of $5,000 received from the sale of hops was deposited in the bank to the credit of the trustee, and that by means of the hop industry she was enabled to liquidate a considerable portion of the deferred payments for the purchase price of the farms. It is apparent that there can be no profit in a farm without cultivation. Labor and the food for laborers engaged in training the vines and picking the hops are among the first essentials necessary to the successful operation of a hop farm, for the betterment of the estate, and to prevent it from becoming profitless and deteriorating in value. The debt of the defendant belongs to a different class, and is clearly distinguishable from obligations incurred in the purchase of merchandise for the use of a cestui qui trust entirely disconnected with the trust estate, and from the personal obligations of the trustee. The trustee and her husband have no other property subject to execution. She is practically insolvent except for any interest which she may have in the premises in question, all of which, together with the interest of her husband, is subject to the execution.

In England the rule is that, where the

trustee is authorized to carry on a business and to employ certain funds or property for that purpose, a creditor of the business has a right to the benefit of the lien which the trustee has against the property devoted to the purpose, subject to any equities between the trustee and the cestui qui trust, none of which appear in this case. 2 Lewin on Trusts, p. 862. If Mrs. Ranzau, the trustee, had paid for the balance of the labor and expenditures of defendant Davis in relation to the hops, could there be any question but that she would have a just claim against the estate for the same? We think such a claim would be sanctioned by the courts. When the matter is properly before the court, a creditor who assisted in the business should not be disappointed in payment so far as the funds dedicated are concerned. Strickland v. Symons, 26 Ch. D. 248; Lewin on Trusts, p. 862, note. The distinction made in England as to "dedication to particular trade purposes" is not always maintained in the United States, but the rights of the creditor to reach the trust property directly are based upon analogous reasons. It is stated in 3 Pom. Equi. Juris. (3d Ed.) p. 2104, note, as follows:

> "Where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or nonresident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery."

See Norton v. Phelps, 54 Miss. 467; Ames' Cas. on Trusts, 421.

In Gisborn v. Charter Oak Life Ins. Co., 142 U. S. 326, 337, 12 Sup. Ct. 277, 35 L. Ed. 1029, Mr. Justice Brewer, in delivering the opinion of the court, said that in mining it is not a trustee's duty to stop work the moment a vein is lost, and that, though it could not be foretold in advance how great had been the displacement, it was a reasonable exercise of the power vested in the trustee to make some limited exploration to see if the lost vein could not be recovered, and that reasonable expenses thus incurred are chargeable upon the trust estate.

The subjection of the property in question to the satisfaction of the debt of defendant is in effect applying the issues and profits of the farm, namely, the proceeds of a former hop crop which were used in paying for the realty, to the liquidation of such indebtedness, and in equity and good conscience this should be done. It is the province of a court of equity to lend its aid in the fair administration of a trust, but not to exercise its jurisdiction for the purpose of defrauding one for labor and expenses bestowed upon property claimed to be or held in trust.

For at least two reasons, the interest of the Ranzaus in the property and the circumstances and conditions of the trust estate, the judgment of the circuit court which had the benefit of hearing all the witnesses, and so was in a good position to pass upon the merits of the case, should be affirmed; and it is so ordered.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(85 Or. 113)

ROGUE RIVER FRUIT & PRODUCE ASS'N v. GILLEN-CHAMBERS CO.

(Supreme Court of Oregon. July 17, 1917.)

Department 1. Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

On petition for rehearing. Denied.

For former opinion, see 165 Pac. 679.

O. C. Boggs, of Medford, and Beach, Simon & Nelson, of Portland, for appellant. Neff & Mealey, of Medford, for respondent.

BURNETT, J. In a petition for rehearing counsel for defendant press upon our attention the following extract from Pippy v. Winslow, 62 Or. 219, 223, 125 Pac. 298:

> "Under the circumstances of this case, that part of the building which passed under the inspection of Mr. Winslow, the owner, and Mr. Tobey, the architect, and was approved by them in good faith expressly or by implication, was not open to objection by them afterwards, and plaintiffs may recover therefor"—citing authorities.

That was a suit to foreclose a mechanic's lien. On the hearing in this court we were called upon to decide questions of fact as well as of law. We considered, as stated, "the circumstances of the case," and in the excerpt quoted determined an issue of fact, and not a question of law. The instruction desired by the defendant in the instant case and the refusal of which was assigned as error demanded that the court charge the jury as a legal conclusion that the inspection of the building foreclosed the plaintiffs from ever thereafter objecting to the work thus approved. The cases relied upon to support this doctrine were where the architect was made the final arbiter as to the excellence of the work and compliance with the contract. The stipulation gave him jurisdiction to hear and determine disputes of that character and made his adjudication final. There is no such situation in the case at hand. However much we may believe that a man experienced as the superintendent of the plaintiff may have been actually knew the quality of the work done by the defendant, yet that was a question of fact for the jury, and we cannot say as a matter of law that he did know or that the plaintiff is bound by his knowledge.

The petition fails to distinguish issues of fact and questions of law, and hence must be denied.

McBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

(85 Or. 251)

REICHERT v. SOOY-SMITH.

(Supreme Court of Oregon. July 24, 1917.)

1. MORTGAGES 🔑603—MORTGAGEE IN POSSESSION—COMPENSATION FOR IMPROVEMENTS.

Purchaser of orchard at mortgage foreclosure sale cannot, after redemption, recover of judgment debtor his expenses in cultivating it, under L. O. L. § 249, which requires restoration of debtor to his estate on redemption to be complete, as there is no counterpart to this in the Code whereby purchaser may charge judgment debtor with disbursements in operating the premises.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1783–1785.]

2. MORTGAGES 🔑602 — REDEMPTION — USE AND OCCUPATION.

Judgment debtor, on redemption, has no right of action against purchaser at mortgage foreclosure sale for mere use and occupation, but only for actual profit he has made out of the property through use not permitted by L. O. L. § 251.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1778–1782.]

Department 1. Appeal from Circuit Court, Jackson County; Frank M. Calkins, Judge.

On motion for rehearing. Denied.

For former opinion, see 165 Pac. 1174.

Lincoln McCormack, of Medford, for appellant. George M. Roberts, of Medford, for respondent.

BURNETT, J. It will be remembered that this was an action by the assignee of a purchaser at a foreclosure sale to recover from the redemptioner the amount of money expended by the plaintiff in caring for and cultivating the orchard on the premises during his occupancy of the land. His total claim amounted to $1,074.45, and he credited upon it $166.89, the net amount he had received from the sale of fruit grown there during the period he was in possession. Considering his demand, the court held, in substance, speaking by Mr. Justice Benson, that he had made the expenditures as a volunteer, without any request, either express or implied, or arising by operation of law, on the part of the defendant, and hence there could be no recovery for them.

[1] The petition for rehearing earnestly presses upon us that, independent of the statute, the court should allow the expenses incurred by the plaintiff by analogy to the rule which has allowed the judgment debtor to recover for the rents, issues, and profits accruing between the sale and his own redemption of the premises. The reason for this favor extended to the one indebted on the decree is found in the statute in these words:

> "If the judgment debtor redeem at any time before the time for redemption expires, the effect of the sale shall terminate and he shall be restored to his estate." Section 249, L. O. L.

Beginning with Cartwright v. Savage, 5 Or. 397, the court has consistently held that this means complete restoration to the judgment debtor of his estate, including, as in that case, what the purchaser had actually received from the realty while he had it in his custody. By the redemption the creditor has received his own, with interest, and such taxes as he may have paid on the holding during his occupancy. To allow him to take more out of the actual proceeds of the premises would be to sanction extortion, permitting him to reap where he had not sown. By a Socratic argument in the Cartwright Case, Mr. Justice McArthur disposes of the matter thus:

> "How can the property be said to be restored to its original condition, if, when redeemed, the judgment debtor is obliged to take it back, denuded of the crops which he himself has sown, and which, but for the accidental circumstance that the sale was made just before harvest, he himself would have reaped?"

There is therefore statutory sanction for returning to the redemptioner the rents and profits accruing between sale and redemption, for they are an inseparable adjunct of the estate which is restored to him. No counterpart to this is found in the Code, by which the purchaser may pile up disbursements in operating the premises and charge them to the judgment debtor.

[2] On the other hand, the debtor cannot be permitted to make gain out of the purchaser, where the latter has not increased his store because of his possession. Under the Cartwright Case, and others like it, we take it to be established as a principle that if a redemptioner would recover from the purchaser, it must be shown that the latter has actually collected rents due from a tenant whom he found in possession, or has himself in very truth acquired net profits by reason of his having the land in charge. The statute gives the purchaser the right to the possession of the property from the day of sale until redemption, and that, too, without condition, except as against waste, as defined in section 251, L. O. L.; hence there can reasonably be no action by the redemptioner against the purchaser for mere use and occupation. The process of passing title by sale under a decree is not fulfilled until the delivery of the sheriff's deed. Pending this the purchaser holds the estate tentatively, and must be prepared to restore it, not partly, but completely. He must deliver it without waste; but, in the language of section 251, L. O. L.:

> "It shall not be deemed waste for the person in possession of the property at the time of sale or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs to building thereon, or to use wood or timber on the property thereof, or for the re-

pair of fences, or for fuel in his family while he occupies the property."

The expenses the purchaser incurs under this section are for his own benefit, and he cannot charge them to the redemptioner. What more of substantial gain he makes out of the property follows the estate, as part of it, when it is restored to the redemptioner. All his disbursements perchance may come to naught when the redemptioner pays to the sheriff, after due notice, the amount of the bid plus interest and taxes paid. The utmost that can be said is that for actual profit the purchaser must account, but for no more.

It has been aptly said that we cannot add to the burdens of the redemptioner. Neither can we increase his benefits, where none have accrued; and unless he can show that the purchaser, while in possession, has acquired a net profit, there can be nothing due from the latter. In short, the purchaser cannot load upon the redemptioner an amount of expenses which would virtually improve the original owner out of his property. Neither can the latter recover from the former something not realized by the occupation of the premises in excess of the permissible waste allowed by section 251, supra. The language quoted in the former opinion from 2 Jones on Mortgages (6th Ed.) § 1122, refers to a mortgagee in possession, to which situation it must be limited, and must be distinguished from the condition where a purchaser has taken charge of the property under the statute. The one who buys at a sale is a statutory personage, not a mortgagee in possession, although the twain have some common characteristics. When he invests his money, it is subject to the legislative enactments governing that species of alienation, and he cannot take more than is therein authorized, viz., the amount of his bid, with interest, and the taxes he has paid. Of course, in ascertaining whether or not there was a net gain, the benefit of which accrues to the redemptioner, the matter of offsetting the expenses against the gross receipts might be involved.

The conclusion is that the petition for rehearing must be denied.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(19 Ariz. 182)

SUPERIOR & PITTSBURG COPPER CO. v. TOMICH. (No. 1535.)

(Supreme Court of Arizona. July 2, 1917.)

Dissenting opinion. For former opinion, see 165 Pac. 1101.

ROSS, J. (dissenting). I endeavored to show in my dissenting opinion in Inspiration Consolidated Copper Co. v. Mendez, 166 Pac. 1183, that the new right of action contemplated by section 7, art. 18, of the Constitution, and for which the Legislature was directed to provide, by proper legislation, is not and could not be an action for damages for personal injury according to the standards of the common law. The procedure adopted by the Legislature to enforce the right is according to the common-law rules and standards of damages in case of tort, but the right of action itself finds no prototype in the common law. It is in its essential features the same right of action upon which compensation for injury is justified by the courts. If the injury be "due to a condition or conditions of the occupation," then it cannot be due to the negligence of either the employer or employé. If it be due to the negligence of the employer, the injured employé or his dependents should pursue the common-law remedy for damages in tort or accept compensation under the Workmen's Compensation Act. If it be caused by the negligence of the employé, his only recourse is compensation under the Workmen's Compensation Act.

Recovery was had in the present case upon the theory that, although the injury was due to a condition or conditions of the occupation without any fault of either the employer or employé, the damages should be ascertained and measured by the standards of the common-law action for negligence following the legislative formula. The error was in applying the old common-law remedy to the new right; in dressing this new and up-to-date creature of the law with habiliments two or more centuries old.

If this new right of action arises only in case of an unavoidable accidental injury in which neither the employer nor employé is to blame or at fault, the liability, in order to conform to due process of law and afford equal protection of the law, should be ascertained and measured according to the rules adopted by the different systems of compensation laws. New York Central R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667; Mt. Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685; Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678.

The Legislature misapprehended its duty and misconceived its powers when it provided that contributory negligence and assumption of risk could be interposed to an action based upon an injury without fault. The constitutional mandate neither in direct terms nor by implication authorizes these defenses. On the contrary, the very definition of the right of action foreshadowed and intended to be created excludes them as defenses. The injury, to be actionable under this law, must have been "caused by an accident due to a condition or conditions of such occupation," and not by any negligence. Assumed risk is a species of contributory negligence, in that one who takes employment in a dangerous or hazardous occupation, whether inherently so or by reason of the employer's negligence, of which he has knowledge, may be said to have contributed to his own injury from the mere fact of working under such conditions.

We have the Legislature (and the majority opinion approves it) announcing the paradoxical and strangely absurd rule that, if the accident is caused by contributory negligence, that is, negligence of both the employer and the employé, "the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employé"; whereas the employer, innocent of wrong, guilty of no fault, for accidents inherent and unavoidable, must pay the whole toll. He must pay more than the one whose negligence contributed to the injury. The Legislature and the court unite in awarding some immunity to an employer whose negligence contributes to the injury, and since injuries must occur, are inevitable, in order to secure any reduction of the damages, the employer is encouraged to contribute thereto, or, failing in actually being guilty of negligence, estop himself from denying it by pleading contributory negligence in his answer as in the present case.

The large verdict in this case is only illustrative of what is likely to happen in any case. It is but reasonable to infer from what both my Colleagues say in their opinions that they believe the verdict excessive. The learned counsel of appellee, at the oral argument, admitted that the verdict was too large by consenting to a remitter. It will generally, if not always, be so, under a law that makes the employer without fault liable in damages measured by common-law standards. Whether influenced by bias and prejudice or not, as contended by appellant in this case, the jury will always award damage for mental and physical suffering, elements of damages, as Justice Pitney says in the White Case, not chargeable to the employer without fault. The verdict and judgment here emphasize the absolute necessity of compensation in such cases "according to a reasonable and definite scale." If it is not so regulated, it will generally be "so insignificant, on the one hand, or onerous, on the other," as to shock the conscience of the ordinary disinterested person.

The criticism therefore is directed, not at compensation where there is no fault, but at the method or procedure used in ascertaining the compensation.

END OF CASES IN VOL. 165